

**IN THE SUPREME COURT OF FLORIDA**

SCOTTIE D. ALLEN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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CASE NO. SC19-1313

L.T. No. 18000203CFAXMX

DEATH PENALTY CASE

ON APPEAL FROM THE CIRCUIT COURT  
OF THE SECOND JUDICIAL CIRCUIT,  
IN AND FOR WAKULLA COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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## **PRELIMINARY STATEMENT**

This is the direct appeal of a conviction for first-degree murder and a sentence of death. Citations to the record in this brief will be designated as follows: references to the direct appeal record are referred to by “R,” followed by the page number; references to the jury trial transcript are referred to by “JT,” followed by the volume and page number; and Allen’s Initial Brief is referred to by “IB” followed by the page number.

## **STATEMENT OF THE FACTS**

### **Prior Violent Felony and Prison Sentence**

On December 30, 2002, Appellant and a female companion were helping the victim pack up her belongings and move. R-371; JT Vol. IV, p.350. Appellant’s female companion and the victim got into an argument. JT Vol. IV, p.350. Appellant’s female companion then blocked the victim from leaving. JT Vol. IV, p.350. When the victim walked over to a window to try to yell out, Appellant choked her to death. JT Vol. IV, p.350. The victim died by asphyxiation. R-371, 481.

On July 28, 2003, Appellant was found guilty of one count of second-degree murder and two counts of grand theft auto. R-359, 361. The first grand theft auto charge involved the theft of the victim’s car; the second charge involved the theft of a DVD player, stereo, laptop, digital camera, and a PlayStation II. R-481.

As to count one, Appellant received a sentence of 25 years with 78 days of jail credit. R-367. As to counts two and three, Appellant received 5-year sentences concurrent to each other and concurrent to the sentence imposed on count one; he also received 78 days of jail credit. *Id.*

### **Appellant and Mr. Mason Are Cellmates at Wakulla Correctional Institution**

In the fall of 2017, Ryan Mason was an inmate housed in cell 109 in the protective management unit inside the J Dorm at Wakulla Correctional Institution. JT Vol. I, pp.21, 24, 41. Mr. Mason's cellmate was Appellant. JT Vol. I, p.26.

### **Appellant Discovers Why Mr. Mason Is in Prison**

A "couple of weeks" prior to the beginning of October 2017, Appellant decided that he was going to kill Mr. Mason because Appellant believed that Mr. Mason "had been lying" to him. JT Vol. II, p.206. Mr. Mason told Appellant that he was in prison for "home invasion." JT Vol. II, p.206. One day when Mr. Mason went to take a shower, he "left his locker open." JT Vol. II, p.206. Taking advantage of the situation, Appellant saw Mr. Mason's "legal work." JT Vol. II, p.206. Surprised, Appellant thought that Mr. Mason was "a real piece of shit." JT Vol. II, p.206. Appellant "stewed on it" for a few days, told himself "fuck it," and then decided to kill Mr. Mason. JT Vol. II, p.206. Appellant thought Mr. Mason deserved to die because he was a "Chomo." JT Vol. II, p.203. According to Appellant, Mr. Mason as "a waste of space." JT Vol. II, p.203.

Roughly two weeks later on Friday, September 29, 2017, Appellant “raped” Mr. Mason “twice just for a little retribution.” JT Vol. II, p.207. On Saturday, September 30, 2017, Appellant raped Mr. Mason again. JT Vol. II, p.207. On Sunday, October 1, 2017, Appellant “didn’t mess with” Mr. Mason but told himself that he would kill Mr. Mason the following morning. JT Vol. II, p.207.

### **Appellant Murders Mr. Mason on 10/2/17**

On the morning of Monday, October 2, 2017, Appellant woke up and used the bathroom because he “had the flutter stomach.” JT Vol. II, p.207. At approximately 8:30 a.m. during the morning count, Sergeant Paul Gray observed both Mr. Mason and Appellant sitting on their bunks in their cell. JT Vol. I, pp.26, 32. The only people in that cell were Mr. Mason and Appellant. JT Vol. I, p.36. Mr. Mason said “good morning” to Sergeant Gray. JT Vol. I, p.26.

