IN THE SUPREME COURT OF FLORIDA

ALVIN DAVIS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC19-0716

ON REVIEW FROM THE DISTRICT COURT OF APPEAL, FIRST DISTRICT OF FLORIDA

RESPONDENT'S ANSWER BRIEF

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PRELIMINARY STATEMENT

Petitioner Davis, the Appellant in the District Court of Appeal and the defendant in the trial court, will be referred to in this brief as Petitioner or by proper name. Respondent State of Florida, the Appellee in the District Court of Appeal and the prosecuting authority in the trial court, will be referred to in this brief as Respondent, the prosecution, or the State.

The record on appeal is cited as "R" followed by the page number.[1] The sealed record on appeal containing the pre-sentence investigation report is cited as "SR" followed by the page number. Petitioner's Initial Brief is cited as "IB" followed by the page number.

[1] References are to the single volume contained on this Court's online docket.

STATEMENT OF THE CASE

The State charged Petitioner with one count of possession of a firearm by a convicted felon and a jury found him guilty as charged. (R. 9, 33). The trial court adjudicated Petitioner guilty and sentenced him to fifteen years in prison with three of those years being a minimum mandatory sentence. (R. 144-52). The First District Court of Appeal affirmed and certified the following question:

> WHEN, IF EVER, MUST AN APPELLATE COURT REVERSE A SENTENCE BASED ON THE TRIAL COURT'S CONSIDERATION OF "REMORSE," "FAILURE TO TAKE RESPONSIBILITY," OR THE LIKE?

Davis v. State, 268 So. 3d 958, 968-69 (Fla. 1st DCA 2019) (en banc).

STATEMENT OF THE FACTS

According to the evidence at trial, a juvenile was driving a car with Petitioner as a passenger. (R. 288-89, 310). Officers stopped the car for driving without headlights and found drugs, drug paraphernalia, and a firearm. (R. 287, 307). Officers found the firearm under Petitioner's seat, wrapped in an orange shirt with his DNA. (R. 290-92, 354-55). According to the juvenile driver, he did not know the firearm was in the car until moments before the traffic stop, when Petitioner pulled it out, wrapped it in the orange shirt, and stuffed it under his seat. (R. 311-12). The jury found Petitioner guilty of being a felon in possession of a firearm. (R. 33, 418).

Prior to sentencing, the trial court ordered a pre-sentence investigation (PSI). (R. 420). The PSI noted that Petitioner "wants to wait until sentencing to make a statement to the court." (SR. 162). The PSI recommended the maximum sentence—fifteen years' imprisonment—and explained its rationale:

> The defendant has an extensive prior criminal history which includes numerous violent offenses. The defendant has had opportunities to rehabilitate, however apparently chooses to continue to engage in criminal behavior. The defendant also appears to have a history of gang related activity. The defendant apparently continues to be a threat to the safety of the community. It is therefore respectfully recommended that he be sentenced to the maximum amount of incarceration allowed by the sentencing guidelines.

(SR. 169).

Petitioner's prior convictions for violent crime include: attempted second-degree murder, attempted robbery with a firearm, armed robbery with a firearm,

aggravated assault with a deadly weapon, discharging a firearm on school property, and aggravated battery with a deadly weapon and his lowest permissible sentence was 118.125 months' imprisonment. (R. 141-42). At the sentencing hearing, the State asked for the statutory maximum sentence—fifteen years' imprisonment—based on Petitioner's violent criminal history and continuing to violate the law. (R. 188). Petitioner's counsel asked for a bottom of the guidelines sentence, which was approximately ten years' imprisonment, explaining, "[Appellant] has a significant history and its not something that we can deny[.]" (R. 188-89). Counsel also informed the trial court that Petitioner wished to speak. (R. 188-89).

Petitioner's allocution comprises approximately four pages of transcript and contained conspiratorial language and insults to both his attorney and the trial court. (R. 189-92). For instance, some of Petitioner's remarks included:

> So, the State, nor my attorney refused to have it [the firearm] tested because it would have proved the driver was lying.
>
> ….
>
> The police officer clearly on the record coerced and manipulated the driver into saying that it was my gun.
>
> ….
>
> How could this injust[ice] take place in this courtroom without my lawyer taking part? Evidence in the law of constructive possession proves me right. I understand I cannot get any justice here in this courtroom. I trust my life and liberty in the hands of the First DCA Court who knows firsthand the illegal action taking place in this Leon County courtroom assistance, most of these appointed court lawyers.

