IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC2024-1264

JESSE BELL,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE THIRD JUDICIAL CIRCUIT, IN AND FOR LAFAYETTE COUNTY, FLORIDA
Lower Tribunal No.: 19000055CFBXMX

REPLY BRIEF OF THE APPELLANT

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PRELIMINARY STATEMENT

Appellant, Jesse Bell ("Bell"), relies on the arguments presented in the Initial Brief of the Appellant ("Initial Brief"), and offers the following Reply to the Appellee's Answer Brief ("Answer Brief"), which was filed on November 15, 2024. While Bell will not reply to every issue and argument raised by the Appellee, he expressly does not abandon the issues not specifically replied to herein.

References to the record on appeal for Bell's direct appeal in Florida Supreme Court Case No.: SC2020-0472 are of the form R[page number(s)]. References to the current post-conviction record on appeal before this Court in Florida Supreme Court Case No.: SC2024-1264 are of the form PC[page number(s)]. Page references to the Initial Brief are designated with IB[page number]. Page references to the Answer Brief are designated with AB[page number]. All other references will be self-explanatory or otherwise explained. All emphasis is supplied unless otherwise noted.

ARGUMENT

REPLY TO PRELIMINARY ARGUMENT

Appellee's preliminary argument found at AB13-14 is addressed in this section. Appellee refers to Bell's claims for relief raised under

Florida Rule of Criminal Procedure 3.851 as "buyer's remorse arguments" and argues that this Court should "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." AB13. Bell's December 26, 2023 Amended Motion to Vacate Sentence of Death Pursuant to Florida Rule of Criminal Procedure 3.851, which is his ***initial*** motion for post-conviction relief, is appropriately filed pursuant to Fla. R. Crim. P. 3.851, and Bell is not attempting to manipulate the criminal justice system by exercising his codified right to collaterally challenge his death sentence in an initial motion under Rule 3.851.

As a capital defendant facing the ultimate state sanction of death, Bell had the federal Sixth Amendment right to counsel and a jury, the federal Fourteenth Amendment right to due process, and the federal Eighth Amendment right to an individualized sentencing determination. These fundamental rights were denied to Bell during his penalty phase trial because of his involuntary waivers of counsel and jury. Appellee correctly asserts that victims have a Florida constitutional right to prompt finality. *See* Art. I, § 16(b)(10), Fla. Const. This is certainly an important constitutional right, as all rights

enshrined in Florida's constitution are. Bell's current litigation, and realistically probably all capital post-conviction litigation, reflects the difficult and important task of balancing victims' right to finality against capital defendants' own constitutional rights. Bell respectfully submits to this Court that the victims' Florida constitutional right to finality cannot take primacy over his federal Sixth Amendment right to counsel and a jury, federal Fourteenth Amendment right to due process, and federal Eighth Amendment right to an individualized sentencing determination.[1] The victims' right to finality in this case is not violated by ensuring that Bell receives a constitutionally adequate penalty phase trial.

Appellee also asserts that Bell's arguments that his waiver of counsel and jury were involuntary casts a shadow on the voluntariness of his un-challenged no-contest plea. AB14. Appellee

[1] The Florida Constitution also protects Bell's: right to counsel, right to a jury trial; right to due process; and right to access the Florida courts for "redress of any injury." *See* Art. I, § 9, § 16, § 21, § 22, Fla. Const.

argues that it is therefore "doubtful, at least as to the pre-plea, counsel-waiver portions of Bell's issues, that this Court should grant relief without vacating Bell's post-counsel waiver plea." AB14 (citing *Kittles v. State*, 356 So. 3d 835, 836 (Fla. 4th DCA 2023); *State v. T.G.*, 800 So. 2d 204, 213 (Fla. 2001); *Robles v. State*, 336 So. 3d 378, 386 (Fla. 2d DCA 2022)). However, Bell submits that this Court need not vacate his no-contest plea in order to grant relief on his post-conviction claims challenging his ***death sentence*** and constitutionally inadequate ***penalty phase trial.***

Bell is not challenging any aspect of his conviction, and he further does not assert that his no-contest plea was entered for any involuntary reason. Bell is only challenging his waiver of counsel and a jury as it relates to his penalty phase trial and subsequent death sentence. Further, the involuntary reasons that Bell chose to waive his counsel and jury can certainly be different than the reason he chose to enter his no-contest plea. Bell was fully aware of his rights to counsel and a jury when he waived, and Bell understood the nature of the rights he was waiving. The issue is that Bell did not want to waive his counsel and jury for the penalty phase, but chose to do so to speed up his penalty phase proceedings and hasten an

expected death sentence so that he could escape the abuse at Florida State Prison ("FSP") by being transferred to death row at Union Correctional Institution as quickly as possible.