After the morning count, Appellant put a sheet up over the door. JT Vol. II, p.208. Appellant then “tapped [Mr. Mason] on the shoulder and ... said ‘You’re it.’” JT Vol. II, p.207. Mr. Mason “tried to fight.” JT Vol. II, p.207. Mr. Mason “did some kicking and knocked” both he and Appellant “off the bed onto the floor.” JT Vol. II, p.207. Mr. Mason got away from Appellant because he “was kicking like crazy.” JT Vol. II, p.207. To keep other inmates from hearing the struggle, Appellant “grabbed [Mr. Mason] from behind and pulled him over toward the toilet.” JT Vol. II, p.208. Then, Appellant “sat on [Mr. Mason’s] chest and held him.” JT

Vol. II, p.208. While Mr. Mason was still conscious, Appellant told him: “I’m going to strangle the life out of you. You’re a piece of shit. You know, tell the devil I said hello.” JT Vol. II, p.208. After that, Mr. Mason fell unconscious. JT Vol. II, p.208. Appellant then tied one of Mr. Mason’s T-shirts around Mr. Mason’s neck. JT Vol. II, p.209. Then, Appellant put Mr. Mason on his bed with “his head facing down.” JT Vol. II, p.209.

After killing his cellmate, Appellant “sat down, drank a cup of coffee, [and] ate a half a Honey Bun.” JT Vol. II, p.209. Because he thought Mr. Mason was “a piece of shit,” Appellant “was going to mutilate” Mr. Mason’s body by “cut[ting] his dick off and shov[ing] it down his throat.” JT Vol. II, p.209. Appellant “went on morning break” and unsuccessfully tried to use Mr. Mason’s canteen card. JT Vol. II, p.209. Appellant returned to his cell “to do some awful stuff to [Mr. Mason’s body].” JT Vol. II, p.209. When he entered the cell, Appellant noticed that Mr. Mason “had shit on himself, and it was the awfulest stink” that Appellant had ever smelled in his life. JT Vol. II, p.209. Appellant then said to himself: “Okay, you won that one. I’m not touching you. You won that one, pal.” JT Vol. II, p.209. Appellant moved Mr. Mason’s body “from his head facing [Appellant’s] bunk to his head facing toward the door.” JT Vol. II, p.210. Appellant made another cup of coffee and then went to lunch. JT Vol. II, pp.209-10.

Mr. Mason did not appear at breakfast that morning or lunch that afternoon, which was unusual. JT Vol. I, p.67. Appellant told Bobby Johnson, a fellow inmate in the J Dorm, that Mr. Mason was feeling a little under the weather. JT Vol. I, p.67. Mr. Johnson observed Mr. Mason “was still in bed.” JT Vol. I, p.67.

Appellant expected that the correctional officers would discover Mr. Mason’s body during the lunch count. JT Vol. II, p.210. When they did not, Appellant returned to his cell and made another cup of coffee. JT Vol. II, p.210. “[R]ight at two o’clock,” Appellant went out into the yard. JT Vol. II, p.210. That afternoon, Correctional Officer Tanglera Jordan was working “front support” at Wakulla Correctional Institution. JT Vol. I, pp.54-55. Not wanting to be in the cell for the 4:00 count with the body of Mr. Mason “smelling like that,” Appellant approached Officer Jordan and said: “I really hate to ruin your day, but I killed my roommate six-and-a-half hours ago.” JT Vol. II, pp.210-11, JT Vol. I, p.56. To Officer Jordan, Appellant appeared serious, but calm; he did not seem overly down or depressed. JT Vol. I, pp.56-57, 59.

Officer Jordan then informed a sergeant who was working with her in front support; that sergeant then notified Captain Nathan Strawn, the on-shift officer in charge. JT Vol. I, p.56. To Captain Strawn, Appellant appeared calm, interested, even-toned; he did not appear hyper, nervous, upset, or under the influence of any intoxicants. JT Vol. I, pp.62-63.

