

IN THE SUPREME COURT OF FLORIDA

WAYNE C. DOTY,

Appellant,

vs.

CASE NO. SC18-973

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE EIGHTH JUDICIAL CIRCUIT,
IN AND FOR BRADFORD COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

ANDY THOMAS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

BARBARA J. BUSHARIS
Assistant Public Defender
Fla. Bar No. 71780
Leon County Courthouse
301 S. Monroe St., Suite 401
Tallahassee, Florida 32301
(850) 606-8500
barbara.busharis@flpd2.com

ATTORNEY FOR APPELLANT

RECEIVED, 12/31/2018 05:58:25 PM, Clerk, Supreme Court

TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE.....	1
I. Prior Proceedings.	1
II. Proceedings Below.....	4
STATEMENT OF THE FACTS	8
SUMMARY OF THE ARGUMENT	30
ARGUMENT	32
I. Fundamental Error Occurred When the Court Failed to Instruct the Jury to Determine Beyond a Reasonable Doubt that the Aggravating Factors Were Sufficient to Justify Death and that the Aggravating Factors Outweighed the Mitigating Circumstances Because Those Determinations Are Required to Impose a Death Sentence for Capital Murder.	32
A. For sentencing purposes, the determinations that at least one aggravating factor is present, that the aggravating factors are sufficient to justify imposing death, and that aggravating factors outweigh any mitigating evidence presented, are “elements” that must be submitted to a jury because they increase the maximum sentence from life in prison to death.	33
1. Findings increasing the penalty for a crime, including findings required to authorize the death penalty after a guilty verdict on the underlying offense, must be made by a jury.	34
2. Florida’s capital sentencing scheme establishes that whether aggravating factors are sufficient to justify the death penalty, and whether those factors outweigh mitigating	

circumstances, are elements of capital murder for sentencing purposes.	40
B. Due process requires proof beyond a reasonable doubt of any determination that must be made before the death penalty is available for a particular defendant.	43
C. Requiring a jury to make the critical findings required by section 921.141, Florida Statutes, based on proof beyond a reasonable doubt, is consistent with this Court’s precedent.....	46
D. The trial court’s failure to instruct the jury to determine beyond a reasonable doubt whether the aggravating factors were sufficient to justify the death penalty, and whether the aggravating factors outweighed the mitigating factors, created fundamental error.....	51
II. The Trial Court Erred in Refusing to Consider the Defense Request for a Non-Binding Sentencing Recommendation, Which Was Within the Court’s Discretion.....	53
CONCLUSION	54
CERTIFICATES OF SERVICE AND FONT SIZE	54

TABLE OF AUTHORITIES

CASES

<i>Alleyne v. United States</i> , 570 U.S. 99 (2013)	32, 38, 39, 49
<i>Apprendi v. New Jersey</i> , 530 U.S. 466 (2000).....	passim
<i>Asay v. State</i> , 210 So 3d 1 (Fla. 2016).....	45, 46
<i>Blakely v. Washington</i> , 542 U.S. 296 (2004).....	37, 38, 49, 50
<i>Brown v. State</i> , 2018 WL 6696034, No. SC18-323 (Fla. Dec. 20, 2018)	49, 50
<i>Daugherty v. State</i> , 211 So. 3d 29 (Fla. 2017).....	51
<i>Doe v. State</i> , 499 So. 2d 13 (Fla. 3d DCA 1986)	53
<i>Doty v. State</i> , 170 So. 3d 731 (2015)	1
<i>F.B. v. State</i> , 852 So. 2d 226 (Fla. 2003).....	51
<i>Foster v. State</i> , 2018 WL 6379348, No. SC18-860 (Fla. Dec. 6, 2018)	47, 48
<i>Foster v. State</i> , 235 So. 3d 294 (Fla. 2018)	49
<i>Goldwire v. State</i> , 73 So. 3d 844 (Fla. 4th DCA 2011).....	53
<i>Hurst v. Florida</i> , 136 S. Ct. 616 (2016).....	39, 48, 49
<i>Hurst v. State</i> , 202 So. 3d 40 (Fla. 2016).....	passim
<i>In re Winship</i> , 397 U.S. 358 (1970).....	43, 44
<i>Lockett v. Ohio</i> , 438 U.S. 586 (1978)	44
<i>Patterson v. State</i> , 206 So. 3d 64 (Fla. 4th DCA 2016)	53
<i>Perry v. State</i> , 210 So. 3d 610 (Fla. 2016).....	33, 47
<i>Ramroop v. State</i> , 21 So. 3d 657 (Fla. 2017)	51

<i>Reed v. State</i> , 837 So. 2d 366 (Fla. 2002).....	51, 52
<i>Ring v. Arizona</i> , 536 U.S. 584 (2002).....	passim
<i>Sullivan v. Louisiana</i> , 508 U.S. 275 (1993).....	32, 44, 45, 51

STATUTES

§ 775.082(1)(a), Fla. Stat. (2018)	42
§ 782.04(1)(b), Fla. Stat. (2018)	40
§ 921.141(2), Fla. Stat. (2018).....	30, 40, 41, 42, 46
§ 921.141(3), Fla. Stat. (2018).....	30, 40, 41, 42

OTHER AUTHORITIES

Fla. Std. Jury Instr. (Crim.) 7.2 (2017)	40
Fla. Std. Jury Instr. (Crim) 7.11 (2017)	43

CONSTITUTIONAL PROVISIONS

Art. V, § 3(b)(1), Fla. Const.....	1
Amend. V, U.S. Const.	34
Amend. VI, U.S. Const.	32, 34, 50
Amend. XIV, U.S. Const.	34

STATEMENT OF THE CASE

This is an appeal from a final order of the circuit court for Bradford County, Florida, sentencing Wayne C. Doty to death for the killing of Xavier Rodriguez, a fellow inmate at Florida State Prison. (R. 1380-1400.) The order was entered following a second penalty phase trial after Mr. Doty's original death sentence was vacated pursuant to *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). This Court has jurisdiction pursuant to article V, section 3(b)(1) of the Florida Constitution.

I. Prior Proceedings.

Mr. Rodriguez was killed on May 17, 2011. In August of that year Mr. Doty was charged with the first-degree premeditated murder of Mr. Rodriguez. (R. 139-40.) Mr. Doty entered a plea of guilty in August 2012. Following a penalty phase trial conducted in January 2013, a jury recommended a sentence of death by a vote of ten to two, and the trial court imposed that penalty. (R. 142-44, 146-67.) On direct appeal, this Court affirmed the conviction and sentence in *Doty v. State*, 170 So. 3d 731 (2015). (R. 45-56.)¹

Mr. Doty initially sought to waive all post-conviction proceedings, and the State requested a hearing pursuant to *Durocher v. Singletary*, 623 So. 2d 482 (Fla. 1993). (R. 108-26.) The court ordered a hearing and appointed two experts to

¹ This Court reviewed Mr. Doty's guilty plea in *Doty v. State* and concluded it was knowingly, intelligently, and voluntarily entered. 170 So. 3d at 738-39.

examine Mr. Doty. (R. 252-54.) A scheduled competency and *Durocher* hearing was canceled following the United States Supreme Court decision in *Hurst v. Florida*, decided January 12, 2016 (R. 316-18, 398-400), and the State filed a Memorandum regarding the applicability of *Hurst* to Mr. Doty's case (R. 298-308). Mr. Doty's appointed collateral counsel also filed a memorandum of law regarding the applicability of *Hurst*. (R. 439-51.) After being found competent to dismiss the pending postconviction proceedings, Mr. Doty authorized counsel to file a Motion to Defer Dismissal of Postconviction Proceedings and Discharge of Collateral Counsel. (R. 631-33, 635-39.) This was followed by Defendant's Motion to Withdraw His Dismissal of Postconviction Proceedings and Discharge of Collateral Counsel, filed July 1, 2016 (R. 667-69) and granted on July 20, 2016 (R. 681-82). Defense counsel then filed a Motion to Vacate Sentence with Special Request for Leave to Amend. (R. 738-68.)

While that motion was still pending, Mr. Doty in April 2017 filed a pro se Motion to Dismiss CCRC and Waiver of All Further Postconviction Proceedings Pursuant to Fl. R. Crim. P. 3.851(1). (R. 877-88.) Defense counsel filed a response, taking the position that any available relief under *Hurst* could not be waived. (R. 927-31.) Counsel's motion referenced Mr. Doty's ongoing efforts to challenge certain conditions of his confinement, his belief that he was being singled out for vindictive treatment because he had committed a crime at the institution where he

was being housed, and counsel's belief that the motion to dismiss reflected the "coercive nature of his onerous conditions of confinement." (R. 928-29.)

Then, on July 14, 2017, defense counsel filed Defendant's Motion to Withdraw his Pro Se Motion to Dismiss Collateral Counsel and Waive Further Postconviction Proceedings. (R. 985-88.) The motion requested that the court grant his waiver of the pro se motion and indicated an intent to seek a new penalty phase on the basis of *Hurst v. State*, 202 So. 3d 40 (Fla. 2016).

