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Case No. SC2023-1662
Lower Court Case No. 2018-CF-203

In the Supreme Court of Florida

SCOTTIE D. ALLEN,
***Appellant*,**

v.

STATE OF FLORIDA,
***Appellee*.**

ON APPEAL FROM THE CIRCUIT COURT
OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR WAKULLA COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

Appellant, Scottie D. Allen, was sentenced to death in 2019 for the first-degree murder of Ryan Mason. *See Allen v. State*, 322 So. 3d 589, 592-96 (Fla. 2021). In Allen's direct appeal, this Court summarized the facts of the offense as follows:

> The evidence presented at trial established that while serving a twenty-five-year prison sentence for second-degree murder, Allen strangled Mason to death in the cell they shared at Wakulla Correctional Institution. Allen confessed to planning and carrying out Mason's murder, including to an investigator from the Florida Department of Law Enforcement (FDLE) during a recorded interview, which was played for the jury, without objection from Allen. As the trial court cogently explained in its sentencing order, the evidence showed that:
>
> > [Allen] planned the murder for weeks after learning Mason had lied to him about the nature of the criminal offense that landed Mason in prison. Upon learning that Mason was convicted of child molestation, [Allen] decided he would kill him. [Allen] raped Mason periodically over the following two weeks to make Mason's life miserable. During this time, [Allen] was paying careful attention to the timing of the inmate head counts throughout each day. On October 1, 2017, [Allen] decided the following morning would be the day he killed Mr. Mason.
> >
> > On the morning of October 2, 2017, in-between head counts, [Allen] raised and draped a sheet over the cell bars to keep anyone from being able to see into the cell. [Allen] then committed

> the murder and immediately made himself a cup of coffee, sat down, ate half of a honey bun and finished the cup of coffee.
>
> Allen then calmly reported to a correctional officer that he had murdered his cellmate, which resulted in the discovery of Mason's body.

Id. at 592-93 (original alterations). In addition to his confession to FDLE, Allen also confessed to planning and carrying out Mason's murder in two letters that he sent to the Wakulla County State Attorney's Office. (D-R. at 352-53, 402-04).[1]

Soon after he was indicted for Mason's murder, and the State filed a notice of its intention to seek the death penalty, Allen filed a *pro se* "Waiver of Representation by Counsel" in which he asserted his right to represent himself under *Faretta v. California*, 422 U.S. 806 (1975). (D-R. at 57-58). The trial court then conducted an initial *Faretta* inquiry and appointed an expert, Dr. Jennifer Meyer, to evaluate Allen's competency to proceed and for self-representation. (D-R. at 71-74, 856-71). Dr. Meyer met with Allen and later submitted

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[1] Citations in this brief to the relevant lower court records will be as follows: the record on direct appeal (SC2019-1313) will be cited as "D-R."; the trial transcripts that were filed on direct appeal will be cited as "T."; and the postconviction record that has been filed in this appeal (SC2023-1662) will be cited as "PC-R."

two written reports finding no concerns with Allen's competency in either area. (D-R. at 100-13). After receiving Dr. Meyer's reports and conducting a second *Faretta* inquiry, the trial court granted Allen's request to represent himself. (D-R. at 928-60). On the same day his request for self-representation was granted, Allen filed a written demand for a speedy trial. (D-R. at 98-99).

Subsequently, Allen represented himself during jury selection and at the guilt phase of his trial. (D-R. at 1250-1487; T. at 1-275). At the end of the guilt phase, the jury found Allen guilty as charged. (T. at 288-89). Before the penalty phase, Allen had a discussion with the trial court in which he explained in detail his reasons for declining to present any mitigation, which he had previously explained to Dr. Meyer. (T. at 294-301).[2] Allen reaffirmed that decision after the State rested during the penalty phase. At that point, the trial court ruled that Allen had made a knowing and intelligent waiver of mitigation. (T. at 352-53). At the end of the

[2] Dr. Meyer recounted that Allen told her, among other things, that he intended to waive counsel and all mitigation because the evidence against him on the charge of first-degree murder was "damning," he did not want to grow "old and feeble" in the general prison population, and he felt that he would be more comfortable in an individual cell on death row. (D-R. at 111-12).

penalty phase, the jury unanimously found that Allen should be sentenced to death. (T. at 396-400).

Prior to Allen's *Spencer*[3] hearing, the trial court conducted a third *Faretta* inquiry and again ruled that Allen was competent to waive counsel. (D-R. at 895-909). In addition, the trial court ordered the Department of Corrections ("DOC") to prepare a presentence investigation report ("PSI"). It also appointed an attorney, Robert Morris, as special counsel to investigate and present mitigation at the *Spencer* hearing. (D-R. at 414-17). Allen informed the court that "[u]nder no circumstances [did he] want [his] family contacted" for the PSI or by special counsel. The trial court agreed that Allen had the right to make that decision and advised him that his instruction would be followed. (T. at 401-02; D-R. at 893-95).

At the *Spencer* hearing, Allen declined the trial court's renewed offer of counsel and advised that he would not be presenting any evidence. (D-R. at 979-81). Morris then called two witnesses: mitigation specialist Monica Jordan, who testified regarding Allen's personal history; and forensic psychologist Dr. Martin Falb, who,

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

among other opinions, diagnosed Allen with Post-Traumatic Stress Disorder ("PTSD"). (D-R. at 983-1055, 1067-1105). Allen also gave an allocution in which he addressed and largely confirmed Jordan's account of his childhood. (D-R. at 1057-63). On the second day of the *Spencer* hearing, the State called its own psychologist, Dr. Gregory Prichard, as a rebuttal expert. (D-R. at 1173-95). After the hearing, Allen filed a sentencing memorandum. (D-R. at 795-801).

On July 23, 2019, the trial court held a sentencing hearing, at which it read its sentencing order and pronounced Allen's death sentence. (D-R. at 961-75). In its order, the trial court assigned "great weight" to each of the four aggravating factors that were found by the jury.[4] It further considered and assigned weight to various mitigating circumstances that were raised by the testimony and evidence at the *Spencer* hearing. At the end of its order, the trial court concluded that the aggravating factors cumulatively outweighed the mitigating

[4] The jury found four aggravating factors: (1) Allen was previously convicted of a felony and under sentence of imprisonment; (2) Allen was previously convicted of a felony involving the use or threat of violence to another person; (3) the murder was especially heinous, atrocious, or cruel ("HAC"); and (4) the murder was committed in a cold, calculated, and premeditated manner, without any pretense of moral or legal justification ("CCP"). (T. at 396-98).

circumstances, and that a death sentence was appropriate for the murder of Ryan Mason. (D-R. at 813-21).

On direct appeal to this Court, Allen, through counsel, raised four issues of fundamental error. *See Allen*, 322 So. 3d at 956. This Court found that each of Allen's arguments was without merit. *Id.* at 596-603. It further determined that the guilt-phase evidence was sufficient to support Allen's conviction for first-degree murder. *Id.* at 603. Thus, the Court affirmed Allen's conviction and death sentence. *Id.* The appellate mandate was issued on September 2, 2021. (PC-R. at 31). Allen thereafter filed a Petition for Writ of Certiorari in the United States Supreme Court, which was denied on January 24, 2022. *See Allen v. Florida*, 142 S. Ct. 904 (2022).

After this Court's mandate was issued, the State Attorney who prosecuted Allen's case and DOC submitted public records for the case to the capital records repository. (PC-R. at 83-84, 98-99); *see* Fla. R. Crim. P. 3.852. Allen's collateral counsel filed a demand for additional public records from DOC. (PC-R. at 149-55). DOC filed objections to several of the additional requests. (PC-R. at 191-96). After a hearing, the lower court sustained DOC's objections to two of those requests. (PC-R. at 245-47, 1364-65).

On January 21, 2023, Allen, through counsel, filed a Motion to Vacate Judgment of Conviction and Sentence pursuant to Florida Rule of Criminal Procedure 3.851, raising fourteen claims for relief. (PC-R. at 254-685). Allen's first eight claims alleged that various errors occurred during the *Spencer* hearing. (PC-R. at 261-312). In his next four claims (Claims 9 through 12), Allen challenged the trial court's decisions to allow him to represent himself. (PC-R. at 312-21). In Claim 13, Allen challenged comments that were made by the prosecutor during jury selection. (PC-R. at 321-25). Finally, in Claim 14, Allen raised a claim of cumulative error. (PC-R. at 325-26). The State filed a response in which it argued that all of Allen's claims were procedurally barred on collateral review because they were claims of trial court error that could have or should have been raised on direct appeal. Alternatively, the State argued that each claim was without merit on the face of the record. (PC-R. at 693-766).

A *Huff*[5] hearing was held on September 18, 2023. (PC-R. at 1268-1309). On October 4, 2023, the lower court entered an order summarily denying Allen's rule 3.851 motion as to all claims. The

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

lower court concluded in its order: "Defendant's claims are purely legal and do not require an evidentiary hearing. . . . These issues should have been raised on direct appeal and therefore are precluded from this court's consideration by collateral review." (PC-R. at 1227-30). Allen moved for rehearing, which was denied. (PC-R. at 1231-35). Allen then timely appealed. (PC-R. at 1256-57).

SUMMARY OF THE ARGUMENT

Issues I-XII

As the lower court correctly ruled, every issue that Allen raised in his motion for postconviction relief was a matter that could have been raised in this Court on direct appeal. Allen challenged decisions the trial court made or unobjected-to matters that occurred during the *Spencer* hearing (Claims 1-8), the trial court's rulings allowing him to waive counsel (Claims 9-12), and comments made by the prosecutor during jury selection (Claim 13). Because collateral relief is not available on grounds that were or could have been raised at trial and, if properly preserved, on direct appeal, Allen's rule 3.851 motion was correctly summarily denied in full.

Moreover, each collateral claim was without merit on the face of the record. Even if Allen's claims had not been procedurally barred,

then, the summary denial of every claim that is raised in his Initial Brief must still be affirmed, as set forth below.

Issue I (Claim 1): Consistent with Allen's constitutional rights to represent himself and to control the objectives and content of his defense, the trial court correctly honored Allen's instruction that his family not be contacted regarding potential mitigation. Moreover, because Allen voluntarily waived the opportunity to present his own mitigation, and the trial court fully considered all mitigating evidence that was presented by special counsel, there was no violation of Allen's right to an individualized sentencing.

Issue II (Claim 2): Because special counsel was not dependent on funding from the Justice Administrative Commission ("JAC"), the JAC funding lapse did not affect Allen's *Spencer* hearing.

Issue III (Claim 3): The trial court was not obligated to grant a continuance of the *Spencer* hearing that no party requested. Further, Allen himself objected to the only continuance that was granted, which had been requested by special counsel.

Issue IV (Claim 4): Because Allen waived the right to present mitigation, he cannot complain about the trial court's failure to call its own mitigation witnesses.

Issue V (Claim 5): Allen waived any objections to the PSI by failing to object when he was given the opportunity and by failing to present any material omitted from the PSI that he believed should have been considered as mitigation evidence.