Shortly thereafter, Sergeant Gray and Captain Strawn headed over to the J Dorm. JT Vol. I, p.62. Starting at cell 101, Sergeant Gray started to check each cell. JT Vol. I, p.41. When he arrived at cell 109, Sergeant Gray observed a blanket obscuring the view into the cell. JT Vol. I, pp.43-44. Sergeant Gray pulled the sheet back and observed Mr. Mason deceased, “laying on the bunk next to the door with — completely covered with a blanket.” JT Vol. I, pp.41, 44. Mr. Mason had a T-shirt wrapped around his neck. JT Vol. I, p.46; JT Vol. II, p.161. Captain Strawn also observed Mr. Mason’s body in the cell. JT Vol. I, p.62.

Dr. Alexis Acosta, the medical director at Wakulla Correctional Institution, was notified of an unresponsive inmate. JT Vol. I, pp.48-49. She went to the J Dorm and found Mr. Mason “deceased at that time in his cell.” JT Vol. I, p.49. Mr. Mason had a T-shirt around his neck. JT Vol. I, pp.50, 80. The T-shirt was tied in a square knot. JT Vol. II, p.163. Mr. Mason’s face was “purplish” in color, he had swelling around his eyes and lips, he was cold to the touch, and he had lividity on his back. JT Vol. I, p.50. Lividity, or livor mortis, is post-mortem pooling of the blood that occurs when the heart stops beating; it usually appears two to four hours after death occurs. JT Vol. I, p.51; JT Vol. II, pp.168-69.

Later that same afternoon, Florida Department of Law Enforcement (FDLE) Agent Dana Lapointe interviewed Appellant at Wakulla Correctional Institution. JT

Vol. II, pp.184-97. During the interview, Appellant denied that he killed Mr. Mason. JT Vol. II, pp.190-91.

On October 3, 2017, Dr. Clark performed an autopsy on Mr. Mason's body. JT Vol. I, p.90; JT Vol. II, p.159. The cause of Mr. Mason's death was "ligature strangulation." JT Vol. II, pp.162, 181. The T-shirt, which was "really tight around the neck," served as the ligature. JT Vol. II, p.164. Because the ligature was so tight, it "actually dug into the skin"; Dr. Clark used a scalpel to "saw" the T-shirt off Mr. Mason's neck. JT Vol. I, p.98; JT Vol. II, p.166.

Although Dr. Clark did not see many of the typical signs that indicate manual strangulation, he could not rule out that Mr. Mason suffered from manual strangulation as well. JT Vol. II, pp.181-82. Strangulation occurs when the flow of deoxygenated blood from the brain through veins in the neck is cut off. JT Vol. II, p.178. Although the delivery of oxygenated blood to the brain through the carotid arteries may be cut off when pressure is applied to the neck, blood continues to flow to the brain through the vertebral arteries "that are based in the bone itself." JT Vol. II, p.178. When strangulation occurs, "the vertebral arteries are still pumping blood to the brain, but the blood isn't able to come down; it causes congestion." JT Vol. II, p.178. When that congestion occurs, the brain starts to swell. JT Vol. II, p.178. As the brain swells, blood vessels inside the brain become compressed. JT Vol. II, p.178. This vessel compression then "causes hypoxia, or a lack of oxygen to the

brain.” JT Vol. II, p.178. After one or two minutes of choking, a victim may lose consciousness — but regain consciousness if the blood flow returns to normal. JT Vol. II, pp.178-79. After three to five minutes of choking, “irreversible brain damage” starts to occur. JT Vol. II, p.178. While losing consciousness, a victim would be aware of what is happening. JT Vol. II, p.179.

Mr. Mason’s face was “really red, purple, discolored.” JT Vol. II, p.161. Mr. Mason suffered petechial hemorrhages on his face, caused by “a rupture of small blood vessels due to a marked congestion of the neck.” JT Vol. II, p.161. This occurs “because the blood is going into the head and tissues but not draining out because of the compression of the neck.” JT Vol. II, p.164; *see also* JT Vol. II, p.169 (“Now the intense congestion that you see above the ligature ... is due to the fact that that ligature was on there, compressed the veins, did not compress the vertebral arteries. Blood is going in, but it’s not coming out. So the blood is going to stay in the face and cause the red/purple discoloration.”). Mr. Mason also suffered petechial hemorrhaging in his eyes. JT Vol. II, p.173.