Defendant's Motion for Recommendation of Transfer From Florida State Prison to Union Correctional Institution was filed August 7, 2017, stating that Mr. Doty's co-defendant (William Wells) was being housed at Florida State Prison and that Mr. Doty was continuing to experience hostile treatment by the assistant warden there. (R. 999-1000.) On that date the trial court entered an Order Granting Motion for Postconviction Relief and Motion to Withdraw Pro Se Motion to Dismiss Collateral Counsel and Waive Further Postconviction Proceedings; and, Vacating Sentence of Death. (R. 1003-11.) The court found the *Hurst* error in Mr. Doty's case was not harmless because, although two of the aggravators were such that "no reasonable juror would not have found their existence," the court could not determine that the jury had unanimously found the aggravators outweighed the mitigators. (R. 1007.) The two aggravators in question were that Defendant was

previously convicted of another violent felony, and that the defendant committed the capital felony while in prison. (R. 1007-08.)

The State filed a Renewed Notice of Intent to Seek Death Penalty stating it would rely on three aggravators: the two mentioned above, and that the capital felony was a homicide committed in a cold, calculated and premeditated manner without pretense of moral or legal justification. (R. 1063-64.)

II. Proceedings Below.

Mr. Doty filed Defendant's Motion for Additional Peremptory Challenges on November 14, 2017 (R. 1143-47) and Defendant's Motion for Individual and Sequestered Voir Dire (R. 1148-57). Both motions were denied. (R. 1167-70.) A Motion to Allow Limited Participation of Defense Team During Voir Dire was granted. (R. 1173-74.) Mr. Doty also filed Defendant's Motion for Preliminary Jury Instructions requesting, inter alia, the following instructions:

The State of Florida must present and prove an aggravating circumstance or circumstances and the State must convince you beyond a reasonable doubt that at least one of the aggravating circumstances applies in this case.

The law specifically limits what aggravating circumstances the State may present for your consideration. They deal with the manner in which the killing was done and the legal status of the defendant. Jurors in a capital case are not allowed to consider any other factors in aggravation that are not specifically set out in the law in determining whether death is an appropriate sentence. The defendant then may present

any mitigating circumstances he wishes for you to consider. Unlike aggravating circumstances, mitigating circumstances do not have to be proved beyond a reasonable doubt and you must consider and weigh all mitigating evidence presented to you.

If you find the State of Florida has not proved an aggravating circumstance beyond a reasonable doubt, you must return a verdict of life imprisonment without the possibility of parole. If you find the State of Florida has proved at least one aggravating circumstance beyond a reasonable doubt, your job will then be to weigh the aggravating factor or factors against the mitigating factors in determining which sentence to impose. In doing so, each of you may rely on your own moral response to the facts and evidence. You are required to individually consider all mitigation presented and make an individual determination as to the proper sentence. Your determination need not be the same as other jurors who vote for the same sentence. Be aware that the law never requires a sentence of death.

(R. 1178-79.)

The motion was denied “without prejudice to the issue of proposed language being readdressed closer to the date of jury selection.” (R. 1191.) The court approved additional funds for a mitigation specialist, Ms. Louise Godfrey, and a mitigation mental health expert, Dr. Cliff Levin. (R. 1214-15.)

Mr. Doty filed a Notice of Intent to Present Expert Testimony of Mental Mitigation listing the following mitigating factors: (a) Adverse childhood experiences; (b) Mental health diagnoses; (c) Mental health symptomology; (d) History of violence as acceptable; (e) Failure of the juvenile system; (f) Loss of

empowerment in the adult prison system; and (g) Defendant cooperated with the State. (R. 1247-48.) Mr. Doty also filed a Motion in Limine to prevent the state from referring to certain of the mitigating factors as “non-statutory.” (R. 1249-51.) In addition, Defendant’s Motion for Jury Instruction Delineating All Mitigating Factors Under Sec. 921.141(7)(h), Florida Statutes, requested that the trial court instruct the jury on each proffered mitigating factors. (R. 1252-53.)

Mr. Doty stipulated that he was the person named in the judgment and sentence dated March 10, 1997, that the State would introduce into evidence to establish his prior conviction. (R. 1271.) He also stipulated that he was under a sentence of imprisonment when the capital felony occurred. (R. 1272.)

A jury was selected on February 19, 2018, including three alternates. (R. 1717, 1901, 1902.) Mr. Doty confirmed at the beginning of voir dire that he wanted to continue to represent himself. (R. 1717.)² After the panel was announced one of the jurors selected stated that he spent about ten hours per week in ministry at the Bradford County Jail and other correctional facilities. (R. 1911.) The State had no objection to the juror continuing those activities; Mr. Doty stated he would prefer that the juror be excused, but then agreed to “sleep on it” and decide what to do when trial resumed in the morning. (R. 1913-14.)

² The offer of counsel was renewed and declined on each day of the trial. (R. 1948, 2132, 2267, 2346.)

Before the trial began, Mr. Doty stated he would enter the presentence investigation report into evidence with certain agreed-upon redactions. (R. 1949-50.) Mr. Doty also withdrew his objection to Juror 362, the volunteer chaplain in the prison system. (R. 1952-53.) At Mr. Doty's request the court revised the standard preliminary jury instructions to reflect that he had entered a plea rather than been found guilty at a trial. (R. 1955.) Mr. Doty reserved his opening statement until the conclusion of the State's case. (R. 1975.)

STATEMENT OF THE FACTS

Summary of Penalty Phase Testimony

Lieutenant Homer Scott. Lieutenant Homer Scott was employed by the Department of Corrections and was a sergeant at Florida State Prison when Mr. Rodriguez was killed. (R. 1976-77.) He described the stringent security measures and procedures for moving inmates within Florida State Prison and “K wing” in particular. (R. 1977-90.) K wing was where he was assigned on the evening of May 17, 2011, and Mr. Doty and Inmate Wells were working as orderlies. (R. 1992-93.) Lieutenant Scott complimented them on how clean the wing was. (R. 1994.) Mr. Rodriguez, who was also an orderly, asked whether he could use a phone, and took it into a nearby dayroom with Mr. Doty and Mr. Wells. (R. 1995.) After a few minutes he asked whether he could go upstairs to a conference room where it was more quiet, and Lieutenant Scott agreed. (R. 1996.) Lieutenant Scott noticed Mr. Doty and Mr. Wells begin to clean again, which he thought was not necessary, but did not stop them. (R. 1997-98.) The officers on duty had just conducted a “wing check” which involves checking on each inmate individually, and had approximately half an hour before the inmates would be counted again, at which time the orderlies would have to be in their cells. (R. 1998-2000.)

Lieutenant Scott was on the quarterdeck with other officers when Mr. Doty and Mr. Wells returned; Mr. Doty informed him there was “a dead body upstairs.”

(R. 2000-01.) Officers placed Mr. Doty and Mr. Wells in handcuffs and put them in the shower area. (R. 2001-02.) Lieutenant Scott went upstairs; at first he did not see a body, but then spotted Mr. Rodriguez on the floor behind a desk. (R. 2002-03.) Mr. Rodriguez was blue; he had wounds and his hands were bound. There was also a noose around his neck, which was tied so tightly the officers had trouble cutting it off. (R. 2003, 2009-10.) After they removed it they performed CPR and took him to the medical wing, where they attempted to resuscitate him, but he was pronounced dead when emergency medical services arrived. (R. 2010-11.)

On cross-examination Lieutenant Scott agreed that Mr. Doty had conducted himself in a respectful manner that night, and that Mr. Doty did not resist the authorities in any manner. (R. 2015-16.) Lieutenant Scott agreed that Mr. Doty had cooperated with authorities, which assisted in the resolution of the case. (R. 2017.)

Senior Inspector Kevin Snow. Senior Inspector Kevin Snow, an investigator for the Department of Corrections Office of the Inspector General, was an “on call” inspector at the time of the incident, assigned to Union Correctional Institution. (R. 2019-23.) He received a call about a possible homicide at Florida State Prison and went there to launch the investigation. (R. 2024-25.) Inspector Snow decided to call the Florida Department of Law Enforcement and medical examiner to assist with the investigation. (R. 2027-29.) He photographed Mr. Rodriguez’s body and then went to K wing to collect and photograph evidence. (R.

2030-31.) Among the items collected was a homemade knife found in the room where Mr. Rodriguez had been killed. (R. 2031-32.) Inspector Snow noted there was not a lot of blood in the room, indicating Mr. Rodriguez could have passed away before being stabbed. (R. 2034.) Inspector Snow determined the homemade knife could have been made from a piece of a footlocker. (R. 2037-40.) He spoke with Mr. Doty on May 23, and Mr. Doty agreed to be interviewed after being Mirandized. (R. 2014-43.) Inspector Snow described Mr. Doty as “very forthcoming” and said he “cooperated wholeheartedly with the investigation. (R. 2043, 2087.)

During the interview Mr. Doty said several incidents had led to the killing, and he had been thinking about it for two and one-half to three and one-half weeks. (R. 2044, 2047.) Mr. Rodriguez had called Mr. Doty a “snitch” and a “fuck boy” several weeks earlier. (R. 2044, 2045.) Mr. Doty believed Mr. Rodriguez had stolen some tobacco from him. (R. 2045.) On the day he was killed Mr. Rodriguez tried to alter their working arrangements, and Mr. Wells said “he’s got to go.” (R. 2047.) Mr. Doty described the steps he and Mr. Wells took to get ligatures and a knife in place, and to maneuver Mr. Rodriguez into the upstairs room. (R. 2047-57.) Once he was there, they tricked him into allowing his hands to be tied. (R. 2066-67.) Mr. Doty put Mr. Rodriguez into a sleeper hold and kept him in it for about 45 seconds, until Mr. Rodriguez urinated on himself and went limp. (R.