The cases Appellee cites cannot be construed to support the proposition that this Court must vacate Bell's unchallenged no-contest plea in order to grant relief on his claim that his pre-plea counsel waiver was involuntary or that his trial counsel was ineffective for failing to discover evidence indicating the counsel waiver was involuntary.

Appellee cites to the Fourth District Court of Appeal's assertion in *Kittles v. State*, 356 So. 3d 835, 836 (Fla. 4th DCA 2023) 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." AB14. The Fourth DCA and Appellee cite this Court's opinion in *State v. T.G.*, 800 So. 2d 204 (Fla. 2001) to support this standard, but applying it in Bell's case would construe this Court's opinion in *T.G.* far too broadly and appear to apply the standard in a context that this Court did not intend. In *T.G.* this Court applied the fundamental error doctrine to allow a juvenile defendant to appeal the entry of his pro se no-contest plea in his delinquency proceeding even though the

juvenile had not followed the preservation requirement of filing a motion to withdraw plea prior to his direct appeal. *T.G.*, 800 So. 2d at 212. This Court explained that it was recognizing a "narrowly drawn and extremely limited exception" to the preservation requirement out of a "unique concern for juveniles who enter pleas without the benefit of counsel." *T.G.*, 800 So. 2d at 213. This Court found that T.G.'s pro se no-contest plea was "involuntary as a matter of law" because the trial court had not specifically complied with the procedures governing a juvenile's waiver of counsel under Fla. Juv. P. R. 8.165 specifically stating. *Id.* at 213.

It appears that this Court intended that where a ***juvenile*** defendant's waiver of counsel in a ***delinquency proceeding*** was rendered involuntary by not complying with Florida Rule of Juvenile Procedure 8.165, then any subsequent plea would be considered involuntary as a matter of law, particularly due to the unique concerns this Court expressed for juveniles who enter pleas without the benefit of counsel. This Court therefore carved out a narrow exception to the requirement that a defendant file a motion to withdraw plea before appealing an involuntary plea for juvenile delinquency cases.

Recently, in *State v. Dortch*, 317 So. 3d 1074, 1083 (Fla. 2021), this Court declined to apply that narrow exception carved out in *T.G.* to an adult non-capital defendant who attempted to appeal his plea as involuntary without first filing a motion to withdraw plea, distinguishing Dortch as "not a minor." *Id.* at 1083. In *Kittles*, the Fourth DCA also declined to apply *T.G.'s* narrow exception for an adult non-capital defendant who tried to appeal his pro se no-contest plea without first filing a motion to withdraw plea, distinguishing Kittles as a non-juvenile not entitled to the exception. *Kittles v. State*, 356 So. 3d 835, 836 (Fla. 4th DCA 2023). Like Dortch and Kittles, Bell is an adult defendant, and it does not appear that this Court's reasoning behind the holding of *T.G.* directly applies to him as a non-juvenile. Of additional importance, the three defendants in *T.G.*, *Dortch*, and *Kittles* were all challenging their plea as involuntary, whereas Bell is not.[2] The *T.G.*, *Dortch*, and *Kittles* opinions do not

[2] Appellee also cites *Robles v. State*, 336 So. 3d 378, 381 (Fla. 2d DCA 2022), another case where the defendant challenged her pro se plea as involuntary. Once again, the cases Appellee cites all include defendants asserting that their pleas were involuntary. If Bell was asserting that his plea was involuntary, then these cases may more accurately apply to his situation, but he makes no such assertion.

appear to imply that a court must vacate a non-challenged plea due to an involuntary waiver of counsel, even if that waiver of counsel occurred prior to the voluntary plea. Bell submits that if he pled no-contest for the same involuntary reason that he waived his counsel and jury, then his plea absolutely should be vacated. However, Bell can have different reasons for his waivers versus his no-contest plea, and he does not allege that his plea was involuntary. This Court can and should vacate Bell's waiver of counsel and jury as those waivers relate to Bell's penalty phase without disturbing Bell's no-contest plea.