Fluid drainage from Mr. Mason’s mouth suggested pulmonary edema, “which is part of the dying process where the blood backs up into the lungs, causing fluid to mix with blood to kind of froth up and come out of the mouth and nose.” JT Vol. II, p.162. Mr. Mason’s “C-6 vertebral bony body was fractured.” JT Vol. II, p.171. A C-6 fracture would require “intense pressure ... and hyperextension of the head at

the same time.” JT Vol. II, p.171. Mr. Mason was alive when the fracture occurred “because there’s bleeding into the tissue.” JT Vol. II, p.171. Mr. Mason’s body also had “red bruising on the outside of his left wrist,” bruising on his left forearm, bruising behind the left knee, and bruising just above the left ankle. JT Vol. II, pp.174-76. Dr. Clark did not observe any sexual trauma to the body of Mr. Mason. JT Vol. II, p.180.

A DNA sample from the shirt around Mr. Mason’s neck matched the DNA profile of Mr. Mason and the profile of Appellant. JT Vol. II, p.138 (“It was 130 billion times more likely to come from Scottie Allen and Ryan Mason than Ryan Mason and an unrelated individual.”). Additionally, a DNA sample from Mr. Mason’s left-hand fingernails matched the DNA profile of Mr. Mason and the profile of Appellant. JT Vol. II, p.140 (“[T]he DNA profile ... is 700 billion times more likely to have originated from Scottie Allen and Ryan Mason than Ryan Mason and an unrelated individual.”).

## **STATEMENT OF THE CASE**

### **First Letter to the State Attorney’s Office**

On October 23, 2017, the State Attorney’s Office in Wakulla County received a letter from Appellant. JT Vol. II, p.142; *see also* R-352-53:

Yesterday some FL [Department of Corrections (DOC)] employees came to my cell here at Florida State Prison and questioned me about the murder. I am accused of that happened [sic] at Wakulla on 10-2-17. They told me I am facing the death penalty because of certain

circumstances. I want to clear some of these circumstances up because they have them wrong! I should not be facing the death penalty. This was a bad accident and I will accept a plea deal in the range of 3 to 5 years.

The DOC employee said that I was planning this murder for at least 3 months. The truth is I was only planning it for about two or three weeks at the most before I executed Ryan Mason. I did not plan it in a gangland style murder. All I did was rape him four times to make his life miserable the two days before I decided that he would die.

The DOC employees said that I raped him 16 times. I only raped him 4 times over a two-day period so they have the story wrong. Whoever told them it was 16 times is lying to make it look worse than it was. They also told me that I used a broom handle to sodomize him. I only used my fingers and cock so that too is a lie.

They said that I was plotting a terrorist type murder for 3 months. I actually started the plan in September and it happened in October. So you see they are saying it's a lot worse than it really was. This case really is a simple one.

The Major at Wakulla C.I. said that drugs were involved and that I was high and out of my mind when this murder occurred. I was not high and this too is a lie. I was sober and I knew exactly what happened. That Major is a liar and he will lie in court. I was not on drugs. I do smoke some good K-2 from time to time, but I was not on K-2 at the time of my murder.

So, you see, there are a bunch of lies in this case. I am sure there will be inmates lying on me saying that I used a shirt to choke the life out of Ryan. Really, the truth is that I used my hands and choked him until I saw the life ebb from his eyes. Afterwards, I put the shirt around his neck just to make sure.

Then the DOC Captain said that I had sex with him after I killed him. That too is untrue. I may have planned to — this is true — but, he shit himself after he died and I couldn't stand the smell and so I was not able to fuck him and so this is a lie that they are making up on me.

As I said, I think that 3 to 5 years is good deal for all of us and will resolve this case without all of these embarrassing lies being exposed. This case is not a death penalty case and it's a lot simpler than it looks.

