CAPITAL CASE NO. SC2024-1264

In the

Supreme Court of Florida

JESSE BELL,

APPELLANT,

v.

STATE OF FLORIDA,

APPELLEE.

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

APPELLEE'S ANSWER BRIEF

ASHLEY MOODY
ATTORNEY GENERAL OF FLORIDA

JASON W. RODRIGUEZ
SENIOR ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 125285

OFFICE OF THE ATTORNEY GENERAL
PL-01, THE CAPITOL
TALLAHASSEE, FL 32399-1050
(850) 414-3300
capapp@myfloridalegal.com

COUNSEL FOR THE STATE OF FLORIDA

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INTRODUCTION

Long-time inmate Jesse Bell stabbed and choked inmate Eastwood to death before stabbing a prison guard (Officer Newman). He waived his right to counsel, pleaded no contest, waived his right to a penalty-phase jury (in that order), and received a death sentence that this Court affirmed on appeal after finding his plea knowing, intelligent, and voluntary.

Bell timely filed a 3.851 motion arguing: (1) his counsel waiver was involuntary due to prison abuse; (2) his penalty-phase-jury waiver was involuntary due to prison abuse; (3) ineffective assistance of trial counsel (IATC) for not discovering/presenting prison-abuse evidence from three sources (two inmates and an interview) to challenge Bell's counsel waiver; (4) IATC for failing to discover/present the same evidence to challenge Bell's post-counsel-waiver decision to waive a jury; and (5) an Eighth Amendment claim about failure to consider unpresented mitigation.

The court below summarily denied these claims as procedurally barred, conclusively refuted, and legally insufficient. Bell now appeals that decision and urges reversal. But his buyer's remorse arguments only warrant affirmance.

RECORD CITATIONS

The State will cite: (1) the direct-appeal record as **DAR**:[page]; and (2) the record below as **1PCR:**[volume]:[page].

STATEMENT OF THE CASE AND FACTS

This Court recited the facts undergirding Bell's conviction and sentence on direct appeal. *Bell v. State*, 336 So. 3d 211, 212-16 (Fla. 2022). The short version is that, in June 2019, Bell (who was already serving a forty-year sentence for kidnapping, armed robbery, aggravated battery, escape, and burglary of a dwelling) and his cellmate killed inmate Eastwood by stabbing both his eyes and strangling him as a rehearsal for their later, unsuccessful attempt to murder Correctional Officer Newman. (DAR:207, 342, 368-69); *Bell*, 336 So. 3d at 212-13. Newman survived with stab wounds. Eastwood did not. *Id.* Post-*Miranda*,[1] Bell and his cellmate admitted to killing Eastwood and planning to kill Newman. (DAR:451, 489-509, 516-60, 562-87.) They targeted Newman because "he kept fucking with us for no reason." (DAR:565.)

Judge Fina presided over all of Bell's proceedings from the waiver/plea hearing through the final order denying postconviction relief. (DAR:20, 128, 356; 1PCR:1569.)

After a grand jury indicted Bell for both first-degree murder

[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

and attempted murder of a correctional officer with a deadly weapon, Bell waived his right to counsel, pleaded no contest, and waived a penalty phase jury (in that order) after lengthy colloquies. (DAR:130-73, 179-80, 368-69.) An expert, and the court, found Bell competent. (DAR:174-78, 182, 198-204, 440-41.) Bell then testified at the penalty phase and admitted his competency report as mitigation. (DAR:434, 599-602). He was sentenced to death,[2] and this Court affirmed. (DAR:339-56); *Bell*, 336 So. 3d at 218.

Capital Collateral Regional Counsel - Middle Region (CCRC-M) appeared as postconviction counsel and filed Bell's first Rule 3.851 motion and Appendix. (PCR1:63, 441-85, 493-609.) The State moved to require Bell to refile a 3.851 motion in compliance with the separately pleaded requirement in Rule 3.851(e)(1) and later supplemented that motion by laying out all the claims Bell could

[2] The court found four aggravators: (1) Bell was serving a felony prison sentence when he committed the murder (assigned great weight); (2) Bell previously committed another felony—the contemporaneous attempted murder of Newman with a deadly weapon—involving the use or threat of violence (assigned great weight); (3) the capital felony was especially heinous, atrocious, or cruel (HAC) (assigned very great weight); (4) the capital felony was committed in a cold, calculated, and premeditated (CCP) manner without any pretense of moral or legal justification (assigned very great weight). (DAR:342-51.)

potentially be raising. (PCR1:486-92, 610-21.)

The State specifically argued that Bell's (1) involuntary counsel-waiver and (2) penalty-phase-jury waiver claims were separate claims that should be separately pleaded. (PCR1:611, 613 (numbered items 1 and 7).) It also specifically argued that Bell's claims that counsel ineffectively failed to present evidence challenging two separate waivers (counsel and penalty-phase-jury) from an interview and two inmates were, at least, two separate claims. (PCR1:614-15 & n.4 (numbered items 13 and 17). The State affirmatively agreed to accept the three pieces of evidence Bell argued counsel should have produced as ineffectiveness subclaims. (PCR1:614-15 n.4.)

The postconviction court granted the State's motion and ordered Bell to refile his motion and comply with Rule 3.851(e)(1) and substantively denied Bell's motion for reconsideration. (1PCR:625-26, 632-49, 840-42.)

Bell subsequently filed a five-volume Appendix, a notice explaining his numbering system, and his operative 3.851 motion. (1PCR:843-1083.) The crux of his first two claims was that his counsel and penalty phase jury waivers were involuntary due to

extensive abuse while in prison both before and after Eastwood's murder. (1PCR:860-96.) This abuse, according to Bell's allegations, included: (1) he was (over several years) subject to threats and violence from Florida inmates; (2) he was constantly transferred from prison to prison for his protection; (3) he killed Eastwood to escape inmate abuse by obtaining a death sentence and going to death row; (4) prison guards threatened to kill him and left him covered in chemical agents for some time after he killed Eastwood and stabbed Newman; (5) Bell was transported to Florida State Prison (FSP) in a van with chemical agents and the heat turned up; (6) the van driver made the ride uncomfortable and dangerous by constantly hitting the brakes; (7) Bell was beaten by FSP correctional officers and deprived food as well; (8) Bell was placed in a Plexi-glass room with no A/C in the middle of summer; (9) no one in authority offered help or evaluated the impact of abuse on his mental health; (10) the FSP abuse was ongoing at the time of his December 13, 2019 waivers. (1PCR:860-73.)

Bell asserted, as Claim 1, that his counsel *and* penalty-phase-jury waivers were involuntary and discussed them in subsections A (counsel) and B (jury). (1PCR:860-76.)

For Claim 2, Bell argued counsel ineffectively failed to challenge the voluntariness of his counsel and penalty phases by presenting an interview/two inmates. (PCR1:877-98.) The interview (between Investigator J.T. Williams and Bell) had been admitted into evidence during Bell's penalty phase as Exhibit 20 and was available to this Court and appellate counsel on direct appeal. (DAR:434; 1PCR:882-84, 1561 n.3; *Bell v. State*, SC2020-0472, Docket Date 07/20/2021 ("EXHIBITS ~ Copies - State's Exhibits 18, 19, 20 & 21").

Bell did not all allege or analyze counsel's ineffectiveness related to the voluntariness of his counsel and penalty-phase-jury waivers as separate claims despite the fact he had already waived his right to counsel when his jury waiver took place. Instead, Bell discussed the three pieces of evidence (the interview and two inmates) under sub-headings A, B, and C, and raised a cumulative-prejudice claim under sub-heading D. (PCR1:877-98.)

Finally, Bell raised a third numbered claim alleging the failure to fully consider mitigation violated the Eighth Amendment. (PCR1:898-917.)

The State answered Bell's motion, summarized what the

documents in his Appendix showed, and urged summary denial. (PCR1:1099-1172, 1344-1418.) Its operative Answer[3] also specifically argued Bell had forfeited both Claims 1 and 2 by his persistent failure to comply with the postconviction court's order and Rule 3.851(e)(1)'s separately pleaded requirement. (1PCR:1373-74, 1383, 1386.)

The court summarily denied all Bell's claims after a *Huff*[4] hearing. (PCR1:1560-69.) The court also noted Bell expressly waived any challenge to the voluntariness of his plea. (1PCR1:1565 n.6.) Beforehand, postconviction counsel expressly acknowledged that Bell was competent to proceed in postconviction. (1PCR:1086-87, 1173.)

Bell timely appealed. (1PCR:1651.)

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[3] The State was required to file an amended Answer after its motion to deviate from the requirement in rule 3.851 that it use the same numbering system as Bell was denied.

[4] *Huff v. State*, 622 So. 2d 982 (Fla. 1993). (PCR1:1506-59.)

ARGUMENT SUMMARY

Issue "1": Counsel and Jury Waiver Voluntariness

The voluntariness of two different waivers occurring at two different times is two different claims. This Court should affirm the summary denial of both claims as pleaded in violation of Rule 3.851(e)(1) below.

Apart from that, the counsel-waiver issue is ***procedurally barred*** (it could have been raised before, including on appeal as fundamental error since the interview Bell uses in postconviction was in the direct-appeal record), ***conclusively refuted by the record*** (Bell swore the waiver was voluntary and explained he was just taking responsibility for his actions), and ***legally insufficient*** (Bell never alleged any of the prison violence he claimed to experience was intentionally designed to procure the waiver, he had other options to deal with it, and there is no nexus between the claimed abuse and counsel waiver).

For similar reasons, the jury waiver claim is ***procedurally barred***, ***conclusively refuted by the record***, and ***legally insufficient***.

Issue "2": IATC Counsel and Jury Waiver Voluntariness

Bell had counsel for less than eight days before the court allowed him to exercise his constitutional right to self-representation.

The counsel-waiver-voluntariness-IATC issue is ***procedurally barred*** by Bell's plea (Bell pleaded no contest *after* waiving his right to counsel), ***conclusively refuted by the record*** (Bell's testimony and explanations showing his counsel waiver was voluntary), and ***legally insufficient*** (counsel has no duty to contradict a competent client's wish to represent himself, a contrary rule would not be federally retroactive, there was no deficient performance given counsel had less than eight days to investigate, and there was no prejudice both because Bell's waiver was voluntary and it is speculative to suggest retaining counsel would have made any difference).

For similar reasons, the jury-waiver issue is ***procedurally barred***, ***conclusively refuted by the record***, and ***legally insufficient***.

Issue "3": Eighth Amendment Mitigation

This claim was properly summarily denied because it was: (1) ***waived*** (Bell expressly stated he did not want more mitigation and affirmatively blocked a comprehensive PSI to discover more mitigation); (2) ***procedurally barred*** (a variation of this claim was previously rejected on direct appeal); and (3) ***legally insufficient*** (the Eighth Amendment does not require courts to consider unpresented mitigation).

STANDARD OF REVIEW

Summary denials are reviewed de novo and proper when "the claim is" (1) "legally insufficient"; (2) "procedurally barred"; or (3) "refuted by the record." *Morris v. State*, 317 So. 3d 1054, 1071 (Fla. 2021); *Cole v. State*, 392 So. 3d 1054, 1061 (Fla. 2024). Claims that are (4) time-barred or (5) based on not-retroactive, new rules of constitutional law are also properly summarily denied. *Zack v. State*, 371 So. 3d 335, 344 (Fla. 2023) (time barred); *Bogle v. State*, 288 So. 3d 1065, 1069 (Fla. 2019) (not retroactive); *Gaskin v. State*, 218 So. 3d 399, 401 (Fla. 2017) (not retroactive).

However, where, as here, the trial and postconviction judge are the same, some deference is due to the judge's determination of factual issues—like voluntariness—in postconviction because the court observed the defendant's demeanor before permitting him to waive his rights/enter a plea in the first place. *Cf. State v. Bright*, 200 So. 3d 710, 742 (Fla. 2016) ("Notably, the postconviction court judge was the same judge that presided over the jury selection process and was, therefore, in a better position to analyze the juror's demeanor and the genuineness of her answers.").

ARGUMENT

Bell murdered one person and tried to murder another while serving a lengthy sentence. Against explicit judicial warnings, Bell waived counsel, pleaded no contest, and waived his right to a penalty-phase jury on December 13, 2019. He then actively obstructed the trial court's attempt to discover more mitigation and received a death sentence. After this Court affirmed, Bell experienced buyer's remorse, decided his waivers were a bad idea, and filed a 3.851 motion to undo his counsel/jury waivers while also asserting a mitigation-related, Eighth-Amendment, claim.