….

> If I did anything wrong, or said something that's inappropriate, I would apologize. Right now, and I ask -- I would be asking for leniency, but I did nothing wrong. I am not guilty of the charge that I'm accused of. I am innocent. And the facts, evidence and the law proves me right. I will allows the First DCA to correct this injust[ice].

(R. 189-92). The trial court made the following comments while imposing its sentence:

> And I can see here by your score sheet, you have an extensive violent history here and a lot of it involves a firearm. We have a second degree murder, attempted second degree murder, attempted armed robbery with a firearm, armed robbery with a firearm, aggravated assault with a deadly weapon, discharging a firearm on school property, aggravated battery with a deadly weapon, batter on a law enforcement officer, felony battery. Just a violent, unfortunate history that we're dealing with. And a lot of it involves a firearm. And now we have a new offense that involves a firearm again.
>
> ….
>
> You still fail to take any responsibility for your actions. And considering your history here, your failure to take any responsibility, the nature of the crime, the fact that it involves a firearm, the Court will sentence you to 15 years in the Department of Corrections, which is the statutory maximum.

(R. 192-93).

SUMMARY OF ARGUMENT

The First District correctly held that lack of remorse can be a permissible consideration at non-capital sentencing proceedings. First, a non-capital sentencing court has wide discretion under the Criminal Punishment Code ("CPC") to consider almost anything it deems relevant in fashioning an individualized and appropriate sentence. It may impose the maximum sentence based solely on the fact of a conviction. In determining an appropriate and individualized sentence, sentencing courts need as much information about a criminal defendant and the circumstances of his or her criminal conduct as possible. Considering lack of remorse is consistent with that need for information and consideration of the whole picture.

Additionally, considering lack of remorse serves legitimate penological interests, such as rehabilitation. The CPC makes rehabilitation a goal of the criminal justice system, albeit subordinate to punishment. Therefore, a defendant's potential or lack of potential for rehabilitation is a relevant consideration. Courts have long recognized that individuals who show remorse are more likely to rehabilitate.

A trial court's consideration of a defendant's freely offered allocution does not violate the right against self-incrimination because a defendant who freely allocates waives the right to remain silent. The Supreme Court of the United States has expressly rejected the argument that a defendant cannot be forced to choose between the right to remain silent and the right to allocate. Once a defendant

allocates, a sentencing court is free to consider what that defendant says, including statements demonstrating a lack of remorse.

Finally, proper application of the fundamental error standard should lead this Court to approve the First District's affirmance of the sentence even if it does not agree with the holding that lack of remorse is a permissible factor at sentencing. The district courts have effectively eviscerated the fundamental error standard in this context by requiring the State to demonstrate harmless error. Under the fundamental error standard, it is Petitioner's burden to demonstrate that the alleged error affected the sentence—not the State's burden to demonstrate that the alleged error had no effect on the sentence.

ARGUMENT

ISSUE I: WHETHER A NON-CAPITAL SENTENCING COURT MAY TAKE INTO CONSIDERATION A DEFENDANT'S FAILURE TO SHOW REMORSE OR ACCEPT RESPONSIBILITY AND IF NOT, WHETHER UN-OBJECTED TO COMMENTS CONSIDERING SUCH FACTORS CONSTITUTES FUNDAMENTAL ERROR.

A. Standard of Review

"Errors that have not been preserved by contemporaneous objection can be considered on direct appeal only if the error is fundamental." *Jackson v. State*, 983 So. 2d 562, 568 (Fla. 2008). In the sentencing context, fundamental error analysis requires that courts examine "the nature of the error, its qualitative effect on the sentencing process and its quantitative effect on the sentence…. In most cases, a fundamental sentencing error will be one that affects the determination of the sentence such that the interests of justice will not be served if the error remains uncorrected." *Maddox v. State*, 760 So. 2d 89, 99-100 (Fla. 2000) (internal citation omitted).

B. Preservation

Petitioner did not object to the trial court's comments. (R. 192-93). While Petitioner's claim relates to the sentencing process rather than the sentencing order and does not require a motion under Florida Rule of Criminal Procedure 3.800(b) to preserve the alleged error, a contemporaneous objection was required. Therefore, this Court's review is limited to fundamental error.