REPLY TO ARGUMENT I

Appellee first argues that 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)." AB15. As an initial matter, Appellee's argument under Fla. R. Crim. P. 3.851(e) challenging the pleading sufficiency of Bell's Claim One is improperly before this Court because Appellee did not timely appeal the trial court's decision on the pleading sufficiency of Bell's motion. Although Appellee attempts to couch this Rule 3.851(e) pleading sufficiency

argument in the context of "affirm[ing]" the trial court's decision on Claim One, in effect Appellee is making an argument that the trial court's decision on the pleading sufficiency of Bell's Rule 3.851 motion should be reversed because the trial court actually accepted Bell's motion as facially sufficient.

Appellee filed two motions challenging the pleading sufficiency of Bell's original Rule 3.851 motion filed on September 26, 2023. PC486-92; 610-26. The trial court granted Appellee's motions and ordered Capital Collateral Regional Counsel-Middel Region ("CCRC") to file an amended motion. PC625-26. In compliance with the trial court's order, CCRC filed Bell's amended Rule 3.851 motion on December 26, 2023. On February 6, 2024, Appellee filed a Motion to Deviate from Florida Rule of Criminal Procedure 3.851(1)(3), arguing again that Bell's December 26, 2023 amended Rule 3.851 motion did not "correctly separate his claims under Rule 3.85l(e)(l)," and requested to be allowed to deviate from Appellee's own pleading requirements by not following the numbering of Bell's claims raised in his amended motion. PC1094-97. Accepting Bell's amended motion as facially sufficient, the trial court denied Appellee's motion in an order rendered March 11, 2024, finding that the "State shall

amend its answer to use the same numbering system contained in the Defendant's amended initial 3.851 motion." PC1264. Appellee had thirty days under Fla. R. App. P. 9.142(c)(3) to file an appeal with this Court seeking review of the trial court's nonfinal order on the pleading sufficiency of Bell's amended motion. Appellee failed to file an appeal. This issue is therefore not properly before this Court, and this Court should decline to consider Appellee's argument.

Further, the trial court clearly accepted Bell's December 26, 2023 motion as facially sufficient because the court scheduled a *Huff*[3] hearing on the motion and then subsequently rendered the July 18, 2024 final order summarily denying the motion on its merits. Once again, Appellee failed to initiate any appeal of the trial court's acceptance of Bell's motion as facially sufficient.[4] The fact that Appellee now tries to raise the argument by stating that this Court should "affirm the summary denial because Bell failed to comply with Rule 3.851's requirement for separately pleaded claims," does not

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

[4] Appellee may have had another avenue under Fla. R. App. P. 9.140 to cross-appeal the trial court's July 18, 2024 final order as rendering a summary denial on the merits of Bell's claims instead of denying them as facially insufficient. Appellee failed a second time to appeal.

now properly present the issue for review. AB18. The trial court did not summarily deny Bell's claims due to any pleading insufficiency. The trial court accepted Bell's claims as sufficiently plead and then denied them on the merits. Appellee is effectively asking this Court to reverse the trial court's acceptance of Bell's motion as facially sufficient without having filed a timely appeal of that decision. This Court should decline to do so.

Nevertheless, CCRC briefly notes that Bell's December 26, 2023 amended Rule 3.851 motion does plead the voluntariness of his counsel and jury under Claim One as two separately-labeled and distinct subclaims under the overarching legal theory that these waivers were involuntary. Claim One, Subclaim A argues Bell's counsel waiver was involuntary. PC868-73. Claim One, Subclaim B argues Bell's jury waiver was involuntary. PC873-76. Appellee asserts that "[t]hese separate waiver-voluntariness claims should have been labeled Claim 1 and Claim 2 respectively." AB15. Bell's waivers of counsel and a jury are already separately plead, and there is no logical or legal reason that Bell should be required to further separate or renumber the subclaims raised under Claim One. As the opposing party representing the State of Florida, Appellee cannot and

should not attempt to dictate the minutia of how capital defendant Bell numbers or pleads his claims for relief under Fla. R. Crim. P. 3.851. Putting aside the fact that Appellee's argument is not even properly before this Court, it appears that Appellee is attempting to create an issue with the pleading sufficiency of Bell's Claim One where one simply does not exist.