I hope you will take all of this into consideration and we can resolve this case so everyone is happy. Take care and I hope to hear from you soon.

### **Second Interview with FDLE**

On March 9, 2018, FDLE Agent Lapointe conducted another interview with Appellant; this time, the interview took place at Florida State Prison. JT Vol. II, pp.199-200. Appellant admitted that he sent the letter received by the State Attorney's Office on October 23, 2017. JT Vol. II, p.202.

With regard to the killing of Mr. Mason, Appellant said: "I did what I did because I felt like [Mr. Mason] deserved it." JT Vol. II, p.202. Appellant stated that he was not under the influence of any drugs when he killed Mr. Mason. JT Vol. II, p.203. In describing how he felt about the murder of Mr. Mason, Appellant said: "I didn't feel bad to begin with.... I mean, I did what I did, you know, knowingly and intelligently.... And I'm willing to accept whatever consequences come with that, you know?" JT Vol. II, p.211.

### **Second Letter to the State Attorney's Office**

On June 4, 2018, Appellant sent a letter to the State Attorney's Office in Wakulla County. *See* R-402-03:

I am contacting you today to bring to your attention my intentions and thoughts on my pending criminal case of murder perpetrated on Ryan M. Mason on October 2nd, 2017 at Wakulla Correctional Institution.

First, I would like to assert the fact that I have given you both a written confession, and a taped clarification of that written confession obtained by F.D.L.E. I made it very clear that I made him suffer physically, mentally, and emotionally in the days leading up to his murder. I also made it very clear that in Ryan Mason's last moments on Earth I made sure he knew he was going to die. That early morning of October 2nd, 2017, he struggled valiantly in those last moments. Begging me with his eyes as I sat on his chest with my hands around his throat. The last words Ryan Mason heard in his last moment before he succumbed to unconsciousness was "Tell the Devil I said hello." I do not regret nor do I feel the least bit of remorse for killing Ryan Mason. I believe I've had that abundantly clear.

With the above said I can't help but wonder why to date 6-4-18 I have not been charged. I'm truly perplexed by this. I have given you your conviction on a silver platter! I feel as though you're not sure what degree of murder in which to charge me. Or maybe you are just waiting for the election cycle to end, I don't know. To be honest I would like to be done with this process before the November midterms. With that said, I now tell you my intentions.

If I am charged with 1st degree murder and you seek the death penalty (as you should) I have every intention of demanding fast and speedy trial.

I have every intention of waiving jury trial and going strictly for bench trial. I have every intention if found guilty of waiving the penalty phase jury. I will not plead guilty, but I have no intention of offering resistance either. I will not testify on my own behalf. This is to me clean, clear cut, and efficient.

With the information I have given I find it hard to believe that you won't seek the death penalty, but stranger things have happened.

So with that I ask you the following questions: (1) If you don't seek the death penalty, are you in essence saying I have a license to do it

again?; (2) If you don't seek the death penalty, are you in essence saying Ryan M. Mason deserved his fate?; and (3) If you don't seek the death penalty and I happen to kill again, is that blood on your hands? I believe it is! Do the right thing and seek the death penalty in this case. It's a slam dunk!

At this point in my life, I have nothing to lose, and think it in the best interest of all parties involved that you charge me with 1st degree murder, and seek the death penalty.

This letter was introduced into evidence during the penalty phase, with everything from "I do not regret nor do I feel the least bit of remorse for killing Ryan Mason" to the end of the letter redacted. JT Vol. IV, pp.339, 346, 358.

### **Indictment**

On June 25, 2018, a grand jury presented an indictment alleging that Appellant committed first-degree, premeditated murder. R-20.

### **Arraignment**

On October 3, 2018, Appellant was arraigned on the first-degree murder charge presented by the grand jury. R-908. Appellant was appointed counsel from the Public Defender's Office. R-919. Through counsel, Appellant entered a plea of not guilty. R-919. And, the State filed and served on Appellant a notice of intent to seek the death penalty. R-33-35, 919-22. Through counsel, Appellant expressed his desire to be present for every pre-trial hearing. R-924.