Issue VI (Claim 6): Allen's statements to the PSI interviewer, which were accurately reported in the PSI, did not constitute errors or omissions that the State was obligated to correct. Moreover, as with Allen's prior claim, he waived any objection to the PSI by failing to raise the alleged defects at the *Spencer* hearing.

Issue VII (Claim 7): Because Allen had full notice of the PSI's contents and the opportunity to object, any errors in the PSI did not violate Allen's right to due process.

Issue VIII (Claim 10): Allen's behavior in court throughout the trial proceedings defeats any claim that he suffered from a severe mental illness that would have authorized the trial court to force counsel upon him against his will. Thus, the trial court did not abuse its discretion by finding that Dr. Falb's PTSD diagnosis did not affect Allen's competency for self-representation.

Issue IX (Claim 11): Allen's desire to be housed on death row likewise did not constitute a severe mental illness that would have

justified a denial of his decision to waive counsel.

Issue X (Claim 12): The trial record, which included three full *Faretta* inquiries and repeated explanations by Allen of his reasons for waiving counsel, refutes any claim that Allen's waiver of counsel was not knowing, voluntary, and intelligent.

Issue XI (Claim 13): The prosecutor did not misstate the law during jury selection. Further, the statements and questioning to which Allen now objects were appropriate to determine which prospective jurors would have been unable to vote in favor of the death penalty under any circumstances.

Issue XII (Claim 14): Because Allen's claims are individually procedurally barred and meritless, his claim of cumulative error likewise fails.

Issue XIII

The trial court did not abuse its discretion by denying two of Allen's requests for additional public records from DOC. Allen failed to identify any cognizable postconviction claim to which the requests were relevant, and the requests appeared to be nothing more than an improper "fishing expedition." Thus, the additional requests were properly rejected as both irrelevant and overbroad.

ARGUMENT

ISSUES I-XII

ALL OF THE CLAIMS THAT WERE RAISED IN ALLEN'S MOTION FOR POSTCONVICTION RELIEF UNDER RULE 3.851 WERE CORRECTLY SUMMARILY DENIED.

I. STANDARD OF REVIEW.

"A circuit court should hold an evidentiary hearing on a rule 3.851 motion 'whenever the movant makes a facially sufficient claim that requires a factual determination.'" *Valentine v. State*, 339 So. 3d 311, 313 (Fla. 2022) (quoting *Rogers v. State*, 327 So. 3d 784, 787 (Fla. 2021) (quoting *Pardo v. State*, 108 So. 3d 558, 560 (Fla. 2012))). "In contrast, a circuit court may summarily deny a claim that is legally insufficient or refuted by the record." *Id.* Circuit courts may also summarily deny postconviction claims that are procedurally barred. *See Morris v. State*, 317 So. 3d 1054, 1071 (Fla. 2021). The standard of review for the summary denial of a postconviction claim is de novo. *See Valentine*, 339 So. 3d at 313 n.3.

II. EACH CLAIM IN ALLEN'S MOTION WAS CORRECTLY DENIED AS PROCEDURALLY BARRED.

It has long been established that "[i]ssues which either were or could have been litigated at trial and upon direct appeal are not cognizable through collateral attack." *Smith v. State*, 445 So. 2d 323,

325 (Fla. 1983); *see also Truehill v. State*, 358 So. 3d 1167, 1186 (Fla. 2022); *Conahan v. State*, 118 So. 3d 718, 732 (Fla. 2013). In the capital postconviction context, rule 3.851 expressly states that relief is not authorized "based upon claims that could have or should have been raised at trial and, if properly preserved, on direct appeal of the judgment and sentence." Fla. R. Crim. P. 3.851(e)(1).

In this case, the postconviction court correctly found that every claim raised in Allen's rule 3.851 motion was an issue or argument that could have been raised on direct appeal. (PC-R. at 1227-30). Claims 1 through 8 challenged decisions the trial court made or unobjected-to matters that occurred during the *Spencer* hearing, (PC-R. at 261-312), Claims 9 through 12 challenged the trial court's decisions allowing Allen to represent himself, (PC-R. at 312-21), Claim 13 challenged comments made by the prosecutor during jury selection, (PC-R. at 321-25), and Claim 14 raised a claim of cumulative error based on the combined effect of the prior thirteen claims, (PC-R. at 325-26).[6] All of these issues could have been

[6] Allen does not challenge the denials of Claims 8 and 9 in his Initial Brief. As a result, he has abandoned any argument that the postconviction court erred by summarily denying those claims. *See Archer v. State*, 293 So. 3d 455, 458 n.2 (Fla. 2020) (holding that

litigated in the trial court prior to the imposition of Allen's sentence and thereafter raised on direct appeal. *See, e.g.*, *Martin v. State*, 311 So. 3d 778, 811 (Fla. 2020) ("Claims of improper argument should be raised on direct appeal and are therefore procedurally barred in postconviction proceedings."); *Robinson v. State*, 913 So. 2d 514, 524 n.9 (Fla. 2005) (collateral claim that the trial court erred "in its consideration of mitigation" when it imposed the death sentence was a claim of "trial court error that should have been raised on direct appeal"); *Patton v. State*, 784 So. 2d 380, 393 (Fla. 2000) (collateral claim of inadequate competency hearing was "procedurally barred because it should have been raised on direct appeal"). Thus, Allen's rule 3.851 motion was correctly summarily denied.

Allen argues that an evidentiary hearing should have been granted because his postconviction claims "relie[d] on facts that are extrinsic to the record." (Initial Br. at 2) (citing *Rutherford v. Moore*, 774 So. 2d 637, 646 (Fla. 2000)). But a defendant's mere reference to facts that do not appear in the trial court record is not sufficient, in and of itself, to avoid the procedural bar set out in rule 3.851(e)(1).

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subclaim that was raised in the appellant's rule 3.851 motion but not argued in his initial brief was deemed abandoned).

Rather, as long as the claim "*could have* . . . been raised at trial," and could subsequently have been raised on direct appeal if it had been "properly preserved," then it is barred on collateral review. Fla. R. Crim. P. 3.851(e)(1) (emphasis added); *see also Garcia v. State*, 622 So. 2d 1325, 1326 & n.5 (Fla. 1993) (rejecting, as procedurally barred on collateral review, issues that "could have been . . . raised on direct appeal, if properly preserved"). Here, Allen fails to identify any facts that could not have been developed in the trial court if his current arguments had been timely and properly preserved. Nor does Allen make any effort to explain why, in the absence of such facts, this Court would have been unable to properly address the merits of his arguments on direct appeal. Again, all of Allen's collateral claims concerned purported errors that were made by the trial court (Claims One through Twelve) or comments by the prosecutor that were purportedly improper (Claim Thirteen). All of those matters could have been addressed and resolved on the face of the trial record, without any need for further factual development.

Allen's reliance on *Rutherford* is misplaced. There, this Court stated that "[a]ppellate counsel cannot be deemed ineffective for failing to investigate and present facts in order to support an issue

on appeal," since "[t]he appellate record is limited to the record presented to the trial court." *Rutherford*, 774 So. 2d at 646. Thus, the Court was addressing the circumstances under which appellate counsel can be found ineffective for failing to raise issues on direct appeal. The Court did not hold or imply that an argument can be raised for the first time on collateral review merely because it was unpreserved and undeveloped in the trial court.

In short, Allen failed to raise any collateral claim in his rule 3.851 motion that could not have been raised and resolved on direct appeal. For that reason alone, the postconviction court's summary denial of relief must be affirmed.

III. ADDITIONALLY, EACH CLAIM WAS WITHOUT MERIT ON THE FACE OF THE RECORD.

Nonetheless, Allen's claims were also meritless on the face of the record. Although the postconviction court did not reach the merits of the claims, "[a]n appellate court may affirm a correct result reached by a lower court for any reason that is supported by the record, even if it is not the reason the lower court articulated for its ruling." *Brown v. State*, 304 So. 3d 243, 272 n.13 (Fla. 2020) (citing *Robertson v. State*, 829 So. 2d 901, 906 (Fla. 2002)). Here, even if

Allen's claims had not been procedurally barred, each claim would still have been properly summarily denied on the merits.

A. Issue I (Claim 1): The Trial Court's Decision to Honor Allen's Instruction That His Family Not be Contacted Regarding Potential Mitigation Did Not Violate Allen's Right to an Individualized Sentencing.

The United States Supreme Court has held that in capital cases, "the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Kansas v. Marsh*, 548 U.S. 163, 174 (2006) (original alteration, emphasis omitted) (quoting *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality op.)). "In aggregate, [the Supreme Court's] precedents confer upon defendants the right to present sentencers with information relevant to the sentencing decision and oblige sentencers to consider that information in determining the appropriate sentence." *Id.* at 175. Such mitigation is a component of the requirement that, in order to be "constitutionally permissible," "a state capital sentencing system must . . . permit [the sentencer] to render a reasoned, individualized sentencing determination based on

a death-eligible defendant's record, personal characteristics, and the circumstances of his crime." *Id.* at 173-74 (citing *Gregg v. Georgia*, 428 U.S. 153, 189 (1976)). "This individualized consideration of mitigation has been described as '[t]he core substantive ingredient' of a capital defendant's right to individualized sentencing." *Cruz v. State*, 372 So. 3d 1237, 1244 (Fla. 2023) (original alteration) (quoting *Puiatti v. McNeil*, 626 F.3d 1283, 1314 (11th Cir. 2010)).

Even so, it is also "well established that a competent defendant may waive the right to present mitigation during the penalty phase of a capital trial." *Russ v. State*, 73 So. 3d 178, 188 (Fla. 2011); *see also Fletcher v. State*, 343 So. 3d 55, 58 (Fla. 2022) ("We have 'repeatedly recognized the right of a competent defendant to waive presentation of mitigating evidence.'") (quoting *Koon v. Dugger*, 619 So. 2d 246, 249 (Fla. 1993)). "With individual liberty—and, in capital cases, life—at stake, it is the defendant's prerogative, not counsel's, to decide on the objective of his defense . . . ." *McCoy v. Louisiana*, 584 U.S. 414, 417 (2018). Moreover, "the Sixth Amendment grants to each criminal defendant the right of self-representation, regardless of [the] consequences . . . ." *State v. Bowen*, 698 So. 2d 248, 250 (Fla. 1997) (citing *Faretta*, 422 U.S. at 834); *see also Mosley v. State*, 349

So. 3d 861, 867 (Fla. 2022) ("[A]n accused has the 'constitutional right to conduct his own defense.'") (quoting *Faretta*, 422 U.S. at 836). "In the field of criminal law, there is no doubt that 'death is different,' but, in the final analysis, all competent defendants have a right to control their own destinies." *Sparre v. State*, 164 So. 3d 1183, 1198 (Fla. 2015) (quoting *Hamblen v. State*, 527 So. 2d 800, 804 (Fla. 1988)). As such, "this Court affords competent capital defendants 'great control over the objectives and content of [their] mitigation.'" *Bell v. State*, 336 So. 3d 211, 217 (Fla. 2022) (original alteration) (quoting *Boyd v. State*, 910 So. 2d 167, 189 (Fla. 2005)).