Appellee also argues that Bell's claims that his waiver of counsel and a jury were involuntary are procedurally barred because they could have been raised on direct appeal. AB22, 40. Appellee argues that Bell is procedurally barred from litigating the voluntariness of his counsel waiver in postconviction because he failed to properly preserve and present the issue on direct appeal. AB24-25. Appellee accurately asserts that Bell personally knew the information about the abuse at FSP, but did not present it to the trial court.[5] AB25. Bell

[5] Appellee also asserts that Bell did not ask his trial counsel to present the evidence of the abuse privately or ex parte to the trial court. There is no way to confirm from the face of the direct appeal or current post-conviction record what Bell told trial counsel or what trial counsel knew about the abuse because the trial court erroneously failed to grant an evidentiary hearing on Bell's Claim Two to determine trial counsel's strategy regarding the abuse. *See* IB75-76. Appellee is essentially arguing a fact that cannot be gleaned from the face of the current appellate record, highlighting the need for an

could not realistically apprise the trial court in open court of the FSP abuse because he was a vulnerable and mentally ill capital defendant whose safety was at risk. IB45; 61. FSP staff attended every one of Bell's court dates, and Bell believed talking about the abuse would have put himself at peril if he explained in open court what was happening to him at FSP. IB45; 61. As argued in Argument II in the Initial Brief, Bell needed the assistance of his trial counsel to safely inform the court of what was happening to him at FSP. IB60-61. However, it is simply not clear what trial counsel's strategy was as to the abuse because the trial court erroneously failed to hold an evidentiary hearing. *See* IB75-76.

Appellee also asserts that Bell could have sought appellate review based on the J.T. Williams interview that was admitted into evidence and in the appellate record. AB25-26. It should be noted that while the full audio recording of the interview was admitted into evidence at Bell's trial, the full audio recording was not actually played for the trial court during Bell's trial. *See* R562-87. Therefore, the portion of the audio interview that was transcribed and

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evidentiary hearing to fully establish the factual circumstances surrounding Bell's waivers.

immediately apparent on the face of the direct appeal record did not reflect Bell's references to the abuse during the interview. Regardless, while the J.T. Williams interview should have alerted trial counsel to ask Bell about the abuse, which would have led to the discovery of the corroborating statements from inmates Mitchell Womack and Leo Boatman (IB64-69), the interview by itself did not provide enough evidence on the face of the appellate record for appellate counsel to raise the issue on direct appeal.

Appellee also argues that Bell's Initial Brief argument that it would be a violation of due process to procedurally bar Bell's Claim One in post-conviction does not appear to be preserved in the lower court. AB25. However, Bell's Claim One was presented to the lower court in an attempt to surmount the perceived procedural bar under Fla. R. Crim. P. 3.851 and was explicitly argued as a claim for relief under the federal Fourteenth Amendment right to due process. PC868-76. Further, this particular argument made in the Initial Brief (IB44-45) was in response to the trial court actually finding that Bell's Claim One was procedurally barred, and Bell cannot be expected to anticipate and preemptively respond in his Rule 3.851 motion to every finding that the trial court might make on his motion.

Regardless, Bell's Claim One was filed in post-conviction and argued to the lower court pursuant to a due process argument, and the lower court could reasonably construe Claim One as an attempt to surmount any perceived procedural bar in post-conviction because it was filed in the Rule 3.851 motion in the first place.[6]

Appellee further argues that Bell has failed to address the retroactivity of what Appellee calls Bell's "proposed new rule of due process law that claims like this one cannot be procedurally barred in postconviction." AB26. Appellee misinterprets Bell's Rule 3.851 motion and Initial Brief. Bell does not at any point in either pleading propose or argue for any new bright-line rule of law that would apply to all criminal defendants, and so therefore he does not need to address any retroactivity issue.[7] Bell's Claim One was raised in post-

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[6] Footnotes 5 and 6 of Bell's Rule 3.851 motion also acknowledged that "claims of fundamental error requiring automatic reversal are ordinarily raised on direct appeal." PC868, 873.

[7] It should be noted that Appellee argues throughout that Bell is proposing multiple new rules of law that require a retroactivity determination. AB26-27; 58-60; 83-87. However, Bell is not proposing any new rule of law in any of his claims, and he is merely raising claims for relief under the Fla. R. Crim. P. 3.851 framework. Therefore, Bell will not respond to Appellee's various retroactivity analyses, since no new rules requiring a retroactively determination are being proposed.

conviction in an abundance of caution to preserve the fundamental error in his case for federal review and because of the extremely unique appellate situation presented by the fact that evidence of that fundamental error was not realistically apparent on the face of the appellate record.