C. Law and Argument on the Merits

Petitioner contends that a trial court violates due process when it considers a defendant's lack of remorse or failure to take responsibility in determining an appropriate sentence. Petitioner's argument invokes principles such as the presumption of innocence, the right to remain silent, and the right to maintain one's innocence. This Court should approve the First District's decision and hold that consideration of lack of remorse at non-capital sentencing proceedings is permissible for four reasons.

First, it is consistent with the trial court's need for as much information as possible about a defendant and the circumstances of his or her conduct in fashioning an appropriate sentence. Second, consideration of lack of remorse advances legitimate penological interests, such as rehabilitation. Third, an allocution serves as a waiver of the right to remain silent. The trial court should be allowed to consider what a defendant says during an allocution, including statements demonstrating a lack of remorse. Finally, proper application of the fundamental error standard should lead this Court to approve of the First District's affirmance of the sentence even if it does not agree with the holding that lack of remorse is a permissible factor because Petitioner cannot demonstrate that it affected the sentence in light of his horrendously violent history and insistence on carrying firearms as a convicted felon.

The arguments in this brief fall into two parts. The first part will address

consideration of a defendant's lack of remorse from a policy standpoint and the statutory authority for doing so. The second part will address the interaction between lack of remorse and the right to remain silent.

I. Remorse is an Appropriate Consideration to Advance Legitimate Penological Interests and is Consistent with the Trial Court's Need to Consider the Circumstances Surrounding the Crime

Analysis of this issue should begin with the role of the sentencing judge. According to the Supreme Court of the United States:

> A sentencing judge, however, is not confined to the narrow issue of guilt. His task within fixed statutory or constitutional limits is to determine the type and extent of punishment after the issue of guilt has been determined. Highly relevant—if not essential—to his selection of an appropriate sentence is the possession of the fullest information possible concerning a defendant's life and characteristics.

Williams v. New York, 337 U.S. 241, 247 (1949) (emphasis added).

Under Florida's Criminal Punishment Code ("CPC"), "[r]ehabilitation is a desired goal of the criminal justice system but is subordinate to the goal of punishment." § 921.002(1)(b), Fla. Stat. (2017). The legislature has authorized non-capital sentencing courts to impose any sentence up to the statutory maximum based solely on the fact of a conviction. § 921.002(1)(g), Fla. Stat. Pursuant to those legislative goals and authorization, sentencing judges in Florida consider many factors to get a complete picture of a criminal defendant prior to sentencing. *See* § 921.231(1)(a)-(o), Fla. Stat. (requiring a presentence investigation report to include, among other things, an offender's prior criminal history, education, financial status,

social and medical history, employment background, and perception of offenders motivations and ambitions and assessment of offender's explanations for criminal activity).[2] *See also Apprendi v. New Jersey*, 530 U.S. 466, 481 (2000) (noting that judges may consider "various factors relating both to the offense and offender—in imposing a judgment *within the range* prescribed by statute.") (emphasis in original).

A defendant's remorse or willingness to accept responsibility is part of the complete picture that trial courts should consider. *See Simmons v. State*, 419 So. 2d 316, 320 (Fla. 1982) ("A person's potential for rehabilitation is an element of his character ….") Given the legislative pronouncement that rehabilitation "is a desired goal of the criminal justice system," even if subordinate to punishment, § 921.002(1)(b), Fla. Stat., consideration of remorse is even more logical. Lack of remorse or failure to take responsibility is relevant to a defendant's character and speaks to his or her potential for rehabilitation.[3] In the present case, Petitioner's

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[2] This is not an exclusive list of factors non-capital sentencing courts may consider for two reasons. First, a PSI is not ordered in many cases. Yet no one argues that sentencing courts have limited discretion when a PSI is not ordered. Second, reliance on only what is enumerated in section 921.231(1)(a)-(o) is inconsistent with the longstanding principle that sentencing courts have wide discretion to consider anything they deem relevant and the legislature's express authorization to impose the maximum sentence for any non-capital felony based solely on the fact of a conviction.

[3] "After Committing a Crime, Guilt and Shame Predict Re-Offense," Association for Psychological Science, *available at* https://www.psychologicalscience.org/news/releases/after-committing-a-crime-guilt-and-shame-predict-re-offense.html (citing study showing that offenders who

violent criminal history and his allocution, which included conspiratorial language and blaming others, make clear that he is not a good candidate for rehabilitation.