### **Waiver of Court-Appointed Counsel and Election to Proceed *Pro Se***

On November 26, 2018, Appellant filed “Defendant’s Waiver of Representation of Counsel.” R-57-58.

### **Competency Evaluation Ordered**

On December 7, 2018, the trial court issued an “Order Appointing Expert for Competency Evaluation.” R-71-74. The trial court based the order on Fla. R. Crim. P. 3.210 (competence to proceed) and *Indiana v. Edwards*, 128 S. Ct. 2379 (2008) (competency to proceed *pro se*). R-71.

### **Pretrial Hearing on 12/20/18**

At the start of the pretrial hearing on December 20, 2018, the trial court addressed Appellant’s request to represent himself. R-858. The trial court reminded Appellant that it “filed an order that requires a psychiatric evaluation before we change counsel or discharge [counsel].” R-858. The trial court informed Appellant that, should he change his mind after discharging counsel, an attorney could be appointed to represent him. *See* R-859 (“Primarily I want you to understand that you — you’ll be going through this scenario with me, or with a judge, at every opportunity, because you have a right to change your mind. If you are granted the right to represent yourself, you can change your mind and ask for an attorney at that point.”); *see also* R-860 (“And as I’ve said before, at any point in the process if you wish to — if you’re allowed to proceed by yourself and you wish to have someone

else — have someone represent you at the time, then all you need to do is inquire — just state it.”).

The trial court explained to Appellant how self-representation may impact the ability to file post-conviction claims like ineffective assistance of counsel. R-866. The court also explained the need to preserve issues for appellate review by lodging contemporaneous objections. R-874. The trial court, line-by-line, explained the “Self-Representation Advisory From/Trial” with Appellant, which Appellant initialed and signed. R-80-81, 871-78.

### **Competency Reports**

On January 16, 2019, the court-appointed psychologist issued the “Forensic Psychological Evaluation Competency to Proceed.” R-101-06. The psychologist opined that Appellant “is Competent to Proceed at this time.” R-106. That same day, the court-appointed psychologist issued the “Forensic Psychological Evaluation Competency for Self-Representation.” R-108-14. The psychologist opined that Appellant “appears competent for self-representation.” R-113. Additionally, the psychologist diagnosed Appellant with “Antisocial Personality Disorder” and “Other Specified Depressive Disorder.” R-111.

### **Pretrial Hearing on 2/06/19**

Appellant indicated that he did not have any issues with the presentation provided by counsel from the Public Defender’s Office. R-931. At the trial court’s

direction, Appellant reviewed the form entitled “Self-Representation Advisory From/Trial” that he signed on December 20, 2018. R-932. Appellant informed the court that he still desired to represent himself. R-932. Indicating that it reviewed the competency reports, the trial court found Appellant competent to stand trial and competent to represent himself. R-933-35, 942.

Appellant expressed his understanding to the trial court that, if he elects to represent himself then some appellate and post-conviction issues might not be justiciable. *See* R-935 (“Once the death penalty is imposed, I go to death row, ultimately, and many of my appealable issues are null and void due to the fact of me representing myself.”). Appellant declined the assistance of standby counsel. R-940, 941, 949, 953. And, Appellant demanded a speedy trial. R-98-99, 944. When asked, Appellant informed the court that he wanted a jury for the guilt phase of his trial. R-945. Additionally, Appellant confirmed with the trial court that he did not intend to present any mitigation evidence nor did he intend to call any witnesses. R-945, 951. The trial court explained to Appellant the purpose of a *Spencer* hearing. R-945-46. Also, the trial court mentioned the possibility of a “mitigation referee” that the court could appoint “to present mitigation.” R-946. The trial court opined that it did not think Appellant “can object to that.” R-946.

The trial judge left the courtroom, and the State and Appellant talked on the record. R-955-59. During that conversation, Appellant indicated that his “intentions are to not do a life sentence on the compound.” R-956.