The constitutional requirement of an individualized sentencing and the defendant's right to waive mitigation exist simultaneously. Thus, this Court has explained that "[a] capital defendant may waive the right to present evidence, but such a waiver does not eliminate the [trial] court's responsibility to consider mitigating evidence in the record." *Id.* (citing *Sparre*, 164 So. 3d at 1196). In *Muhammad v. State*, 782 So. 2d 343 (Fla. 2001), *abrogated in part by Marquardt v. State*, 156 So. 3d 464, 490-91 (Fla. 2015), this Court established the procedure that trial courts must follow "when a capital defendant waives the right to present any mitigating evidence and invites a

death sentence . . . ." *Bell*, 336 So. 3d at 217. Specifically, "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." *Id.* (citing *Muhammad*, 782 So. 2d at 343).

Additionally, "[i]f the PSI and the accompanying records alert the trial court to the probability of significant mitigation, the trial court has the discretion either to call its own witnesses or . . . to appoint an independent, special counsel, who can call witnesses to present mitigation evidence." *Marquardt*, 156 So. 3d at 491. The decision whether to appoint special counsel, however, is "a matter within the [trial] court's discretion." *Robertson v. State*, 187 So. 3d 1207, 1214 (Fla. 2016) (citing *Sparre*, 164 So. 3d at 1198-99); *see also Fletcher*, 343 So. 3d at 58 ("We have further left it within the trial court's discretion to appoint special counsel."); *Jackson v. State*, 18 So. 3d 1016, 1033 (Fla. 2009) ("When a defendant waives mitigation evidence, *Muhammad* simply requires the trial court to order the preparation of a PSI and also permits the trial court to call witnesses to present mitigation evidence to the extent that the PSI alerts the court of the existence of significant mitigation.").

In this case, the trial court complied with the requirements of

Muhammad and its progeny. The trial court ordered DOC to prepare a PSI and appointed special counsel to gather potential mitigation to present at the *Spencer* hearing. (D-R. at 414-17). The trial court thereafter utilized both the PSI and the testimony presented by special counsel when it considered whether a death sentence was appropriate. (D-R. at 814). Nothing more was required. Indeed, the trial court went beyond *Muhammad*'s requirements by exercising its discretion to appoint special counsel. *See Jackson*, 18 So. 3d at 1033 ("[T]he trial court fully complied with [*Muhummad*'s] requirements by ordering the preparation of a PSI. In addition, the sentencing order reflects that the trial court utilized the PSI when it considered the appropriate sentences to be imposed for the murders.").

Nevertheless, Allen now contends that he was denied an individualized sentencing due to the trial court's decision to honor *his* instructions that none of his family members be contacted for the PSI or by special counsel. When the trial court advised Allen that it would be ordering a PSI that would "include information such as previous mental health problems, school records, and relevant family background," Allen replied, "Under no circumstances do I want my family contacted." He explained, "My mother is very sick and I -- as I

expressed to [former defense counsel], I feel that this would push her over the edge and I don't want to be responsible for that." (T. at 401-02). Allen repeated that instruction at another hearing after he was told that the trial court would be appointing special counsel. (D-R. at 893-95). Allen later sent a letter to the trial court demanding that the investigation of mitigation be ended after an investigator reportedly tried to contact his mother. (D-R. at 447-48). In response, special counsel filed a letter recounting that he had met with Allen and assured him that neither he nor his investigator had contacted or would contact Allen's family. (D-R. at 453-56).

Despite that limitation, the trial court heard extensive evidence at the *Spencer* hearing regarding Allen's personal history and family background. Earlier, during the pretrial competency proceedings, Allen had given a thorough account of his background to Dr. Meyer, who noted that Allen "seemed straightforward in his reports" and "appeared to be a good historian." (D-R. at 102). Allen disclosed to Dr. Meyer, among other things, that his mother and stepfather divorced when he was six years old, that he was sexually abused by his cousin and grandfather between the ages of eight and twelve, that he began "acting out" around the age of nine, which resulted in legal

troubles and his placement in various juvenile living environments, and that he was exposed to alcohol and drugs at an early age and began abusing marijuana daily from the age of twelve. (D-R. at 102-03). Before the *Spencer* hearing, Allen met with and gave another account of his background to investigator and mitigation specialist Monica Jordan, who was able to obtain a large volume of records corroborating Allen's statements. (D-R. at 480-792, 983-94, 996-97). At the *Spencer* hearing, Jordan testified at length regarding Allen's family history and personal background, including his childhood history of sexual abuse, juvenile delinquency, and drug abuse. (D-R. at 997-1024). Allen's history of sexual abuse and family dysfunction was accepted by the trial court and given "great weight" in its sentencing order as a mitigating circumstance. (D-R. at 819).

There was no deprivation of Allen's right to an individualized sentencing under these facts. As this Court has observed: "The United States Supreme Court's precedent regarding mitigation 'confer[s] upon defendants the right to present sentencers with information relevant to the sentencing decision and oblige[s] sentencers to consider that information in determining the appropriate sentence. [And] [t]he thrust of [the Supreme Court's]

mitigation jurisprudence ends [t]here." *Bell*, 336 So. 3d at 216 n.9 (original alterations) (quoting *Marsh*, 548 U.S. at 175). Thus, the mitigation component of the individualized sentencing requirement is satisfied as long as "the sentencer [is] not . . . precluded from considering . . . any aspect of a defendant's character or record and any of the circumstances of the offense *that the defendant proffers* as a basis for a sentence less than death." *Marsh*, 548 U.S. at 174 (emphasis added) (quoting *Lockett*, 438 U.S. at 604).

Allen cites no authority, however, holding that a defendant is deprived of an individualized sentencing when the trial court does not consider possible mitigation evidence that the defendant himself declined to present, or—as here—that he actively forbade from being developed and presented. On the contrary, such a rule would violate the defendant's rights to control the objectives of his defense and to waive the presentation of mitigating evidence. *See McCoy*, 584 U.S. at 417; *Fletcher*, 343 So. 3d at 58. Where, as here, the defendant freely and voluntarily waived the right to counsel, it would also violate his Sixth Amendment right to self-representation. *See Faretta*, 422 U.S. at 832; *see also Hamblen*, 527 So. 2d at 804 ("To permit counsel to take a position contrary to [the defendant's] wishes through the

vehicle of guardian ad litem would violate the dictates of *Faretta*."); *see also Muhammad*, 782 So. 2d at 368 (Harding, J., concurring) ("[I]n exercising the discretion to appoint its own counsel or standby counsel, the trial court should be careful not to undermine the defendant's Sixth Amendment right to self-representation and to be the captain of his or her own ship.").

This Court's decision in *Mora v. State*, 814 So. 2d 322 (Fla. 2002), is instructive. There, defense counsel, prior to Mora's penalty phase, "wanted to contact Mora's siblings in Spain to see if any mitigation could be developed through them." *Id.* at 331. Mora, however, "prohibited [his counsel] from doing so because Mora was afraid that his siblings would not be able to handle learning of their brother's first-degree murder conviction because his siblings were quite elderly and weak." *Id.* Mora's counsel brought the matter to the attention of the trial court, which "refused to allow Mora to waive any possible mitigation without first allowing [counsel] to develop all possible mitigation." *Id.* The trial court further ruled that because it "found no reasonable cause to believe that [Mora's counsel] was providing ineffective assistance," it would not appoint a different attorney to represent Mora. Ultimately, Mora elected to discharge his

counsel and represent himself at his penalty phase rather than allow his counsel to contact his relatives. *Id.* at 331-32.

On appeal, this Court held that the trial court erred by forcing Mora to choose between allowing his counsel to contact his relatives and proceeding without counsel altogether. The Court observed that "Mora, who at the time of trial was in his seventies and his siblings in their seventies and eighties, informed the trial court of the reasons why he did not want to contact his siblings and indicated that there was no mitigation to be had." *Id.* at 333. It noted that "Mora was adequately advised of his ability to present the mitigating evidence from his family members," and concluded that "his decision not to have [his counsel] disturb these relatives under the circumstances of this case should have been respected." *Id.*

If a represented defendant has the right to instruct his counsel not to contact his family members in an investigation of possible mitigating evidence, then a defendant who waives counsel and chooses to represent himself necessarily has the same right with respect to any special counsel appointed under *Muhammad*. To hold otherwise would "violate the dictates of *Faretta,*" *Hamblen*, 527 So. 2d at 804, and negate the defendant's authority "over the objectives

and content of his mitigation," *Boyd*, 910 So. 2d at 189.

Allen's stated reason for not wanting his family contacted was essentially identical to Mora's: he was afraid of the impact learning about his conviction and possible death sentence would have on his mother's health. Thus, the trial court correctly respected Allen's decision and ordered DOC and special counsel not to contact Allen's family. *See Mora*, 814 So. 2d at 333; *see also Boyd*, 910 So. 2d at 189-90 (holding that the trial court correctly allowed Boyd to limit his mitigation presentation to testimony from his pastor and himself); *see also Krawczuk v. State*, 92 So. 3d 195, 205 (Fla. 2012) (holding that counsel was not ineffective for failing to investigate and present mitigation where "Krawczuk repeatedly insisted that counsel not pursue mitigation and not involve his family"). There was no denial of Allen's right to an individualized sentencing under these facts—particularly in light of the detailed evidence of Allen's personal history that was in fact presented at the *Spencer* hearing.

Allen's reliance on *Barnes v. State*, 29 So. 3d 1010 (Fla. 2010), is misplaced. In *Barnes*, this Court held only that the appointment of special counsel to investigate and present mitigation when the defendant has declined to do so does not, in itself, violate the

defendant's right to self-representation. *See id.* at 1022-26. Further, in finding that there was no violation of Barnes' right to self-representation under the facts and circumstances of that specific case, the Court emphasized that the mitigation that was presented by special counsel "was not in conflict with any evidence presented by Barnes and was not in conflict with his mitigation theory that he confessed and took responsibility." *Id.* at 1026. The Court did not hold that a trial court may not place limits on a special counsel's investigation in accordance with the defendant's express wishes, let alone hold that any such limitations would violate the constitutional requirement of an individualized sentencing.

Finally, even if the trial court had erred by respecting Allen's instructions, and even if the issue was one that could be properly raised on collateral review, any error was harmless on the face of the record. *See Ault v. State*, 53 So. 3d 175, 187 (Fla. 2010) ("[A] trial court's findings on mitigation are also subject to review for harmless error, and this Court will not overturn a capital appellant's sentence if it determines that an error was harmless beyond a reasonable doubt."). "In this context, the question is whether there is a reasonable possibility that the error contributed to the sentence." *Id.*

at 195 (citing *State v. DiGuilio*, 491 So. 2d 1129, 1138 (Fla. 1986)). "If there is no likelihood of a different sentence, then the error must be deemed harmless." *Id.* (citing *Rogers v. State*, 511 So. 2d 526, 535 (Fla. 1987), *receded from on other grounds*, *Jackson v. State*, 347 So. 3d 292, 305-06 (Fla. 2022)); *see also* § 924.051(7), Fla. Stat.

