IN THE SUPREME COURT OF FLORIDA

ALVIN DAVIS,

Petitioner,

vs. CASE NO. SC19-716

STATE OF FLORIDA,

Respondent.

_____/

ON DISCRETIONARY REVIEW
FROM THE FIRST DISTRICT COURT OF APPEAL

INITIAL BRIEF OF PETITIONER

ANDY THOMAS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

LORI A. WILLNER
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 857149
301 S MONROE ST., SUITE 401
TALLAHASSEE, FLORIDA 32301
(850) 606-8500
lori.willner@flpd2.com

ATTORNEYS FOR PETITIONER

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PRELIMINARY STATEMENT

This Court accepted discretionary review of *Davis v. State,* 268 So. 3d 958 (Fla. 1st DCA 2019) based on the First District Court of Appeal's certification of the following question of great public importance:

> **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?**

Mr. Davis suggests that a more appropriate certified question would be:

> **DOES A TRIAL COURT COMMIT LEGAL ERROR WHEN IT TAKES INTO CONSIDERATION FAILURE TO ACCEPT RESPONSIBILITY OR LACK OF REMORSE IN DETERMINTING A SENTENCE?**

The Record on Appeal contains three volumes. Volume I is the clerk's record and will be referenced "(R. [page number]." Volume II is the transcript of the trial and will be referenced "(T. [page number]". Volume III contains jury selection.

STATEMENT OF THE CASE

(1) Nature of the case. This is an appeal of a judgment and sentence in a criminal case following a jury trial.

(2) Course of proceedings. Mr. Davis was charged with and convicted of possession of a firearm by a convicted felon after a jury trial. (R. 9). The First District Court of Appeal affirmed the conviction and certified a question of great public importance. *Davis v. State,* 268 So. 3d 958 (Fla. 1st DCA 2019).

(3) Disposition in the lower tribunal. Mr. Davis was sentenced to 15 years in prison, the maximum for a second-degree felony. (R. 146).

STATEMENT OF THE FACTS

A jury convicted Mr. Davis of possessing a firearm by a convicted felon. (T. 7; R. 187). Mr. Davis did not testify. At sentencing,

Mr. Davis stated:

> If I did anything wrong, or said anything that's inappropriate, I would apologize. Right now…I would be asking for leniency, but I did nothing wrong. I am not guilty of the charge I'm accused of. I am innocent.

Immediately following that the trial court stated:

> 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. 192-193).

SUMMARY OF THE ARGUMENT

The certified question should be answered by this Court by reiterating the rule in Florida that a lack of remorse or a failure to take responsibility may not be considered at sentencing. Resentencing is required 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.

The context of the trial court's comment that Mr. Davis failed to take responsibility was made in response to his protestation of innocence and was one of the factors upon which the trial court based the sentence. Thus, Mr. Davis's punishment was based, at least in part, on his protestation of innocence. This Court has held that due process guarantees an individual the right to maintain his innocence even when faced with overwhelming evidence of guilt. *Holton v. State,* 573 So. 2d 284 (Fla. 1990).

The opinion of the First District invades the province of the Legislature by rewriting Florida's sentencing statute and abandons long-standing case law. That court's approach would have Mr. Davis accept responsibility while simultaneously maintaining his innocence, a right afforded to all criminal defendants under the U.S. and Florida constitutions. *See* U.S. Const. amends. V, VI & XIV; art I, §§ 9, 16(a), & 22, Fla. Const.

ARGUMENT

WHEN A TRIAL COURT TAKES INTO CONSIDERATION THAT A DEFENDANT HAS FAILED TO SHOW REMORSEOR TO ACCEPT RESPONSIBILITY, IT COMMITS ERROR ENTITLING THE DEFENDANT TO A NEW SENTENCING HEARING BEFORE A DIFFERENT JUDGE.

Standard of Review: The standard of review of an improper sentencing consideration is de novo. *Norvil v. State,* 191 So. 3d 406 (Fla. 2016).

The Merits:

A. The Law in Florida prior to the *Davis* opinion.

This Court held almost thirty years ago in *Holton v. State* that a defendant has the right to maintain his or her innocence under the Florida and U.S. Constitutions. 573 So. 2d 284, 292 (Fla. 1990). Due process is violated when a trial court uses a protestation of innocence against a defendant. *Id.* In *Cromartie v. State,* 70 So. 3d 559 (Fla. 2011), this Court held that consideration of an improper sentencing factor is error. In *Pope v. State,* 441 So. 2d 1073 (Fla. 1983), this Court held that "lack of remorse should have no place in the consideration of aggravating factors." District Courts of Appeal are required to follow case law set forth by the Supreme Court. *Hoffman v. Jones,* 280 So. 2d 431 (Fla. 1973).