### **Speedy Trial Demand**

On February 6, 2019, Appellant filed a “Demand for Speedy Trial,” invoking Fla. R. Crim. P. 3.191(b). R-98-99.

### **Competency Determination**

On February 8, 2019, the trial court issued the “Order Finding Scottie Allen Competent to Proceed and Competent to Represent Himself.” R-118-20.

### **Pretrial Hearing on 2/13/19**

At the start of the pretrial hearing on February 13, 2019, the trial court renewed the offer of court-appointed counsel to Appellant. R-1128. Appellant declined and indicated his desire to continue to proceed *pro se*. R-1128. The trial court asked Appellant if he had any questions about proceeding *pro se*, and Appellant declined. R-1129. The trial court found that Appellant “is competent to waive counsel and that he’s doing this freely, knowingly, and voluntarily.” R-1129.

After the trial court explained the process for jury selection, Appellant invoked Florida Rule of Criminal Procedure 3.300(b) and requested “that voir dire be done individually.” R-1131. The trial court responded that it would use a “hybrid approach” where the parties could pose general questions to the panel but could ask

follow-up questions on an individual basis. R-1132. Appellant asked the trial court if it would give the venire a “questionnaire to fill out.” R-1137. The trial court indicated that, due to Appellant’s speedy trial demand, time would not allow for it. R-1137.

When the trial court asked Appellant if he had changed his mind about not wanting to present any mitigation evidence, Appellant replied: “No, sir, that’s the same.” R-1146. Appellant asked the trial court about a possible motion to suppress his recorded and written statements. R-1150. The trial court reminded Appellant that he demanded a speedy trial “which means you told me you are ready to go.” R-1150. Nonetheless, the trial court indicated that “in an abundance of caution, what I will probably do is go ahead and hear it during the trial....” R-1150. The trial court then asked Appellant about his desire to waive mitigation but potentially move to suppress evidence. R-1151. Appellant responded that he simply had questions about the process. *See* R-1152 (“I’m not going to bring that up again. It was just a question I had, you know, if I wanted to.”). After the trial court explained the difference between witness testimony and attorney questions and closing argument, Appellant indicated that he did not intend on testifying on his own behalf. R-1161.

### **Jury Selection**

On February 18, 2019, jury selection commenced. R-1248. At the start of the proceedings, the trial court renewed the offer to appoint counsel to represent

Appellant. R-1250. Appellant indicated his desire to continue to proceed *pro se*. R-1250.

The trial court then explained the hybrid jury selection process to Appellant again: “I’m going to ask them about pretrial publicity, and all we’re going to say, ‘Has anybody heard anything about this case?’ I’m going to have them raise their hands. We’re going to write down those juror numbers. And then I will take them individually, and we’ll talk to that person one at a time outside the presence of everybody else.” R-1252.

During voir dire, Appellant informed the trial court that he did not intend to call any witnesses during the trial. R-1441.

### **Jury Trial Guilt Phase**

On February 19, 2019, the jury trial commenced. JT Vol. I, p.1. Appellant’s opening statement outlined his trial strategy: “During the course of this trial, I won’t be admitting any evidence on my behalf or calling any witnesses, and the main reason is because I don’t have to prove my innocence. They have to prove my guilt. If they do it, we will see it. That’s it.” JT Vol. I, p.19.

After the State rested, Appellant informed the trial court that he was “not going to testify.” JT Vol. II, p.217. The defense then rested. JT Vol. II, p.223. Appellant informed the trial court that he read the proposed jury instructions in their “entirety” and had “no objections.” JT Vol. II, p.225. Subsequently, Appellant

informed the trial court that he had no objection to the final instructions. JT Vol. III, pp.239, 272.

On the morning of February 20, 2019, the State gave its closing argument. JT Vol. III, p.253. Appellant did not give a closing argument. JT Vol. III, p.270.