A sentencing court's "[i]mpressions about the individual being sentenced-the likelihood that he will transgress no more, the hope that he may respond to rehabilitative efforts to assist with a lawful future career, the degree to which he does or does not deem himself at war with his society-are, for better or worse, central factors to be appraised under out theory of 'individualized' sentencing." *United States v. Grayson*, 438 U.S. 41, 47-48 (1978) (*superseded by statute on unrelated grounds as stated in Barber v. Thomas*, 560 U.S. 474, 482 (2010)). "If a defendant is remorseful, it means that he is sorry he committed the crime for which he is to be sentenced. One who so regrets his acts may not commit such acts in the future. This is the type of factor judges have historically taken into consideration in imposing sentence." *St. Val v. State*, 958 So. 2d 1146, 1146-47 (Fla. 4th DCA 2007); *accord Burr v. Pollard*, 546 F.3d 828, 832 (7th Cir. 2008) (noting that lack of remorse is a permissible factor at sentencing because it "speaks to traditional penological interests such as rehabilitation (an indifferent criminal isn't ready to reform) and deterrence (a remorseful criminal is less likely to return to his old ways.")

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experience guilt, and therefore remorse, are less likely to reoffend).

Many state and federal courts permit consideration of a defendant's lack of remorse at sentencing to promote legitimate penological interests, such as rehabilitation, and because it bears upon a defendant's character.[4]

Petitioner contends that the First District's decision runs afoul of this Court's decision in *Holton v. State*, 573 So. 2d 284 (Fla. 1990), which held that a defendant has a right to maintain his or her innocence at any stage of the proceedings, even when confronted with overwhelming evidence of guilt. Read in context, the language in *Holton* was part of its holding that "entering a plea of not guilty does not preclude consideration by the sentencer of matters relevant to mitigation." *Id*. at 292. *Holton*'s language that a defendant has the right to "maintain his or her innocence" and that "[t]he fact that a defendant has pled not guilty cannot be used against him or her" was in the context of holding that the trial court erred in its ruling

[4]*See United States v. Segal*, 549 F.2d 1293, 1299 n. 3 (9th Cir. 1977) (stating, "a sentencing court could impose a harsh sentence as a penalty for the defendant's refusal to admit his guilt, since an admission would evidence the first step in rehabilitation."); *State v. Burgess*, 943 A.2d 727, 754 (N.H. 2008) (noting that a trial judge may consider a defendant's lack of remorse and stating that the "grounds for considering such evidence are that it may reflect upon a defendant's character and be pertinent in determining whether rehabilitation efforts would be successful."); *State v. Knight*, 701 N.W.2d 83, 88 (Iowa 2005) ("We conclude that a defendant's lack of remorse is highly pertinent to evaluating his need for rehabilitation and his likelihood of reoffending."; *Smith v. Commonwealth*, 499 S.E.2d 11, 14 (Va. Ct. App. 1998) (holding that sentencing judges may consider a defendant's lack of remorse because "[c]onsideration of a defendant's attitude 'play[s] an important role in the court's determination of the rehabilitative potential [and future dangerousness] of the defendant.'") (alterations in original).

that the mitigating circumstance of a defendant's inability to appreciate the criminality of his conduct or conform it to the law did not apply because he maintained his innocence. *Id*. at 292. *Holton* had nothing to do with lack of remorse.

Petitioner conflates a trial court's consideration of lack of remorse with judicial vindictiveness, which involves punishing a defendant for exercising the right to a trial or appeal. In the present case, the First District properly separated judicial vindictiveness from consideration of lack of remorse and noted that it did not see any evidence that the trial court was vindictive or otherwise punished Petitioner for exercising a constitutional right. *Davis*, 268 So. 3d at 968.

Petitioner also contends that a defendant's willingness to show remorse may be considered to reduce a sentence, it may not be considered to increase a sentence. That contention is problematic because it comes from Florida's capital sentencing structure, *See Pope v. State*, 441 So. 2d 1073, 1078 (Fla. 1983) ("Any convincing evidence of remorse may properly be considered in mitigation of the sentence, but absence of remorse should not be weighed either as an aggravating factor nor as an enhancement of an aggravating factor"), and specific statutory authority to consider a showing of remorse to downward depart. § 921.0026(2)(j), Fla Stat. The First District correctly distinguished capital from non-capital sentencing. *Davis*, 268 So. 3d at 965. The maximum sentence in a capital case—death—requires a conviction and proof of a statutory aggravating factor. § 921.141(6)(a)-(p), Fla. Stat. Lack of

remorse is not among the listed aggravating factors, and therefore, cannot be used as an aggravator. However, defendants can offer anything as mitigation in capital sentencing, even non-statutory mitigators. *Hitchcock v. Dugger*, 481 U.S. 393, 394 (1987).