Bell now (via three numbered issues) raises those same buyer's remorse arguments before this Court in a bid for a second chance at a life sentence. But a capital defendant's buyer's remorse and bad decisions are not enough to warrant a second penalty phase. Each of the issues Bell raises are procedurally barred, conclusively refuted, legally insufficient, and/or waived. This Court should therefore affirm and give primacy to the victims' self-executing right to prompt finality over Bell's attempt to manipulate the criminal justice system. *See* Art. I, § 16(b)(10), (d), Fla. Const.

But there is one quick note about Bell's issues to make first. The heart of this appeal is whether Bell's pre-plea-counsel waiver and post-plea, penalty-phase-jury waivers were voluntary. Bell repeatedly insists that he is not challenging his plea. But it is difficult to see how any court could find waivers occurring before and after the plea are involuntary while the plea itself is voluntary.

Agreeing with Bell's involuntariness arguments casts a shadow on the voluntariness of his plea despite this Court's affirmance, and Bell's express waiver, of that argument. And it is doubtful, at least as to the pre-plea, counsel-waiver portions of Bell's issues, that this Court could grant relief without vacating Bell's post-counsel-waiver plea. *See Kittles v. State*, 356 So. 3d 835, 836 (Fla. 4th DCA 2023) (citing this Court's decision in *State v. T.G.*, 800 So. 2d 204, 213 (Fla. 2001) for the rule that a "plea agreement entered into by a *pro se* defendant who improperly waived their right to counsel is involuntary as a matter of law"); *Robles v. State*, 336 So. 3d 378, 386 (Fla. 2d DCA 2022) (An "uncounseled plea, entered without a valid waiver of the right to counsel, is involuntary.").

Fortunately, there is no need to cast doubt on Bell's plea because his involuntariness arguments fail on the merits.

I. BELL'S INVOLUNTARY-COUNSEL-WAIVER AND INVOLUNTARY-JURY-WAIVER CLAIMS ARE PROCEDURALLY BARRED, CONCLUSIVELY REFUTED, AND LEGALLY INSUFFICIENT.

Bell's purported "first" issue asserts that both his (1) pre-plea counsel waiver and (2) post-plea, penalty-phase-jury waiver were involuntary due to generalized abuse he suffered while in prison. These two waivers are discussed separately for analytical clarity. But, as a threshold issue, this Court should affirm Bell's first numbered issue because the voluntariness of his counsel and jury waivers should have been pleaded below as separate claims under Florida Rule of Criminal Procedure 3.851(e)(1).

Bell inappropriately blended two separate claims (the voluntariness of his counsel and penalty phase jury waivers) below and refused to fix the issue when the state and postconviction court pointed it out.[5] These separate waiver-voluntariness claims should have been labeled Claim 1 and Claim 2 respectively.

Florida Rule of Criminal Procedure 3.851(e)(1) provides that each "claim or subclaim shall be separately pled and shall be sequentially numbered beginning with claim number 1." Rule

[5] (1PCR:611, 613 (numbered items 1 and 7), 625-26, 840-42, 860-76, 1373-74, 1383, 1386.)

3.851(1) does not allow claims/subclaims to be raised as "A" or "B"; both must be "sequentially numbered beginning with claim 1."

A claim is a "particular legal basis wedded to a specific factual foundation." *Raulerson v. Warden*, 928 F.3d 987, 1005 (11th Cir. 2019). If either the facts or legal basis supporting "a claim" change, it is not actually the same claim. *Green v. Sec'y, Dep't of Corr.*, 28 F.4th 1089, 1129 (11th Cir. 2022). The Eleventh Circuit has encouraged Florida courts to "require more straightforward post-conviction pleading" to prevent abuse. *Id.* at 1159.

The voluntariness of Bell's counsel and jury waivers are separate claims. Critical facts—the specific waiver at issue, the right being waived, the court's colloquy questions, Bell's responses, and the time each waiver took place—are different for each waiver. That is enough to trigger the separate claim and numbering requirement in Rule 3.851(e)(1).

The source of law for the underlying rights being waived is also different. The Sixth Amendment to the United States Constitution protects seven separate trial rights, including the rights: (1) to a speedy trial; (2) to a public trial; (3) to an impartial jury trial; (4) to be informed of the accusation against him; (5) to confront the

witnesses against him; (6) to have the compulsory process to obtain favorable witnesses; and (7) to have the assistance of counsel for his defense. U.S. Const. amend. VI. It goes without saying that a defendant may waive any combination of these rights and the waiver of one does not necessarily involve the waiver of another.

When Bell waived his right to counsel, he waived the right enshrined in the Sixth Amendment's *counsel provision*. When he waived his right to have a jury penalty phase, he ostensibly waived the right contained in the Sixth Amendment's *jury-trial provision*[6] and his statutory right to a jury under § 921.141, Florida Statutes.

Finally, the remedy (by operation of law and regardless of Bell's contrary protestations) is also different depending on which

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[6] Under current law, a defendant does not have a Sixth Amendment right to a penalty phase jury if he has already been convicted of a prior violent felony and the elements of the crime give all the information needed to make that determination. *See Erlinger v. United States*, 602 U.S. 821, 837-42 (2024); § 921.141(6)(b), Fla. Stat. (providing it is an aggravating circumstance if the "defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person"). But even then, under current Florida statutory law, such a defendant would still have a statutory right to a penalty phase jury under § 921.141, Florida Statutes. Given the attempted murder of Officer Newman with a deadly weapon, which was an aggravator, Bell probably did not have a Sixth Amendment right to a penalty-phase jury to waive after his no-contest plea to that offense.

waiver is deemed involuntary. If Bell's pre-plea counsel waiver was involuntary, that would almost certainly invalidate everything that came after it (including his no-contest plea). *E.g.*, *State v. T.G.*, 800 So. 2d 204, 213 (Fla. 2001). By contrast, if Bell's post-plea, jury waiver was invalidated, that would only affect his sentence. These were separate claims under Rule 3.851(e)(1) and should have been pleaded as such.

Despite the State explicitly, and repeatedly, arguing Bell was required to separately plead these two claims, he refused. By failing to correctly plead these two claims, Bell forfeited them. *See Matthews v. State*, 288 So. 3d 1050, 1060-62 (Fla. 2019) (affirming summary denial of a facially insufficient claim after an opportunity to amend); *cf.* Fla. R. Crim. P. 3.851(e)(1) (failure to properly plead claims waives claims if no amendment is filed).

This Court should therefore affirm the summary denial because Bell failed to comply with Rule 3.851's requirement for separately pleaded claims. *Cf. Everett v. State*, 377 So. 3d 1123, 1126 (Fla. 2024) (affirming summary denial where the defendant used the wrong wording in alleging the requirements for DNA testing); *Damren v. State*, No. SC2023-0015, 2023 WL 5968167, at

*2 (Fla. Sept. 14, 2023) (affirming summary denial where the defendant failed to use the correct wording in alleging newly discovered evidence claim).

With that said, the State will analyze the voluntariness of Bell's counsel and penalty-phase-jury waivers as separate issues below, starting with the counsel waiver.

COUNSEL-WAIVER-VOLUNTARINESS ISSUE

Issue

Bell's first actual issue requires this Court to determine whether his claim that he involuntarily waived his right to counsel before entering his plea warranted an evidentiary hearing. Bell asserts that he is only seeking a new penalty phase, not vacation of his no-contest plea, based on an involuntary counsel waiver that occurred before his plea. This issue should be affirmed as procedurally barred, conclusively refuted, and legally insufficient.

Relevant Facts

Judge Fina held a motion/plea hearing on December 13, 2019, at 10:00 a.m., where Bell confirmed he wanted to plead no contest and waive his right to counsel and a penalty-phase jury. (DAR:34, 131-34, 149, 165-66, 172, 179-80.) The court engaged in

a detailed *Faretta*[7] colloquy where Bell swore: (1) his mind was "free and clear" (DAR:137, 144); (2) no one told him "not to use an attorney" (DAR:145); and (3) no one "threatened" him if he hired "an attorney or" accepted "a court appointed lawyer in any way" (DAR:145; see also DAR:420 (Bell denying anyone "threatened" or "forced" him to waive counsel).) Bell insisted he wanted to represent himself and had sufficient time to make that decision. (DAR:148-51.)

Judge Fina determined Bell was competent and granted his self-representation request after determining Bell made a "decisive uncoerced decision" to waive counsel. (DAR:151.) The court then accepted Bell's no-contest plea after engaging in another colloquy, finding the plea was "freely and voluntary made," and done with a proper "waiver of counsel." (DAR:172.)

Bell repeatedly emphasized that he wanted to "get this over with as soon as possible." (E.g., DAR:176.) He explained he was going to be in prison "pretty much the rest of" his life anyway and:

> I am tired of dealing with it. . . . I think it is easier for everybody if it is over with. All these back and forth it is a hassle for the DOC. It is a hassle for me. I have to sit

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

> here all day chained up like an animal. I am just ready to get it over with, Your Honor.

(DAR:176-77.) Elsewhere, Bell testified he was representing himself (and waiving a penalty-phase jury) to take responsibility:

> Everybody has thought it's crazy that me and my codefendant wanted to plead guilty and ***waive the jury*** and ***represent ourselves***, but I think society's gone crazy because they've created such political correctness that you can't even take responsibility for yourself anymore without jumping through a whole bunch of hoops. And I think it's a shame we cost the taxpayers extra money and stuff like this when we should be able to plead guilty, get our sentence and go on with whatever we're sentenced to.
>
> It has nothing to do with being crazy or anything like that, doing what me and him did. We're men and we've always taken responsibility for what we did.

(DAR:601) (emphases added). Bell also refused explicit offers of counsel several times against "the advice of the Court." (DAR:153, 170, 420, 437, 443.)

Bell's operative 3.851 motion asserted his counsel waiver was involuntary because of abuse while in prison. (1PCR:860-73.) The State urged summary denial. (1PCR:1372-83.)

Ruling Below

Summarily denied as procedurally barred, conclusively refuted by the record, and legally insufficient. (1PCR:1560-64.)

Procedural Bar

Bell's counsel-waiver-involuntariness claim is procedurally barred because it could have been preserved and raised on direct appeal. *See* Fla. R. Crim. P. 3.851(e)(1); *Figueroa-Sanabria v. State*, 366 So. 3d 1035, 1054-55 (Fla. 2023) (reversing on direct appeal because a counsel waiver was not knowing, intelligent, and voluntary); *Noetzel v. State*, 328 So. 3d 933, 946 (Fla. 2021) (holding Bell's co-perpetrator's "waiver of the right to counsel" was "voluntary" on direct appeal); *Knight v. State*, 211 So. 3d 1, 17 (Fla. 2016) (involuntary counsel waiver claim was procedurally barred because it was raised and rejected on direct appeal).

Labeling the issue "fundamental error" does not surmount this bar. *Martin v. State*, 311 So. 3d 778, 811 (Fla. 2020) (explaining "where a claim of fundamental error is not raised on direct appeal, it is procedurally barred"); *Stephens v. State*, 975 So. 2d 405, 423 (Fla. 2007) (fundamental-error claims barred because they could have been raised on direct appeal).

And structural error does not either. *Weaver v. Massachusetts*, 582 U.S. 286, 295 (2017) confirms that even structural error is not automatically reversible in postconviction. In *Weaver*, the Supreme

Court held direct-appeal structural error does *not* equate to *Strickland*[8] prejudice in postconviction. *Weaver*, 582 U.S. at 299-305 (requiring the defendant to show *Strickland* prejudice—a reasonable probability of a different outcome—for a claim that counsel failed to preserve a public-trial violation which, if preserved and raised on direct appeal, would have been automatically reversible structural error).

Bell incorrectly tries to use the doctrines of structural and fundamental error[9] to surmount procedural bars in postconviction.

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[8] *Strickland v. Washington*, 466 U.S. 668, 686 (1984).

[9] Fundamental error is a question of state, not federal, law. *E.g.*, *Pinkney v. Sec'y, Fla. Dep't of Corr.*, 876 F.3d 1290, 1297 (11th Cir. 2017) (explaining a "fundamental error question is an issue of state law, and state law is what the state courts say it is"); *Castillo v. McFadden*, 399 F.3d 993, 1003 (9th Cir. 2005) (explaining "fundamental error" is a feature of state law analogous to "plain error" review in "federal court"). While the Supreme Court has used the generalized term "fundamental constitutional errors," it later explained what it meant by that term: federal structural error. *See Neder v. United States*, 527 U.S. 1, 7-8 (1999). Federal structural error and Florida fundamental error are not the same thing. Federal courts use the term "structural error" to describe errors that are not subject to harmless error analysis but must be preserved for appeal. *Weaver*, 582 U.S. at 299; *United States v. Flores-Martinez*, 677 F.3d 699, 712 n.8 (5th Cir. 2012). "Plain error" is the term federal courts use to describe errors that are cognizable on appeal even though unpreserved. *United States v. Goodson*, 358 F. Appx 533, 535 (5th Cir. 2009) (recognizing an unpreserved

Weaver confirms that structural error is not necessarily reversible in postconviction, and this Court's precedent shows fundamental error is not either.