2067-68.) Mr. Wells left the room, and Mr. Doty stabbed Mr. Rodriguez repeatedly in an effort to remove his heart and be sure he was dead. (R. 2069.) Mr. Wells then returned, and together they tied ligatures around Mr. Rodriguez's neck before Mr. Doty went to report the incident. (R. 2070.)

Later Inspector Snow was recalled to identify video footage from security cameras on the night of the incident, and the video footage was admitted without objection. (R. 2017.) He explained the videos showed a period of approximately 20 minutes in which no medical aid was rendered to Mr. Rodriguez because of the various people who had to be notified, but added that by all signs Mr. Rodriguez was dead when officers first found him. (R. 2122-23.) He also noted Mr. Doty told him that Mr. Doty and Mr. Wells waited several minutes before reporting the incident to give Mr. Rodriguez time to die. (R. 2124.)

Dr. William Hamilton. Dr. William Hamilton, the District 8 medical examiner, testified about the autopsy he performed on Mr. Rodriguez on May 18, 2011. (R. 2088, 2093.) Dr. Hamilton noted a ligature mark around Mr. Rodriguez's neck, evidence of binding of his wrists, other small bruises, and a "closely spaced pattern" of 25 stab wounds on his lower chest and mid abdomen. (R. 2094.) A small amount of blood in the abdomen itself indicated there was a weak heartbeat when the stab wounds were inflicted, but Dr. Hamilton noted that a weak heartbeat could continue even after brain death. (R. 2098.) He concluded the cause of death

was ligature strangulation and multiple stab wounds, noting the stab wounds inflicted with a homemade instrument could have caused fatal infection even if they were not immediately fatal. (R. 2100-01.)

Officer Greg Laughlin. Greg Laughlin, a former Plant City Police officer, testified about investigating the crime for which Mr. Doty was originally convicted and incarcerated, i.e. the killing of Harvey Horne in 1996. (R. 2135, 2138-43.) He interviewed Mr. Doty, who had been found sleeping in his car, the morning after Mr. Horne's body was found. (R. 2144, 2153.) Mr. Doty told him he and a friend had unsuccessfully attempted to get some methamphetamine from Mr. Horne and then spent the afternoon drinking before returning with a gun. (R. 2144-47.) When they returned Mr. Doty went inside by himself and shot Mr. Horne in a robbery attempt. (R. 2148.) Methamphetamine and marijuana were found at the scene. (R. 2149-50.) While speaking with Officer Laughlin about Mr. Harvey's death Mr. Doty also talked about the recent loss of a younger brother in a well-publicized traffic accident in Plant City. (R. 2155-62.) The witness agreed the event was a significant one for Mr. Doty, but denied it had any relation to the killing of Mr. Horne. (R. 2164-65.) Mr. Doty stipulated that he was the person convicted for the killing of Mr. Horne. (R. 2171-72.)

Marisel Serrano. Marisel Serrano was Mr. Rodriguez's mother; her victim impact testimony was read into the record. (R. 1226-27, 1242-43, 2166-71.) She

stated Mr. Rodriguez was attempting to better himself while in prison and had plans to return to his family after his release. (R. 2168.)

The State rested its case after the victim impact testimony, and Mr. Doty called his own witnesses.

Lieutenant Dennis Cauwenberghs. Lieutenant Dennis Cauwenberghs, an officer at Florida State Prison, testified he had known Mr. Doty for “quite a few years.” (R. 2202.) After Mr. Rodriguez was killed Mr. Doty was relocated to Q wing, Lieutenant Cauwenberghs’s unit, which is a “max management housing unit” for inmates who have assaulted a guard or fellow inmate. (R. 2203.) On May 20, 2011, Mr. Doty told Lieutenant Cauwenberghs he wanted to speak with Inspector Show, and gave Lieutenant Cauwenberghs a statement. (R. 2204.) Mr. Doty said he had tricked Mr. Rodriguez into being tied up and choked him while Mr. Wells held his nose closed, then stabbed him. (R. 2204.) Lieutenant Cauwenberghs agreed he knew Mr. Doty to be a good worker, and that coming forward to accept responsibility for such an incident was unusual. (R. 2205-06.) He also agreed Mr. Doty’s cooperation had helped in resolving the case. (R. 2206.) On cross examination he added that, due to security measures on K and Q wings, it would not have been difficult to learn who was involved. (R. 2208-09.)

Leo Boatman. Inmate Leo Boatman testified at length about the stresses of prison life and prison culture, stating he had been incarcerated for 12 years. (R.

2211, 2214-19, 2226-37, 2257-58.) Among his observations was that he would respond violently to personal insults because “one of the key things [in prison] is respect.” (R. 2214.) He described close confinement as a “total disconnection.” (R. 2218.) Allowing a fellow inmate to perceive one as weak could lead to a “life or death” situation, and murder could be a “survival mechanism.” (R. 2215-16, 2257.) Using grievance procedures to resolve problems was usually futile or even dangerous; the grievance box was referred to as the “snitch box.” (R. 2230-33.) Mr. Boatman was allowed to testify about a specific incident, not involving Mr. Doty, in which he was able to fashion a weapon and used it to threaten several officers in an effort to get to a fellow inmate who had insulted him. (R. 2224-25.) He also testified he had fought a different inmate, leading to that man’s death, after the inmate beat up a friend of his. (R. 2226.) He said he had never known Mr. Doty to be manipulative or to take advantage of other inmates. (R. 2227-28.)

Mary Cole. Mary Cole is Mr. Doty’s mother; at the time of the penalty phase trial she lived in Colorado with her husband of 30 years. (R. 2369-71.) Mr. Doty was the youngest of Mrs. Cole’s five children. (R. 2374.) During her relationship with Randall Doty, Mr. Doty’s father, he was strict with her children, especially the boys. (R. 2378-79.) Mrs. Cole said Mr. Doty did not have behavioral problems as a baby. (R. 2379.) She denied that Randall Doty was an alcoholic during their relationship, but said they fought over his being a “womanizer.” (R.

2379-80, 2391-92.) When Mr. Doty was about two and his older sister was about four years old, Mrs. Cole and the two children were living with Randall Doty in a motel in Plant City. (R. 2382.) Her older sons were living with their father in New Mexico at that time. (R. 2392.) They befriended a couple named “Tom” and “Ann.” (R. 2384.) Mrs. Cole and Randall Doty had an altercation after a visit from Ann, and she left with her daughter to go to the store. (R. 2385.) When she returned, Randall Doty and Mr. Doty were gone, and she found \$20 and two bus tickets to Colorado. (R. 2385.) She learned Randall Doty had left with Ann. (R. 2386.)

Mrs. Cole could not get help from the police because, they said, Randall Doty had a right to custody of his son, and she denied any domestic abuse. (R. 2385-86.) She returned to Colorado and did not see Mr. Doty, her son, again until he was about 20 or 21 years old. (R. 2387.) He came to Denver and spent three or four months living with her and her husband. (R. 2387.) While he was there, he got a job and contributed to the household. (R. 2388.) He showed her “love and affection,” but could not seem to connect with people. (R. 2388-89.) He was unable to accept the affection of his family. (R. 2399.) She found out he had grown up with little stability. (R. 2399-400.) One night he did not come home; she called someone who worked for the same company, and that person told her Mr. Doty had collected his final check and returned to Florida because “his dad needed him.”

(R. 2397.) She never heard anything from Randall Doty until Mr. Doty was arrested in 1996. (R. 2386.)

Dario Valdez. Dario Valdez is Mr. Doty's older half-brother. (R. 2401.) He said his relationship with Randall Doty, his stepfather, was "not good," and that Randall Doty was abusive to both his mother and his brothers. (R. 2402, 2419.) He did not think Randall Doty was abusive to Mr. Doty at that time because Mr. Doty was still a baby and their mother would not allow it. (R. 2419.) He and his brothers went to live with their father as a result. (R. 2403.) Mr. Valdez denied that Mrs. Cole or his own father were ever abusive to their children. (R. 2403.) Some time after Mr. Valdez went to live with his father, he learned his mother and half-sister had moved back to Colorado. (R. 2405.) They were told Wayne did not go with her; he hoped Randall Doty would treat him well because Wayne was his only son. (R. 2405-06.) Mr. Valdez remembered seeing Mr. Doty when Mr. Doty came to Colorado. (R. 2413.) The family helped Mr. Doty get a job and they tried to take care of each other. (R. 2413-14.) Mr. Valdez said it was a shock for them to see each other again after so long. (R. 2414.) Mr. Valdez concluded by telling Mr. Doty that he appreciated him very much "for just being there for us for a little bit." (R. 2415.)

Shelley Connor. Shelley Connor is Mr. Doty's stepmother. (R. 2428.) She moved in with Randall Doty when she was 18 and Mr. Doty was about five years

old. (R. 2429.) By then Randall Doty and Ann had a son, as well, also named Randall, but Mrs. Connor did not find out about Randall right away. (R. 2429, 2451.) Mrs. Connor became responsible for taking care of Mr. Doty. (R. 2431.) Randall Doty was often out with girlfriends; he did not spend much time with his family. (R. 2432.) She described Randall Doty as having an alcohol problem and being both verbally and physically abusive. (R. 2433-34.) Once he beat her so badly she could not go to work for a week. (R. 2434.) On one occasion when she was hiding in her room so people would not see signs of abuse, Mr. Doty reported the abuse to someone at school and the police came to question her. (R. 2436-37.) She denied the abuse because Randall Doty told her “if I told them the truth, that they would take you [Mr. Doty] away and, if you got taken away, he would kill me.” (R. 2437.) Not long after that Mr. Doty started getting in trouble, doing things like taking checks and stealing a car. (R. 2439.) He spent time in a youth program, and she visited him there. (R. 2443-44.)