Non-capital sentencing is different because sentencing courts do not weigh "aggravators" and "mitigators" like capital sentencing courts. Instead, the maximum sentence in a non-capital case may be imposed based solely on the fact of a conviction. No additional findings are required. § 921.002(1)(g), Fla. Stat.; *Lane v. State*, 981 So. 2d 596, 598 (Fla. 1st DCA 2008). Thus, since Petitioner was a non-capital offender, the Legislature has empowered the trial court to sentence him to fifteen years' imprisonment whether he showed remorse or not because it was the fact of his conviction (not to mention his horrendously violent criminal history) that justified a sentence up to the statutory maximum.

Additionally, since remorse is a permissible factor in considering a defendant's request for a downward departure, § 921.0026(2)(j), Fla Stat., and is a permissible mitigating circumstance in capital cases, it cannot truly be an impermissible factor. A truly impermissible factor—race, religion, or national origin—cannot be considered to reduce a sentence because it cannot be considered at all. *Davis*, 268 So. 3d at 966. Remorse is the only factor that Petitioner claims can be used to his benefit but not his detriment in a non-capital case.

Petitioner makes two contentions regarding the federal case law and sentencing guidelines. First, Petitioner contends that the First District "effectively rewrote Florida's sentencing statute and imported the substantive law" of federal and other state courts. (IB. 11). Second, Petitioner contends that even under the federal sentencing guidelines, lack of remorse cannot increase a sentence because it operates similarly to Florida's downward departure scheme. (IB. 12). Both contentions are incorrect. First, the First District did not rewrite the CPC. It's decision simply acknowledges what has always been true under the CPC: a non-capital sentencing court has wide discretion to consider anything it deems relevant, except for certain impermissible factors such as race, religion, national origin, etc. Second, Petitioner's characterization of the federal sentencing guidelines is incorrect, as a sentencing court may use lack of remorse to increase a sentence. *See United States v. Cruzado-Laureano,* 527 F.3d 231, 236 (1st Cir. 2008) ("lack of remorse may permissibly serve two different functions under the Guidelines: to disqualify a defendant from receiving a reduction in offense level for acceptance of responsibility and as a factor in determining the defendant's particular sentence within the Guidelines range.")

Finally, Petitioner asserts that there is no statutory basis in Florida for a trial court to use lack of remorse in determining an appropriate sentence. (IB. 17). Petitioner is incorrect for two reasons. First, non-capital sentencing courts have statutory authority to impose any sentence up to the statutory maximum based on

nothing but the fact of a conviction. § 921.002(1)(g), Fla. Stat.; *Lane*, 981 So. 2d at 598. There is no exclusive list of factors a non-capital sentencing court is limited to considering. Second, the legislature has mandated that PSIs provide the trial court with a wide variety of information to aid it in determining the defendant's potential for rehabilitation and an appropriate sentence. § 921.231(1)(a)-(o), Fla. Stat. Among other things, a PSI must include "[t]he views of the person preparing the report as to the offender's motivations and ambitions and an assessment of the offender's explanations for his or her criminal activity." § 921.231(1)(*l*), Fla. Stat. A defendant's motivations, ambitions, and explanations of conduct encompass remorse.

II. Consideration of Lack of Remorse Offends Neither the Presumption of Innocence nor the Right to Remain Silent

Petitioner also contends that considering a defendant's lack of remorse undermines the presumption of innocence, (IB. 11, 21), and that "[a] trial court violates due process in considering lack of remorse or failure to take responsibility because it infringes on the defendant's right to testify and not incriminate himself." (IB. 13).

Petitioner's first contention—that considering lack of remorse undermines the presumption of innocence—merits little discussion. A jury found Petitioner guilty and the trial court adjudicated and sentenced him. (R. 33, 144-52). Thus, Petitioner's presumption of innocence no longer exists. This Court has stated that the

presumption of innocence "ceases upon the adjudication of guilt and the entry of sentence." *Vaccaro v. State*, 11 So. 2d 186, 187 (Fla. 1942) (en banc).