Until now, the First District Court of Appeal had repeatedly held that a defendant's failure to take responsibility and lack of remorse are improper

sentencing considerations. *See e.g., Wood v. State,* 148 So. 3d 557 (Fla. 1st DCA 2015) (holding a sentence conditioned even in part on a lack of remorse violates due process and warrants remand for resentencing before a new judge.) *Dumas v. State,* 134 So. 3d 1048 (Fla. 1st DCA 2013) (holding lack of remorse or failure to take responsibility may not be considered by the trial court when fashioning an appropriate sentence); *Jackson v. State,* 39 So. 3d 427 (Fla. 1st DCA 2010) (finding the statement by the trial court can reasonably be read only as conditioning the sentence, at least in part, upon appellant's claim of innocence, in violation of established law).[1]

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[1] There seems to be a slight discrepancy as to whether the standard includes the word "only." One of the early mentions of this test was in *Johnson v. State,* 679 So. 2d 831 (Fla. 1st DCA 1996). The Court stated that the trial court's comment "may reasonably be read to suggest that appellant's sentence was the result, at least in part, of his decision to exercise his constitutional right to insist on a jury trial." This was the same language in *Lyons v. State,* 730 So. 2d 833 (Fla. 4th DCA 1999); *Moorer v. State,* 926 So. 2d 475 (Fla. 1st DCA 2006); and *Nawaz v. State,* 28 So. 3d 122 (Fla. 1st DCA 2010). Then suddenly, in *Jackson v. State,* 39 So. 3d 427 (Fla. 1st DCA 2010), the First DCA stated the test to be whether the words of the trial court could reasonably be read **only** as conditioning the sentence, at least in part, upon appellant's claim of innocence, but it cited to *Nawaz* for this proposition, and the word "only" was not part of the *Nawaz* opinion. Subsequent decisions sometimes use only and sometimes do not. *See Dumas v. State,* 134 So. 3d 1048 (Fla. 1st DCA 2013)(contains "only"); *Wood v. State,* 148 So. 3d 557 (Fla. 1st DCA 2014) (does not contain the word only); *and Love v. State,* 235 So. 3d 1037 (Fla. 2018) (no use of the word only). Mr. Davis contends that the words of the trial court can only be read to suggest that his sentence was based, at least in part, on his decision to maintain his innocence. No one disputes that the trial court relied on Mr. Davis's failure to accept responsibility when imposing the sentence. It explicitly stated that it did.

The First District followed this precedent through *Burns v. State*, 43 Fla. L. Weekly D1569 (Fla. 1st DCA July 11, 2018), *review granted,* 2019 WL 76628 (Fla. January 2, 2019), where it held that a trial court cannot base a sentence on a defendant's choosing to maintain innocence. It also certified a question of great public importance to this Court as to whether a sentencing court can consider lack of remorse after the defendant has apparently lied under oath at the trial. This Court accepted jurisdiction but then stayed review pending this case.

The overwhelming weight of authority supports the First District's holding in *Burns.* Every District follows this rule of law. In *Heatly v. State,* 192 So. 3d 584 (Fla. 2d DCA 2016), that court afforded Mr. Heatly a new sentencing hearing because the trial court stated that Mr. Heatly would not "own up to it." *Id.* at 585; *see also Pehlke v. State,* 189 So. 3d 1036 (Fla. 2d DCA 2016) (holding it was error for trial court to consider defendant's failure to demonstrate remorse).

The Third District has also recognized that consideration of lack of remorse constituted error. *Lawton v. State,* 207 So. 3d 359 (Fla. 3d DCA 2016). *See also Green v. State,* 84 So. 3d 1169 (Fla. 3d DCA 2012) (holding that a lack of remorse, failure to accept responsibility, or exercising of one's right to remain silent may not be considered by the trial court in fashioning an appropriate sentence).