The aggravating circumstances in this case were substantial. The trial court found the same four aggravators that were found by the jury—sentence of imprisonment, prior violent felony, HAC, and CCP—and it gave them all "great weight." (D-R. at 814-17). "Three of th[ose] aggravating circumstances[], HAC, CCP, and prior violent felony, have repeatedly been identified by this Court as among the most serious aggravating factors." *Bush v. State*, 295 So. 3d 179, 215 (Fla. 2020); *see also Craft v. State*, 312 So. 3d 45, 56 (Fla. 2020) (noting that HAC, CCP, and prior violent felony "are three of the most serious and weighty aggravators in the capital sentencing scheme"). As to the first two aggravators, Allen was serving a 25-year prison sentence at the time of Mason's murder for his previous murder of Karen Abtan, whom Allen had similarly strangled to death in 2002. (D-R. at 814-15). As to HAC, the trial evidence showed that Allen strangled Mason with such force that he fractured one of Mason's

vertebrae, and that Mason was conscious and fought for his life during the attack. (D-R. at 815-16). As to CCP, Allen admitted to planning the murder for weeks after learning that Mason had lied to him about Mason's reason for being in prison, and that he repeatedly raped Mason before finally killing him. (D-R. at 816-17).

As to mitigation, Allen argues only that, if Jordan had been able to interview his family members, she could have "paint[ed] a much more vivid picture of [his] deplorable childhood." (Initial Br. at 20). But the most significant facts of Allen's childhood—including that he was a victim of repeated sexual abuse at a young age and that he was raised in a dysfunctional family setting—were already presented at the *Spencer* hearing, accepted as proven, and given "great weight" by the trial court. (D-R. at 819, 997-1024). Moreover, the trial court expressly rejected the suggestion that Allen was under the influence of an extreme mental or emotional disturbance at the time of the murder due to PTSD that resulted from the physical and sexual abuse he suffered as a child. In support, the trial court observed that "[t]he murder was planned for weeks and was deliberate," Allen "was calm and coherent immediately following the murder," and "[t]here was no testimony or other evidence that [Allen] exhibited any signs

of being under the influence of drugs, alcohol or from an episodic PTSD event at the time of the murder." (D-R. at 817).

In light of the substantial aggravating circumstances and the mitigation evidence of Allen's childhood that was already presented and considered by the trial court, there is no reasonable possibility that additional evidence about Allen's childhood would have resulted in a different sentence. Thus, any error was harmless. *See, e.g.*, *Bevel v. State*, 376 So. 3d 587, 596 (Fla. 2023) (finding that additional mitigating evidence would not have "tipped the scale" such that it would have resulted in a life sentence); *Mullens v. State*, 197 So. 3d 16, 32 (Fla. 2016) (holding that where the trial court did consider Mullens' difficult childhood as mitigation, "any error by the trial court in overlooking [other mitigation was] harmless, particularly in light of the fact that the trial court found the existence of three aggravating circumstances and assigned great weight to each").

B. Issue II (Claim 2): The JAC Funding Lapse Did Not Affect the *Spencer* Hearing or Violate Allen's Right to an Individualized Sentencing.

The record makes clear that the JAC's funding lapse in April 2019 did not have any impact on Allen's *Spencer* hearing. Although special counsel, Morris, filed a notice informing the trial court of the

issue, he also stated that he "would continue to work diligently on" Allen's case, that "[f]ortunately, [he was] not reliant on JAC funding to 'keep the lights on,'" and that he filed the notice only to "keep the [c]ourt abreast of" something that could have been an issue if Allen had been represented by counsel. (D-R. at 457-59). Morris's investigator, Jordan, similarly testified at the *Spencer* hearing that she incurred a lot of "up-front costs" due to the JAC funding lapse, but that it "wasn't really a problem." (D-R. at 991).

Allen nonetheless argues that the funding lapse deprived him of an individualized sentencing because it prevented Morris from hiring various experts that Morris believed would have been required for "an effective penalty phase presentation." (D-R. at 473). But Morris never said that he was prevented from hiring such experts due to a lack of funding. On the contrary, Morris advised the trial court that Allen "ha[d] rejected and [was] unwilling to be the subject of actual interviews and diagnostic testing." (D-R. at 435). In a subsequent letter memorializing a conversation he had with Allen, Morris stated that Allen had agreed to cooperate with Dr. Falb, but that Allen was "not interested in having any scans of [his] brain or any medical testing and . . . would not submit to those." (D-R. at 455-56). The

only expert Allen agreed to cooperate with, Dr. Falb, in fact testified at the *Spencer* hearing. (D-R. at 1067-1105).[7] At the beginning of the second and final day of the *Spencer* hearing, Allen rejected the trial court's renewed offer of counsel, confirmed that he understood that that day would be his last opportunity to present mitigation, and informed the court that he did not wish to present any mitigation. (D-R. at 1172-73). Thus, the record establishes that the lack of additional expert testimony was due to Allen's refusal to cooperate and his repeatedly-stated desire not to present any of his own mitigation evidence, not the lapse in JAC funding.

As stated above, the Supreme Court's mitigation precedents merely grant capital defendants the right to submit evidence in mitigation and "oblige[] sentencers to consider that information in determining the appropriate sentence." *Bell*, 336 So. 3d at 216 n.9

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[7] Allen met with the State's rebuttal expert, Dr. Prichard, only because he was ordered to do so. (D-R. at 1109-14). On direct appeal, Allen argued that the State's introduction of his statements to Dr. Prichard violated his Fifth Amendment privilege against self-incrimination. This Court held that Allen had forfeited any such claim or, alternatively, that the claim was unpreserved and did not rise to the level of fundamental error. *See Allen*, 322 So. 3d at 600-02. To the extent Allen is now arguing that his meeting with Dr. Prichard shows that he changed his mind about cooperating with experts other than Dr. Falb, his argument is refuted by the record.

(quoting *Marsh*, 458 U.S. at 175). A defendant is not deprived of an individualized sentencing by a court's failure to consider evidence that the defendant himself refused to introduce or develop. Allen's argument that he was deprived of an individualized sentencing due to the JAC funding lapse is therefore meritless.

C. Issue III (Claim 3): The Trial Court's Failure to Grant an Additional Continuance of the *Spencer* Hearing, Which No Party Requested, Did Not Violate Allen's Right to an Individualized Sentencing.

Allen next argues that he was deprived of an individualized sentencing based on Jordan's testimony that her investigation into Allen's background was partly limited by time constraints. (D-R. at 991). In his rule 3.851 motion, Allen argued that if Jordan had been given more time, she would have been able to travel to Michigan and obtain his school records, which would have provided additional mitigation evidence. (PC-R. at 290-92).

However, neither special counsel nor Jordan requested an additional extension of time so that Jordan could conduct further investigation. In his status report that was filed on March 29, 2019, when the *Spencer* hearing was scheduled for April 3, 2019, Morris requested a continuance of 30 to 60 days "to adequately afford [him]

additional time to prepare." (D-R. at 431-33). The court granted the request and continued the *Spencer* hearing (by 65 days) to June 7. (D-R. at 438). No further extensions were sought. Moreover, Allen himself sent a letter to the court "strongly object[ing]" to the single continuance of the *Spencer* hearing. (D-R. at 447).

The trial court was not obligated to grant a continuance that no one requested. And to the extent Allen is faulting Morris for not seeking one, there is "no attorney-client relationship . . . between special counsel and the defendant. Therefore, a defendant has no basis for claiming that special counsel's presentation of mitigation evidence was ineffective." *Grim v. State*, 971 So. 2d 85, 102 (Fla. 2007). In any event, the trial court's failure to grant a continuance did not deprive Allen of the right to an individualized sentencing for the same reasons discussed previously, *i.e.*, the right simply obliges the sentencer to consider any mitigating evidence submitted by the defendant and "ends [t]here." *Bell*, 336 So. 3d at 216 n.9 (original alteration) (quoting *Marsh*, 458 U.S. at 175). Here, the trial court did not fail to consider any mitigation that was submitted by Allen. Accordingly, Allen's claim is without merit.

Additionally, any error was harmless. Based on the weighty

aggravating circumstances and the mitigation evidence of Allen's childhood that was already presented to the trial court and considered in its sentencing order, there is no reasonable likelihood that Allen's school records, copies of which were attached to his rule 3.851 motion, (PC-R. at 385-486), would have resulted in a different sentence. *See Ault*, 53 So. 3d at 195.

Allen briefly alleges in this claim that he had "a change of heart about presenting mitigation during the *Spencer* hearing." (Initial Br. at 33). However, the discussion he references took place *after* the *Spencer* hearing and only concerned whether he wanted an attorney to assist him with his sentencing memorandum, which he ultimately said he did not. (D-R. at 1236-42). Allen's assertion that the JAC's lack of funds prevented him from presenting mitigation is without merit for the same reasons discussed in Issue II, *supra*.

D. Issue IV (Claim 4): The Trial Court's Failure to Call its Own Witnesses at the *Spencer* Hearing Did Not Violate Allen's Right to an Individualized Sentencing.

In his next claim, Allen argued that under *Muhammad*, the trial court should have called its own witnesses at the *Spencer* hearing in addition to those called by special counsel, and that its failure to do so violated his right to an individualized sentencing. (PC-R. at 295-

97). This Court, however, has previously rejected the argument that a trial court is required to call its own witnesses when the defendant has waived mitigation. *See Grim v. State*, 841 So. 2d 455, 462 (Fla. 2003) (holding that because the defendant waived the presentation of mitigation, "he cannot complain on appeal that the trial court abused its discretion by not calling . . . its own witness to testify relative to two possible mental statutory mitigators").

In this case, because Allen waived the right to present his own mitigating evidence, Allen likewise cannot complain that the trial court abused its discretion by not calling its own witnesses, and its failure to do so did not deprive him of the right to an individualized sentencing. *See id.*; *see also Bell*, 336 So. 3d at 216 n.9. Moreover, as discussed above with respect to Allen's prior claims, Allen flatly refused to allow anyone to contact his family for the *Spencer* hearing, and he made clear that he would not cooperate with any experts other than Dr. Falb. (T. at 401-02; D-R. at 447-48, 453-56). Again, Allen's assertion that he changed his mind about presenting mitigation is refuted by the record. (D-R. at 1172-73, 1236-42). Accordingly, even if the trial court had wanted to call Allen's family or its own expert witnesses, it would have been unable to do so. Therefore, this claim

is without merit on the face of the record.

E. Issue V (Claim 5): Alleged Errors in the PSI Did Not Violate Allen's Right to an Individualized Sentencing.

As his final claim concerning his right to an individualized sentencing, Allen argued that that right was violated due to alleged deficiencies in the PSI. Specifically, Allen argued that his own statements to the DOC officer who prepared the PSI that his physical and mental health status were "[g]ood" and that "he had no prior issues with substance abuse or alcohol" were inaccurate. (PC-R. at 297-99; *see* D-R. at 427). Allen further argued that the PSI should have reported his history of threats from other inmates between 2004 and 2011, and one instance when he was stabbed in 2014; a claim by an inmate named Steven Williams that Allen killed Mason at his direction; and Allen's mental health records. (PC-R. at 299-301). For multiple reasons, this claim is without merit.