Indeed, this Court has held even exemption-from-execution claims, the most critical of all claims, may be procedurally barred on the eve of an execution. *Dillbeck v. State*, 357 So. 3d 94, 98-100 (Fla. 2023). And the Supreme Court has similarly held a capital defendant may waive his right against cruel and unusual punishment in method-of-execution claims. *See Stewart v. LaGrand*, 526 U.S. 115, 119 (1999) (Capital defendant "waived his claim that execution by lethal gas is unconstitutional."). These holdings demonstrate the extent to which waivers and procedural bars go under current law in situations far more dire than the voluntariness of Bell's counsel waiver.

Bell is procedurally barred from litigating the voluntariness of his counsel waiver in postconviction because he failed to properly

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structural error claim could only be reviewed for plain error and was not automatically reversable). Florida uses the term "per se" error to describe errors that are not subject to harmless-error analysis and "fundamental error" to describe errors cognizable on appeal even though unpreserved. *See Johnson v. State*, 53 So. 3d 1003, 1007 n.5 (Fla. 2010). None of these terms have much, if anything, to do with postconviction procedural bars.

preserve and present that issue on direct appeal. He personally knew the information he now wishes to use to invalidate his waiver and did not present it to the court during his counsel-waiver colloquy, ask his counsel to present it privately to the court and State or ex parte to the court, or seek appellate review based upon it even though the full J.T. Williams interview was admitted into evidence and in the appellate record. (DAR:434 (Exhibit 20).) This Court should not tolerate such gamesmanship from capital defendants. *Cf. Mullens v. State*, 197 So. 3d 16, 40 (Fla. 2016).

Bell's argument that it would be a violation of due process to procedurally bar his claim now fails for three rather straightforward reasons. The first is this due process argument does not appear to be preserved, and Bell makes no fundamental error argument. This Court should not allow him to make one for the first time in reply when the state will have no means of responding in writing and should, instead, only permit him to point out where he preserved this issue below if he can. *See, e.g.*, *Miller v. State*, 379 So. 3d 1109, 1122 n.9 (Fla. 2024) (first-time, reply-brief arguments waived); *Spaulding v. Spaulding*, 326 So. 3d 186, 187-88 (Fla. 1st DCA 2021)

(collecting cases holding courts are not required to undertake fundamental-error analyses not raised in initial briefs).

The second is that Exhibit 20 (the J.T. Williams interview) was actually in the direct-appeal record and Bell could have used it to urge fundamental error the same basic way he tried to use it in his postconviction motion. (DAR:434; 1PCR:866-67, 882-84, 1561 n.3; *Bell v. State*, SC2020-0472, Docket Date 07/20/2021 ("EXHIBITS ~ Copies - State's Exhibits 18, 19, 20 & 21").[10]

Finally, Bell has failed to address the retroactivity of his proposed new rule of due process law that claims like this one cannot be procedurally barred in postconviction. Such a rule is not retroactive under federal law. *See Edwards v. Vannoy*, 593 U.S. 255, 272, 276 (2021); *Cf. LaGrand*, 526 U.S. at 119 (To "hold that Eighth Amendment protections cannot be waived in the capital context, would create and apply a new procedural rule in violation of *Teague v. Lane,* 489 U.S. 288 (1989)").

[10] The State notes that Bell's habeas petition in SC24-1556 does not raise a claim of ineffective assistance of appellate counsel on this basis and he cannot do so in his forthcoming Reply to the State's Response. In any event, the interview does not demonstrate an involuntary waiver given Bell was relaxed and jovial throughout. (Hear Exhibit 20 at 29:49-39:52.)

Had Bell unsuccessfully raised this issue on direct appeal and argued it did not need to be preserved under due process, that would have been the time to assert the imposition of a bar violates due process. Postconviction is too late to create this new rule.

Merits

Bell argues he involuntarily waived his right to counsel years ago because of abuse he suffered while in prison. But when he was actually waiving the right, he swore before Judge Fina that no one forced or threatened him into waiving counsel; he was only doing so because he was tired of dealing with the charge and wanted to take responsibility. (DAR:145, 176-77, 420, 601.) Bell's buyer's remorse and belated claims that his prior testimony was perjured are not a sufficient basis to find his counsel waiver involuntary. Instead, Bell's involuntary-counsel-waiver claim was properly summarily denied as both conclusively refuted and legally insufficient.

A. Conclusively Refuted by the Record

Bell's sworn testimony conclusively refutes his factual allegation that his counsel waiver was involuntary. "It is well-settled that when a court determines whether an allegation is conclusively refuted by the record, it may rely on the sworn

testimony the defendant has given in" a "colloquy. Any allegations that contradict those answers should not be entertained." *DeJesus v. State*, 255 So. 3d 423 (Fla. 3d DCA 2018).[11] *See also Reynolds v. State*, 99 So. 3d 459, 484 (Fla. 2012) (affirming summary denial of a claim that the court failed to adequately question defendant on the voluntariness of his decision to testify despite allegations that counsel "coerced him into silence" and rejecting the argument he was entitled to "an evidentiary hearing to further investigate this claim" because the colloquy demonstrated a "knowing, voluntary, and intelligent waiver").[12]

Bell, in sworn testimony, testified that: (1) his mind was "free and clear" (DAR:137, 144); (2) no one told him not to use an attorney (DAR:145); and (3) he was not threatened "in any way" into not accepting counsel (DAR:145, 420) (emphases added). He also testified he wanted to "represent" himself to "take responsibility."

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[11] *See also McClenney v. State*, 351 So. 3d 649, 653 (Fla. 3d DCA 2022); *Rodriguez v. State*, 223 So. 3d 1095 (Fla. 3d DCA 2017); *Cartwright v. State*, 112 So. 3d 582, 584-85 (Fla. 4th DCA 2013); *Alfred v. State*, 71 So. 3d 138, 139 (Fla. 4th DCA 2011); *Johnson v. State*, 22 So. 3d 840, 842-45 (Fla. 1st DCA 2009); *Henry v. State*, 920 So. 2d 1245, 1246 (Fla. 5th DCA 2006).

[12] This Court recently cited *Reynolds* approvingly while resolving a different issue. *Jackson v. State*, 347 So. 3d 292, 302 (Fla. 2022).

(DAR:601.) Bell did not say he wanted to expedite his case and waive his rights due to abuse in prison. (DAR:176-78.) He cannot now contradict his statements about why he wanted to waive counsel and expedite his case. Nor can he contradict his sworn testimony that he was not threatened or forced in any way into waiving counsel.

Bell attempts to distinguish plea colloquy cases about a defendant being bound by his colloquy answers because they involve pleas instead of counsel waivers. However, he offers no principled reason sworn testimony can be used to refute an allegation that a plea is involuntary but sworn testimony cannot be used to refute an allegation a counsel waiver is involuntary. This Court should reject Bell's attempted distinguishments as distinctions without a difference.

Bell's sworn statements (that he was not threatened in any way into waiving counsel and did so to take responsibility/because he was tired of dealing with this case) conclusively refute his postconviction contention that his counsel waiver was involuntarily procured by abuse while in prison. *See Bell*, 336 So. 3d at 218 (finding Bell's plea voluntary because when "asked whether anyone

threatened, coerced, or promised him anything in exchange for entering his plea, Bell answered no"). *See also Salerno v. Lewis*, 917 F.2d 566 (9th Cir. 1990) (unpublished table decision) (rejecting claim the defendant's "fear of prison violence coerced him into entering a guilty plea" because he denied "anyone had used force or threats to induce him to plead guilty" during a colloquy).

B. Legally Insufficient

Bell's involuntary-counsel-waiver claim is also legally insufficient to state a due process violation. His allegations of prison abuse—even taken as true—do not render his counsel waiver involuntary under due process. The Fourteenth Amendment's Due Process Clause prohibits "any State" from depriving "any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. Due process requires a waiver of a constitutional right to be "voluntary." *McCarthy v. United States*, 394 U.S. 459, 466 (1969) (citing *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)).

A waiver is voluntary if it is "the product of a free and deliberate choice rather than" official "intimidation, coercion, or deception." *See Berghuis v. Thompkins*, 560 U.S. 370, 382 (2010); *Moran v. Burbine*, 475 U.S. 412, 421 (1986). Neither a defendant's

subjectively felt, internal coercion, nor valid governmental action render a waiver involuntary. *See Colorado v. Connelly*, 479 U.S. 157, 159-62, 169-70 (1986); *Brady v. United States*, 397 U.S. 742, 756 (1970).

This Court has indicated external pressure from non-state actors can render a waiver involuntary. *See Farr v. State*, 124 So. 3d 766, 779 (Fla. 2012). *But see Colorado v. Connelly*, 479 U.S. 157, 159-62, 169-70 (1986) (explaining only "governmental coercion" is relevant to the voluntariness of a *Miranda* waiver and rejecting a "free will" rationale that would find a "waiver invalid whenever the defendant feels compelled to waive his rights by reason of any compulsion, even if the compulsion does not flow from the police."); *Oregon v. Elstad*, 470 U.S. 298, 305 (1985) (Due process not concerned "with moral and psychological pressures to confess emanating from sources other than official coercion.").

Bell asserts his counsel waiver was involuntary because: (1) he was (over several years) subject to threats and violence from Florida inmates; (2) he was constantly transferred from prison to prison for his protection; (3) he killed Eastwood to escape inmate abuse by obtaining a death sentence and going to death row; (4) prison

guards threatened to kill him and left him covered in chemical agents for some time after he killed Eastwood and stabbed Newman; (5) Bell was transported to FSP in a van with chemical agents and the heat turned up; (6) the van driver made the ride uncomfortable and dangerous by constantly hitting the brakes; (7) Bell was beaten by FSP correctional officers and deprived food as well; (8) Bell was placed in a Plexi-glass room with no A/C in the middle of summer; (9) no one in authority offered help or evaluated the impact of abuse on his mental health; (10) the FSP abuse was ongoing at the time of his December 13, 2019 waivers. (1PCR:860-73) He frames this issue as an unconstitutional choice between waiving counsel and continued abuse.

But the framing is wrong. The State did not give him an unconstitutional choice between waiving counsel and continued abuse. Bell's allegations relate to the conditions of his confinement and have nothing to do with the voluntariness of his counsel waiver. *Cf. Cole v. State*, 392 So. 3d 1054, 1063 (Fla. 2024).

Bell had other alternatives to obtain relief from the conditions of his confinement, such as: (1) filing a state-court action seeking emergency relief from the alleged abuse; (2) filing a federal civil suit

seeking emergency relief from the alleged abuse;[13] (3) telling the court about the abuse and letting it address the issue with the State; or (4) seeking counsel's help in escaping/preventing the abuse by conveying it to the court with just the prosecutor and defense counsel present or even ex parte.[14] These alternatives are not unconstitutional and therefore do not violate due process. *See Bordenkircher v. Hayes*, 434 U.S. 357, 365 (1978) (constitutionally permissible, but unpleasant, alternatives do not violate due process). That is doubly true where the record contains abundant evidence that Bell knew how to file legal documents, read, and understand caselaw.

Bell's allegations simply repeat the self-imposed false dilemma that (according to him) put him on death row in the first place. But a self-imposed, false belief that the only two options are waiving

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[13] Indigent inmates may file court cases with the costs either waived or deferred, so Bell's lack of funds does not excuse his failure to pursue legal remedies. *Fla. Parole Comm'n v. Spaziano*, 48 So. 3d 714, 717 (Fla. 2010) (explaining Florida permits prison inmates initiating civil actions to defer court costs if unable to pay); *Martinez v. Kristi Kleaners, Inc.*, 364 F.3d 1305, 1307 (11th Cir. 2004) (explaining the federal in forma pauperis statute, 28 U.S.C. § 1915).