Appellee further argues that Bell's sworn testimony during his waiver colloquies conclusively refutes his factual allegation that his counsel and jury waivers were involuntary. AB27-30; 41-42. Appellee cites a litany of cases to support this argument, most of which involve defendants who were challenging their plea as involuntary and were bound by their answers during their plea colloquy. AB28.[8]

Appellee incorrectly argues that distinguishing cases involving plea waiver colloquies (which Appellee cites to) versus counsel waiver colloquies are distinctions without a difference. There is a principled difference between the two. There is a high level of finality associated with pleas, which would contribute to the fact that defendants are frequently bound by their sworn statements during plea colloquies. *See Stano v. Dugger*, 921 F. 2d 1125, 1150 (11th Cir. 1991) (citing

[8] Appellee also cites cases in which the defendant challenged their waiver of the right to testify. AB28.

Tollett v. Henderson, 411 U.S. 258, 267 (1973) ("The Supreme Court has given finality to guilty pleas by precluding claims of constitutional deprivations occurring prior to entry of the plea."); *Stano v. State*, 520 So. 2d 278, 279 (Fla. 1988) (rejecting defendant's claim that his plea was involuntary as an "attempt to go behind the plea"); *Rodriguez v. State*, 223 So. 3d 1095, 1097 (Fla. 3d DCA 2017) ("[U]nder Florida law, a defendant is bound by the statements he makes under oath during a plea colloquy."); *Scheele v. State*, 953 So.2d 782, 785 (Fla. 4th DCA 2007) ("A plea conference is not a meaningless charade to be manipulated willy-nilly after the fact; it is a formal ceremony, under oath, memorializing a crossroads in a case.").

Bell's involuntary counsel waiver and his sworn testimony during his colloquy as to that waiver should not be viewed with the same finality as a defendant's answers during a plea colloquy. Bell is not challenging his no-contest plea or his testimony during his plea colloquy because Bell did not enter his plea for the same involuntary reason he waived his counsel and jury. Bell's colloquy responses shed light on why he chose to enter his no-contest plea. Bell explained:

> ***I believe in taking responsibility for what you do...***
>
> [E]verybody 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 …
>
> 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.***

R601 (emphasis added). Bell did not waive his penalty phase counsel and jury for the same voluntary reason as he plead no-contest. Bell plead no-contest to take responsibility for his role in the homicide and attempted homicide. Despite his answers during his colloquy, Bell waived counsel and jury to expedite his penalty phase proceedings and escape the FSP abuse. This difference in reason for Bell's three decisions, regardless of what he said on the record at trial, is evidenced by the fact that Bell now in post-conviction only challenges his counsel and jury waiver related to his penalty phase and death sentence. He challenges no aspect of his guilt phase or conviction.

"[L]awyers in criminal courts are necessities, not luxuries. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963). The presence and

assistance of counsel is paramount, "as it affects a defendant's ability to 'assert any other rights he may have."' *Figueroa-Sanabria*, 366 So. 3d at 1057 (internal citation omitted). While this Reply Brief will not attempt to parse out the comparative level of importance of the right to counsel versus the right to trial, it is clear that Bell's involuntary waiver of his right to counsel affected his ability to assert all of his other rights because he did not have the benefit of competent counsel to assist him during his capital case. Bell should not be bound by his testimony during his counsel and jury colloquies because he could not safely disclose the abuse he was experiencing. The only solution to this unconstitutional dilemma is to grant Bell a new penalty phase trial where he can safely exercise his constitutional rights to counsel and jury in his capital case.

Appellee also argues that Bell's involuntary counsel waiver and involuntary jury waiver claims are legally insufficient to state a due process violation because Bell's allegations of prison abuse do not render his waivers involuntary. AB30-38; 42. As an initial matter on this issue, it should be noted that Appellee misconstrues which facts Bell is arguing rendered his waivers involuntary. Appellee incorrectly asserts that Bell argues 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." AB31. While these facts are important mitigating facts included in Bell's Claim Three/Argument III, Bell did not argue these facts to support the involuntariness of his waivers under Claim One/Argument I. These facts were included in a section of Bell's Rule 3.851 motion explicitly labeled as "Background for Claim 1" that initially stated that "The facts in this "Background for Claim 1" section are not offered as direct support for Claim 1. They are instead offered to provide the historical background and context leading up to Bell's waivers on December 13, 2019." PC862. The facts which are argued as supporting the involuntariness of Bell's waivers are found in the "Facts in Support of Claim 1" section of Bell's Rule 3.851 motion and are more specifically narrowed to evidence of the abuse Bell suffered while at FSP. PC863-68.