First, Allen waived any objections to the PSI by failing to object when he was given the opportunity to do so. At the beginning of the *Spencer* hearing, the trial court asked Allen if had the opportunity to review the PSI, and he said yes. He did not dispute or object to any aspect of the PSI. (D-R. at 980). Nor did he seek to introduce on his

own behalf any evidence of the matters that he now contends should have been considered by the trial court. Thus, any objections to the absence of such information in the PSI were waived. *See McKenzie v. State*, 153 So. 3d 867, 883-84 (Fla. 2014) (holding that defendant waived any deficiencies in the PSI when he failed to alert the trial court to any missing information, and failed, while acting as his own counsel at the *Spencer* hearing, to present the material that he later claimed should have been included); *see also Barnes*, 29 So. 3d at 1027 (rejecting claim that PSI contained testimonial hearsay that should not have been considered by the trial court where "Barnes had a fair opportunity to rebut or dispute any matters contained in the PSI but did not take the opportunity to do so").

Second, any defects in the PSI did not deprive Allen of the right to an individualized sentencing. Allen had the opportunity to submit any mitigation evidence that he believed was appropriate, and he chose not to do so. Once again, nothing more was required. *See Bell*, 336 So. 3d at 216 n.9. Further, the trial court appointed special counsel and gave full consideration in its sentencing order to all mitigating evidence that was contained in the record and presented at the *Spencer* hearing. (*See* D-R. at 817-20). Therefore, Allen was

afforded a comprehensive individualized sentencing determination, notwithstanding his decision to waive mitigation.[8]

Third, even if this Court were to determine that the PSI was deficient, any error was again harmless in light of the substantial aggravating circumstances and the mitigation that was already considered and weighed by the trial court. As to aggravation, Allen was serving a 25-year sentence for second-degree murder when he violently tortured and murdered his cellmate. All four aggravators were given "great weight" by the trial court. (D-R. at 814-17). As to mitigation, the trial court heard evidence of Allen's dysfunctional childhood, including his history of sexual abuse and drug use that began at a young age, and gave that history "great weight." (D-R. at

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[8] To the extent Allen is arguing that the PSI did not comport with the requirements of *Muhammad*, separate from his claim that his right to an individualized sentencing was violated, the appointment of special counsel rendered any defects in the PSI irrelevant. This Court has explained that "the purpose of the *Muhammad* PSI requirement is to alert the trial court to the probability of significant mitigation so that the trial court can exercise its discretion to call witnesses or appoint counsel to present mitigation to the court." *Jones v. State*, 212 So. 3d 321, 342 (Fla. 2017). Thus, this Court held in *Jones* that where the trial court appointed special counsel to present mitigation at the *Spencer* hearing, and also independently examined the record for evidence of mitigation, Jones was not entitled to relief on his claim that the PSI was deficient. *See id.*

817-20). Despite Allen's personal history, the trial court determined that the aggravating factors cumulatively outweighed the mitigating circumstances and ruled that a sentence of death was appropriate for Allen's murder of Ryan Mason. (D-R. at 820-21).

The matters that Allen contends should have been included in the PSI were comparatively minor and would not have warranted a life sentence. While Allen contends that his own statements in the PSI that his physical and mental health were good and that he had no prior drug or alcohol issues were false, the trial court heard other evidence of Allen's mental health and history of drug use through Jordan and Dr. Falb. (D-R. at 983-1056, 1067-1105). Additionally, Allen gave an allocution during the *Spencer* hearing in which he addressed and largely confirmed Jordan's account of his personal history. (D-R. at 1057-65). Allen's history of conflicts with other inmates years before he murdered Mason would not have warranted any significant weight. And Williams' claim that Allen killed Mason at his direction would likewise not have warranted any significant weight, given that it conflicted with Allen's own statements describing how he raped and murdered Mason after thinking about it for several weeks in retribution for Mason lying to him. Taken together, there is

no reasonable possibility that those matters would have resulted in a different sentence. *See Ault*, 53 So. 3d at 195.

F. Issue VI (Claim 6): The State Did Not Violate Allen's Due Process Rights by Presenting a PSI That It Knew or Should Have Known Was Inaccurate.

Allen alleges that his inaccurate statements in the PSI also violated his right to due process. Again, Allen argues that his own statements to the PSI interviewer that his physical and mental health status were good and that he had no prior issues with drugs or alcohol were false. (PC-R. at 302-304; *see* D-R. at 427). According to Allen, the State presented "false or misleading evidence" to the trial court by including those statements in the PSI, without attempting to refute them based on other records, and thereby violated his right to due process. (Initial Br. at 40-41) (quoting *Consalvo v. Sec'y for Dep't of Corr.*, 664 F.3d 842, 846 (11th Cir. 2011)).

Although Allen does not use the phrase "*Giglio* violation," he appears to be asserting that the State's inclusion of his statements in the PSI violated the principle of *Giglio v. United States*, 405 U.S. 150 (1972), "that the presentation of known false evidence violates due process . . . ." *Consalvo*, 664 F.3d at 845 (citing *Giglio*, 405 U.S. at 153). "A *Giglio* claim is based on the prosecutor's knowing

presentation at trial of false testimony against the defendant." *Mordenti v. State*, 894 So. 2d 161, 175 (Fla. 2004). "To establish a *Giglio* violation, it must be shown that (1) the testimony given was false; (2) the prosecutor knew the testimony was false; and (3) the statement was material." *Id.* If the defendant can meet his burden to establish "that the State knowingly presented false testimony, upon [his] doing so, the burden shifts to the State to establish that the testimony was not material." *Davis v. State*, 383 So. 3d 743, 755 (Fla. 2024). On the materiality prong, "[t]he State must prove that the error was harmless beyond a reasonable doubt, meaning that 'there is no reasonable possibility that the error contributed to the conviction.'" *Id.* (quoting *DiGuilio*, 491 So. 2d at 1138).

As with Allen's prior claim, Allen waived any objections to the PSI by not objecting when he was given the chance to do so. (D-R. at 980). By confirming that he had read the PSI and not raising any objection, Allen effectively approved the trial court's consideration of the PSI's contents, including his own statements to the interviewer. For that reason alone, his current claim fails. *See McKenzie*, 153 So. 3d at 883-84; *see also Calhoun v. State*, 312 So. 3d 826, 852 (Fla. 2019) ("Calhoun's [*Giglio*] claim is procedurally barred because it is

based on information—Calhoun's statement to law enforcement and the associated trial testimony and closing argument—that was available to Calhoun and his counsel at trial.").

Regardless, Allen's *Giglio* claim is without merit. First, the statements in the PSI to which Allen now objects were not "testimony [presented] against the defendant." *Mordenti*, 894 So. 2d at 175. Rather, they were Allen's own statements that were accurately relayed to the trial court. Second, the statements were not false. The two statements, in full, were as follows: (1) "Defendant advised this officer that his physical and mental health were good."; and (2) "Defendant advised this officer that he had no prior issues with substance abuse or alcohol." (D-R. at 427). Allen does not dispute that he in fact made those statements to the officer. Since the PSI accurately reported what Allen said, there was nothing the State was obligated to correct. *See Calhoun*, 312 So. 3d at 849, 852 (holding that officer's testimony accurately recounting what the defendant said to him "was not false").

Third, any error was again harmless, and thus not "material" within the meaning of *Giglio*. *See Davis*, 383 So. 3d at 755. The trial court heard extensive evidence of Allen's troubled childhood, mental

health issues, and history of substance abuse through Jordan, Dr. Falb, and Allen himself. That history was considered by the trial court in its sentencing order. The additional matters that Allen argues should have been included in the PSI were insignificant in comparison to the aggravating circumstances and the mitigation evidence that was presented at the *Spencer* hearing. Accordingly, even if the statements in the PSI had been false or misleading, they ultimately had no impact on Allen's sentence.

G. Issue VII (Claim 7): Alleged Errors in the PSI Did Not Violate Allen's Due Process Right Not to Be Sentenced Based on Materially Inaccurate Information.

Allen argues in Claim 7 that the same alleged defects in the PSI that formed the basis for Claims 5 and 6 also violated his "due process right to be sentenced on the basis of accurate information." *Ben-Yisrayl v. Buss*, 540 F.3d 542, 554 (7th Cir. 2008). This claim is meritless on the face of the record for essentially the same reasons that Claims 5 and 6 were without merit, namely: Allen waived any objection to the PSI at the *Spencer* hearing; the PSI was not false or misleading; and any deficiency in the PSI was harmless. For the sake of brevity, those arguments from Claims 5 and 6 are incorporated by reference into the State's response to this claim.

Additionally, the Eleventh Circuit has observed that "the degree of due process protection required at sentencing is only that which is necessary 'to ensure that the [trial] court is sufficiently informed to enable it to exercise its sentencing discretion in an enlightened manner.'" *United States v. Plasencia*, 886 F.3d 1336, 1343 (11th Cir. 2018) (quoting *United States v. Stephens*, 699 F.2d 534, 537 (11th Cir. 1983)). Here, because Allen had ample opportunity to dispute any aspects of the PSI that he disagreed with, there was no violation of due process. *See id.* at 1343-45 (rejecting due process challenge to sentencing enhancement where the defendant had notice of the government's intention to seek an upward variance based on the enhancement and the opportunity to object).

H. Issue VIII (Claim 10): The Trial Court's Finding that Allen Was Competent to Represent Himself Despite Evidence That He Suffers from PTSD Did Not Violate Allen's Right to Due Process.

As discussed previously, "[a]n accused has a Sixth Amendment right to represent himself at trial." *Woodbury v. State*, 320 So. 3d 631, 645 (Fla. 2021) (citing *Tennis v. State*, 997 So. 2d 375, 377 (Fla. 2008)). "And while an accused also has a right to the assistance of counsel, that right confers just what it says—assistance. 'To thrust

counsel upon the accused, against his considered wish . . . violates the logic of the [Sixth] Amendment.'" *Id.* (original alterations) (quoting *Faretta*, 422 U.S. at 820). "Therefore, each defendant 'must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of that respect for the individual which is the lifeblood of the law.'" *Id.* (quotation marks omitted) (quoting *Faretta*, 422 U.S. at 834).

Under *Faretta*, "once a defendant elects to make an unequivocal request for self-representation . . . the trial court is obligated to hold a hearing 'to determine whether the defendant is knowingly and intelligently waiving his right to court-appointed counsel.'" *McCray v. State*, 71 So. 3d 841, 864 (Fla. 2011) (quoting *Tennis*, 997 So. 2d at 378). If, after conducting that inquiry, the "court determines that a competent defendant of his or own free will has 'knowingly and intelligently' waived the right to counsel, the dictates of *Faretta* are satisfied, the inquiry is over, and the defendant may proceed unrepresented." *Noetzel v. State*, 328 So. 3d 933, 948 (Fla. 2021) (quoting *Hooks v. State*, 286 So. 3d 163, 168 (Fla. 2019)).