Mrs. Connor said Randall Doty had led her to believe Mr. Doty’s mother did not want him. (R. 2443.) She found out Randall Doty had fathered other children he did not support. (R. 2445-46.) Eventually he left her for another woman, and she married that woman’s ex-husband, Robert Connor. (R. 2450.) At the time of the penalty phase trial Mrs. Connor and Mr. Connor had been married for 28 years. (R. 2450.) She said Mr. Doty and Mr. Connor had a good relationship. (R. 2450-

51.) Years later Randall Doty's son, Randall, was killed in a collision with a semi truck. (R. 2452.) Randall Doty called her then, asking her to testify on his behalf in a civil suit so that he could claim some money based on Randall Jr.'s death. (R. 2453.)

Robert Dayton Connor. Robert Dayton Connor, Mr. Doty's stepbrother, testified that he and Mr. Doty spent a lot of time together for a period of time when they were children. (R. 2465-67.) Mr. Connor did not have a good relationship with Randall Doty. (R. 2469.) He lived with Randall Doty and his mother as a teen and said Randall Doty did not do anything with them as a family; Randall Doty was verbally and physically abusive to his mother. (R. 2473-74.) In a final incident Randall Doty was hitting Robert's mother and Robert Connor hit him with a wrench. (R. 2474.) When the police came, they arrested Randall Doty. (R. 2474.) Randall Doty told him "If I ever, ever see you again, I'm going to make your life a miserable hell." (R. 2474. Mr. Connor and his mother left within 24 hours, and he did not see Randall Doty again until the penalty phase trial. (R. 2474-75.) He lost contact with Mr. Doty until after Mr. Doty was already in prison. (R. 2486.)

Robert Connor. Robert Connor is the husband of Mr. Doty's stepmother Shelley Connor, and the father of Robert Dayton Connor. (R. 2489.) He met Mr. Doty in 1989. (R. 2489.) He said Shelley Connor always considered Mr. Doty as a son. (R. 2490.) He could tell, when he first met Shelley, that she was suffering the

effects of physical and emotional abuse. (R. 2491.) He tried his best to help Mr. Doty when he could. (R. 2491-92.)

Ann Hertle. Ann Hertle did not testify; instead, her prior testimony was read into the record. (R. 2494.) She said she was in a relationship with Randall Doty for about two years when Mr. Doty was a child. (R. 2496.) Randall Doty and Ms. Hertle were the parents of Randall Doty, Mr. Doty's half-brother, who was killed in a traffic accident when he was just 17. (R. 2495-97.) Randall Doty was both physically and mentally abusive to her, including an occasion when he punched her in the stomach while she was pregnant with Randall. (R. 2497.) Ms. Hertle said she treated Mr. Doty like her other children, including spanking him "when he needed spankings." (R. 2501.) One time when Mr. Doty and her son TJ were playing with matches and burned a spot on the carpet, she spanked Mr. Doty and burned his hand on the stove. (R. 2503.) After she left Randall Doty, when Mr. Doty was about four years old, she did not see Mr. Doty again until he was 12. (R. 2504.) Ms. Hertle was asked about comments she made describing Mr. Doty as "evil and vindictive." (R. 2505.) She stated he was not evil, but "sneaky," and that she wondered whether that was because of being Randall Doty's son. (R. 2505.) Randall Doty was never a parent to her son Randall. (R. 2507.) She tried introducing them when the younger Randall was about seven years old; Randall Doty would visit sometimes, but often would not show up when he was supposed

to. (R. 2508.) Eventually the boy “realized that his dad didn’t care about him” and stopped seeing him. (R. 2508.) However, after the younger Randall’s death, the elder Randall “kind of appeared out of nowhere” and tried to claim money from a resulting lawsuit. (R. 2507.)

Randall Doty. Randall Doty, Mr. Doty’s father, was questioned by standby counsel. (R. 2150-12.) He admitted being abusive to his former wives. (R. 2528, 2530). He said he had a child before Wayne Doty with whom he had no contact because his ex-wife divorced him and her husband adopted the child. (R. 2513.) He said he may have fathered a child with another woman, but was never sure it was his and could not remember any details. (R. 2513-18.) He acknowledged receiving money from a lawsuit after the younger Randall’s death, and said he did not remember asking Shelley Connor to testify on his behalf in that lawsuit. (R. 2519-20.) He said he did not play a role in raising Randall until Randall was eight or nine years old, but claimed after that he would see the younger Randall when he could. (R. 2523.)

Randall Doty denied taking Mr. Doty from his mother, saying “she had four kids; I wanted to keep him.” (R. 2525.) He said Ann Hertle was abusive to Mr. Doty, and that was why he was abusive to her. (R. 2528.) He said he did not remember any investigation into his beating of Shelley Connor. (R. 2532.) He admitted often leaving Mr. Doty alone to drink and chase women. (R. 2537.)

During redirect examination, conducted by Mr. Doty, Randall Doty again admitted being an abuser, and said he understood he had hurt a lot of people. (R. 2545-46.) He said he finally cut off ties with Mr. Doty after Mr. Doty was incarcerated because Mr. Doty was “always in lockup...always in trouble.” (R. 2548) After Randall Doty left the stand, Mr. Doty apologized to the court for the tenor of their exchange. (R. 2550.) The court asked whether he wanted standby counsel to continue questioning witnesses, and Mr. Doty responded “No. I’m good, Your Honor. My problem has been resolved and has been removed from this courtroom.” (R. 2550.)

Dr. Harry Krop. Dr. Harry Krop, a licensed psychologist, stated he had evaluated Mr. Doty several times for competency, and most recently to explore possible mitigating factors. (R. 2552-54.) He said one of the things that impressed him about Mr. Doty was, “although he certainly wanted me to educate the jury as to who he is, he also wanted to make it clear that he was not trying to make excuses for what he did or what he has done in life.” (R. 2555.) Dr. Krop said he had no question that Mr. Doty was competent to represent himself. (R. 2558.)

Dr. Krop identified an evaluation of Mr. Doty from October 1985, when Mr. Doty was 12 and a half years old, saying Mr. Doty had been referred for evaluation because of “telling big lies and refusing to live with his father and stepmother.” (R. 2560-61, 2566.) The “big lies” involved the abuse of Shelley Doty [Connor], and

Dr. Krop acknowledged that Mr. Doty's report of abuse had not been false. (R. 2561, 2566.) The evaluation diagnosed Mr. Doty with compulsive personality disorder, and Dr. Krop said he had also diagnosed Mr. Doty with obsessive compulsive personality disorder. (R. 2562.) The 1985 evaluation recommended family therapy as well as individual therapy. (R. 2563.)

Dr. Krop then reviewed a series of mitigating factors, such as Mr. Doty's acceptance of responsibility. (R. 2568.) He discussed adverse childhood experiences (ACEs) and stated they are experiences that will have a "significant effect" on behavior later in life. (R. 2569.) Mr. Doty had a number of ACEs in his life because he did not have a positive male role model; when his father was present, he engaged in domestic violence; he was neglectful; he caused Mr. Doty to perceive abandonment by his mother; and all these experiences contributed significantly "to the kind of life Mr. Doty has demonstrated over a period of time." (R. 2570-72.) Dr. Krop also acknowledged that the juvenile system is not always able to provide appropriate treatment, and that in Mr. Doty's case there was a "domino effect." (R. 2574-75.) He explained that "[f]rom the time that you were involved in the juvenile justice system, you really did not have an opportunity to be in a healthy environment to help modify some of the unhealthy behaviors that you had started exhibiting at an early age." (R. 2575-76.) One result was that Mr. Doty learned to detach from his emotions. (R. 2577.) Dr. Krop related this to the fact

that Mr. Doty repeatedly expressed sympathy for the families of his victims, but not remorse for the victims themselves. (R. 2578.)

Dr. Krop concluded by saying “you have repeatedly told me that you are willing to accept whatever verdict this jury decides to render as long as you know that they have heard all of the evidence...Obviously, you’re not saying that you hope that you get the death penalty, but you are saying that you’re willing to accept that because you know you’ve done something horrific.” (R. 2579-80.) Dr. Krop opined that this was a competent decision for Mr. Doty to make. (R. 2580.)

Louise Godfrey. Louise Godfrey, a mitigation specialist and family mediator, testified for the purpose of introducing a report she had prepared in 2012 summarizing various school records. (R. 2600-61.) She did not provide additional testimony in court. (R. 2602.)

When trial resumed for a final day Mr. Doty presented the court with his list of mitigating factors, including: (1) Wayne C. Doty had adverse childhood experiences, including abandonment, neglect, and exposure to violence; (2) Wayne C. Doty has shown mental health symptoms of obsessive focus on negative life events and experiences; (3) Wayne C. Doty has experienced a life where violence is acceptable; (4) Wayne C. Doty was failed by the Florida Department of health and Rehabilitative Services and the juvenile system; (5) Wayne C. Doty has been affected by the prison milieu due to the similarities between the violent atmosphere

in prison and at home as a child; (6) Wayne C. Doty did cooperate with Department of Corrections employees and law enforcement agencies by accepting responsibility; and (7) Wayne C. Doty has conducted himself respectfully during all court proceedings. (R. 2267-68.) After conferring with standby counsel, Mr. Doty informed the court he would rely on closing arguments and would not actually testify. (R. 2272.) The court conducted a charge conference; Mr. Doty accepted the jury instructions and verdict form. (R. 2177-87, 2273-79.)