Petitioner's second contention—that consideration of lack of remorse violates a defendant's right to testify and to not incriminate himself—likewise fails. First, Petitioner's contention that defendants might feel pressured into making the difficult choice between exercising the right to remain silent and seeking leniency has already been rejected. In *McGautha v. California*, 402 U.S. 183, 185 (1971)[5], the Supreme Court addressed an Ohio procedure that required a jury to determine both guilt and punishment after a single trial and in a single verdict. The Court rejected the argument that "the desire to address the jury on punishment unduly encourage[d] waiver of [his] privilege to remain silent on the issue of guilt." *Id*. at 213. The Court explained, "[t]he criminal process, like the rest of the legal system, is replete with situations requiring 'the making of difficult judgments' as to which course to follow.... Although a defendant may have a right, even of constitutional dimension, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose." *Id*. *See also Harvey v. Schllinger*, 76 F.3d 1528, 1535 (10th Cir. 1996) (holding that right against self-incrimination is not

[5] vacated in part on other grounds in *Crampton v. Ohio*, 408 U.S. 941 (1972), in light of *Furman v. Georgia*, 408 U.S. 238 (1972). Because *Furman* did not undercut any of *McGautha*'s rationale concerning self-incrimination, *McGautha*'s self-incrimination rationale is still valid.

violated when a defendant chooses to allocate in the hope of a reduced sentence, and that just as a defendant may choose to testify at trial, he or she may choose to speak at sentencing); *State v. Wilson*, 985 P.2d 840, 843-44 (Or. Ct. App. 1999) (stating, "[t]he inescapable fact that defendant may not simultaneously exercise his constitutional right to say something [at sentencing] and his constitutional right to say noting [in the face of pending charges] hardly provides a reason to conclude that he may not be sentenced for the crimes of which he stands convicted.")

Criminal defendants are not required to allocute; and no one forced Petitioner to do so. At the sentencing hearing, defense counsel made clear that Petitioner chose to speak when she stated at the end of her argument, "Mr. Davis did want to address the Court also, Your Honor." (R. 189). Once Petitioner freely allocuted, the trial court was free to consider his statements.

While the right against self-incrimination applies to the penalty phase, "it is not uncommon for a constitutional rule to apply somewhat differently at the penalty phase than it does at the guilt phase." *White v. Woodall*, 572 U.S. 415, 421 (2014). A sentencing court "may not weigh the exercise of [Fifth Amendment] rights against the defendant." *United States v. Rodriguez*, 959 F.2d 193, 197 (11th Cir. 1992) (per curiam). However, "[j]ust as a jury weighs a defendant's testimony once he waives his Fifth Amendment privilege at trial, a judge may consider a defendant's freely offered allocution regarding remorse during sentencing." *United States v. Stanley*,

739 F.3d 633, 652 (11th Cir. 2014). *See also Brown v. State*, 27 So. 3d 181, 184-85 (Fla. 2d DCA 2010) (Kelly, J., Concurring) ("Once a defendant chooses to testify, he places his credibility at issue, and the sentencing court may take his statements and demeanor into consideration.") A defendant thus waives the right to remain silent by allocuting.

Stanley is instructive. Convicted of securities fraud, one of the defendants allocuted and the trial court considered his lack of remorse. 739 F.3d at 652. The court described the allocution as follows:

> [i]n the face of the substantial evidence presented at trial and the jury's verdict, Harris repeatedly denied any wrongdoing, insisting that "[t]his elaborate story is not what happened…. I was completely transparent." "I didn't steal no money from nobody." He imagined that "[t]he jury convicted me because I got scared and I fled, I panicked. That's the only reason." Finally, he implored the court, "[y]our Honor, I am not this person y'all are making me out to be. I don't do fraud. Never have. Never will. I don't take money from people. I am just not that person."

Id. The court affirmed, noting "[j]ust as a jury weighs a defendant's testimony once he waives his Fifth Amendment privilege at trial, a judge may consider a defendant's freely offered allocution regarding remorse during sentencing." *Id*. Rather than conditioning the defendant's sentence on his decision to exercise a constitutional right, the trial court "permissibly considered Harris's voluntary, repeated, emphatic, and unbelievable statements of innocence." *Id*. (emphasis added).