[14] *See Farr v. State*, 124 So. 3d 766, 778 (Fla. 2012) (noting counsel investigated claims of physical and psychological abuse by jail guards).

counsel or being subjected to prison abuse does not violate due process or render a counsel waiver involuntary. *See Colorado v. Connelly*, 479 U.S. at 162, 170 (confession voluntary despite the voice of God telling the defendant "either to confess to the killing or commit suicide"); *Braun v. Ward*, 190 F.3d 1181, 1185-86 (10th Cir. 1999) (counsel waiver not involuntary as a "choice between no counsel and ineffective counsel" because there was a "third option").

Relatedly, there is no objective nexus between waiving counsel and the abuse Bell supposedly sought to escape. He could have retained already-appointed counsel and still limited mitigation to his own testimony and competency report, meaning no further investigation by counsel would have been necessary and the penalty phase could still have been expedited. *See Boyd v. State*, 910 So. 2d 167, 189 (2005) (Regardless of "whether the defendant is represented by counsel or is proceeding pro se, the defendant has the right to choose what evidence, if any, the defense will present during the penalty phase."). Bell's counsel waiver and stated goal of procuring a death sentence to escape abuse have nothing to do with each other. Without an objective, causal connection between the waiver and Bell's escape plan, there is no due process violation.

Even if Bell could surmount that threshold, his claim still fails because none of the alleged abuse was intentionally designed to procure his counsel waiver. To show a due process violation/involuntary waiver, the defendant must establish the abuse or protection offer was intentionally designed to elicit the waiver. *See United States v. Ramos-David*, 16 F.4th 326, 333-34 (1st Cir. 2021) (rejecting a claim that a guilty plea was involuntary due to "physical violence while in jail" when the defendant failed to allege his plea was "coerced" by "threats made during the beatings," instead stated he was beaten as punishment for being a "snitch" rather than "in order to plead guilty," and denied being threatened during the plea colloquy); *Beaty v. Schriro*, 509 F.3d 994, 1003 n.6 (9th Cir. 2007) (defendant's statements not involuntary even if he faced specific threats of violence in jail because he was not explicitly presented a choice between escape and confession)

Bell did not allege that anyone (inmates or prison staff) either abused/threatened to abuse him *unless* he waived counsel or offered protection from abuse *in exchange* for his counsel waiver. He alleged the inmate-abuse was based on beliefs about his prior gang affiliation/snitch status. That was, according to Bell, the abuse that

precipitated his plan to kill Eastwood and escape from general population to death row. He alleged the prison-guard abuse was retaliation for stabbing Officer Newman.

Being in an extremely abusive/difficult prison environment and feeling subjectively trapped simply does not render a defendant's waivers involuntary. *Cf. Arizona v. Fulminante*, 499 U.S. 279, 286-88 (1991) (Voluntariness was a "close" question when a state agent offered protection from ongoing prison violence "in exchange for a confession"). Since Bell only alleged the prison environment was generally abusive, not that anyone sought to coerce him to waive counsel in exchange for protection/cessation of the alleged abuse, his claim that his counsel waiver was involuntary was legally insufficient.

Bell's reliance on *Figueroa-Sanabria v. State*, 366 So. 3d 1035 (Fla. 2023) to rebut this argument is misplaced. *Figueroa-Sanabria* is about whether a capital defendant's waiver of counsel was intelligent and voluntary after the trial court misinformed him that, if he did not waive counsel, the court would require counsel to put on mitigation. *Id.* at 1046-47. That was legally incorrect and undermined the knowing nature of the counsel waiver. *Id.* at 1054.

The court's explicit, if/then statement, about forcing counsel to present mitigation *unless* the defendant waived counsel also went to the voluntariness of the waiver. *Id.* at 1046-47, 1054. The defendant waived counsel because the court *explicitly* told him that if he did not, the court would force counsel to go against his wishes. *Id.* That is a true voluntariness issue.

By contrast, Bell's argument is that his waiver was involuntary based on generalized prison abuse without any explicit connection to his waivers except in his own mind. He did not allege that he was explicitly given an option between further abuse and a waiver. *Cf. Figueroa-Sanabria*, 366 So. 3d at 1046-47, 1054 (explicit choice between counsel waiver and mitigation).

That is fatal to an involuntariness claim. The Supreme Court has recognized that voluntariness is a close call even when a promise of protection from prison violence *is designed* to procure the waiver. *See Fulminante*, 499 U.S. at 286-88. The Court has also recognized that powerful, subjectively felt, internal pressure is insufficient to render a waiver involuntary. *Colorado v. Connelly*, 479 U.S. 157, 170 (1986) (coercion flowing from the "voice of God" urging the defendant to confess did not render waiver invalid).

Bell's counsel-waiver-involuntariness claim needed to allege more than just generalized prison abuse and subjectively feeling there was only one way out to render his counsel waiver involuntary. Without an allegation he was explicitly offered a choice between abuse and waiver (by either inmates or state actors), his involuntary-counsel-waiver claim was legally insufficient.

One last note. Bell complains that his waivers deprived him of an individualized sentencing determination. Based on Bell's brief, it appears these complaints are only to highlight the importance of his waivers and not relevant to granting relief. (IB:54.) However, it bears pointing out that Bell's counsel and jury waivers have no real connection to what mitigation would be presented in a penalty phase. Bell could still limit mitigation to exactly what was presented at his penalty phase. *See Boyd v. State*, 910 So. 2d 167, 189 (2005).

This Court should thus affirm the summary denial of Bell's claim that his counsel waiver was involuntary due to generalized prison abuse.

JURY-WAIVER-VOLUNTARINESS ISSUE

Issue

Bell's second actual issue requires this Court to determine whether his claim that he involuntarily waived his right to a penalty-phase jury after entering his plea warranted an evidentiary hearing. This issue should be affirmed as procedurally barred, conclusively refuted, and legally insufficient.

Relevant Facts

See above, pgs. 19-21 (Counsel-Waiver-Voluntariness Issue, Relevant Facts). On December 5, 2019 (arraignment/first appearance), Bell said he wanted a penalty-phase jury. (DAR:632.) But later at the December 13, 2019, motion hearing, Bell changed his mind and decided to waive a penalty-phase jury. (DAR:149.) The court engaged in an extensive colloquy with Bell focusing on the role of a penalty-phase jury. (DAR:148-49, 165-67, 172-73, 178-80.) And Bell explained why he wanted a bench penalty phase:

> I don't want a jury because I figure you know more about how prisons are run than 12 people off the street would and you would be more able to consider my mitigating factors rather than 12 people off the street.

(DAR:176.) He also confirmed he had not "been threatened or forced in any way" to "make this decision," which was solely his. (DAR:180.) The court ultimately accepted Bell's penalty-phase jury waiver. (DAR:180.)

Bell's operative 3.851 motion asserted his penalty-phase-jury waiver was involuntary because of abuse while in prison. (1PCR:873-77.) The State urged summary denial. (1PCR:1383-85.)

Ruling Below

Summarily denied as procedurally barred, conclusively refuted by the record, and legally insufficient. (1PCR:1560-64.)

Procedural Bar

This Court has repeatedly held that claims challenging the voluntariness of jury waivers are procedurally barred if raised in postconviction. *E.g.*, *Knight v. State*, 211 So. 3d 1, 17 (Fla. 2016) (holding a claim that a waiver of "penalty phase" jury was not "voluntary" was "procedurally barred, as it should have been raised on direct appeal"); *Lopez v. Singletary*, 634 So. 2d 1054, 1056 (Fla. 1993) (holding a claim that the defendant "did not knowingly and voluntarily waive the sentencing jury" was "procedurally barred because" it "could have been" raised on direct appeal). *See also* Fla.

R. Crim. P. 3.851(e)(1). This issue is barred and Bell's attempts to circumvent that bar are even weaker here than in the counsel-waiver section above given the nature of the right at issue here versus the right to counsel addressed previously. See above, pgs. 22-27 (Counsel-Waiver-Voluntariness Issue, Procedural Bar).

Merits

Bell argues he involuntarily waived his right to a penalty-phase-jury years ago because of abuse he suffered while in prison. But when he was actually waiving the right, he swore before Judge Fina that he had not "been threatened or forced in any way" to waive a jury. (DAR:180.) He also explained the decision was tactical because he felt Judge Fina would "be more able to consider" his mitigation than "12 people off the street." (DAR:176.) Bell's buyer's remorse and belated claims he perjured himself are insufficient reasons to find his penalty-phase-jury waiver involuntary. Instead, his involuntary-jury-waiver claim was properly summarily denied as conclusively refuted and legally insufficient.

A. Conclusively Refuted by the Record

Bell's sworn testimony conclusively refutes his factual allegation that his penalty-phase jury waiver was involuntary. *See*

e.g., *Alfred v. State*, 71 So. 3d 138, 139 (Fla. 4th DCA 2011). He testified that he had been thinking about the decision to waive a penalty phase jury "for six months," no one "threatened or forced" him "in any way" to waive a penalty-phase jury and the decision to do so was solely his. (DAR:180.) He also explained he wanted to waive a penalty phase jury to take responsibility for his actions and because he felt the court would be more likely to understand his mitigation. (DAR:176, 601.) These statements conclusively refute Bell's postconviction assertion that his penalty-phase jury waiver was involuntary.

B. Legally Insufficient

Bell's involuntary-jury-waiver claim is also legally insufficient to state a due process violation. His allegations of abuse—even taken as true—do not render his penalty-phase-jury waiver involuntary because: (1) Bell had (and failed to try) other avenues for relief, *see Braun v. Ward*, 190 F.3d 1181, 1185-86 (10th Cir. 1999) and (2) he did not claim any of the abuse was deliberately designed to procure his penalty-phase-jury waiver, *e.g., United States v. Ramos-David*, 16 F.4th 326, 333 (1st Cir. 2021).

II. BELL'S INVOLUNTARY-COUNSEL-WAIVER-IATC AND INVOLUNTARY-JURY-WAIVER-IATC CLAIMS ARE PROCEDURALLY BARRED, CONCLUSIVELY REFUTED, AND LEGALLY INSUFFICIENT.

Bell's purported "second" issue asserts IATC claims alleging his counsel failed to discover and present evidence of prison abuse to challenge the voluntariness of Bell's counsel and jury waivers. He identifies three pieces of evidence he argues counsel ineffectively failed to discover/present to this Court: (1) the 10/9/2023 J.T. Williams interview with Bell; (2) inmate Mitchell Womack's statements; (3) inmate Leo Boatman's statements. Finally, Bell also raises a cumulative error claim under this issue.

As a threshold, this Court should hold any ineffectiveness claims related to Bell's counsel and penalty-phase jury waiver were forfeited by his persistent failure to comply with Rule 3.851(e)(1). The State and postconviction court specifically pointed out that ineffectiveness related to two different waivers occurring at two different times were two different claims that needed to be pleaded separately, but Bell refused.[15] For the same basic reasons

[15] (1PCR:614-15 & n.4 (numbered items 13 and 17), 625-26, 840-42, 860-76, 1373-74, 1383, 1386.)

discussed previously, this Court should hold Bell's improper pleading forfeited these issues. (See above, pgs.15-19.)

Bell's purported "second" issue demonstrates the critical importance of capital defendants properly pleading their claims. Bell was not represented during his penalty-phase jury waiver, so he faces an uphill battle arguing for IATC there. But he was represented during his counsel waiver and thus can, facially, argue ineffectiveness there. Rule 3.851(e)(1) was designed to force capital defendants to correctly plead their claims to differentiate between issues like this and should be strictly enforced by this Court.

For its part, the State will analyze IATC related to the counsel-waiver and penalty-phase-jury waiver separately. In this case, none of its arguments hinge in the evidence counsel failed to discover/present, and so everything will be analyzed together. Since none of Bell's IATC claims show deficient performance, his cumulative error claim fails. *E.g.*, *Truehill v. State*, 358 So. 3d 1167, 1187 (Fla. 2022).

COUNSEL-WAIVER-VOLUNTARINESS-IATC ISSUE

Issue

Bell's third actual issue requires this Court to determine whether his claim that counsel ineffectively failed to challenge the voluntariness of his pre-plea counsel waiver with evidence from an interview/two inmates warranted an evidentiary hearing. Bell, again, asserts that he is only seeking a new penalty phase, not vacation of his no-contest plea, based on counsel's failure to challenge what Bell asserts is an involuntary counsel waiver that occurred before his plea. This issue should be affirmed as procedurally barred, conclusively refuted, and legally insufficient.

Relevant Facts

See above, pgs. 19-21 (Counsel-Waiver-Voluntariness Issue, Relevant Facts). Regional Conflict Counsel was appointed as Bell's counsel on December 5, 2019, without Bell's authorization or request. (DAR:132-33, 629-30, 635-36.) Four days later, Bell objected to counsel's appointment and, citing *Faretta*, moved to represent himself. (DAR:59-65.)