Appellee further argues that the "State did not give [Bell] an unconstitutional choice between waiving counsel and continued abuse," and "Bell's allegations relate to the conditions of his

confinement and have nothing to do with the voluntariness of his counsel waiver." AB32. While the evidence that Bell was abused by FSP staff while awaiting trial certainly does relate to his conditions of confinement at FSP, that evidence also proves that Bell's waivers were involuntary because his choice was not made clearly free and responsible in the absence of subverting factors. IB36-37. The FSP abuse presented Bell with a choice that was constitutionally offensive- waive his counsel and jury to expedite his proceedings so that he could escape from the abuse at FSP or exercise his rights to counsel and jury and endure the abuse for longer. IB38, 42 (citing *Figueroa-Sanabria v. State*, 366 So. 3d 1035, 1054 (Fla. 2023). The complete deprivation of counsel and jury that resulted from Bell's involuntary waivers was federal structural error[9] that requires an automatic vacation of his death sentence and remand for a new penalty phase trial. IB32-43. Relief is proper.

[9] The complete deprivation of counsel that resulted from Bell's involuntary waiver was also Florida fundamental error requiring automatic reversal. IB35-36.

REPLY TO ARGUMENT II

Appellee argues as an initial matter that 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)." As explained *supra* at pp. 8-11, this argument is not properly before this Court because Appellee did not timely appeal the trial court's decision related to the pleading sufficiency of Bell's amended Rule 3.851 motion. Further, CCRC maintains that Claim Two of Bell's Rule 3.851 motion was sufficiently plead, and the trial court accepted it as such and rendered a finding on the merits.

Appellee argues that Bell's claim that trial counsel ineffectively failed to investigate/present evidence his *pre-plea* counsel waiver was involuntary is procedurally barred by the entry of his no-contest plea. AB49. Appellee further argues that because Bell pleaded no-contest, he is limited to attacking the voluntariness 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. AB49. Appellee cites to *Tollett v. Henderson*, 411 U.S. 258, 267 (1973) and many subsequent opinions that have cited *Tollett* or its principles to support the argument that the entry of

Bell's no-contest plea cuts off inquiry into any constitutional violations that happened prior to the entry of Bell's plea. AB47-49.

However, construing *Tollett* and its progeny in the manner Appellee suggests would cause an absurd result in Bell's case and any similarly situated capital cases. In *Tollett*, the United States Supreme Court ("USSC) found that when a defendant pleads guilty, "he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." *Tollett*, 411 U.S. at 267. That defendant "may only attack the voluntary and intelligent character of the guilty plea." *Id.*

The *Tollett* court granted certiorari to answer the very narrow question of "whether a state prisoner, pleading guilty with the advice of counsel, may later obtain release through federal habeas corpus by proving only that the indictment to which he pleaded was returned by an unconstitutionally selected grand jury." 411 U.S. 258, 260 (1973). Tollett was not under a sentence of death and so therefore was not attempting to raise any post-conviction claims related to his penalty phase or his trial counsel's actions related to his penalty phase. Tollett was indicted by a grand jury for first-degree murder, pled guilty, and was subsequently sentenced to ninety-nine years. *Id.*

at 261. Many years later, Tollett "sought state habeas corpus, alleging for the first time that he was deprived of his constitutional right because Negroes had been excluded from the grand jury which indicted him in 1948." *Id.* at 259.

The *Tollett* court was not deciding whether Tollett could challenge penalty phase issues related to a death sentence after he had plead guilty. The *Tollett* court was deciding whether Tollett could challenge his conviction based on an argument that his indictment was returned by an unconstitutionally selected grand jury after Tollett had pled guilty to that same indictment. The *Tollett* court specifically held "that after a criminal defendant pleads guilty, on the advice of counsel, he is not automatically entitled to federal collateral relief on proof that the indicting grand jury was unconstitutionally selected. The focus of federal habeas inquiry is the nature of the advice and the voluntariness of the plea, not the existence as such of an antecedent constitutional infirmity." *Id.* at 266.