The Fourth District recently held that it is constitutionally impermissible for the trial court to consider the fact that a defendant continues to maintain his

innocence and is unwilling to admit guilt. *James v. State,* 264 So. 3d 982 (Fla. 4th DCA 2019). The court stated resentencing is required under this circumstance even if the refusal to admit guilt is but one of several factors considered by the trial court in imposing the sentence. *Id.* at 987; *see also Davis v. State,* 149 So. 3d 1158 (Fla. 4th DCA 2014) (considering a defendant's lack of remorse in imposing sentence is error).

Finally, the Fifth District Court recently held that when the trial court considers whether the defendant was truthful in his testimony or failed to show remorse, error or denial of due process may result. *Beauchamp v. State,* 44 Fla. L. Weekly D1351a (Fla. 5th DCA May 24, 2019). The Court stated "the sentencing judge expressly indicated that he considered Beauchamp's untruthfulness and lack of remorse when determining the sentence to be imposed". *Id.; see also Strong v. State,* 263 So. 3d 199 (Fla. 5th DCA 2019) (trial courts may not base sentencing decisions on lack of remorse or failure to take responsibility).

Trial judges can rely on lack of remorse in determining whether to mitigate a sentence but not to increase a sentence. *Catledge v. State,* 255 So. 3d 937 (Fla. 1st DCA 2018); *see also Ritter v. State,* 885 So. 2d 413 (Fla. 1st DCA 2004) (holding remorse can be grounds for mitigation of a sentence, but the opposite is not true). Even when a defendant requests mitigation, if the trial court's comments regarding remorse do not indicate it is only considering it for the purpose of rejecting

mitigation, the defendant is entitled to a new sentencing hearing. *Chiong-Cortes v. State,* 260 So. 3d 1154 (Fla. 3d DCA 2018); *see also Shepard v. State,* 227 So. 3d 746, 749 (Fla. 1st DCA 2017). Furthermore, it is not the mere mention by the trial court of an impermissible factor that requires a new sentencing hearing, but rather the consideration of the impermissible factor in determining the sentence. *Hayes v. State,* 150 So. 3d 249, 252 (Fla. 1st DCA 2014).

This was the state of the law prior to *Davis.* The First District receded from its cases which do not allow a trial court to consider failure to take responsibility or lack of remorse in determining the sentence, even when the defendant has not introduced remorse into the equation by requesting a downward departure or mitigation.

B. How the *Davis* opinion was wrongly decided.

The *Davis* opinion is incorrect in two ways:

1. The majority opinion declares that considering remorse or a lack of responsibility is not a "truly impermissible sentencing factor." *Davis 268 So. 3d* at 966. This is contrary to precedent from this Court and all five District Courts of Appeal. The majority asserts that, because a trial court is allowed to consider remorse to fashion a favorable sentence, lack of remorse may be held against a defendant. *Id*. This ignores the reality of how remorse is introduced at a sentencing hearing.

If a defendant wants to raise remorse in asking for a more favorable sentence, a trial judge is free to act on this request. There is no correlation between this process and the penalty for exercising a constitutional right. "It is only a punitive reliance on improper factors in sentencing that is improper." *Davis*, 268 So. 3d at 976, (J. Kelsey, concurring). The error in this case was the trial court's use of its perception of Mr. Davis's lack of responsibility because he failed to admit his guilt. The trial court thus violated Mr. Davis's due process rights and his exercise of his right to maintain his innocence.

As this Court held in *Pope v. State,* because an absence of remorse can only be inferred from negative evidence, a trial court can commit error when it infers a lack of remorse from the exercise of constitutional rights. 441 So. 2d 1073, 1078

(Fla. 1983). While the majority does not state it wants to abolish a defendant's right to maintain his innocence, this is in effect what will happen when a trial court is permitted to infer a lack of remorse from a defendant's continued protestation of innocence.

The majority writes that a "defendant's remorse or willingness to accept responsibility comprises part of the whole picture." *Davis* 268 So. 3d at 964. This is misleading. When consideration of these factors conflicts with exercise of a constitutional right or infringement on a protected class, it cannot be part of the whole picture. The majority concedes that a trial court cannot base its decision on religion, for example. *Davis* 268 So. 3d at 966.

The *Davis* opinion changes the law by abandoning Florida's bright-line test, as well as dozens of prior cases, and it creates conflict with every other district as well as ignores the constitutional protections afforded all criminal defendants. The constitution does not allow for a sentence to be based, even in part, on consideration of a defendant's failure to take responsibility because presumption of innocence is the foundation of our criminal justice system.