In *Indiana v. Edwards*, 554 U.S. 164 (2008), the Supreme Court

adopted a "narrow exception" to *Faretta*'s rule that a defendant who knowingly and intelligently waives the right to counsel must be allowed to proceed pro se. *In re Amends. to Fla. Rule of Crim. Pro. 3.111*, 17 So. 3d 272, 274 (Fla. 2009). Specifically, the Supreme Court held that "the Constitution permits States to insist upon representation by counsel for those competent enough to stand trial . . . but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves." *Id.* (quoting *Edwards*, 554 U.S. at 178). "Without deciding whether *Edwards* compels states to provide additional protection to severely mentally ill defendants," this Court later amended Florida Rule of Criminal Procedure 3.111(d)(3) "to implement the narrow limitation upon the right to self-representation recognized in *Edwards*." *Id.*

As this Court has observed, however, "*Edwards* did not grant any substantive rights to defendants. The decision only explained that states are *constitutionally permitted* to deny self-representation rights to defendants who are competent to stand trial but not competent to represent themselves." *Hernandez-Alberto v. State*, 126 So. 3d 193, 210 (Fla. 2013) (emphasis added). Further, "while technical skill is not part of the *Faretta* calculus," *Edwards* is based

on the premise that "'the government's interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant's interest in acting as his own lawyer." *Woodbury*, 320 So. 3d at 646 (quoting *Edwards*, 554 U.S. at 177). "Thus, after conducting a *Faretta* inquiry, a trial court *may* preclude a defendant from exercising his right to proceed pro se if the court finds that the defendant is 'unable to carry out the basic tasks needed to present his own defense without the help of counsel.'" *Id.* (emphasis added) (quoting *Edwards*, 554 U.S. at 175-76). Such basic tasks include the "organization of defense, making motions, arguing points of law, participating in voir dire, questioning witnesses, and addressing the court and jury." *Id.* at 646 n.6 (quoting *Edwards*, 554 U.S. at 176) (citing *McKaskle v. Wiggins*, 465 U.S. 168, 174 (1984)).

"In applying *Edwards*, courts have narrowly interpreted what qualifies as severe mental illness." *Loor v. State*, 240 So. 3d 136, 140 (Fla. 3d DCA 2018). "For example, a defendant's misguided writing style, bizarre statements, and incorrect legal arguments alone are not evidence of 'severe mental illness.'" *Id.* (citing *Sturdivant v. State*, 61 N.E.3d 1219, 1225 (Ind. Ct. App. 2016)). "Hostile behavior," "[a] mental evaluation diagnosing the defendant with a personality

disorder," "and a history of depression and learning disabilities" have likewise been rejected as insufficient. *Id.* (citing *United States v. Glass*, 357 F. App'x 58, 60 (9th Cir. 2009), *United States v. Heard*, 762 F.3d 538, 543 (6th Cir. 2014), and *United States v. Rodgers*, 537 F. App'x 273, 275 (4th Cir. 2013)). "In contrast, [the Eleventh Circuit has] found that the defendant had a severe mental illness where he suffered from 'organic psychosis' from a brain injury, displayed memory loss, and often appeared incoherent." *Id.* (citing *Holland v. Florida*, 775 F.3d 1294, 1298-99, 1314 (11th Cir. 2014)).

In *Woodbury*, this Court declined to adopt "a per se rule or presumption that all individuals with bipolar disorder suffer so severely from mental illness that they are unable to carry out basic trial tasks without assistance." 320 So. 3d at 647-48. Focusing on Woodbury's in-court behavior, the Court observed that "Woodbury filed pro se discovery motions and a demand for speedy trial, conducted voir dire examination of the potential jurors by himself, cross-examined witnesses, argued evidentiary objections, and even requested a special jury instruction derived from the federal standard instructions." *Id.* at 647. Ultimately, the Court concluded that "Woodbury's behavior in court defeats any claim that he was not

competent to conduct the proceedings on his own." *Id.*

Similarly, the Court held in *Noetzel* that "Noetzel's disclosure of a mental illness d[id] not preclude him from waiving the right to counsel and proceeding pro se." 328 So. 3d at 949. Indeed, the Court noted that "Noetzel's case [was] not even close, as there [was] no 'purportedly erratic' behavior" of the kind Woodbury had claimed he engaged in. *Id.* at 950. As it did in *Woodbury*, the Court emphasized the numerous ways that Noetzel participated in his trial, including by filing pro se motions, addressing the court, and cross-examining witnesses. "During all of the proceedings, Noetzel's interactions with the trial court were appropriate; he had no trouble following what was happening or carrying out his previously articulated strategies." *Id.* On that basis, this Court held that "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." *Id.*

In Claim 10 of his rule 3.851 motion, Allen alleged that he was incompetent to represent himself because he suffers from PTSD. On that basis, he argued that the trial court should have denied his motion for self-representation under *Edwards*, and that its failure to

do so violated his right to due process. In support, Allen cited Dr. Falb's PTSD diagnosis at the *Spencer* hearing, as well as the opinion of an expert retained by Allen's collateral counsel who had "advised that she would have found him incompetent to proceed *pro se* on the basis that his PTSD limited him from mounting a proper defense and presenting mitigation." (PC-R. at 313-16).

As a threshold matter, Allen did not identify any authority in his rule 3.851 motion—from any federal or state court—holding that a failure to deny a defendant's motion for self-representation under *Edwards* equates to a denial of due process. On its face, *Edwards* merely set out an exception to *Faretta* that grants state courts the authority, if they choose to do so, to deny self-representation to defendants who are sufficiently competent to stand trial and who have knowingly and voluntarily waived the right to counsel, "but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves." *Edwards*, 554 U.S. at 178. As this Court has pointed out, "*Edwards* did not grant any substantive rights to defendants." *Hernandez-Alberto*, 126 So. 3d at 210. This Court has also "decline[d] to limit *Faretta*'s right to self-representation beyond the very limited exception recognized

by the Supreme Court in *Edwards*." *In re Amends. to Fla. Rule of Crim. Pro. 3.111*, 17 So. 3d at 274 n.3.

As a result, even if there had been a constitutionally-permissible basis for the trial court to force counsel upon Allen against his will, that was a matter for the trial court to decide, within its discretion, in the interest of the "integrity and efficiency" of the proceedings. *Edwards*, 554 U.S. at 177 (quoting *Martinez v. Ct. of Appeal of Cal.*, 528 U.S. 152, 162 (2000)). Its failure to do so did not deprive Allen of any substantive right. Therefore, Allen's argument that, under *Edwards*, the trial court's decision to grant his voluntary, knowing, and intelligent request for self-representation resulted in a denial of his right to due process is without merit. *See also Muehleman v. State*, 3 So. 3d 1149, 1160 (Fla. 2009) ("[W]here a competent defendant 'knowingly and intelligently' waives the right to counsel and proceeds unrepresented 'with eyes open,' he or she *ipso facto* receives a 'fair trial' for right to counsel purposes.") (quoting *Potts v. State*, 718 So. 2d 757, 759-60 (Fla. 1998)).

Moreover, even if Allen could properly raise this issue, the trial court did not abuse its discretion in finding that Allen was competent to represent himself. *See Woodbury*, 320 So. 3d at 645 ("Trial court

rulings regarding competency to waive counsel are reviewed for abuse of discretion."). The trial court ruled on the issue for the first time before trial in response to Allen's waiver of counsel. (D-R. at 57-58, 118-20, 941-42). It did so again in its sentencing order in response to Dr. Falb's PTSD diagnosis at the *Spencer* hearing, holding that the diagnosis was not "tantamount to a severe mental illness that would have had bearing on whether [Allen] was found . . . competent to waive counsel pursuant to" *Edwards*. (D-R. at 817).

The record contains ample evidence to support the trial court's rulings. Initially, the court appointed Dr. Meyer to evaluate Allen's competency to proceed and his competency for self-representation. (D-R. at 71-74). In *Edwards*, the Supreme Court cited an amicus brief from the American Psychiatric Association for the proposition that "[d]isorganized thinking, deficits in sustaining attention and concentration, impaired expressive abilities, anxiety, and other common symptoms of severe mental illnesses can impair the defendant's ability . . . for self-representation . . . ." *Edwards*, 554 U.S. at 176 (first alteration in original). In this case, the trial court directed Dr. Meyer to address each of those specific considerations, as well as Allen's ability to follow rulings and orders of the court and

to manifest appropriate courtroom behavior. (D-R. at 73-74). In her subsequent report, Dr. Meyer wrote that she found "[n]o serious concerns or limitations" in any of those areas, and she concluded that "[f]rom a psychological standpoint, Mr. Allen appears competent for self-representation." (D-R. at 108-14).

Further, as was the case in both *Woodbury* and *Noetzel*, Allen's conduct throughout the trial refutes any claim that he suffered from "severe mental illness" that would have authorized the trial court to force him to proceed with counsel. Allen behaved properly during all in-court appearances, including all three *Faretta* inquiries. (D-R. at 859-78, 896-909, 935-41). At the end of the guilt phase, the trial court commended Allen for his "decorum throughout this entire process." (T. at 234). In its sentencing order, the trial court gave some weight, as a mitigating circumstance, to the fact that it "did not have a single issue with [Allen]'s conduct during the entirety of the proceedings," and that "[h]e was respectful to jail personnel, opposing counsel, *amicus*, and psychologists." (D-R. at 819-20).

Allen cogently explained, on multiple occasions, his reasons for seeking to represent himself and waive mitigation. (D-R. at 111-12, 870-71, 955-57; T. at 294-301). He fully participated in his trial,

including by: filing pro se documents, such as his waiver of counsel, speedy trial demand, and sentencing memorandum, (D-R. at 57-60, 98-99, 447-48, 461, 795-801); conducting voir dire, (D-R. at 1319-24, 1357-64, 1397-1401, 1426-29); discussing with the court and the prosecutors whether prospective jurors should be stricken, and exercising his own for-cause challenges and peremptory strikes, (D-R. at 1325-31, 1365-67, 1401-05, 1430-34, 1481-89); giving an opening statement, (T. at 19); cross-examining witnesses, (T. at 58-59, 68-72; D-R. at 1051-53, 1104-05, 1221-32); and delivering an allocution during the *Spencer* hearing, (D-R. at 1057-65).

Allen's "behavior in court defeats any claim that he was not competent to conduct the proceedings on his own." *Woodbury*, 320 So. 3d at 647. Even if, as Allen now claims, his decisions were influenced by symptoms of PTSD, this is simply not a case where Allen was "unable to carry out the basic tasks needed to present his own defense without the help of counsel." *Id.* at 646 (quoting *Edwards*, 554 U.S. at 175-76). On the face of the record, as the trial court correctly determined, any mental health issues did not rise to the level of a "severe mental illness" within the meaning of *Edwards*. (D-R. at 817). Accordingly, Allen cannot show that the trial court

abused its discretion "in allowing [him] to invoke his constitutional right to conduct his own defense," *Woodbury*, 320 So. 3d at 649, let alone that that decision constituted a denial of due process. Thus, this claim was correctly summarily denied.