At "4:10:01 PM" on December 11, 2019 (less than two days before Bell's plea and waivers), the State provided Bell's counsel a

discovery exhibit containing hundreds of items. (DAR:38-52, 128.) One of these items was a recording between Bell and Investigator J.T. Williams (later admitted as State's Exhibit 20). (DAR:41, 434, 562-87.) In that recording, Bell (who is relaxed and jovial throughout) mentions an "ass whopping" and says he "wasn't mad about that." (Hear Exhibit 20 at 29:49-39:52.)

Bell appeared with appointed counsel on December 13, 2019, around 10:00 a.m. and waived his right to counsel before anything else. (DAR:34, 37, 128-51.) Later, at his penalty phase, the court gave Bell the opportunity to publish the entirety of Exhibit 20, but Bell expressly waived his right to do so. (DAR:587; 1PCR:1561 n.3.)

Ruling Below

Summarily denied as procedurally barred, conclusively refuted by the record, and legally insufficient. (1PCR:1564-68.)

Procedural Bar

Bell's claim that counsel ineffectively failed to investigate/present information (from an interview and two inmates about prison abuse) to challenge the voluntariness of his counsel waiver is procedurally barred by entry of his no-contest plea, which was affirmed on direct appeal and went unchallenged below.

Pleading to a crime "represents a break in the chain of events which has preceded it in the criminal process" and—with a limited exception—precludes a defendant from raising claims "relating to the deprivation of constitutional rights that occurred prior to the" plea. *Tollett v. Henderson*, 411 U.S. 258, 267 (1973).[16] That includes pre-plea ineffectiveness claims and claims related to self-representation. *See Stano v. State*, 520 So. 2d 278, 279 (Fla. 1988) (holding pre-plea ineffectiveness claims were forfeited by the plea and correctly, summarily denied); *United States v. Coffin*, 76 F.3d 494, 498 (2d Cir. 1996) (holding a "plea effectively waived all ineffective assistance claims relating to events prior to" its entry); *United States v. Pena*, 762 F. App'x 34, 38 (2d Cir. 2019) (pre-plea deprivation of counsel claim barred by plea where defendant did not claim the deprivation made the plea "involuntary or

[16] *Tollett* applies to both no-contest and guilty pleas. *Maldonado v. Campbell*, No. 20-1345, 2020 WL 6194595, at *2 (6th Cir. Aug. 17, 2020); *Gomez v. Berge*, 434 F.3d 940, 942-43 (7th Cir. 2006) (applying *Tollett* to a no-contest plea); *Feo v. Savage*, 108 F.3d 337 (9th Cir. 1997) (unpublished table decision) (holding the defendant "waived" a claim of ineffective assistance for "failing to conduct an adequate pre-trial investigation" claim by "entering a plea of no-contest"); *Abonza-Torres v. Sec'y, Dep't of Corr.*, No. 19-13653-J, 2020 WL 13564082, at *1 (11th Cir. Sept. 3, 2020) (Jill Pryor, J.) (applying *Tollett* to a no-contest plea).

unintelligent").[17] The only pre-plea ineffectiveness claims that are not waived are ones claiming the ineffectiveness rendered the plea "involuntary." *E.g., United States v. Winchel*, No. 21-10233, 2023 WL 3533884, at *2 (5th Cir. May 18, 2023).

A post-plea defendant may "only attack the voluntary and intelligent character of" the "*plea*" and constitutional violations occurring *after* it. *Tollett*, 411 U.S. at 267 (emphasis added); *United States v. Orduno-Ramirez*, 61 F.4th 1263, 1270 n.5 (10th Cir. 2023) (*Tollett* only precludes "pre-plea constitutional violations" and does not "foreclose relief" for violations occurring after the plea).

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[17] *See also Werth v. Bell*, 692 F.3d 486, 495-99 (6th Cir. 2012) (collecting cases holding a *Faretta* issue is barred after a guilty plea and noting only the Ninth Circuit has held to the contrary); *United States v. Dewberry*, 936 F.3d 803, 806-07 (8th Cir. 2019) (same). *Vanaman v. United States*, No. 16-15452-E, 2017 WL 11684637, at *2 (11th Cir. Sept. 1, 2017) (pre-plea ineffective assistance claim waived by entry of unchallenged plea); *Baker v. State*, 879 So. 2d 663, 664 (Fla. 5th DCA 2004) (rejecting a pre-plea ineffectiveness claim because a plea "cuts off inquiry into all issues arising prior to the plea"); *Bodden v. State*, 766 So. 2d 416, 417 (Fla. 4th DCA 2000) (same). *See also United States v. Williams*, 29 F.4th 1306, 1314 (11th Cir. 2022) (explaining a plea generally waive all "claims of constitutional error" occurring before it); *Bullard v. Warden, Jenkins Corr. Ctr.*, 610 F. App'x 821, 824 (11th Cir. 2015) (explaining a plea waives "any claim of ineffective assistance of counsel unless the deficient performance relates to the voluntariness of the plea itself").

Bell's claim that counsel ineffectively failed to investigate/present evidence his *pre-plea* counsel waiver was involuntary was procedurally barred by his no-contest plea. Since Bell pleaded no-contest, he was limited to attacking "the voluntary and intelligent character of" his "*plea*" and nothing else prior to it, like the validity of his pre-plea counsel waiver, without an allegation that the constitutional violation rendered his plea involuntary. *See Tollett*, 411 U.S. at 267. But this claim did not attack his plea at all; Bell affirmatively disclaimed any argument that his no-contest plea was involuntary. (1PCR1:1565 n.6.) As a result, any issue about the validity of his pre-plea counsel waiver was procedurally barred. *See Stano v. State*, 520 So. 2d 278, 279 (Fla. 1988) (holding pre-plea ineffectiveness claims were procedurally barred by plea and correctly, summarily denied).

Bell argues that his current ineffectiveness claims are not barred by his plea because they relate to the penalty phase rather than the guilt phase. Setting aside the doubtful nature of his argument that an involuntary, pre-plea counsel waiver would not automatically vacate his plea, *State v. T.G.*, 800 So. 2d 204, 213 (Fla. 2001), Bell was only represented *before* he pleaded no contest

and never afterwards. The sole focus of this ineffectiveness claim can only be events that occurred prior to the plea because counsel had no responsibility whatsoever for anything that occurred after Bell waived his right to counsel. All aspects of the alleged ineffectiveness violation occurred prior to entry of Bell's plea and are therefore barred under *Tollett* unless they relate to the voluntariness of his plea, which Bell insists this claim does not. (1PCR1:1565 n.6.)

That is why this situation is distinctly different from Bell's hypothetical where a defendant enters a plea and keeps counsel for a penalty phase. In that case, no investigation-related Sixth Amendment violation actually occurs until counsel fails to admit evidence in the penalty phase or take some other action after the plea. The actual violation of the right to effective counsel thus occurs *after* the plea and is not barred thereby. *See Orduno-Ramirez*, 61 F.4th at 1270 n.5 (*Tollett* only precludes "pre-plea constitutional violations" and does not "foreclose relief" for an "alleged Sixth Amendment violation" that occurred after the plea).

This Court should hold that Bell's no-contest plea barred him from attacking his pre-plea counsel waiver because he affirmatively did not challenge his no-contest plea.

Merits

Bell faults counsel for failing to save him from himself and his own insistence (against the advice of the court no less) on self-representation. But he cut off counsel's time to investigate any voluntariness issues by waiving counsel eight days after counsel was appointed and two days after counsel obtained the haystack of evidence containing the needle-like interview Bell asserts shows involuntariness and should have prompted further investigation. Bell also swore his counsel waiver was voluntary during the *Faretta* colloquy. And he offers no caselaw suggesting counsel has a duty to save his client from his own bad decisions by urging the court to block his competent client's self-representation request.

Bell exercised his Sixth Amendment right to self-representation instead of availing himself of counsel's assistance. No one suggests that was a good idea; it rarely, if ever, is. *See Faretta v. California*, 422 U.S. 806, 852 (1975) (Blackmun, J., dissenting with Rehnquist, C.J.) ("If there is any truth to the old

proverb that 'one who is his own lawyer has a fool for a client,' the Court by its opinion today now bestows a constitutional right on one to make a fool of himself.").

But the fault for that decision rests squarely on Bell's shoulders and cannot be foisted on counsel after Bell experiences buyer's remorse. Bell's involuntary-counsel-waiver-IATC claim was properly summarily denied as both conclusively refuted and legally insufficient.

A. Conclusively Refuted by the Record

Bell's claim that counsel ineffectively failed to investigate and present evidence his counsel waiver was involuntary is conclusively refuted by the record showing the waiver was in fact voluntary. *See Teffeteller v. Dugger*, 734 So. 2d 1009, 1023 (Fla. 1999) ("Trial counsel cannot be deemed ineffective for failing to raise meritless claims").

Bell's sworn testimony demonstrates his waiver was voluntary. (DAR:137, 144-45, 176-77, 420, 601.) Any attempt to contradict Bell's sworn testimony with the three pieces of evidence Bell asserts counsel should have found and used would have failed. *See Bell v. State*, 336 So. 3d 211, 218 (Fla. 2022) (finding Bell's plea voluntary

because when "asked whether anyone threatened, coerced, or promised him anything in exchange for entering his plea, Bell answered no"). This claim was properly summarily denied.

B. Legally Insufficient.

Bell's claim that counsel ineffectively failed to investigate and present evidence his counsel waiver was involuntary is also legally insufficient. Counsel has no duty to challenge the voluntariness of a competent defendant's counsel waiver, a contrary rule is not federally retroactive, and Bell's allegations failed to show ineffectiveness under *Strickland*.

1. There Is No Sixth-Amendment Duty to Fight a Competent Client's Self-Representation Request.

Bell's claim requires this Court to examine and decide a threshold issue: whether the Sixth Amendment places any obligation on counsel to challenge a competent defendant's counsel waiver. *See Chaidez v. United States*, 568 U.S. 342, 352 (2013) (explaining, in *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010), before "asking whether the performance of" an "attorney was deficient under *Strickland,* we considered (in a separately numbered part of the opinion) whether *Strickland* applied at all").)

The answer to that threshold inquiry is no and disposes of Bell's involuntary-counsel-waiver-ineffectiveness claim. Counsel has no Sixth-Amendment duty to oppose a *competent*[18] client's self-representation request. *Cf. Faretta v. California,* 422 U.S. 806, 820 (1975) ("The language and spirit of the Sixth Amendment contemplate that counsel, like the other defense tools guaranteed by the Amendment, shall be an aid to a willing defendant—not an organ of the State interposed between an unwilling defendant and his right to defend himself personally."); *Montejo v. Louisiana*, 556 U.S. 778, 788 (2009) (reemphasizing that a defendant may

[18] Bell has not challenged his competency to waive his rights at any point, and this Court found him competent after reviewing an expert's evaluation. (DAR:198-204, 440-41); *see also Noetzel v. State*, 328 So. 3d 933, 946, 952 (Fla. 2021) (explaining the same level of competence required to waive counsel or enter a guilty plea). The State's arguments do not therefore address counsel's duties to a non-competent defendant. *Cf. United States v. Boigegrain*, 155 F.3d 1181, 1187-88 (10th Cir. 1998) (noting "the appellate opinions that have touched on it all imply that the criminal lawyer's obligation to advocate the positions of his client is dependent on the client being mentally competent to stand trial"); *United States v. Avila-Gonzalez*, 757 F. Appx 353, 355-57 (5th Cir. 2018) (recognizing counsel can be ineffective for failing to investigate "whether the defendant is competent to knowingly waive the right to counsel" and remanding for a hearing on that issue); *Austin v. Davis*, 876 F.3d 757, 785 (5th Cir. 2017) (analyzing, and ultimately rejecting, a claim of ineffectiveness for failing to investigate his client's competence to waive counsel).

knowingly and voluntarily waive his right to counsel, and that trying to prevent him from doing so is to, effectively, "imprison a man in his privileges and call it the Constitution").

The decision to waive counsel is "personal to the defendant." *Brown v. Artuz*, 124 F.3d 73, 78 (2d Cir. 1997).[19] And neither "the "advice nor the presence of counsel is needed in order to effectuate a knowing waiver of the Sixth Amendment right"; indeed, "even an unrepresented defendant can waive his right to counsel." *Montejo v. Louisiana*, 556 U.S. 778, 788 n.2 (2009); *Michigan v. Harvey*, 494 U.S. 344, 352-53 (1990).