2. The First District misapprehends how remorse can be used under the federal sentencing guidelines. The First District effectively rewrote Florida's sentencing statute and imported the substantive law of federal and other states' standards into Florida's sentencing process. *Davis* at 985, (Makar, J., dissenting.)

The First District notes that the federal sentencing guidelines consider acceptance of responsibility as a legitimate and appropriate factor to reduce a sentence. *Davis,* 268 So. 3d at 963. The federal statute specifically allows character to be considered. *See* 18 U.S.C. § 3661 (providing that no limitation shall be placed on the information concerning the background, character and conduct of a person convicted of an offense for the purpose of imposing a sentence).

The Florida Legislature has not adopted the federal sentencing guidelines which permit considering lack of remorse. Furthermore, even under the federal sentencing guidelines, it is reversible error for a trial court to consider lack of remorse if this infringes on the defendant's right to maintain his innocence. *See U.S. v. Whitten,* 610 F.3d 168 (2nd Cir. 2010) (the federal sentencing guidelines do not provide for a harsher sentence for going to trial than for entering a plea). The application of acceptance of responsibility under the federal sentencing scheme is akin to the use of that factor in Florida in a downward departure sentence. A defendant in federal court who clearly demonstrates acceptance of responsibility for his offense may get a decrease of the offense level by 2 or 3 levels. However, there is nothing in the federal guidelines that allows for an increase in the level of offense for not accepting responsibility. *See Davis v. State*, 268 So. 3d at 963.

C. Why this Court should answer the revised question "yes."

There are two reasons for this Court to answer yes.

1. Under Art. I, § 22, of the Florida Constitution, as well U.S. Const. amends. V, VI & XIV, Mr. Davis has the right to maintain his innocence throughout the legal proceedings. *See also Holton v. State,* 573 So. 2d 284 (Fla. 1991). "Due process guarantees an individual the right to maintain innocence even when faced with evidence of overwhelming guilt." *Id.* Due process is violated when a trial court uses a protestation of innocence against a defendant. *Id.* A defendant has the right to plead not guilty and the right to remain silent. *See also Davis v. State,* 149 So. 3d 1158 (Fla. 4th DCA 2014) (holding when a court predicates the length of a sentence on the defendant's failure to show repentance, it violates the defendant's right not to incriminate himself). 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 to not incriminate himself.

The 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. *Allen v. State,* 211 So. 3d 48 (Fla. 4*th* DCA 2017). "Allowing a sentencing court to penalize a defendant for not admitting guilt after a conviction or adjudication would jeopardize various rights attached to these post-trial

processes and chill a defendant's right to remain silent." *Id.* at 54; *see also Green v. State,* 84 So. 3d 1169 (Fla. 3d DCA 2012). The Third District explains that:

> When a defendant chooses to remain silent at a sentencing hearing, and the trial court regards this lack of remorse or a failure to accept responsibility, it causes an impermissible chilling effect upon a defendant's due process rights, and cannot serve as a constitutionally permissible sentencing consideration. A defendant would face a Hobson's choice between his right to remain silent (thus maintaining his innocence and preserving, as a practical matter, his appellate rights) and his right to allocution at sentencing.

Green, 84 So. 3d at 1172.

There is no valid reason for the First District to have jettisoned the long-standing principle that resentencing is required if the comments by the trial court can reasonably appear to suggest that the imposition of the sentence was based, at least in part, on maintaining innocence. When a trial court interprets a defendant's silence at sentencing as a lack of remorse or a failure to accept responsibility, this causes an impermissible chilling effect upon a defendant's due process rights. *Id.*

It is unclear why the First District implemented such a sea change in the law after decades of consistency. The court did not identify reasons to support such a dramatic shift other than it believed the federal system was better. As stated previously, the sentence in this case would not be allowed to stand in federal court either as it was a violation of constitutionally protect rights. Such an epic shift in

Florida's sentencing policy must be made by the legislature. *Davis,* at 85, (J. Makar, dissenting).

The Record supports Judge Wetherell's comment that there is "no way to interpret the trial judge's comment that Appellant 'still fails to take any responsibility for his actions' as anything other than a direct rebuke of Appellant for continuing to protest his innocence." *Davis,* 268 So. 3d at 981, (J. Wetherell, dissenting*).* The language of the trial court was plain and unambiguous. Judge Lewis stated "[b]ecause the trial court expressly stated that it considered Appellant's failure to take responsibility when sentencing him, Appellant's sentence should be vacated and the case remanded for resentencing before a different judge." *Davis,* 268 So. 3d at 978, (J. Lewis, dissenting).