The instant case is akin to *Stanley*. Like *Stanley*, Petitioner chose to allocute freely and voluntarily. In fact, Petitioner's allocution is far more outrageous and

conspiratorial than the one in *Stanley*. Yet Petitioner basically argues that the trial court was required to ignore virtually every word he uttered, as his entire allocution consisted of accusing others of misconduct and asserting that he was not guilty in the face of overwhelming evidence. There is no logical basis for a rule that allocutions may work in a defendant's favor but cannot also work to his or her detriment.

Relying on *Allen v. State*, 211 So. 3d 48 (Fla. 4th DCA 2017) and *Green v. State*, 84 So. 3d 1169 (Fla. 3d DCA 2012), Petitioner's contends that "[t]he prohibition against penalizing a defendant for not admitting guilt is designed to protect an individual's right of appeal or prospects of post-conviction relief that might be jeopardized by rewarding a defendant's admission of guilt following trial." (IB. 13). The problem with Petitioner's reliance on *Allen* and *Green* is the fact that both cases involved defendants who did not wish to speak at sentencing and the trial courts punished them for declining to speak. In *Allen*, the trial court expressly offered a quid pro quo, "I'm going to max you out to the most it can be unless you tell me the truth right now." 211 So. 3d at 51. After expressing frustration with counsel attempting to advise the defendant about the implications of admitting guilt, the trial court continued to press for the truth and Appellant denied any wrongdoing. *Id*. In *Green*, the defendant invoked his right to remain silent at sentencing and the trial

court openly expressed frustration with that decision and imposed the maximum sentence. 84 So. 3d at 1171.

This case is nothing like *Green*, *Allen*, or any other case involving a defendant exercising the right to remain silent at sentencing. Petitioner chose to allocute without pressure from the trial court, (R. 189), thereby waiving his right to remain silent. Just as a defendant's voluntary testimony at trial may be used to his or her detriment, so too may a defendant's voluntarily offered allocution.

III. Even if the Trial Court Erred by Considering Lack of Remorse, the Error Was Not Fundamental

Even if this Court declines to hold that a trial court may consider a defendant's lack of remorse at sentencing, it should not approve the application of fundamental error Petitioner advances and that the district courts have been using in the context of impermissible sentencing factors. There is a reason unpreserved errors receive a different level of scrutiny than preserved errors. In the sentencing context, an error is not fundamental unless a defendant can demonstrate that it resulted in a longer sentence. *Maddox*, 760 So. 2d at 99-100.

Despite the different level of scrutiny and heightened standard, Petitioner asks this Court to require appellate courts in Florida to reverse a sentence "if the comments by the trial judge can reasonably appear to suggest that imposition of the sentence was based, at least in part, on maintaining innocence or exercising a constitutional right." (IB. 4, 6). Some cases inappropriately applied that rule even

when the standard of review was fundamental error. *See Dumas v. State*, 134 So. 3d 1048 (Fla. 1st DCA 2013) (holding that trial court committed fundamental error because "[t]he court's statement can reasonably be read only as conditioning the sentence, at least in part, on Appellant's lack of remorse and claim of innocence….")

The rule Petitioner advances and that the district courts have been using—that reversal is required, whether preserved or unpreserved, when the trial court's comments can reasonably be read to base the sentence, at least in part, on lack of remorse—effectively eviscerates the preservation requirement. If the State bears the burden when the alleged error is unpreserved, there is no reason to apply the fundamental error standard at all. Put differently, the rule Petitioner advances and that the district courts have been using eviscerates the fundamental error standard and places the burden on the State to show why reversal is not warranted.

In addition to being an incorrect application of the fundamental error standard, the above-mentioned rule promotes sandbagging. *See Johnson v. State*, 120 So. 3d 629, 633 (Fla. 2d DCA 2013) (Altenbernd, J., dissenting) ("Had his trial lawyer actually objected to the judge's statement at sentencing, I am inclined to believe that the experienced sentencing judge would simply have withdrawn his reliance on that ground and sentenced Mr. Johnson to life in prison based on the evidence at trial and the presentations at the full sentencing hearing."); *Calloway v. State*, 37 So. 3d 891, 896-97 (Fla. 1st DCA 2010) (declining to promote "bizarre incentive" of defense

attorneys strategically failing to object to erroneous jury instructions to obtain a new trial). Likewise, had Petitioner's trial counsel objected, the trial court could have clarified that it would have imposed the maximum sentence even absent the improper consideration, as it could have relied on the other permissible factors it articulated— Petitioner's violent criminal history, the nature of the crime, or the fact that it involved a firearm. (R. 193). In fact, the trial court would not have even needed to rely on any of those permissible factors, as it could have imposed the maximum sentence based on nothing but the fact of a conviction. § 921.002(1)(g), Fla. Stat.; *Lane*, 981 So. 2d at 598.