Bell's position that counsel must advocate *against* a competent client's self-representation wish and obtain an order forcing his client to unwillingly accept representation leaves counsel

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[19] *Wallace v. Davis*, 362 F.3d 914, 920 (7th Cir. 2004) ("If counsel had presented evidence against the client's instructions, then there *would* have been a solid ineffective-assistance argument. By respecting Wallace's wishes, counsel not only abided by ethical requirements (lawyers are *agents,* after all) but also furnished the quality of assistance that the Constitution demands.") (emphasis in original); *Deere v. Cullen*, 718 F.3d 1124, 1140 (9th Cir. 2013) (holding counsel "had an ethical duty to follow" his competent client's "wishes"); *Rutherford v. Crosby*, 385 F.3d 1300, 1313 (11th Cir. 2004) (counsel's duty to investigate "does not include a requirement to disregard a mentally competent client's sincere and specific instructions" and "obtain a court order in defiance of his wishes").

with the Hobson's choice between Scylla (counsel's ethical duty as an agent to his competent clients) and Charybdis (Bell's proposed duty that counsel force himself on competent clients desiring self-representation or else be held ineffective). *See Frye v. Lee*, 235 F.3d 897, 906 & n.10 (4th Cir. 2000). But Bell points to no caselaw indicating counsel has a duty to investigate/oppose a *competent* client's counsel waiver.

That is because the Sixth Amendment imposes no such duty. *See People v. Kirkpatrick*, 874 P.2d 248, 258-61 (1994) (rejecting a claim that counsel ineffectively opposed a capital defendant's self-representation request on lack-of-prejudice grounds while noting defense counsel's choice to oppose his client's request was ill-advised), *disapproved of on other grounds by People v. Doolin*, 198 P.3d 11 (2009). In *Kirkpatrick*, the California Supreme Court explained in detail why capital "defense counsel in criminal prosecutions should refrain from formally opposing their clients' motions for self-representation." *Id.* at 260.

The court first noted the "serious question as to counsel's standing in this situation" because "when counsel oppose the client's own motion, either we have the anomaly of a motion made

and opposed by the same party, or we have counsel stepping out of the assigned role as party representative." *Id.* It then noted that "permitting counsel to oppose a client's motion is likely to undermine the trust that is essential to an effective attorney-client relationship, and for this reason it will make subsequent representation more difficult in the event the motion for self-representation is denied." *Id. See also Marquardt v. State*, 156 So. 3d 464, 470, 489-91 (Fla. 2015) (recognizing the "tension" and "potential conflict" that exist when a trial court appoints the post-*Faretta* defendant's prior counsel to present mitigation the defendant does not wish to present while finding the defendant was not prejudiced). Finally, the California Supreme Court noted the defendant (not his counsel) has the right to personally decide whether to go pro se. *Kirkpatrick*, 874 P.2d at 260.

Counsel has no Sixth-Amendment duty to oppose his competent client's self-representation request or seek a court order foisting counsel on an unwilling defendant trying to invoke his constitutional right to self-representation under *Faretta*. *See Kirkpatrick*, 874 P.2d at 269 (Mosk, J., concurring) (noting "trial counsels' opposition" to the capital defendant's self-representation

request was "troubling," especially since the defendant "would most likely have been allowed to proceed pro se had not his attorneys expressed opposition"). Bell's claim that counsel ineffectively failed to investigate/present evidence opposing his self-representation request is therefore legally insufficient to state a Sixth Amendment ineffectiveness claim and was properly summarily denied.

2. A Newly Created Rule of Constitutional Law Requiring Lawyers to Oppose a Competent Client's Self-Representation Decision Is Not Federally Retroactive.

Relatedly, Bell's involuntary-counsel-waiver-IATC claim is based on a not-federally-retroactive,[20] new rule of law that counsel must investigate and advocate against a competent client's self-

[20] Bell's claim is also not retroactive under State law, but that issue is not analyzed here in light of the complexity of Florida's retroactivity test and because the federal analysis should prevent later federal delays. A denial from this Court on federal retroactivity grounds would likely be due deference in federal court and thus aid in expediting this case. *See Panetti v. Stephens*, 727 F.3d 398, 413 n.97 (5th Cir. 2013) (noting the Fifth Circuit has somewhat inconsistent holdings but one published decision explicitly held state-court decisions on federal retroactivity "must be viewed and applied" through the lens of federal deference); *Lovins v. Parker*, 712 F.3d 283, 300-02 (6th Cir. 2013) (explaining state-court holdings that a new rule is not retroactive under federal law receives deference in federal court); *Johnson v. McKune*, 288 F.3d 1187, 1194 & n.4 (10th Cir. 2002) (analyzing a retroactivity question by deferring to the state court and determining its rejection of the claim was not unreasonable).

representation decision. *See Wallace v. Davis*, 362 F.3d 914, 920 (7th Cir. 2004) (holding a new rule that "counsel is obliged to override the client's instructions" would not be federally retroactive and "must be established on direct appeal rather than collateral review"). *Cf. Chaidez v. United States*, 568 U.S. 342, 347-58 (2013) (holding a decision finding counsel had a duty to render competent advice on a plea's deportation consequences was not retroactive).

A newly recognized duty that counsel must investigate and oppose his competent client's self-representation request would not be federally retroactive under *Chaidez*. In that case, the Supreme Court recognized "garden variety" applications of *Strickland* do not announce new rules subject to retroactivity analyses, but cases deciding whether a duty is categorically removed from the Sixth Amendment do. 568 U.S. 342, 347-54.

The latter question is at issue in this case, particularly in light of the State's prior argument that counsel categorically had no duty to investigate/oppose Bell's self-representation request. The duty Bell seeks to impose in postconviction—that counsel must investigate and oppose his client's self-representation request—was neither dictated by precedent nor apparent to all reasonable jurists

when his judgment became final. *See id.* at 347. It is instead a new rule imposing a new duty on counsel that is not federally retroactive to Bell's judgment, which finalized when the Supreme Court denied certiorari long before he raised this claim. *See Beard v. Banks*, 542 U.S. 406, 411 & n.3 (2004); *Edwards v. Vannoy*, 141 S. Ct. 1547, 1555-62 & n.3 (2021). Bell cannot, therefore, obtain federal relief on this claim because it relies on a new rule of law that does not affect him. This Court should recognize that fact to aid federal courts later deciding this case.

3. Bell's Involuntary-Counsel-Waiver-IATC Claim Fails Under *Strickland*'s Framework.

Finally, even if Bell could get this far, his counsel-waiver-voluntariness-IATC claim is legally insufficient under *Strickland v. Washington*, 466 U.S. 668, 686 (1984).

Ineffectiveness claims require a defendant to show both that "counsel's performance was deficient" and a reasonable probability the outcome of the trial/penalty-phase would have been different had counsel performed adequately. *Id.* at 687, 695. When the claim is counsel ineffectively failed to make non-dispositive legal arguments, prejudice also requires showing the arguments were

meritorious. *See Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986) (holding the prejudice portion of a claim that counsel ineffectively failed to investigate/litigate a suppression motion requires showing both the motion would have prevailed *and* there is a reasonable probability the outcome at trial would have been different absent the excludable evidence).

Bell's claim his counsel ineffectively failed to investigate and present evidence undercutting the voluntariness of his self-representation request is legally meritless as a matter of law on both the deficient performance and prejudice prongs.

Performance: When "a defendant preempts his attorney's defense strategy, he thereafter cannot claim ineffective assistance of counsel." *Stano v. Dugger*, 921 F.2d 1125, 1151 (11th Cir. 1991) (en banc).

Bell's counsel was not deficient as a matter of law given the time he had before Bell chose to waive counsel. Counsel was appointed December 5, 2019 (DAR:629-30, 635-36), Bell asserted his self-representation right on December 9, 2019 (DAR:59-65, 67), the State provided the Investigator Williams/Bell interview to counsel at "4:10:01 PM" on December 11, 2019 (DAR:38, 41), and

Bell waived his right to counsel shortly after 10:00 a.m. on December 13, 2019. (DA:34, 128, 151.) That means counsel only had about twelve working hours to discover and review the Investigator Williams/Bell interview amongst hundreds of discovery items, research/recognize the potential for the prison abuse to undermine Bell's counsel-waiver, *and* find/interview inmates Boatman/Womack to support the abuse allegations.

The Sixth Amendment's "bare minimum" requirements do not require capital defense lawyers to be Superman. *Cf. United States v. Glover*, 872 F.3d 625, 633 (D.C. Cir. 2017) (describing the Sixth Amendment's requirements as "the bare minimum"); *Atkins v. Singletary*, 965 F.2d 952, 958 (11th Cir. 1992) (recognizing effectiveness as not a "high" bar).

This Court should hold counsel cannot be deemed deficient as a matter of law in these circumstances for two alternative reasons. First, Bell's decision to cut off counsel's time to investigate by waiving counsel precludes him from asserting deficient performance as a matter of law. When a defendant cuts off the time that counsel has to investigate issues, he cannot thereafter claim deficient performance for failing to uncover evidence.

Second, under the facts of this case, there was no deficient performance given the extremely limited amount of time counsel had to investigate the State's discovery/inmate accounts due to Bell's counsel waiver. This claim was legally insufficient on the deficient performance prong and thus properly summarily denied.

Prejudice: This claim is also legally insufficient on *Strickland*'s prejudice prong as augmented by *Kimmelman*. The proper prejudice analysis requires Bell to show two elements: (1) that his proposed evidence of involuntariness would have caused the rejection of his counsel waiver and (2) a reasonable probability that he would have received a life sentence if his counsel waiver was rejected. *Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986) (recognizing prejudice for failure to litigate pretrial issues requires showing both that the pretrial issue was meritorious *and* a reasonable probability of a different outcome).[21]

[21] *See also Hinson v. Tucker*, No. 3:10CV480/RV/MD, 2011 WL 5362091, at *16 (N.D. Fla. Oct. 25, 2011) (recognizing, for *Strickland* prejudice, a defendant claiming his counsel ineffectively failed to object to a self-representation request on competency grounds must show both that he was in fact incompetent and that having counsel would have probably resulted in a different outcome at trial), *report and recommendation adopted*, No. 3:10CV480/RV/MD, 2011 WL 5362079 (N.D. Fla. Nov. 4, 2011).

Bell's counsel-waiver-voluntariness-IATC claim fails at both prejudice points. On the first, had counsel investigated Bell's interview, discovered inmates Boatman/Womack, contradicted his competent clients wishes and presented that evidence while arguing his client's counsel waiver was involuntary, the court would still have been required to let Bell go it alone under *Faretta*'s dictates.

Bell told the court that no one threatened or forced him to waive counsel and, even if counsel pointed to evidence of prison abuse, it is unlikely the court would (or even could) have denied him the right to represent himself based on those statements. *Cf. People v. Stigler*, 2020 IL App (1st) 171561-U, ¶ 14-20 (Ill. App. 2020) (holding the court properly accepted a plea despite his counsel's assertion that the defendant was entering it because he was "fearful of jail" when the defendant told the court he was pleading voluntarily and had nothing to say about his counsel's allegations). Since, in light of his sworn statements, Bell's evidence of involuntariness is legally insufficient to warrant denying his Sixth-Amendment right to represent himself, he cannot demonstrate prejudice.

On the second, Bell has failed to establish a reasonable probability of a life sentence if the court rejected his counsel waiver. *See Wong v. Belmontes*, 558 U.S. 15, 27 (2009) ("*Strickland* places the burden on the defendant, not the State, to show a 'reasonable probability' that the result would have been different.").

For his prejudice analysis, Bell simply assumes that, if counsel had been forced upon him, then he would have put forward substantial mitigation and received a life sentence. But that is not at all clear because, even when "represented by counsel," the "defendant has the right to choose what evidence, if any, the defense will present during the penalty phase." *See Figueroa-Sanabria v. State*, 366 So. 3d 1035, 1054 (Fla. 2023). "Put plainly," Bell could not be forced by counsel to put on any more mitigation than he did without counsel. *See id*. That renders Bell's prejudice allegations speculative and insufficient.

Bell's prejudice analysis rests on sheer speculation about what would have happened if his counsel waiver was rejected. But speculation is insufficient to show *Strickland* prejudice. *E.g.*, *Johnston v. State*, 70 So. 3d 472, 477 (Fla. 2011) ("Mere speculation that counsel's error affected the outcome of the proceeding is

insufficient."); *Perkins v. United States*, 73 F.4th 866, 880 (11th Cir. 2023) (A defendant asserting IATC "must be able to point to evidence of prejudice that amounts to more than mere speculation.").[22]

For all these reasons, Bell has failed to meet his *Strickland* burden, and this Court should affirm.