If the trial court had stated, as suggested by Judge Winsor, that based on "the severity of your crimes, coupled with your extensive criminal history, warrant the maximum sentence, and based on these factors alone, that is the sentence I would impose," *Davis* at 966 n.4, then that would provide clear and unambiguous language for an appellate court to review and most likely the sentence would not have to be vacated. Here, the trial court did not say that. (R. 192-193). Indeed, the majority does not argue that the trial court did not consider Mr. Davis's lack of remorse, but rather that it is allowed to consider lack of remorse. This simply is not true under Florida law.

This Court should continue the prophylactic rule against factoring in a defendant's lack of remorse or assertion of innocence. It serves the cause of justice far better than a rule which extends due process protections to some defendants but not others depending on whether the trial court believes the defendant has shown a failure to accept responsibility or lack of remorse, or other subjective factors. Defendants in similar posture should receive similar sentences.

Judge Makar, in his dissent, noted that "sentencing on objective factors is difficult enough without judicially injecting a subjective, nonstatutory, and emotion-laden factor into the process; persons convicted of a crime can be sentenced on what they did and the harm they caused to the victims (objective factors) versus the perceived lack of an emotion or affect at sentencing (subjective factor)." *Davis, 268 So. 3d* at 987.

It would be difficult for one to demonstrate remorse in any meaningful way and also maintain their innocence. *See Mischler v. State,* 458 So. 2d 37 (Fla. 4th DCA 1984), *approved,* 488 So. 2d 523 (Fla. 1986). Trial courts have discretion and flexibility in imposing sentences, but the sentence must be based on objective criteria. A permissible sentencing factor is one that can be considered without conflicting with constitutional protections or invoking subjective criteria such as lack of remorse or failure to accept responsibility, and is consistent with the directives of the CPC.

2. There is no statutory authority in Florida to allow a trial court to use a perceived failure to show remorse or accept responsibility in determining a sentence.

Section 921.002 Florida Statutes (2018) states in part that:

> (1) The provision of criminal penalties and of limitations upon such penalties is a matter of predominantly substantive law and, as such, is a matter properly addressed by the Legislature. The Legislature, in the exercise of its authority and responsibility to establish sentencing criteria, to provide for the imposition of criminal penalties, and to make the best use of state prisons so that violent criminal offenders are appropriately incarcerated, has determined that it is in the best interest of the state to develop, implement, and revise a sentencing policy. The Criminal Punishment Code embodies the principles that:
>
> (a) Sentencing is neutral with respect to race, gender, and social and economic status.
>
> (b) The primary purpose of sentencing is to punish the offender. Rehabilitation is a desired goal of the criminal justice system but is subordinate to the goal of punishment.
>
> (c) The penalty imposed is commensurate with the severity of the primary offense and the circumstances surrounding the primary offense.
>
> (d) The severity of the sentence increases with the length and nature of the offender's prior record.

The Criminal Punishment Code (CPC) is meant to punish individuals based on objective criteria such as the nature of the offense and the offender's criminal

history**.** *Hall v. State,* 823 So. 2d 757 (Fla. 2002), abrogated on other grounds recognized in *State v. Johnson,* 122 So. 3d 856 (Fla. 2013). The CPC is "unambiguous concerning the factors a trial court may consider in sentencing a defendant." *Norvil v. State,* 191 So. 3d at 409. Any factors which fall outside the parameters of the CPC are impermissible sentencing factors. *Id.*

The CPC does not include lack of remorse as a basis for increased punishment. If the Legislature had intended to include lack of remorse, it could have done so. *see Norvil v. State*, *supra.* This Court referenced both sections 921.0021 and 921.231 in *Norvil.* Section 921.231 refers to a presentencing investigation (PSI) report, which has the purpose of providing the sentencing court with helpful information. In that case, the relevant information was arrests and convictions prior to the time of the primary offense and not subsequent to the primary offense. When judges rely on factors not enumerated in the CPC, they undermine express legislative directions to maximize the finite capabilities of correctional facilities. "Sentencing guidelines are intended to eliminate unwarranted variation in the sentencing process by reducing the subjectivity in interpreting specific offense and offender-related criteria and in defining their relative importance in the sentencing decision." Fla. R. Crim. P. 3.701(b).