Some district courts have applied what appears to be a harmless error test even in cases where they expressly stated that the fundamental error standard applied. *See Torres v. State*, 124 So. 3d 439, 442 (Fla. 1st DCA 2013) ("we cannot say that the sentence would have been the same without the court's impermissible consideration of religion."); *Nawaz v. State*, 28 So. 3d 122, 125 (Fla. 1st DCA 2010) ("Because it is unclear whether the trial court would have imposed the same sentence absent consideration of appellant's national origin, we must vacate appellant's sentence and remand for resentencing before a different judge."); *Santisteban v. State*, 72 So. 3d 187, 198 (Fla. 4th DCA 2011) ("We cannot say that the sentence would be the same without reliance on the impermissible ground.")

While the harmless error language in the above cases acknowledges that appellate courts should not reverse sentences every time a trial court considers an impermissible factor, it still does not accurately reflect the fundamental error standard and the fact that it is Petitioner's burden to establish fundamental error—not the State's burden to establish harmless error. Under the fundamental error standard, it is Petitioner's burden to demonstrate, based on the totality of the record, that the trial court's considering his lack of remorse affected the sentence. The trial courts consideration of Petitioner's lack of remorse, even if improper, does not rise to fundamental error because the record demonstrates that it did not affect the sentence.

The PSI recommended the maximum sentence—fifteen years' imprisonment—and explained its rationale:

> The defendant has an extensive prior criminal history which includes numerous violent offenses. The defendant has had opportunities to rehabilitate, however apparently chooses to continue to engage in criminal behavior. The defendant also appears to have a history of gang related activity. The defendant apparently continues to be a threat to the safety of the community. <u>It is therefore respectfully recommended that he be sentenced to the maximum amount of incarceration allowed by the sentencing guidelines</u>.

(SR. 169) (emphasis added). The prosecutor provided the trial court with Petitioner's scoresheet and requested the maximum sentence—fifteen years' imprisonment—based on Petitioner's violent history, such as attempted murder, robbery with a firearm, and aggravated assault with a deadly weapon, among others, and "flagrant

running afoul of the law, yet again with a firearm….” (R. 141, 188). Defense counsel asked for a bottom of the guidelines sentence, 118.125 months’ imprisonment. This means that the permissible sentencing range was between 9.8 and 15 years. To prevail under the fundamental error standard, Petitioner must demonstrate that the trial court’s decision to impose the maximum over the bottom of the guidelines turned on lack of remorse, rather than the numerous prior convictions for violent crimes such as attempted murder, armed robbery with a firearm, and aggravated battery and assault with a deadly weapon. In other words, to prevail under the fundamental error standard, Petitioner must demonstrate that his violent history and insistence on continuing to possess firearms is not worth at least 5.2 years over the bottom of the guidelines.

In sum, the trial court imposed the maximum sentence—fifteen years’ imprisonment—after the PSI and the prosecutor recommended the exact same sentence, and after Petitioner’s counsel asked for approximately ten years. The trial court’s comments did not draw an objection. Under the fundamental error standard, Petitioner cannot demonstrate that the “you still fail to take any responsibility” comment affected the sentence.

In clarifying the fundamental error standard in the context of unpreserved claims of impermissible sentencing factors going forward, this Court should reiterate that it is a defendant’s burden to demonstrate fundamental error—not the State’s

burden to demonstrate harmless error. For too long the district courts have required the State to prove harmless error even in cases where consideration of impermissible sentencing considerations are unpreserved. This Court should approve the First District's affirmance of the sentence even if it does not agree with its holding that lack of remorse can be a considerable factor at sentencing because Petitioner cannot demonstrate, based on the totality of the record, that it affected the sentence.

CONCLUSION

Based on the foregoing discussion, the State respectfully requests this Honorable Court approve the First District Court of Appeal's holding that lack of remorse is a permissible factor in non-capital sentencing proceedings.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by e-mail to Lori Willner at Lori.Willner@flpd2.com on August 27, 2019.

Respectfully submitted and served,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing was printed in Times New Roman 14 point and thereby satisfies the font requirements of Florida Rule of Appellate Procedure 9.210.

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