I. Issue IX (Claim 11): The Trial Court's Finding That Allen Was Competent to Represent Himself Despite His Stated Desire to be Placed on Death Row Did Not Violate Allen's Right to Due Process.

In Claim 11, Allen argued that his right to due process was violated when he was permitted to represent himself despite evidence that he was seeking to be sentenced to death. (PC-R. at 316-19). This claim is without merit for the same reasons that Claim 10 was meritless. First, *Edwards* does not grant any substantive rights to criminal defendants. Even if there had been a valid basis for forcing counsel upon Allen, the trial court's decision not to do so did not constitute a denial of due process. *See Hernandez-Alberto*, 126 So. 3d at 210; *Muehleman*, 3 So. 3d at 1160. Second, Allen's conduct in court throughout the trial proceedings defeats any claim that he suffered from "severe mental illness" within the meaning of *Edwards*. *See Noetzel*, 328 So. 3d at 950; *Woodbury*, 320 So. 3d at 647-49. The State's arguments on those points for Claim 10 are incorporated by

reference into its response to this claim.

Moreover, there is no evidence in the record that Allen's stated goal of being placed on death row was the result of mental illness. Indeed, Dr. Meyer found precisely the opposite, namely, that his decision to represent himself and waive mitigation "d[id] not appear influenced by symptoms of mental illness, intellectual disability, or any other psychiatric condition." (D-R. at 113). Rather, as Allen explained, the evidence against him on the charge of first-degree murder was "damning," and he preferred to receive a death sentence because he would be more comfortable in an individual cell on death row than in the general prison population. (D-R. at 111-12). Allen later gave substantially the same explanation to the trial court. He said that he does very well in his "own space" where he is not around other people, whereas that would be "impossible" in the general population because the "new generation coming in" are "the most disrespectful . . . people you've ever seen in your life," and "they make you hurt them . . . just on how they act." (T. at 301). Allen told Dr. Prichard that he did not have a "death wish" and "hope[d] [to] get 10 or 15 years on death row." (D-R. at 1183-84). As well, he told Dr. Meyer that once he had been sentenced to death, he would accept

the appointment of counsel so that his attorney could "file[] various appeals" and "delay his execution." (D-R. at 112).

Under these circumstances, Allen's goal of being housed on death row was not evidence that he "suffer[ed] from severe mental illness to the point where [he was] not competent to conduct trial proceedings by [himself]." *Edwards*, 554 U.S. at 178. Again, the trial court did not abuse its discretion or commit any error by granting Allen's request for self-representation.[9]

J. Issue X (Claim 12): The Trial Record Establishes That Allen's Waiver of Counsel Was Voluntary.

Allen next argues that his waiver of counsel was not voluntary based on statements made by another inmate, Steven Williams, in the case of Michael Woodbury, whose first-degree murder conviction and death sentence this Court later affirmed. (PC-R. at 319-21); *see*

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[9] Allen's postconviction motion and brief contain a lengthy aside within this claim suggesting that his former girlfriend, Katie Cardino, might have killed Karen Abtan, the victim in Allen's previous murder case. Notably, however, Allen never actually claims that he did not commit that murder. (*See* PC-R. at 317-19). In any event, to the extent that it is relevant at all, Allen would not have been able to establish that he did not murder Abtan in light of his own sworn confession to the murder, as well as Cardino's detailed statements to law enforcement describing how Allen strangled Abtan to death. (PC-R. at 794-807, 887-916, 967-99, 1097-1146).

Woodbury, 320 So. 3d at 638. Williams was interviewed by FDLE in June 2018 because he was listed as defense witness in Woodbury's case. (PC-R. at 532-34). Williams claimed during the interview that he uses "S and M" to "control [other people's] minds," that he had "seven people under [his] dominance," including Woodbury and Allen, and that Woodbury and Allen both committed their respective murders at his direction. (PC-R. at 536-39).

Allen acknowledged that Williams never claimed in the FDLE interview that he told Allen to waive counsel. Nor did Allen allege that Williams ever did so. Nevertheless, Allen asserted in Claim 12 that because of Williams' "undue influence" over him, his "decision to waive counsel cannot be considered voluntary," and his "right to due process [was] violated." (PC-R. at 320-21).

The trial record establishes beyond any dispute that Allen's waiver of counsel was "knowing, voluntary, and intelligent." *Noetzel*, 328 So. 3d at 948. The trial court conducted three full *Faretta* inquiries—two before the trial and one before the *Spencer* hearing—that substantially followed the model *Faretta* colloquy promulgated by this Court. (D-R. at 859-78, 896-909, 935-41); *see Amend. to Fla. Rule of Crim. Pro. 3.111(d)(2)-(3)*, 719 So. 2d 873, 876-79 (Fla. 1998);

see also Silva v. State, 190 So. 3d 151, 152 n.1 (Fla. 3d DCA 2016) (noting that the model colloquy, "if properly administered, insulates a trial court from challenge for failure to satisfy Sixth Amendment *Faretta* requirements"). The trial court renewed the offer of counsel on at least five other occasions, which Allen rejected each time. (D-R. at 979, 1128-29, 1172, 1250; T. at 403-05).

During the first *Faretta* inquiry, Allen was specifically asked whether "anyone ha[d] put any pressure on [him] in any way to have [him] represent [him]self." Allen replied, "No, sir. This is absolutely voluntary." (D-R. at 867). At the second *Faretta* inquiry, Allen was asked again if anyone had told him not to use a lawyer, or if anyone had threatened him with any consequences if he did hire a lawyer. Allen replied, "No, sir," to both questions. (D-R. at 938). Before the third *Faretta* inquiry, Allen argued that it was unnecessary, stating: "I've been through two *Faretta* hearings. I've reaffirmed at least ten times and I reaffirm right now. I would like to represent myself. I do not need or want an attorney or standby counsel." (D-R. at 899). Even so, the court proceeded to conduct the inquiry, during which Allen stated again that no one had told him not to use a lawyer. (D-R. at 906). Further, as discussed above, Allen cogently explained, on

multiple occasions, his reasons for not wanting counsel. (D-R. at 111-12, 870-71, 955-57; T. at 294-301).

"[O]nce a court determines that a competent defendant of his or her own free will has 'knowingly and intelligently' waived the right to counsel, the dictates of *Faretta* are satisfied, the inquiry is over, and the defendant may proceed unrepresented." *Bowen*, 698 So. 2d at 251. Here, because the record establishes that Allen's waiver of counsel was voluntary, there was no abuse of discretion or violation of due process. *See Noetzel*, 328 So. 3d at 949; *Muehleman*, 3 So. 3d at 1160. Accordingly, this claim is without merit on the face of the record and was properly summarily denied.

K. Issue XI (Claim 13): The Prosecutor Did Not Misstate the Law During Jury Selection.

Allen argues that comments that were made by the prosecutor during jury selection resulted in a "structural defect" in the trial proceedings. *See Johnson v. State*, 53 So. 3d 1003, 1012 (Fla. 2010) (Canady, J., concurring in part) (quoting *Arizona v. Fulminante*, 499 U.S. 279, 309-10 (1991)). Importantly, Allen did not object to any of the comments that he attempted to challenge for the first time in his rule 3.851 motion. As a result, even if this issue had been raised on

direct appeal, the comments would have been reviewable only for fundamental error. *See Weddington v. State*, 270 So. 3d 468, 469 (Fla. 1st DCA 2019) ("Because Appellant did not object to the comments made by the trial judge at the conclusion of jury selection, we review the comments for fundamental error."). "That being said, where a claim of fundamental error is not raised on direct appeal, it is procedurally barred as well." *Martin*, 311 So. 3d at 811.

Regardless, the comments were not improper at all, let alone fundamental error or structural error. It is well-established that a prospective juror "who 'would vote against death regardless of the facts presented or the instructions given' may properly be excused from service on a jury." *Engle v. State*, 438 So. 2d 803, 807 (Fla. 1983) (quoting *Jackson v. State*, 366 So. 2d 752, 755 (Fla. 1978)). The standard for excusing a potential juror for cause in a capital case is "whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" *Miller v. State*, 42 So. 3d 204, 213 (Fla. 2010) (quoting *Wainwright v. Witt*, 469 U.S. 412, 424 (1985) (quoting *Adams v. Texas*, 448 U.S. 38, 45 (1980))).

Therefore, "it is proper to exclude prospective jurors who 'state

that their reservations about capital punishment would prevent them from making an impartial decision as to the defendant's guilt . . . (or) who say that they could never vote to impose the death penalty . . . .'" *Id.* at 213-14 (some alterations in original) (quoting *Witt v. State*, 342 So. 2d 497, 499 (Fla. 1977)). In *Miller*, for example, this Court approved the use of a for-cause challenge of a prospective juror who said that it would be "very difficult" for him to impose the death penalty "even if the facts and circumstances of the case under the law would warrant a sentence of death," and that he did not "think [he] could vote for the death penalty." *Id.* at 214; *see also Hartley v. State*, 686 So. 2d 1316, 1322 (Fla. 1996) (affirming decision to excuse for cause juror who "stated that there were very few, if any, situations in which he would recommend the death penalty").

Contrary to Allen's assertion, the prosecutor did not tell the prospective jurors that "if the aggravating circumstances outweighed the mitigating circumstances, the jury needed to vote for death." (Initial Br. at 59). The trial court instructed the prospective jurors, before they were examined by counsel, that to impose a sentence of death during the penalty phase, they must find that: (1) the State proved an aggravating factor or factors beyond a reasonable doubt;

(2) the aggravating factors were sufficient to justify the death penalty; (3) the aggravating factors outweighed the mitigating circumstances; and (4) death is really the appropriate sentence under all of the facts and circumstances. (D-R. at 1292-93).

When conducting voir dire, the prosecutor used skydiving as a metaphor to examine the potential jurors on whether they felt they would be unable to vote in favor of the death penalty even if they believed that death was the appropriate sentence. The prosecutor explained that he likened the situation to skydiving because there are "some people [who] think about it and say, well, I'm not even getting on the plane," others who "thought they could do it, but when they are on the plane, they decide they can't," versus "other people who can get up and go and jump off the plane if the circumstances are appropriate." (D-R. at 1298). He continued:

> And those are the jurors, quite frankly, that we are looking for in this case, the ones who can get to the door and jump off if it's appropriate. Not the ones who say, Don't even put me on the plane; not the ones who get on the plane, but don't get out of the seat; not the ones who get to the door and say, oh, my God, I can't do this; but the ones who can get to the door and make a determination.
>
> ***
>
> Now, with that in mind, I want to ask you a few questions about whether or not you believe that in the appropriate case you could impose the death penalty, or whether you

> have this feeling in the back of your mind that even though I think it may be the appropriate case, I can't jump out of the plane, because it's maybe a decision that you don't feel that you could live with or a decision you could make even in the appropriate case.

(D-R. at 1298-99).