Verdict and Sentence

The jury was charged after closing statements and returned the following verdict:

A. Aggravating Factors: as to the factors that Mr. Doty was previously convicted of a felony and under sentence of imprisonment, that he was previously convicted of another violent felony, and that the capital felony was committed in a cold, calculated, and premeditated manner without pretense of moral or legal justification, the jury found each factor had been proven beyond a reasonable doubt. (R. 1286.)

B. Sufficiency of the aggravating factors: as to the sufficiency of the aggravating factors, the jury unanimously found that the aggravating factors were sufficient to warrant a penalty of death. (R. 1287.)

C. Mitigating Circumstances: as to the mitigators presented by Mr. Doty, the jury indicated the votes listed below. (R. 1287-89.)

1. Wayne C. Doty had adverse childhood experiences, including abandonment, neglect, and exposure to violence. 12 yes, 0 no.

2. Wayne C. Doty has shown mental health symptoms of obsessive focus on negative life events and experiences. 1 yes, 11 no.

3. Wayne C. Doty has experienced a life where violence is acceptable. 1 yes, 11 no.

4. Wayne C. Doty was failed by the Florida Department of health and Rehabilitative Services and the juvenile system. 12 no.

5. Wayne C. Doty has been affected by the prison milieu due to the similarities between the violent atmosphere in prison and at home as a child. 12 no.

6. Wayne C. Doty did cooperate with Department of Corrections employees and law enforcement agencies by accepting responsibility. 12 yes.

7. Wayne C. Doty has conducted himself respectfully during all court proceedings. 12 yes.

D. Eligibility for the death penalty: The jury checked “yes” under “We, the jury, unanimously find that the aggravation factors that were proven beyond a reasonable doubt in Section A above outweigh the mitigating circumstances established in Section C above. (R. 1289.)

E. Jury Verdict as to Death Penalty: The jury checked “yes” under “Having unanimously found that at least one aggravating factor has been established beyond a reasonable doubt in Section A above; that the aggravating factors are sufficient to warrant a sentence of death in Section B above; and that the aggravating factors outweigh the mitigating circumstances in Section D above; we, the jury, unanimously find that the Defendant, WAYNE C. DOTY, should be sentenced to death.” (R. 1290.)

A *Spencer* hearing was conducted on March 27, 2018 (R. 1567.) The officer of counsel was renewed and declined. (R. 1570.) Mr. Doty made a statement pointing out that three Department of Corrections witnesses had provided testimony supporting the mitigating factor that he accepted responsibility by cooperating. (R. 1571-72.) He referred to mental health testimony from Dr. Krop relating to his obsessive focus on negative life experiences and the failure of the juvenile system in his case (R. 1573-74); inmate Leo Boatman’s testimony regarding the effect of the prison environment (R. 1574); and the testimony of family members regarding adverse childhood experiences (R. 1574-75). He reminded the court he had conducted himself respectfully during all proceedings, and asked the court to consider his evidence in mitigation. (R. 1575-76.) In addition, Mr. Doty offered that he had planned the offense to avoid having any correctional officers involved, to minimize the possibility an officer could have

been attacked. (R. 1582.) Finally, he reiterated that he accepted responsibility for his actions: “it doesn’t bother me to plead guilty...and accept the consequences and responsibility and even the punishment for this case.” (R. 1583.)

The State submitted a Sentencing Memorandum in support of the jury’s recommendation. (R. 1302-09.)

Mr. Doty submitted Defendant’s Request for Sentencing Recommendation, requesting that the Court include in its sentencing order “a specific recommendation that Defendant be transferred to the death row unit at Union Correctional Institution.” (R. 1314-20.) The request alleged that Jeffrey McClellan, assistant warden at Florida State Prison, had been the Chief Classification Officer and Duty Warden of Florida State Prison, and that “[t]hroughout the pendency of this case...Mr. McClellan continually impeded upon Defendant’s due process rights by refusing to turn over requested records of the Defendant, his co-defendant and the victim.” (R. 1314.) The request also stated that Mr. McClellan had been hostile to Mr. Doty during a court-ordered tour of the wing where Mr. Rodriguez was killed and the wing where death row inmates are housed. (R. 1315.) Mr. McClellan also impeded Mr. Doty’s access to various discovery materials. (R. 1316.) Mr. Doty had attempted to use internal procedures to be “special reviewed” without success. (R. 1316-17, 1319.) The request also stated Mr. Doty was aware of at least two other inmates, including penalty phase trial witness Leo Boatman,

who had killed other inmates and were not subject to the restrictions imposed on Mr. Doty; in particular those other inmates were allowed contact visitation and recreation privileges. (R. 1317-18.) In addition, those inmates were not housed in the facilities where their most recent offenses occurred. (R. 1318.) In contrast, Mr. Doty lost his contact visitation and recreational privileges in 2013 and they have not been reinstated. (R. 1318.) Mr. Doty requested a protective order granting no contact between himself and Assistant Warden McClellan, and a recommendation of a transfer to Union Correctional Institution, less than a mile away. (R. 1320.)

Mr. Doty also submitted Defendant's Sentencing Memorandum, which did not ask for a specific sentence, but asked the judge to "find and independently weigh the aggravation and mitigation" presented. (R. 1363-67.) Mr. Doty also repeated his request that any sentencing recommendation include the recommendation that he be transferred to the death row unit at Union Correctional Institution. (R. 1366.)

The State filed an objection to Mr. Doty's request for a sentencing recommendation, conceding that the trial court could enter an order containing a nonbinding recommendation but asserting the court lacked jurisdiction to require the Department of Corrections to process Mr. Doty in a particular manner. (R. 1368-73.)

The trial court entered a Sentencing Order on May 15, 2018. (R. 1380-1400.) The order states that the court independently weighed the aggravating circumstances and the mitigating factors in reaching its decision. (R. 1382.) As to the aggravating factors, the court found the State had proven each of them beyond a reasonable doubt and gave them great weight or very great weight. (R. 1382-88.) As to the mitigating circumstances, the court found Mr. Doty had established each of the seven mitigating circumstances he had put forth, and gave them slight to moderate weight. (R. 1388-96.) The court then found that the “aggravating circumstances far outweigh the mitigating circumstances which the Court has heard and considered,” and sentenced Mr. Doty to death. (R. 1399.)

SUMMARY OF THE ARGUMENT

The standard jury instructions used at Mr. Doty's trial are fundamentally deficient because they do not instruct the jury on the appropriate burden of proof to be applied to the jury's findings.

Florida's capital sentencing scheme requires the jury to make multiple determinations before the death penalty becomes an option for a particular defendant. These determinations include the existence of one or more aggravating factors, a finding that the aggravating factor or factors are sufficient to impose death as a penalty, and a finding that the aggravating factor or factors outweigh any mitigating evidence presented. *See* § 921.141(2), Flat. Stat. (2018). If the jury does not make each of these determinations unanimously, the jury must recommend a sentence of life in prison without possibility of parole, and the trial court must impose that sentence. *See id.* at (2)-(3). However, if a unanimous jury makes each of these determinations, then the statute gives the trial court discretion to choose between life in prison and death. *Id.* at (3)(a)2.

Under established federal and state constitutional doctrine, because the statutory scheme requires each of these determinations before the death penalty is available, these determinations are functionally "elements" of the capital offense and must be proven beyond a reasonable doubt. The jury instructions explain that the first such determination — the presence of one or more aggravating factors —

be proven beyond a reasonable doubt. However, the instructions do not hold the remaining determinations to the same standard. Mr. Doty admitted the underlying crime and did not contest the State's aggravating factors; the entire issue in the penalty phase trial was whether those factors were sufficient to impose the death penalty, and whether they outweighed Mr. Doty's mitigating evidence. Therefore, the omission in the jury instructions created fundamental error.

In addition, the trial court failed to properly exercise its discretion in response to Mr. Doty's allegations of hostile and disparate treatment at the correctional facility where he is currently housed and his request for a sentencing recommendation that would order no contact with the current assistant warden there as well as a transfer to a nearby facility. The court appears to have rejected the request on the ground that any recommendation from the court would be non-binding. Mr. Doty is well aware of this, but takes the position that entering the non-binding order is well within the court's discretion and that the request should not be denied simply because the trial court cannot direct action on the part of the Department of Corrections.

ARGUMENT

I. Fundamental Error Occurred When the Court Failed to Instruct the Jury to Determine Beyond a Reasonable Doubt that the Aggravating Factors Were Sufficient to Justify Death and that the Aggravating Factors Outweighed the Mitigating Circumstances Because Those Determinations Are Required to Impose a Death Sentence for Capital Murder.