The *Tollet* court at no point held and clearly did not intend that the *Tollet* opinion would be construed to mean that a capital defendant's no-contest plea would foreclose inquiry into any events that happened prior to that plea as they relate to that capital

defendant's ***penalty phase*** and ***death sentence***. The *Tollet* case was about a defendant attempting to challenge an alleged constitutional violation related to his ***conviction*** that preceded the defendant's guilty plea. The *Tollet* court held that in this specific circumstance, a defendant cannot gain relief solely by attacking the alleged constitutional violation that happened prior to the guilty plea, but the defendant must also show that his guilty plea was involuntary. Bell is not attacking his conviction, no-contest plea, or any guilt-phase issues. The *Tollet* opinion cannot be construed to imply that capital defendants who are challenging their death sentences in post-conviction are completely foreclosed from raising any events related to their sentence just because those events happened prior to the defendant's entry of a no-contest plea. To construe the *Tollet* opinion and its progeny in such a way would call for an absurd result.

To hold that a capital defendant's plea cuts off inquiry into pre-plea events as those events relate to the defendant's penalty phase and death sentence calls for an absurd result wherein every capital defendant who enters a plea but then proceeds to the penalty phase will be foreclosed from challenging any decisions or actions that trial counsel made prior to entry of the plea, even if those events

specifically relate to the penalty phase. Attorneys representing capital defendants often begin their investigations into potential mitigation many months, or even years, before a conviction is reached. *Tollett* cannot be construed to imply that capital defendants who enter a plea somehow forfeit raising a claim related to counsel's decisions that may have happened prior to that plea, as those decisions relate to the defendant's ***death sentence.*** IB73-74.

Appellee argues that Bell's ineffective assistance of counsel claim is conclusively refuted by the record because his sworn testimony demonstrates his waivers were voluntary. AB52-53; 71-72. However, Bell should not be bound to his sworn testimony during his counsel and jury waiver colloquies because they do not accurately reflect why he waived his counsel and jury, and Bell was not able to safely apprise the trial court of the true reason for his waivers because FSP staff members were present for all his court appearances. Bell's waiver colloquies should not be viewed with the same finality as his plea colloquy because his plea was voluntary, whereas his counsel and jury waiver were not. *See supra* at pp. 17-19.

Appellee further argues that Bell's ineffective assistance of counsel claim related to his involuntary waiver of counsel is legally insufficient under *Strickland v. Washington*, 466 U.S. 668, 686 (1984). AB60-65. As to the deficiency prong of *Strickland*, Appellee argues that trial counsel cannot be found deficient because he, according to Appellee's calculation, only had about "twelve working hours" to discover the evidence supporting that Bell was being abused at FSP. AB61-62. Appellee's argument assumes a fact that is not in evidence nor apparent on the face of the current record and highlights why the trial court needed to grant an evidentiary hearing on Bell's Claim Two. Without trial counsel's testimony explaining how much time he had to work on Bell's case prior to the waivers or what he knew about the abuse, there is no way to glean either of those facts from the current record. Appellee asserts that trial counsel only had twelve working hours based on Appellee's own subjective calculation of what trial counsel's work schedule was.

The trial court should have granted an evidentiary hearing to make the factual determination of how much time trial counsel had to work on Bell's case and what counsel's strategy was concerning the FSP abuse. *See* IB48-49; 76-77; *see also* Fla. R. Crim. P.

3.851(5)(A)(i); *Kocaker v. State*, 311 So. 3d 814, 821 (Fla. 2020) (internal citation omitted) ("An evidentiary hearing must be held on an initial 3.851 motion whenever the movant makes a facially sufficient claim that requires factual determination."); *Dauer v. State,* 570 So. 2d 314 (Fla. 2d DCA 1990) ("The determination of whether or not defense counsel's actions were tactical is a conclusion best made by the trial judge following an evidentiary hearing.").