[22] *See also Bilus v. United States*, No. 20-11585, 2021 WL 3523922, at *6 (11th Cir. Aug. 11, 2021) (speculation insufficient to establish prejudice); *Argo v. Sec'y, Dep't of Corr.*, 465 F. App'x 871, 875 (11th Cir. 2012) (possibility not enough to establish prejudice).

JURY-WAIVER-VOLUNTARINESS-IATC ISSUE

Issue

Bell's fourth actual issue requires this Court to determine whether his claim that counsel ineffectively failed to challenge the voluntariness of his penalty-phase-jury waiver with evidence from an interview/two inmates warranted an evidentiary hearing. Bell's penalty-phase-jury waiver took place after he fired counsel and entered a no-contest plea. This issue should be affirmed as procedurally barred, conclusively refuted, and legally insufficient.

Relevant Facts

See above, pgs. 39-40 (Jury-Waiver-Voluntariness Issue, Relevant Facts) and pgs. 45-46 (Counsel-Waiver-Voluntariness-IATC, Relevant Facts). For clarity, the State will also directly cite relevant facts in its argument below.

Ruling Below

Summarily denied as procedurally barred, conclusively refuted by the record, and legally insufficient. (1PCR:1564-68.)

Procedural Bar

To the extent Bell argues counsel should have anticipated and challenged his penalty-phase-jury waiver before Bell kicked counsel

off his case, the claim is procedurally barred under *Tollett* and *Stano.* Bell waived counsel, pleaded no contest, and then waived the jury in that order. (DAR:151 (accepting Bell's counsel waiver); DAR:172 (accepting Bell's no-contest plea); DAR:180 (accepting Bell's penalty-phase-jury waiver).) Therefore, to the extent Bell is challenging counsel's pre-plea conduct without challenging the plea itself, the claim is barred.[23]

Waived by Self-Representation

Bell waived any claim that his counsel ineffectively failed to investigate/present evidence challenging the voluntariness of his post-plea, penalty-phase-jury waiver because Bell was representing himself for that waiver and could have presented evidence of prison abuse then if he was so inclined. *See Cook v. Ryan*, 688 F.3d 598, 609 & n.11 (9th Cir. 2012) (ineffectiveness claims challenging counsel's pre-counsel-waiver conduct are waived by a defendant's

[23] Apart from a plea, a defendant is generally able to challenge the effectiveness of his pre-counsel-waiver attorney. *E.g.*, *Wilson v. Parker*, 515 F.3d 682, 698 (6th Cir. 2008) (explaining a defendant could challenge his lawyer's pre-counsel-waiver effectiveness under *Strickland*); *United States v. Avila-Gonzalez*, 757 F. Appx 353, 355 (5th Cir. 2018) (explaining self-represented defendant has "no counsel against which to assert an" ineffectiveness but can challenge counsel's pre-waiver effectiveness).

self-representation decision **if** the defendant "could have corrected those errors once he decided to represent himself."). *See also Castillo v. Ryan*, 603 F. Appx. 598, 599 (2015) ("Even if his appointed counsel performed deficiently prior to being relieved of his duties, Castillo could have corrected those errors once he decided to represent himself.") (Cleaned up).

The *Cook* waiver rule is thus a narrow exception to the general rule that a defendant may challenge his lawyer's pre-counsel-waiver conduct. *Cf. Wilson v. Parker*, 515 F.3d 682, 698 (6th Cir. 2008). It applies only if either counsel or the defendant could have performed the task the defendant complains counsel ineffectively failed to perform and both were responsible for that task (counsel before the counsel-waiver and the defendant thereafter). *See Cook*, 688 F.3d at 609 & n.11. This waiver rule is based on the Supreme Court's statements in *Faretta* that a defendant who "elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of 'effective assistance of counsel.'" *Id.* (quoting *Faretta v. California*, 422 U.S. 806, 834 n.46 (1975).)

This Court should adopt *Cook*'s rationale and hold Bell waived his claim that counsel ineffectively failed to investigate and present

evidence challenging a waiver that occurred while Bell was self-represented. Bell was responsible for his own representation during the penalty-phase-jury waiver and could have brought the alleged evidence of involuntariness to the court's attention (he knew about his own statements in the interview and everything Boatman/Womack did after all) the same way he sent letters objecting to counsel and engaged in colloquies with the court.

Therefore, even assuming, counsel had some duty to investigate and oppose Bell's penalty-phase-jury waiver before Bell invoked his self-representation right, the fact that Bell was representing himself during the penalty-phase-jury waiver **and** could have presented the same involuntariness evidence he faults counsel for failing to uncover/present waives this ineffectiveness claim. *See Cook*, 688 F.3d at 609 & n.11 (explaining the rule that a self-represented defendant may not claim ineffectiveness when he could have done what he argues counsel should have done is especially strong when the defendant "already knew much, if not all, of the information he now faults his counsel for failing to develop").

Bell cannot obtain relief on his waived claim that counsel ineffectively failed to do what Bell also could have done pro se during his self-represented, penalty-phase-jury waiver. This Court should therefore affirm.

Merits

Bell waived counsel, entered a no-contest plea, and then (after firing counsel) waived his right to a penalty-phase jury. But he vigorously contends the fault for the third waiver of a penalty-phase jury was somehow counsel's fault. This claim did not warrant an evidentiary hearing and was properly summarily denied as both conclusively refuted by the record and legally insufficient.

A. Conclusively Refuted by the Record

Bell's claim that counsel ineffectively failed to investigate/present evidence his jury waiver was involuntary is conclusively refuted by the record. Bell swore no on threatened or forced him to waive the penalty phase jury in any way and testified the decision was solely his and he had been thinking about it for six months. (DAR:180.) He also explained (under oath) that he waived the jury to take responsibility for his actions and because he was tired of being transported. (DAR:176-77, 601.) This sworn testimony

conclusively refutes the contention that his jury waiver was involuntary, and counsel cannot, therefore, be ineffective for failing to challenge it. *See Teffeteller v. Dugger*, 734 So. 2d 1009, 1023 (Fla. 1999) (no ineffectiveness for failing to make meritless argument).

B. Legally Insufficient.

Bell's claim that counsel ineffectively failed to investigate and present evidence his counsel waiver was involuntary was also legally insufficient. To survive summary denial, the allegations in Bell's penalty-phase-jury-waiver-IATC claim needed to demonstrate: (1) counsel performed deficiently in failing to investigate/present evidence Bell's penalty-phase-jury waiver was involuntary; (2) the court would have been required to reject Bell's penalty-phase-jury waiver if counsel had not been deficient; and (3) there is a reasonable probability that Bell would have received a life sentence if his penalty-phase-jury waiver was rejected. *See Strickland v. Washington*, 466 U.S. 668, 686-87, 695 (1984) (establishing the deficient performance and prejudice elements of ineffectiveness claims); *Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986) (holding prejudice for failure to litigate a pretrial issue requires showing both

that the pretrial issue was meritorious *and* a reasonable probability of a different outcome).

Bell's claim his counsel ineffectively failed to investigate/present evidence undercutting the voluntariness of his jury waiver was properly denied as legally insufficient. Counsel has no duty to undercut a competent client's waiver, a contrary rule is not federally retroactive, and Bell has failed to establish deficient performance and prejudice.

1. There Is No Sixth-Amendment Duty to Fight a Competent Client's Jury-Waiver Decision.

Bell's counsel had no Sixth-Amendment duty to undercut his competent client's penalty-phase-jury waiver. The decision to "waive the right to a jury trial" is "reserved for the" defendant. *McCoy v. Louisiana*, 584 U.S. 414, 422 (2018). Counsel, as an agent of his client, has no duty to investigate/oppose a *competent* client's decision to waive a jury.

2. A Newly Created Rule of Constitutional Law Requiring Lawyers to Oppose a Competent Client's Jury-Waiver Decision Is Not Federally Retroactive.

A newly recognized duty requiring counsel to investigate/oppose a competent client's personal decision to waive a

jury would not be retroactive to Bell's finalized conviction and death sentence. *Cf. Chaidez v. United States*, 568 U.S. 342, 347-58 (2013).

3. Bell's Involuntary-Jury-Waiver-IATC Claim Fails Under *Strickland*'s Framework.

Bell's penalty-phase-jury-waiver-involuntariness-IATC claim fails to show deficient performance and prejudice under *Strickland*.

Performance: Bell's allegations were legally insufficient to show deficient performance because: (1) Bell cut off counsel's time to investigate by invoking his right to self-representation and cannot thereafter assert counsel's investigation was deficient; and (2) counsel was not deficient given they had less than eight days between appointment and Bell's counsel waiver to investigate these issues (and less than two days from receiving the interview Bell claims should have triggered their investigation). (See DAR:34, 38, 41, 59-65, 67, 128, 151, 629-30, 635-36.)

Prejudice: Bell's allegations were also legally insufficient to show prejudice because: (1) the court would not have been required to reject Bell's jury waiver if counsel had discovered/presented the JT Williams interview and Womack/Boatman testimony given Bell's voluntariness testimony (DAR: 145, 420); and (2) there is no

demonstrated, instead of speculative, reasonable probability Bell would have received a life sentence if his jury waiver was rejected. *See Johnston v. State*, 70 So. 3d 472, 477 (Fla. 2011) ("Mere speculation that counsel's error affected the outcome of the proceeding is insufficient.")

III. BELL'S MITIGATION-RELATED, EIGHTH-AMENDMENT ISSUE IS WAIVED, PROCEDURALLY BARRED, AND LEGALLY INSUFFICIENT.

Issue

Bell's purported third issue asserts the court erred in summarily denying his claim that his Eighth Amendment rights were violated by the failure to consider unpresented mitigation before imposing death. This claim was properly, summarily denied below because it was waived, procedurally barred, and legally insufficient.

Relevant Facts

Bell represented himself at his bench penalty phase on 2/21/2020. (DAR:432-622.) He admitted his competency report into evidence and provided some mitigation testimony. (DAR:599-602.) He conceded he did not meet any statutory mitigation, stated he did not wish to call any other witnesses or admit any other exhibits, and rested his case. (DAR:601-03.) Bell's closing argued against two aggravators. (DAR:614-16.)

The court then scheduled a sentencing hearing. (DAR:616.) At the State's suggestion, in light of the relatively limited mitigation Bell presented, the Court also ordered a PSI. (DAR:621-22.) Bell

objected that a PSI was only appropriate under "*Muhammad versus State*"[24] if "mitigation is waived and" he did not waive mitigation. (DAR:622.) The court ordered one anyway, and Bell agreed so long as it would not "prolong anything." (DAR:622.) But then Bell refused "to sign a release of information" and thus prevented "a thorough investigation." (1PCR:1647.)

Ruling Below

Summarily denied as procedurally barred, conclusively refuted by the record, and legally insufficient. (1PCR:1568-69.)

Waived

Bell waived this issue twice over and cannot obtain relief on it now. He first waived it by resting his mitigation case and stating he did not want to present further evidence or witnesses. (DAR:602.) Then, Bell waived this issue again by obstructing the court's attempt to discover further mitigation. The PSI specifically ordered due to Bell's limited mitigation presentation was not "thorough" because Bell "refused to sign a release of information" and obstructed the "investigation." (1PCR:1647.) Bell's Eighth Amendment claim was thus both explicitly and implicitly waived.

[24] *Muhammad v. State*, 782 So. 2d 343, 363 (Fla. 2001).

See Berghuis v. Thompkins, 560 U.S. 370, 383-86 (2010) (recognizing a "course of conduct" can establish waiver); *see also United States v. Roof*, 10 F.4th 314, 357 (4th Cir. 2021) (collecting cases and explaining the Supreme Court has broadly rejected "the idea that, under the Eighth Amendment, a defendant cannot waive procedural safeguards out of a desire to obtain a death sentence").

Procedural Bar

This issue was properly summarily denied as procedurally barred. Bell argued (unsuccessfully) on direct appeal that the Eighth Amendment required the investigation/analysis of unpresented mitigation. *Bell v. State*, 336 So. 3d 211, 216-17 & n.9 (Fla. 2022). He re-argued that claim (or a variation of it) below. But Rule 3.851 does not allow claims (or variations of claims) that could have been, should have been, or were, raised on direct appeal. Fla. R. Crim. P. 3.851(e)(1); *Smith v. State*, 310 So. 3d 366, 373 (Fla. 2020); *Barwick v. State*, 361 So. 3d 785, 792-95 (Fla. 2023). This issue is therefore barred.