“[T]he jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt.” *Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993). The Sixth Amendment thus requires that a criminal defendant is entitled to a jury determination as to “*every element of the crime with which he is charged* beyond a reasonable doubt.” *Apprendi v. New Jersey*, 530 U.S. 466, 476-77 (2000) (emphasis added; quoting *United States v. Gaudin*, 515 U.S. 506, 510 (1995)). The entitlement to a jury determination beyond a reasonable doubt extends to any determination that increases the penalty for a crime. *Alleyne v. United States*, 570 U.S. 99, 104 (2013) (“Any fact that, by law, increases the penalty for a crime is an ‘element’ that must be submitted to the jury and found beyond a reasonable doubt.”) (citing *Apprendi* , 530 U.S. 466, 483 n.10, 490). In other words, for sentencing purposes, any determination that increases the penalty to which a defendant will be subjected is an “element” for which the State bears the burden of proof beyond a reasonable doubt.

Under Florida’s capital sentencing scheme, “to increase the penalty from a life sentence to a sentence of death, the jury must unanimously find the existence of any aggravating factor, that the aggravating factors are sufficient to warrant a sentence of death, that the aggravating factors outweigh the mitigating circumstances, and must unanimously recommend a sentence of death.” *Perry v. State*, 210 So. 3d 610, 640 (2016). These findings must be made beyond a reasonable doubt. *Id.* at 633 (citing *Hurst v. State*, 202 So. 3d 40, 44-45, 53-54, 59-60 (Fla. 2016)). The jury at Mr. Doty’s penalty phase trial was only instructed that the standard of proof beyond a reasonable doubt applied to the existence of an aggravating factor, and was not similarly instructed as to the other findings the jury was required to make. (R. 2308-11, 2313-14.) Because Mr. Doty did not object to the instructions used at trial, this issue must be reviewed for fundamental error.

A. For sentencing purposes, the determinations that at least one aggravating factor is present, that the aggravating factors are sufficient to justify imposing death, and that aggravating factors outweigh any mitigating evidence presented, are “elements” that must be submitted to a jury because they increase the maximum sentence from life in prison to death.

The “elements” of a crime for purposes of conviction and the “elements” of a crime for purposes of sentencing are not always identical. However, as discussed below, that distinction is not what determines the burden of proof in a criminal trial. *See Apprendi* , 530 U.S. at 495-96 (noting the placement of a hate crime

sentence “enhancer” within the sentencing provisions of a criminal statute did not prevent the “enhancer” from functioning as an element of the offense). The legally significant distinction is whether a particular determination increases the available penalty for a crime. *Id.* A determination that increases the penalty is an “element” for sentencing purposes, even if it is not a listed element of the underlying crime. In the context of capital sentencing, any factor that must be found before the death penalty can be imposed is the “functional equivalent” of an element of the charged offense, at least for sentencing purposes. *See Ring v. Arizona*, 536 U.S. 584, 609 (2002) (citing *Apprendi*, 530 U. S. at 494 n. 19).

1. Findings increasing the penalty for a crime, including findings required to authorize the death penalty after a guilty verdict on the underlying offense, must be made by a jury.

Apprendi established that the due process clauses of the Fifth and Fourteenth Amendments, coupled with the right to a jury trial under the Sixth Amendment, require any fact increasing the maximum penalty for a crime to be submitted to a jury and proved beyond a reasonable doubt. 530 U.S. at 476. At issue in *Apprendi* was a state statute allowing a trial judge to apply a “hate crime” sentence enhancement to a conviction for possession of a firearm for an unlawful purpose. *Id.* at 469. The defendant had entered a plea to second- and third-degree offenses exposing him to terms of imprisonment of 5 to 10 years and 3 to 5 years, respectively. *Id.* at 470. In a separate hearing, as provided by state law, the trial

court heard evidence relating to an alleged racial bias on the defendant's part, and found by a preponderance of the evidence that the defendant had acted with a biased purpose. *Id.* at 470-71. The court then sentenced the defendant to an enhanced term of 12 years in prison on one of the second-degree offenses, and concurrent sentences on the other offenses. *Id.* at 471.

The Supreme Court held the defendant "had a constitutional right to have a jury find such bias on the basis of proof beyond a reasonable doubt." *Id.* at 475-76. The court's conclusion was grounded in the historical right to a trial by jury and "the companion right to have the jury verdict based on proof beyond a reasonable doubt." *Id.* at 477-78. The court also noted that trial courts could properly exercise their discretion to fashion sentences within statutory limits. *Id.* at 481. However, the New Jersey statute at issue did more than allow the trial court to sentence the defendant within prescribed limits; it allowed a trial court to sentence a second-degree offense as though it were a first-degree offense if the court made certain determinations based on a preponderance of the evidence. *Id.* at 491.

The Supreme Court rejected the argument that the finding of bias was merely a sentencing factor rather than an element of a more serious offense, stating "the relevant inquiry is one not of form, but of effect — does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" *Id.* at 494. The court added that "when the term 'sentence

enhancement’ is used to describe an increase beyond the maximum authorized statutory sentence, it is the functional equivalent of an element of a greater offense than the one covered by the jury’s guilty verdict.” *Id.* n.19.

Two years after *Apprendi* was decided, the Court held in *Ring v. Arizona* that the principles set out in *Apprendi* required invalidating a state statute allowing a trial judge to determine the existence of aggravating factors so as to justify imposition of the death penalty. 536 U.S. at 589. The defendant in *Ring* had been convicted of first-degree murder in a jury trial, and was then sentenced to death in a separate proceeding in which the trial court found that aggravating factors were present. *Id.* at 592-93. In so holding, the Court overruled an earlier decision upholding the same statutory scheme:

In *Walton v. Arizona*, 497 U. S. 639 (1990), this Court held that Arizona’s sentencing scheme was compatible with the Sixth Amendment because the additional facts found by the judge qualified as sentencing considerations, not as “element[s] of the offense of capital murder.” *Id.*, at 649. Ten years later, however, we decided *Apprendi v. New Jersey*, 530 U. S. 466 (2000), which held that the Sixth Amendment does not permit a defendant to be “expose[d] ... to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone.” *Id.*, at 483. This prescription governs, *Apprendi* determined, even if the State characterizes the additional findings made by the judge as “sentencing factor[s].” *Id.*, at 492.

Apprendi’s reasoning is irreconcilable with *Walton*’s holding in this regard, and today we overrule *Walton* in relevant part. Capital defendants, no less than non-capital defendants, we conclude, are entitled to a

jury determination of any fact on which the legislature conditions an increase in their maximum punishment.

536 U.S. at 588-89.

Under the statute at issue in *Ring*, the maximum punishment the defendant could have received based on the jury's verdict was life in prison. *Id.* at 597. The Supreme Court considered, but rejected, an argument that "death or life imprisonment" were both sentencing options for first-degree murder under Arizona law, and that the defendant "was therefore sentenced within the range of punishment authorized by the jury verdict." *Id.* at 603-04. The statutory provision requiring the trial court to find an aggravating circumstance before death could be imposed meant that the death penalty was authorized "only in a formal sense," and required an additional finding beyond the jury's verdict. *Id.* at 604 (citations omitted). The Court reiterated *Apprendi*'s reasoning that the additional finding was the "functional equivalent" of an element of the offense. *Ring*, 536 U.S. at 609.

The central holding of *Apprendi* was reaffirmed in *Blakely v. Washington*, 542 U.S. 296 (2004), which held a state statute allowing a trial court to impose an "exceptional" sentence in excess of a defined statutory range violated the defendant's right to a trial by jury. The defendant in *Blakely* entered into a plea agreement admitting several offenses, including second-degree kidnapping. *Id.* at 298-99. The standard sentencing range for that offense was 49 to 53 months, but state law allowed the trial judge to impose a longer sentence based on "substantial

and compelling reasons justifying an exceptional sentence.” *Id.* at 299. At sentencing, the court determined the defendant had acted with “deliberate cruelty” —which the defendant did not admit — and imposed an exceptional sentence of 90 months. *Id.* at 300. The Supreme Court held this increase could not be upheld in light of *Apprendi* and the Sixth Amendment right to trial by jury, and reversed. *Id.* at 305.

As it had in *Ring*, the Court rejected an argument that the sentence imposed was theoretically within legal limits for that class of felony, and thus that the judicial fact-finding had not exposed the defendant to a higher penalty. *See Blakely*, 542 U.S. at 303-04. The Court explained that “the ‘statutory maximum’ for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.” *Id.* at 303 (citation omitted). Without finding additional facts, the trial court could not have imposed the “exceptional sentence.” *Id.* It did not matter that the exceptional sentence was under the statutory maximum; what mattered was that it was above the statutory range allowed based on the defendant’s admission. *Id.* at 303-04.

Similarly, in *Alleyne*, the Court held unconstitutional a statute imposing a mandatory minimum sentence on the basis of judicial fact-finding. 570 U.S. at 103. Although the Court had previously drawn a distinction between facts increasing a

statutory maximum and those increasing a mandatory minimum sentence, the Court concluded the distinction was inconsistent with *Apprendi*:

Any fact that, by law, increases the penalty for a crime is an “element” that must be submitted to the jury and found beyond a reasonable doubt. Mandatory minimum sentences increase the penalty for a crime. It follows, then, that any fact that increases the mandatory minimum is an “element” that must be submitted to the jury.

Id. (overruling *Harris v. United States*, 536 U.S. 545 (2002)).

As it had in earlier cases, the Court recognized the continued vitality of sentencing discretion within statutory limits. *Id.* at 116. And, as in earlier cases, the Court firmly rejected the argument that the sentence actually imposed in that case could have been imposed even without additional fact-finding. *Id.* at 112-15.