As to the prejudice prong of *Strickland*, Appellee argues that Bell's prejudice analysis rests on speculation about what would have happened if his counsel waiver was rejected. AB65. Appellee argues that Bell assumes that if he had counsel, then he would have put forth substantial mitigation and received a life sentence, but Bell could not be forced by counsel to put on any more mitigation than he did without counsel. AB65. First, Bell's assessment of his own intentions and desires concerning his penalty phase trial is not speculation. Bell wanted a full mitigation presentation submitted by competent counsel. Bell was forced to waive that mitigation presentation involuntarily to escape the abuse at FSP. Second, while it is impossible to know exactly what mitigation Bell's trial counsel would have presented, what is not speculation is that Bell's trial

counsel would have had an obligation to conduct a thorough investigation of Bell's background, and there was a wealth of mitigation that was available for trial counsel to discover if given the opportunity. *See* IB16-26; *see also Porter v. McCollum*, 558 U.S. 30, 39 (2009) (quoting *Williams v. Taylor,* 529 U.S. 362, 396 (2000)). Trial counsel was not given that opportunity because Bell was involuntarily forced to waive to escape the abuse at FSP. Bell's counsel was ineffective for failing to discover and apprise the trial court of the available evidence that Bell was being abused at FSP, which called into question the voluntariness of his counsel and jury waiver. IB58-72. Bell was particularly prejudiced by the deprivation of his right to counsel, as he did not receive the individualized sentencing determination required in capital cases because he did not have the benefit of an individualized mitigation presentation prepared and presented by appointed counsel. IB62-63; 66-67; 69-70. Relief is proper.

REPLY TO ARGUMENT III

Appellee argues that Bell waived his claim regarding his Eighth Amendment right to an individualized sentencing determination when he rested his mitigation case at trial and stated that he did not

want to present further evidence or witnesses. AB77. Bell did not waive his right to an individualized sentencing determination by limiting his extremely minimal pro se submission of mitigation in an attempt to expedite his penalty phase and escape the abuse at FSP. If anything, Bell asserted his right to an individualized mitigation determination by presenting mitigating evidence about himself, albeit in a bare-bones way due to his limitations as an indigent, incarcerated capital defendant and the FSP abuse. Bell entered Dr. Umesh Mhatre's February 2, 2020 evaluation report into evidence, which explained that Bell had diagnoses for Generalized Anxiety Disorder and Major Depressive Disorder and referenced that Bell's Florida Department of Corrections ("FDOC") records showed a history of sexual abuse when he was five years old. R600; 201. Dr. Mhatre's report concluded that Bell was competent to proceed. R204. Bell also testified briefly in his defense, explaining that: he had never assaulted any correctional officers prior to Officer Newman; he suffered with depression; he had come forward and pled guilty; his family loved him; he had good prison behavior after the homicide; and he was an honest person. R600-601. Bell did not waive mitigation or his right to an individualized sentencing determination.

He was forced to limit his mitigation to almost nothing in a desperate attempt to speed up his penalty phase trial in hopes of escaping the abuse at FSP.

Appellee also incorrectly asserts that Bell's Claim Three is procedurally barred as already unsuccessfully raised on direct appeal. AB78. Bell's current and appellate mitigation claims are sufficiently distinct, and appellate counsel did not make any argument that Bell was denied an individualized sentencing determination due to his involuntary waivers because the evidence that the waivers were involuntary was not apparent enough in the record to raise on direct appeal. IB82-83. Appellee further incorrectly argues that Bell's Eighth Amendment right to individualized sentencing was easily satisfied during his penalty phase trial because he was not prevented from introducing any mitigation. AB82. The requirement of individualized sentencing in capital cases is satisfied by allowing the sentencer to consider all relevant mitigating evidence. *See Blystone v. Pennsylvania*, 494 U.S. 299, 307 (1990). However, the trial court was not allowed to consider all of Bell's relevant mitigating evidence because that evidence was not presented due to Bell's involuntary waivers. Relief is proper.

CONCLUSION AND RELIEF SOUGHT

Based on the foregoing arguments, Bell respectfully requests that this Court: remand his case for an evidentiary hearing on all claims; vacate his sentence of death; and/or grant any other relief this Court deems appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

We hereby certify that a true and correct copy of the foregoing has been electronically filed with the Clerk of the Florida Supreme Court, and electronically delivered to Jason Rodriguez, Assistant Attorney General, at jason.rodriguez@myfloridalegal.com and capApp@myfloridalegal.com on this 5th day of December, 2024.

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CERTIFICATE OF COMPLIANCE

We hereby certify that a true copy of the foregoing Reply Brief of the Appellant was generated in Bookman Old Style 14-point font. We also hereby certify that the Brief contains 6, 473 words of the 6,500 allowed by Fla. R. App. P. 9.100(g).

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