Merits

This issue fails to state an Eighth Amendment claim and was therefore properly summarily denied as legally insufficient. The Eighth Amendment provides that "cruel and unusual punishment" shall not "be inflicted." U.S. Const. amend. VIII. This prohibition is incorporated against the States under the Fourteenth Amendment's Due Process Clause. *E.g.*, *Jones v. Mississippi*, 141 S. Ct. 1307, 1314 (2021); *United States v. Georgia*, 546 U.S. 151, 157 (2006).

Under the Eighth Amendment, "a state capital sentencing system must: (1) rationally narrow the class of death-eligible defendants; and (2) 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. *Kansas v. Marsh*, 548 U.S. 163, 173-74 (2006).

The "requirement of individualized sentencing in capital cases is satisfied by *allowing* the jury to consider all relevant mitigating evidence." *Id.* at 175 (emphasis added) (quoting *Blystone v. Pennsylvania*, 494 U.S. 299, 307 (1990).) In short, the Supreme Court's Eighth Amendment mitigation jurisprudence confers "upon defendants the right to present sentencers with" mitigation

"relevant to the sentencing decision," obliges "sentencers to consider" all presented mitigation in determining the sentence, and ends there. *Bell v. State*, 336 So. 3d 211, 216 n.9 (Fla. 2022) (quoting *Marsh*, 548 U.S. at 175.)

Moreover, the "Sixth Amendment right to self-representation remains firmly in effect through capital sentencing, and the Supreme Court has not indicated that the Eighth Amendment, or any other Amendment, requires mitigation evidence." *United States v. Roof*, 10 F.4th 314, 356 (4th Cir. 2021). The United States Supreme Court has affirmed a capital case where the defendant chose not to present mitigating evidence against the advice of counsel and the trial judge. *Blystone v. Pennsylvania*, 494 U.S. 299, 308-09 & n.4 (1990) (affirming a capital sentence imposed under a statutory scheme that required death if there was no mitigation where the defendant did not put on mitigation). *See also Silagy v. Peters*, 905 F.2d 986, 1007-08 (7th Cir. 1990).

Federal circuit courts analyzing Federal Death Penalty Act cases have resoundingly rejected the argument that a court is obligated to consider mitigation not presented by a self-represented capital defendant under the Eighth Amendment. *See United States*

v. Roof, 10 F.4th 314, 356-58 (4th Cir. 2021) (rejecting the argument that it violated the Eighth Amendment to fail to consider mental mitigation a self-represented defendant never introduced); *United States v. Davis*, 285 F.3d 378, 381 (5th Cir. 2002) (rejecting the argument that "society's interest in a full and fair capital sentencing proceeding can only be served if all possible aggravating and mitigating factors are presented to the" sentencer and reversing a district court that appointed special counsel to present mitigation on behalf of a self-represented defendant); *Silagy v. Peters*, 905 F.2d 986, 1008 (7th Cir. 1990) (A self-represented defendant's "decision not to present mitigating evidence during the sentencing phase of his trial" did not so undermine "the reliability of his sentence that it cannot stand under the guarantees of the eighth amendment.").

This Court has imposed a duty on courts to investigate and analyze unpresented mitigation *only* if a defendant waives all mitigation.[25] *Muhammad v. State*, 782 So. 2d 343, 363 (Fla. 2001),

[25] The source of law for this requirement in Florida is not entirely clear. This Court referred to it as a "policy" requirement when adopting it and cited no constitutional basis (state or federal) for it. *See Muhammad v. State*, 782 So. 2d 343, 363 (Fla. 2001), *holding modified by Marquardt v. State*, 156 So. 3d 464 (Fla. 2015). This "policy" requirement was adopted to facilitate a generalized

modified by Marquardt v. State, 156 So. 3d 464 (Fla. 2015). That duty is inapplicable here. *Bell*, 336 So. 3d at 216-17 & n.9.

Bell's Eighth Amendment right to individualized sentencing was easily satisfied in his 2020 bench penalty phase because he was not prevented from introducing any mitigation. *See* § 921.141(7)(h), Fla. Stat. (2020); *Blystone*, 494 U.S. at 307 ("The requirement of individualized sentencing in capital cases is satisfied by *allowing* the jury to consider *all relevant mitigating evidence*.") (Emphasis added). The court considered all evidence Bell introduced in its order imposing the death penalty. (DAR:351.) Indeed, the court went far beyond the Eighth Amendment's individualized-sentencing requirement by scouring "the record to

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"constitutional imperative" to conduct proportionality review stemming from Florida Constitutional Law alone rather than the Eighth Amendment. *See id.* at 365; *Urbin v. State*, 714 So. 2d 411, 416 (Fla. 1998) (exclusively citing two provisions of the Florida Constitution as the basis for comparative proportionality review). The Eighth Amendment does not require comparative proportionality review at all. *See Pulley v. Harris*, 465 U.S. 37, 50-51 (1984) (holding "comparative proportionality review" is not required by the "Eighth Amendment"). Since *Muhammad*'s "policy" requirement was founded in the need to conduct proportionality review under state constitutional law (not the Eighth Amendment), it is likely no longer valid. *See Cruz v. State*, 372 So. 3d 1237, 1240-44 (Fla. 2023) (eliminating relative-culpability analysis because it was a subset of proportionality review, which was eliminated in *Lawrence v. State*, 308 So. 3d 544, 548-52 (Fla. 2020)).

consider any and all potential mitigation evidence," including mitigation Bell did not present. (DAR:351; DAR:353 ("Because the Defendant did not present much mitigation, this Court ensured that all potential mitigating evidence was considered.").)

A capital defendant may not use the Eighth Amendment to excuse his failure to investigate and/or introduce mitigation after invoking his self-representation right under the Sixth Amendment. *See Roof*, 10 F.4th at 356 (declining "to invoke the Eighth Amendment to dilute the potency of the Sixth"). Bell's Eighth Amendment claim was therefore legally insufficient and properly summarily denied.

It bears noting as well that any newly recognized rule of law holding the Eighth Amendment requires the admission and consideration of all available mitigating evidence would not be retroactive to Bell's finalized death sentence. Whether he realizes it or not, Bell's is seeking (in postconviction) to establish a new Eighth Amendment rule that requires courts to fully investigate and consider all conceivable mitigation even if not introduced by a self-represented defendant.

But that new rule is not federally retroactive. *See Teague v.*

Lane, 489 U.S. 288, 310-14 (plurality opinion) (establishing the federal retroactivity test); *Stewart v. LaGrand*, 526 U.S. 115, 119 (1999) (explaining a proposed new rule that "Eighth Amendment protections cannot be waived in the capital context" would be a new, not retroactive rule under *Teague*).

Since this capital case will likely go into federal litigation after the FSC review, this Court should aid its federal brethren by explicitly holding the right Bell seeks to establish is not federally retroactive and rejecting it on that basis. *Cf. Yeatts v. Angelone*, 166 F.3d 255, 261 (4th Cir. 1999) ("Comity is a two-way street" in federal habeas litigation). Doing so could shave years off this case in federal habeas and thereby advance the victims' state constitutional right to prompt finality.[26] The State thus urges this Court to explicitly recognize Bell seeks recognition of a not-yet-recognized constitutional right that would not be federally retroactive to him.[27]

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[26] Presently, the greatest delay in capital cases comes from federal habeas courts, where capital cases often linger for a decade or more without a decision. *E.g.*, *Mungin v. Sec'y, Fla. Dep't of Corr.*, 89 F.4th 1308, 1316 (11th Cir. 2024) (noting the district court denied a habeas petition "over sixteen years" after it was filed).

[27] Florida utilizes a different retroactivity test for state-law purposes. *See Witt v. State*, 387 So. 2d 922, 926, 931 (Fla. 1980)

Bell's new Eighth Amendment rule would not be federally retroactive to his finalized death sentence. Retroactivity under *Teague* requires answering three questions: (1) when did Bell's conviction become final? (2) Is the rule Bell seeks to apply actually new when viewed from the legal landscape existing when his judgment became final? And (3) if so, is the new rule substantive, and therefore automatically retroactive, or procedural, and therefore not retroactive? *See Beard v. Banks*, 542 U.S. 406, 411 & n.3 (2004); *Edwards v. Vannoy*, 141 S. Ct. 1547, 1555-62 & n.3 (2021) (eliminating the watershed procedural rule exception to retroactivity and recognizing substantive rules are automatically retroactive).

Bell's judgment became final when the United States Supreme Court denied certiorari on October 3, 2022. *See Beard*, 542 U.S. at 411 (explaining a judgment is final for *Teague* purposes when the Supreme Court denies certiorari on direct appeal).

On *Teague*'s second question, the rule Bell seeks is indisputably new. *See Beard*, 542 U.S. at 411 (explaining newness

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(establishing Florida's retroactivity test). For the purposes of saving time in federal court, this Court need not determine whether Bell's second issue would be retroactive under state law and therefore the State does not request it analyze that issue.

is judged on the legal landscape existing at the time of finality). In October 2022, there was no established, Eighth Amendment obligation to investigate and consider unpresented mitigation for a self-represented capital defendant who put on some mitigation. *See United States v. Roof*, 10 F.4th 314, 356 (4th Cir. 2021) (recognizing "the Supreme Court has not indicated that the Eighth Amendment, or any other Amendment, requires mitigation evidence"); *Bell v. State*, 336 So. 3d 211, 216-17 (Fla. 2022) (holding this Court was not required to investigate additional mitigation for Bell).

Teague's final question is easy. A new rule requiring this Court to investigate and consider all unpresented evidence for a self-represented capital defendant who puts on some mitigation is not substantive because it does not prohibit the imposition of the death penalty a class of defendants based on their status or the offense. *See Beard*, 542 U.S. at 416-17; *Edwards*, 141 S. Ct. at 1554-62 & n.3 (eliminating the watershed procedural rule exception to nonretroactivity and holding the right to a unanimous jury determination on guilt is not retroactive); *Jones v. Mississippi*, 141 S. Ct. 1307, 1317-18 & n.4 (explaining and correcting a court-created aberration on procedural vs. substantive rules).

Bell seeks to create and benefit from a new Eighth Amendment rule that is not federally retroactive to his sentence. This Court should aid its federal brethren in speedily resolving the forthcoming federal litigation by explicitly recognizing that fact and holding Bell's Eighth Amendment claim is not federally retroactive.

CONCLUSION

Bell's appellate assertions that his waivers were involuntary, that counsel should have saved him from himself, and that the Eighth Amendment requires the court to become mitigation counsel for a self-represented defendant, boil down to one thing: "buyer's remorse." *E.g.*, *United States v. Melton*, 861 F.3d 1320, 1322 (11th Cir. 2017). Each of Bell's claims are waived, procedurally barred, legally meritless as a matter of law, based on a not-federally-retroactive new rule, and/or conclusively refuted by the record.

The only proper course when a capital defendant's claims suffer from these defects is to affirm the summary denial. *E.g.*, *Barwick v. State*, 361 So. 3d 785, 794-96 (Fla. 2023). This Court should protect the victims' "self-executing" constitutional rights "to proceedings free from unreasonable delay, and to a prompt and final conclusion of the case and any related postjudgment proceedings" by affirming the summary denial. *See* Art. I, § 16(b)(10), Fla. Const.

Respectfully submitted and certified,

ASHLEY MOODY
FLORIDA ATTORNEY GENERAL

/s/ *Jason W. Rodriguez*
JASON W. RODRIGUEZ
SENIOR ASSISTANT ATTORNEY GENERAL
Florida Bar No. 125285

Office of the Attorney General
PL-01, The Capitol
Tallahassee, FL 32399-1050
(850) 414-3300
jason.rodriguez@myfloridalegal.com
E-Service: capapp@myfloridalegal.com

Counsel for the State of Florida

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of November 2024, I electronically filed the foregoing with the Clerk of the Court by using the Florida Courts E-Portal Filing System which will send a notice of electronic filing to the following: Adrienne Shepard and Ali Shakoor, Assistants CCRC-M, 12973 Telecom Pkwy N, Temple Terrace, FL 33637, Adrienne Joy Shepherd and Ali A. Shakoor, Assistants Capital Collateral Regional Counsel Middle, shakoor@ccmr.state.fl.us, shepherd@ccmr.state.fl.us, support@ccmr.state.

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 Florida Rule of Appellate Procedure 9.045. This Answer Brief contains 16,341words in compliance with the 20,000-word limit in Florida Rule of Appellate Procedure 9.210(a)(2)(D), (a)(2)(E).

/s/ Jason W. Rodriguez
Attorney for the State of Florida