Finally, in *Hurst v. Florida*, 136 S. Ct. 616 (2016), the Court held that Florida’s then-existing capital sentencing scheme violated the Sixth Amendment because it allowed the death penalty to be imposed based on judicial fact-finding. In particular, the statute at issue allowed the trial court, alone, to conclusively determine the existence of an aggravating circumstance after receiving an advisory verdict from the jury. *Id.* at 620 (citing § 921.141(2)-(3), Fla. Stat. (2010)).

From these cases, the following general statement can be distilled: Any determination that increases the available penalty for a capital felony from life in prison to death is the functional equivalent of an element of the capital felony, and must be made by a jury based on proof beyond a reasonable doubt.

2. Florida’s capital sentencing scheme establishes that whether aggravating factors are sufficient to justify the death penalty, and whether those factors outweigh mitigating circumstances, are elements of capital murder for sentencing purposes.

First-degree murder is a “capital felony” under section 782.04(1)(a), Florida Statutes (2018). Obtaining a conviction for first-degree murder based on premeditation requires the State to establish the following elements: (1) a victim is dead; (2) the death was caused by the defendant; and (3) the killing was premeditated. *See Fla. Std. Jury Instr. (Crim.) 7.2 (2017)*. Despite the statutory “capital felony” label, under Florida’s capital sentencing scheme, the findings necessary to convict a defendant of first-degree premeditated murder are insufficient to sentence the defendant to death. *See § 782.04(1)(b)*. A separate proceeding must be held, as provided in sections 775.082 and 921.141, Florida Statutes, leading to additional statutorily defined findings.

The provisions of section 921.141 create a system in which the jury makes findings allowing the death penalty to be imposed and then, if specific findings are made, the trial court exercises its discretion to choose between a life sentence and a death sentence. *See § 921.141(2)-(3)*. Section 921.141(2)(b) sets out the specific findings required before a death sentence can be considered:

If the jury:

[...] 2. Unanimously finds at least one aggravating factor, the defendant is eligible for a sentence of death and the

jury shall make a recommendation to the court as to whether the defendant shall be sentenced to life imprisonment without the possibility of parole or to death. The recommendation shall be based on a weighing of all the following:

- a. Whether sufficient aggravating factors exist.
- b. Whether aggravating factors exist which outweigh the mitigating circumstances found to exist.
- c. Based on the considerations in sub-subparagraphs a. and b., whether the defendant should be sentenced to life imprisonment without parole or to death.

§ 921.141(2)(b).

The “eligibility” referred to in section 921.141(2)(b) is not dispositive of the available sentencing range, because section 921.141(2) must be read together with section 921.141(3). Under these statutory provisions, if a jury finds the existence of an aggravating factor beyond a reasonable doubt, but does not separately and unanimously determine that the aggravating factor is sufficient to impose death and that it outweighs any mitigating evidence, the jury’s sentencing recommendation must be for a term of life in prison. When the jury recommends life, “the court *shall* impose the recommended sentence.” § 921.141(3)(a)1. (emphasis added). A defendant cannot be “exposed to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone,” *Apprendi*, 530 U.S. at 483; because the unanimous finding that at least one

aggravating factor exists, without more, justifies only a sentence of life in prison, that finding by itself is not what increases the available penalty.

The available penalty is only increased to death if a jury unanimously recommends death: under section 921.141(3)(a)2., a unanimous recommendation of death is what gives the trial court the discretion to sentence the defendant to either life in prison or death. *See id.* (“the court, after considering each aggravating factor found by the jury and all mitigating circumstances, may impose a sentence of life imprisonment without the possibility of parole or a sentence of death”).

Under this statutory scheme, the death penalty cannot be imposed solely on the basis that the defendant was convicted of first-degree murder, meaning the jury found the three elements of death, causation, and premeditation were established beyond a reasonable doubt. Moreover, the death penalty cannot be imposed on the basis that the jury found one or more aggravating factors present. A finding that one or more aggravating factors are present makes the defendant “eligible” for the death penalty under section 921.141(2)(b), but even then the ultimate sentence cannot be imposed in a given case without additional jury determinations.

Absent the further proceedings and determinations defined in section 921.141, the maximum available sentence for first-degree murder is life in prison. *See* § 775.082(1)(a); § 921.141(3)(a); *Hurst v. State*, 202 So. 3d 40, 53 (Fla. 2016). Without additional unanimous jury determinations that at least one aggravating

factor is sufficient to impose the death penalty and that the aggravating factor outweighs any mitigating circumstances, a defendant cannot be sentenced to death. *See Hurst v. State*, 202 So. 3d at 53; *see also* Fla. Std. Jury Instr. (Crim) 7.11 (2017) (“If your vote on the appropriate sentence is less than unanimous, the defendant will be sentenced to life in prison without the possibility of parole.”). Therefore, for sentencing purposes, these additional determinations are treated as elements of the crime, whether they are called “elements” or something else.

B. Due process requires proof beyond a reasonable doubt of any determination that must be made before the death penalty is available for a particular defendant.

To satisfy the Due Process clause of the federal constitution, convicting an individual of a crime requires proof of the crime beyond a reasonable doubt. *E.g.*, *In re Winship*, 397 U.S. 358, 362 (1970). This means “proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.” *Id.* at 364. The reasonable doubt standard “reflects a profound judgment about the way in which law should be enforced and justice administered.” *Id.* at 361-62 (citation omitted). The requirement of proof beyond a reasonable doubt stands between the accused and a conviction based on factual error. *See id.* at 363. It “provides concrete substance for the presumption of innocence.” *Id.* (citation omitted). In addition, as the United States Supreme Court has explained, the reasonable doubt standard has a vital role in maintaining public confidence in the court system:

Moreover, use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty.

Id. at 364.

Society's interest in the reliability of jury verdicts is even stronger in capital cases than in other criminal cases because of the "qualitative difference between death and other penalties." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion).

Due process requires that the additional fact-finding required to impose the death penalty meet the same standards as the fact-finding required to return the initial guilty verdict. As the Supreme Court has explained:

It is self-evident, we think, that the Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict are interrelated. It would not satisfy the Sixth Amendment to have a jury determine that the defendant is probably guilty, and then leave it up to the judge to determine (as *Winship* requires) whether he is guilty beyond a reasonable doubt. In other words, *the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt.*

Sullivan v. Louisiana, 508 U.S. at 278 (emphasis added) (reversing a conviction where the jury was improperly instructed on the meaning of “reasonable doubt”).

Thus, the Court recognized in *Apprendi* that the requirement of a jury finding went hand-in-hand with “the companion right to have the jury verdict based on proof beyond a reasonable doubt.” 530 U.S. at 477-78.

The current version of section 921.141 was enacted with the purpose of ensuring “that a criminal defendant’s right to a jury is not eroded and encroached upon by sentencing schemes that permit a higher penalty to be imposed based on findings of fact that were not made by a jury.” *Asay v. State*, 210 So 3d 1, 17 (Fla. 2016). The right to a jury trial is as critical, and as fundamental, under state law as under the federal constitution. *See id.* (noting “the critical right to a jury trial” is “one of the guarantees set forth in the Bill of Rights since our country’s — and this State’s — inception.”). To satisfy due process, the required jury findings must be not only unanimous, but based on proof beyond a reasonable doubt:

If a defendant faces punishment beyond that provided by statute when an offense is committed under certain circumstances but not others, it is obvious that both the loss of liberty and the stigma attaching to the offense are heightened; it necessarily follows that the defendant should not — at the moment the State is put to proof of these circumstances — be deprived of protections that have, until this point, unquestionably attached.

Apprendi, 530 U.S. at 484.

C. Requiring a jury to make the critical findings required by section 921.141, Florida Statutes, based on proof beyond a reasonable doubt, is consistent with this Court’s precedent.

The findings required by section 921.141(2)(b), namely the existence of an aggravating factor or factors, whether the aggravating factors are sufficient to impose the death penalty, and whether they outweigh any mitigating circumstances, are “critical findings” requiring jury unanimity. *See Hurst v. State*, 202 So. 3d at 44; *Asay*, 210 So. 3d at 15. Therefore, as a matter of constitutional law, these findings implicate the due process right to proof beyond a reasonable doubt.

In *Hurst v. State*, after a “close review” of the applicable sentencing statutes, this Court stated these critical findings were “elements that must be found unanimously by a jury.” 202 So. 3d at 54. The Court elaborated that the findings were “necessary for the jury to essentially convict a defendant of capital murder — thus allowing imposition of the death penalty....,” *id.* at 53, before emphasizing that unanimity was required as to all three findings:

Thus, we hold that in addition to unanimously finding the *existence* of any aggravating factor, the jury must also unanimously find that aggravating factors are *sufficient* for the imposition of death and unanimously find that the aggravating factors *outweigh* the mitigation before a sentence of death may be considered by the judge.

Id. at 54 (emphasis in original).

Subsequently, this Court stated in *Perry v. State* that “the findings necessary to increase the penalty from a mandatory life sentence to death must be found beyond a reasonable doubt by a unanimous jury.” 210 So. 3d at 633. The decision in *Perry* also explicitly recognized a distinction between the findings that sufficient aggravating factors exist to impose death and that the aggravating factors outweigh any mitigating circumstances, on one hand, and the sentencing recommendation that flows from those findings, on the other:

[W]e determine that the sentencing recommendation is a separate conclusion distinct from the jury’s findings of whether sufficient aggravating factors exist and whether the aggravating factors outweigh the mitigation. It has long been true that a juror is not required to recommend the death sentence even if the jury concludes that the aggravating factors outweigh the mitigating circumstances.