The first prospective juror the prosecutor questioned said that she "wouldn't get on the plane," and she was later excused for cause. (D-R. at 1300, 1330). For another juror who said that he felt like he "could jump off of the plane," the prosecutor asked if he meant that "in an appropriate case, [he] could vote for the death penalty," to which the juror said "yes." (D-R. at 1315-16). Other prospective jurors who said that they could "jump" gave similar explanations or clarifications. (D-R. at 1318, 1345-46, 1348-49, 1394-96).

Allen himself clearly understood the analogy, and even built on it during his own voir dire of the prospective jurors. Allen said that while the prosecutor had compared the situation to skydiving, he likened it more to a "soldier going to war" who might "follow their orders" but then "come back home . . . and have a really hard time living with what they've been through or made decisions about." (D-R. at 1361-62). Using that analogy, Allen asked each group of prospective jurors if voting to impose the death penalty was a

decision that they believed they could live with afterward. (D-R. at 1322-24, 1361-63, 1400-01, 1427-29).

Accordingly, the jury was not misadvised as to the law. Rather, the prosecutor's questioning during jury selection was properly directed toward determining whether any prospective jurors would be unable to vote for the death penalty even if they believed that death was the appropriate sentence. *See Miller*, 42 So. 3d at 213-14. Further, the jury was instructed at the end of the penalty phase: "[E]ven if you find that the sufficient aggravators outweigh the mitigators, the law neither compels nor requires you to determine that the defendant should be sentenced to death. Once each juror has weighed the proven factors, he or she must determine the appropriate punishment for the defendant." (T. at 380).

"[I]n the absence of evidence to the contrary, [it is] presume[d] that jurors follow the trial court's instructions." *Lowe v. State*, 259 So. 3d 23, 52 (Fla. 2018). There was no erroneous comment or instruction in this case, let alone any structural error. *See United States v. Davila*, 569 U.S. 597, 611 (2013) (stating that the concept of structural error applies only to "'a very limited class of errors'" such as "denial of counsel of choice, denial of self-representation, denial of

a public trial, and failure to convey to a jury that guilt must be proved beyond a reasonable doubt") (quoting *United States v. Marcus*, 560 U.S. 258, 263 (2010)). Thus, this claim, even if it had not been procedurally barred, was meritless on the face of the record.

L. Issue XII (Claim 14): Cumulative Error.

The doctrine of cumulative error "applies where multiple errors, though individually harmless, combine to deprive the defendant of a fair and impartial trial." *Sievers v. State*, 355 So. 3d 871, 882 (Fla. 2022). But "[w]here the individual claims of error alleged are either procedurally barred or without merit, the claim of cumulative error also necessarily fails." *Truehill*, 358 So. 3d at 1187 (quoting *Parker v. State*, 904 So. 2d 370, 380 (Fla. 2005)). Here, because Allen's claims are individually procedurally barred and meritless, he is not entitled to relief based on cumulative error.

ISSUE XIII

THE LOWER COURT DID NOT ABUSE ITS DISCRETION BY DENYING TWO REQUESTS FOR ADDITIONAL PUBLIC RECORDS UNDER RULE 3.852.

I. STANDARD OF REVIEW.

This Court reviews lower court "rulings on public records requests pursuant to Florida Rule of Criminal Procedure 3.852 for

abuse of discretion." *Hannon v. State*, 228 So. 3d 505, 511 (Fla. 2017), *abrogated on other grounds*, *Cruz v. State*, 372 So. 3d 1237, 1242-45 (Fla. 2023). "Discretion is abused only when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable person would take the view adopted by the trial court." *Id.* (quoting *Parker v. State*, 904 So. 2d 370, 379 (Fla. 2005)).

"Rule 3.852 is a discovery rule for public records production ancillary to proceedings pursuant to rule 3.851." *In re Amends. to Fla. Rule of Crim. Pro. 3.852*, 140 So. 3d 507, 507 (Fla. 2014). Among other provisions, the rule requires the state attorney who prosecuted the defendant and DOC to submit public records relevant to the case to the capital records repository within 90 days of receiving notice of this Court's mandate on direct appeal. *See id.* at 508 (citing Fla. R. Crim. P. 3.852(d)). Within 240 days after collateral counsel is appointed, retained, or appears for the defendant, such counsel may serve a demand for additional public records, to which the receiving person or agency may object. *See* Fla. R. Crim. P. 3.852(g)(1)-(3). The trial court must then hear and rule on any objection. Before ordering any additional records to be produced, the court must find that the

records "are relevant to the subject matter of a proceeding under rule 3.851, or appear reasonably calculated to lead to the discovery of admissible evidence," and that the "request is not overly broad or unduly burdensome." Fla. R. Crim. P. 3.852(g)(3).

"Rule 3.852 is 'not intended to be a procedure authorizing a fishing expedition for records.'" *Hannon*, 228 So. 3d at 511 (quoting *Sims v. State*, 753 So. 2d 66, 70 (Fla. 2000)). "A defendant 'bears the burden of demonstrating that the records sought relate to a colorable claim for postconviction relief.'" *Branch v. State*, 236 So. 3d 981, 984 (Fla. 2018) (quoting *Chavez v. State*, 132 So. 3d 826, 829 (Fla. 2014)). "Accordingly, where a defendant cannot demonstrate that he or she is entitled to relief on a claim or that records are relevant or may reasonably lead to the discovery of admissible evidence, the trial court may properly deny a records request." *Asay v. State*, 224 So. 3d 695, 700 (Fla. 2017); *see also Dennis v. State*, 109 So. 3d 680, 698-99 (Fla. 2012) (holding that trial court's denials of requests for additional public records under rule 3.852(g) were not an abuse of discretion where the requests at issue were "unduly burdensome" and "nothing more than a fishing expedition").

II. MERITS.

In this case, the lower court did not abuse its discretion by denying two of Allen's requests under rule 3.852(g) for additional public records from DOC. (PC-R. at 245-47). In the two requests, Allen sought: (a) classification files for nine current or former DOC inmates, including their central files and files maintained at specific correctional institutions between 2004 and 2016; and (b) "Reports or data recorded in the Security Threat Group Operational Review Management System relating to the Bloods and Latin Kings during the time period of 2003-2017." (PC-R. at 149-50).

DOC objected to both requests as irrelevant and overly broad and pointed out that Allen had failed to connect either request with a colorable claim for relief. (PC-R. at 191). As to paragraph (b), DOC further argued that the request—which appeared to seek "any and all" information relating to the Bloods and Latin Kings gangs from 2003 to 2017—included both criminal intelligence information that was exempt from public disclosure, and sensitive information that, if released, would jeopardize a person's safety. (PC-R. at 195) (citing §§ 119.071(2)(c), 945.10(1)(e), Fla. Stat.).

Allen responded, as to paragraph (a), that the named inmates

were people who DOC records indicated "had negative interactions with [him] during his time in prison in Florida and are alleged to belong to security threat groups." Allen asserted that "[f]urther information" on those prisoners "would be relevant to a mitigation claim relating to [his] repeated victimization by members of a security threat group." (PC-R. at 235-36). As to paragraph (b), Allen stated that the material was "relevant to the systemic treatment of security threat groups by [DOC] and could serve as mitigating material as it relates to [Allen] and his experiences in the custody of [DOC]." He added that, as to the sensitive nature of the records, the court could conduct an in-camera inspection. (PC-R. at 236).

At a hearing on the matter, the lower court ruled that both requests were "way too attenuating" and that DOC's objections were "well taken." The circuit court judge presiding at the hearing noted that he also presided at Allen's trial, and that he did not see how the matter would have been relevant as mitigation even in the penalty phase. (PC-R. at 1364-65). The lower court later entered a written order denying the requests. (PC-R. at 245-46).

The lower court's ruling was not an abuse of its discretion. To meet his burden, Allen had to establish that "the records sought

relate[d] to a colorable claim for *postconviction* relief.'" *Branch*, 236 So. 3d at 984 (emphasis added). Here, Allen failed to identify any viable postconviction claim. Instead, his counsel argued only that the material might have provided additional mitigation evidence. Since Allen has already been sentenced, however, mitigation is no longer relevant. For that reason alone, the lower court properly denied both requests. *See Walton v. State*, 3 So. 3d 1000, 1010-11 (Fla. 2009) (affirming postconviction court's denial of defendant's demand for additional public records where the defendant failed to demonstrate that the records "would reasonably lead to evidence that would support his postconviction claim").

Further, even if mitigation had been relevant, the requests were still overbroad. While Allen claimed that the material sought was relevant to his alleged victimization while in DOC custody, he failed to explain what that victimization entailed, let alone why it would have been relevant to his murder of Mason. Nor did he explain why it was necessary for him to obtain all classification files for the nine named individuals or all material relating to the Bloods and Latin Kings gangs for the years 2003 to 2017. Consequently, the requests appeared to be nothing more than an "improper fishing expedition."

Dennis, 109 So. 3d at 699. On that basis, as well, the lower court did not abuse its discretion in denying the requests.

Allen briefly suggests, without any elaboration, that "[t]o the extent that the records would be mitigating and [he] was unaware of the material in those records, the records sought would be *Brady*[10] material." (Initial Br. at 64 n.7). However, if there had been some incident that was relevant to Allen's decision to commit the murder, Allen would have been aware of it and could have made a more specific request for public records—particularly since he has never disputed that he committed the offense. He would not need to seek all records pertaining to the nine inmates or all records for the two gangs over a 14-year period. Moreover, Allen makes no effort to explain how he believes the elements of a *Brady* violation could even hypothetically be met.[11] Thus, notwithstanding Allen's reference to *Brady*, his requests are still overbroad, and he still fails to connect

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10 *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

11 *See generally Mordenti*, 894 So. 2d at 169 ("To establish a *Brady* violation, a defendant must demonstrate: '(1) the State possessed evidence favorable to the accused because it was either exculpatory or impeaching; (2) the State willfully or inadvertently suppressed the evidence; and (3) the defendant was prejudiced.'") (quoting *Allen v. State*, 854 So. 2d 1255, 1259 (Fla. 2003)).

them to any colorable postconviction claim.

In short, the denial of the requests was not "arbitrary, fanciful, or unreasonable," nor is this a case "where no reasonable person would take the view adopted by the trial court." *Hannon*, 228 So. 3d at 511. Therefore, Allen fails to establish any abuse of discretion, and the decision below must be affirmed.

CONCLUSION

Based on the authorities and arguments presented herein, the State of Florida respectfully requests that this Honorable Court affirm the lower court's order denying postconviction relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 22, 2024, I electronically filed the foregoing with the Clerk of the Court by using the Florida Courts E-Filing Portal system, which will send a notice of electronic filing to the following: Dawn B. Macready, Chief Assistant CCRC-North, Elizabeth Spiaggi and Nida Imtiaz, Assistants CCRC-North, Office of the Capital Collateral Regional Counsel-North, 1004 Desoto Park Drive, Tallahassee, Florida 32301, dawn.macready@ccrc-north.org, elizabeth.spiaggi@ccrc-north.org, nida.imtiaz-ccrc-north.org.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 14-point Bookman Old Style in compliance with Fla. R. App. P. 9.045(b), and that the page count is 75 pages in compliance with Fla. R. App. P. 9.210(a)(2)(D).

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