The Legislature allows a trial court to consider lack of remorse as a mitigating factor after a request for a downward departure. *See* § 921.0026(2)(j)

("The offense was committed in an unsophisticated manner and was an isolated incident for which the defendant has shown remorse"). This was not the case here.

Although section 921.002(1)(g), Fla. Stat. (2018) states that "the trial court judge may impose a sentence up to and including the statutory maximum for any offense…," it may only do so when it uses permissible sentencing factors. No court would allow a sentence to stand if it found that a sentence was based on an impermissible sentencing factor; the question here is whether the trial court relied on such a factor. The Record clearly demonstrates that it did.

D. Applying the law to the facts of this case.

Mr. Davis entered a plea of not guilty, preceded to trial, and continued to maintain his innocence at sentencing.

Mr. Davis stated:

> If I did anything wrong, or said anything that's inappropriate, I would apologize. Right now…I would be asking for leniency, but I did nothing wrong. I am not guilty of the charge I'm accused of. I am innocent.

Immediately following that the trial court stated:

> 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. 192-193).

The court plainly said that the sentence was based on failure to accept responsibility. At all pertinent times, Mr. Davis maintained his innocence. Accordingly, the court was prohibited from considering Mr. Davis's purported failure to accept responsibility when determining the length of his sentence.

Until *Davis,* Florida had "an easily administered bright-line sentencing rule for Florida judges: do not punish—or appear to punish—a defendant who maintains his innocence for a perceived lack of remorse or the failure to take responsibility or accept guilt for the crime proven." *Davis,* at 268 So. 3d at 981

(Makar, J. dissenting). This bright-line rule should be applied here where the trial court's comments may reasonably be read to suggest that Mr. Davis's sentence was the result, at least in part, of Mr. Davis's right to maintain his innocence.

When the trial court stated that it believed the jury got the decision right and that Mr. Davis should have accepted responsibility, this was a direct encroachment on Mr. Davis's right to maintain his innocence. The reasonable interpretation of the trial court's words are that it improperly considered Mr. Davis's failure to take responsibility and that it did so in violation of Mr. Davis's right to maintain his innocence. The specific harm here is not the sentence itself, but rather the denial of the right to be presumed innocent and to not be punished for proclaiming that right. The majority acknowledges that trial courts cannot punish defendants for exercising their jury-trial rights; *Davis* at 967; *citing Chaffin v Stynchocombe,* 412 U.S. 17 (1973), and yet adopted a rule of law that permits a sentencing judge to do just that. It is impermissible to punish a defendant for exercising a constitutional right. *Corbitt v. New Jersey,* 439 U.S. 212 (1978).

Allowing a trial court to consider Mr. Davis's statement proclaiming his innocence in determining the sentence not only contravenes legislative policy but also cannot be reconciled with the principles upon which our jurisprudence system was founded. *See Bell v. Wolfish,* 441 U.S. 520 (1979) (the enforcement of the principle of presumption of innocence lies at the foundation of the administration

of our criminal law), *citing Coffin v. U.S.* 156 U.S. 432 (1895). This Court should continue to follow existing case law, constitutional principles, and the legislature's directives for the use of objective factors in determining sentences and answer the revised certified question "yes".

CONCLUSION

This Court should reverse the decision of the First District Court of Appeal and hold that failure to accept responsibility, lack of remorse, and maintaining innocence are improper sentencing considerations. Because the Record demonstrates the trial court considered an impermissible factor, failure to accept responsibility, when sentencing Mr. Davis, this Court should reverse and remand for resentencing before a different judge.

CERTIFICATES OF SERVICE AND FONT SIZE

I hereby certify that a copy of the foregoing has been furnished via the Florida Courts E-Filing Portal to Trisha Meggs Pate, Office of the Attorney General, at crimapptlh@myfloridalegal.com, this day of July 1, 2019. I hereby certify that this brief has been prepared using Times New Roman 14 point font.

Respectfully submitted,

ANDY THOMAS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

/s/ Lori A. Willner
LORI A. WILLNER
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 857149
301 S. MONROE ST., SUITE 401
TALLAHASSEE, FLORIDA 32301
(850) 606-8500
lori.willner@flpd2.com

COUNSEL FOR APPELLANT