Id. at 639-40 (citation omitted).

Under the line of cases beginning with *Apprendi* and culminating in *Hurst*, the requirement of proof beyond a reasonable doubt is a “companion right” to the right to a jury determination of the findings that must be made before a death sentence can be considered. Requiring that level of proof is consistent with this Court’s decisions in *Hurst* and *Perry*, as well.

Appellant acknowledges that the Court’s recent decision in *Foster v. State*, 2018 WL 6379348, No. SC18-860 (Fla. Dec. 6, 2018) (motion for rehearing filed Dec. 13, 2018), rejected an argument that the defendant was entitled to a life

sentence because a jury had not unanimously found beyond a reasonable doubt all elements of “capital first-degree murder.” Slip op. at 7. The Court stated “the *Hurst* penalty phase findings are not elements of the capital felony of first-degree murder. Rather, they are findings required of a jury (1) *before* the court can impose the death penalty for first-degree murder, and (2) *only after* a conviction or adjudication of guilt for first-degree murder has occurred.” *Id.* at 9 (emphasis in original).

To the extent *Foster* can be read to reject an argument that the *Hurst v. State* sentencing factors are functional elements of a capital crime, it is inconsistent with *Apprendi*, *Ring*, *Hurst v. Florida*, and *Hurst v. State*, and that reading cannot stand. However, such a broad reading is not necessary, and the decision in *Foster* can be harmonized with *Hurst v. State* and *Perry*. As Justice Scalia noted in his concurrence in *Ring v. Arizona*, it does not matter whether Florida law calls the penalty phase findings “elements of the offense, sentencing factors, or Mary Jane.” 536 U.S. at 610. The findings are, as *Foster* acknowledges, essential to the level of punishment that can be imposed. Thus, they are functional elements, even if they are not elements of the statutorily-defined crime of first-degree murder. Similarly, the Court’s statement in *Foster* that “it is not the *Hurst* findings that establish first-degree murder as a capital crime for which the death penalty may be imposed” is necessarily circumscribed by *Apprendi* and the other cases cited above. The

Supreme Court has repeatedly rejected arguments that a particular sentence could be upheld because it was within a theoretically acceptable range of punishment. *Alleyne*, 570 U.S. at 112-15; *Blakely*, 542 U.S. at 303-04; *Ring*, 536 U.S. at 603-04. The fact that death is theoretically an available penalty in any first-degree murder case does not change the long-standing rule that, to make death an available penalty in a specific case, additional fact-finding must take place over and above that necessary to convict the defendant for the underlying crime.

Moreover, *Foster* was decided in the context of a post-conviction motion, in a case where this Court had already decided that *Hurst v. Florida* would not be applied retroactively to the defendant's sentence. *See Foster v. State*, 235 So. 3d 294, 295 (Fla. 2018) (holding *Hurst* did not apply retroactively to a death sentence that became final in 2001). The Court's distinction between the elements of the underlying offense, which had been proved beyond a reasonable doubt in the defendant's original trial, and the elements required to sentence him to death, which were not, can be read as an alternative explanation of its retroactivity holding. *See slip op.* at 9-10.

Even more recently than *Foster*, this Court reiterated its adherence to *Apprendi* and *Blakely* in *Brown v. State*, 2018 WL 6696034, No. SC18-323 (Fla. Dec. 20, 2018) (State's motion for rehearing filed Dec. 27, 2018). At issue in *Brown* was the statute providing that a defendant whose score on the Criminal

Punishment Code scoresheet is 22 points or fewer must be sentenced to a non-state prison sanction, unless the court makes written findings that such a sanction could present a danger to the public. *See id.*, slip op. at 2 (citing § 775.082(10), Fla. Stat.). The Court agreed that “subsection (10) unambiguously sets the statutory maximum penalty, for *Apprendi* purposes as defined by *Blakely*, as a ‘nonstate prison sanction,’ ...for her and similarly situated offenders.” *Id.* at 5. Absent the factual finding of dangerousness to the public, which was not reflected in the defendant’s underlying verdict, the court did not have discretion to sentence the defendant to a prison sentence. *Id.* Therefore, the Court held, subsection (10) violated the defendant’s Sixth Amendment right to a jury trial. *Id.* at 6.

Similarly, in any *Hurst* resentencing, the statutory maximum penalty, for *Apprendi* and *Blakely* purposes, is life in prison, absent certain critical findings that can only be made by a unanimous jury.

In summary, when retroactivity is not at issue, the *Hurst* findings — the existence of one or more aggravating factors, the finding that the aggravating factors are sufficient to justify imposing the death penalty, and the finding that the aggravating factors outweigh any mitigating evidence —are critical findings that must be submitted to a jury and proved beyond a reasonable doubt before the court can consider a death sentence. These factors, the requirement of a jury determination, and the accompanying burden of proof beyond a reasonable doubt

are due process safeguards standing between a capital defendant and the risk of unfounded or arbitrary imposition of the law's most severe penalty.

D. The trial court's failure to instruct the jury to determine beyond a reasonable doubt whether the aggravating factors were sufficient to justify the death penalty, and whether the aggravating factors outweighed the mitigating factors, created fundamental error.

Fundamental error is error that “reach[es] down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error.” *F.B. v. State*, 852 So. 2d 226, 229 (Fla. 2003). Fundamental error “goes to the foundation of the case...and is equivalent to a denial of due process.” *Id.* (citation omitted). When the issue involves an incomplete or omitted jury instruction, fundamental error occurs if what is omitted is “pertinent or material to what the jury must consider in order to convict.” *Daughtery v. State*, 211 So. 3d 29, 39 (Fla. 2017) (finding the issue of intent was “pertinent or material” to the jury’s deliberations where the defendant was charged with first-degree murder and convicted of second-degree murder). An instruction is material when it involves a disputed issue. *E.g.*, *Reed v. State*, 837 So. 2d 366, 369 (Fla. 2002). Fundamental error is, by definition, harmful. *E.g.*, *Ramroop v. State*, 21 So. 3d 657, 665 (Fla. 2017); *see also Sullivan*, 508 U.S. at 281 (rejecting harmless error analysis for the erroneous description of the burden of proof).

In *Reed*, this Court found fundamental error occurred when a trial court did not instruct the jury as to the correct definition of “malice” for purposes of convicting the defendant of aggravated child abuse. 837 So. 2d at 568. The jury was told the defendant had to act “wrongfully, intentionally, without legal justification or excuse” rather than the correct definition of malice as “ill will, hatred, spite, [or] an evil intent.” *Id.* The Court noted that “the inaccurate definition [was] material to what the jury had to consider” because the definition reduced the burden of proof the State had to satisfy. *Id.* at 369. Finding that the element of malice was disputed at trial, the Court held the inaccurate definition created fundamental error. *Id.* at 370.

In this case Mr. Doty entered a guilty plea that admitted the elements of the charged crime, and did not dispute the aggravating factors. He did, however, dispute the additional findings required to increase the maximum available penalty from life in prison to death. The issue at sentencing was whether those factors were sufficient to justify death, and whether they outweighed the mitigating evidence Mr. Doty presented. Therefore, the burden of proof regarding whether the aggravating factors were sufficient, and whether they outweighed the mitigating evidence, was pertinent and material to what the jury had to consider. The failure to instruct the jury on the correct burden of proof relating to these disputed issues created fundamental error.

II. The Trial Court Erred in Refusing to Consider the Defense Request for a Non-Binding Sentencing Recommendation, Which Was Within the Court's Discretion.

The court erred when it refused to consider the defense request for a non-binding recommendation regarding Mr. Doty's request for a transfer away from Florida State Prison. In denying that request, the court stated it would not make the recommendation because it did not have authority to direct the Department of Corrections to house Mr. Doty in a particular location. However, the defense was asking for a non-binding recommendation, which was within the court's discretion to make. Resentencing can be required when a trial court fails to exercise its discretion based on an erroneous view of the law. *E.g., Doe v. State*, 499 So. 2d 13, 14 (Fla. 3d DCA 1986); *see also Patterson v. State*, 206 So. 3d 64, 66 (Fla. 4th DCA 2016) (reversing for resentencing where the trial court mistakenly believed it did not have discretion to sentence the defendant to concurrent sentences); *Goldwire v. State*, 73 So. 3d 844, 846 (Fla. 4th DCA 2011) (reversing for resentencing where the trial court mistakenly believed it was required to impose adult sanctions).

CONCLUSION

Mr. Doty requests a new penalty phase trial at which the jury will be correctly instructed on the burden of proof applicable to all critical findings. In the alternative, he requests that the trial court be directed to reconsider his motion for a non-binding sentencing recommendation.

CERTIFICATES OF SERVICE AND FONT SIZE

I certify that a copy of the foregoing has been furnished electronically via the Florida Courts e-filing portal to Jennifer A. Donahue, Assistant Attorney General, Capital Appeals Division, on December 31, 2018. I certify that this brief has been prepared using Times New Roman 14-point font.

Respectfully submitted,

ANDY THOMAS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

/s/ Barbara J. Busharis
BARBARA J. BUSHARIS
Assistant Public Defender
Fla. Bar No. 71780
Leon County Courthouse
301 S. Monroe St., Suite 401
Tallahassee, Florida 32301
(850) 606-8500
barbara.busharis@flpd2.com

ATTORNEY FOR APPELLANT