While the jury was deliberating, the trial court informed Appellant what would happen if the jury found Appellant guilty and recommended a death sentence but Appellant chose not to present any mitigating evidence. *See* JT Vol. III, p.280:

Let me — since we're all here, what's probably going to happen if there's a death recommendation and you have not presented any mitigation, the case law requires me at a minimum to order a presentence investigation to go through your background.... The way I think the courts are going right now, and I'm talking out loud right now, is that I'm probably going to end up having to appoint somebody to act as a conduit to provide me — this is — this is — this is at the *Spencer* hearing, to provide me mitigation that you didn't provide to the jury, if there's any out there.

Appellant indicated that, should a penalty phase be needed, he would not give any opening statement or present any mitigation to the jury. JT Vol. III, p.286.

When asked by the trial court to articulate a reason why, Appellant responded:

I believe it's pretty clear through the evidence presented in the guilt phase that — through my statements of confession that there's not much question whether — to my guilt. And as I said in one of those statements, I'm willing to accept the consequences that come with that, if need be.

JT Vol. III, p.286. The trial court then informed the parties that the jury had reached a verdict. JT Vol. III, p.286.

## **Verdict**

On the afternoon of February 20, 2019, the jury found Appellant guilty of first-degree murder. R-160; JT Vol. III, p.288. And, the trial court adjudicated him guilty of first-degree murder. JT Vol. III, p.290.

## **Penalty Phase**

The trial court returned to his questioning of Appellant about the decision to not present any mitigation to the jury during the penalty phase; Appellant responded:

At this point, Your Honor, I'm not — I'm not seeking one way or the other. I'm just allowing the process to happen. If — they found me guilty of first-degree murder. If they — everything that I've had to say or questions that I've had, I've asked and I've said so....

I've said what I have to say. There's really nothing else for me to say or for me to ask that could give me any more information than I already have or that could place any information in the jurors' mind that they don't already have....

JT Vol. III, pp. 294-95.

When asked by the trial court if his approach was “whatever happens, happens,” Appellant responded:

That's exactly what it is, Your Honor. I'm — it'll be whatever it'll be. And like I said, I'm willing — I've never not been willing to accept the consequences of my actions, plain and simple. If they come back with a death verdict, they come back with a death verdict. If they don't, they don't.

You know, I'm — they've seen me. They've heard me articulate. They — so they can infer that I'm intelligent. They can infer that I've represented myself competently. They — or knowingly and

intelligently. You know, they — I don't wish to present any mitigation, you know.

JT Vol. III, p.296.

When informed by the trial court that mitigation would allow the jury “to make an informed decision about you as a person,” Appellant responded: “I want them to make their decision based on facts. I don't want them to base their attention — or base their — I'm sorry.... Their recommendation on whether they like me or not. I don't care if they like me, you know. I want them to go by facts.” JT Vol. III, p.297.

When informed by the trial court that “your background is facts,” Appellant responded:

Judge, my background — okay. My entire life has basically been in an institution of some sort. You know, I've educated myself. You know, I have a GED and I've continually educated myself in what I can, but there's really not much I can tell them as far as, you know, I've been a productive member of society, I've raised a family. I can't tell them any of that, you know.

I mean, if I'm going to get up there and be honest, I've been a criminal and a crook my whole life, you know. And I don't think that's — you know, because I'm going to get up there and I'm going to be honest if I give any type of mitigation. And I don't think it's in my best interest because there's really nothing that I can provide them that is positive about my background.

JT Vol. III, p.298.

When the trial court asked about children, Appellant responded:

My son texted me about three weeks ago, but that's — I don't know either one of them, you know. I hadn't seen my son since he was ten months old. I think I seen him one day when he was five, you know, when I got out of prison in Michigan. Other than that, neither one of them have been a part of my life. I've been a — like I said, I've spent my entire life in institutions of one sort or another.

JT Vol. III, pp. 298-99.

When asked about the possibility of providing the jury with “underlying reasons” for the periods of incarceration, Appellant responded:

It's nothing positive, Your Honor. It's — you know, I did it. My life has been conducted the way it's been conducted through selfishness and greed. You know, I've — that's basically it. You know, when I was a kid, I stole cars to sell them. When I was an adult, I stole cars to sell them. I'm already convicted of second-degree murder, you know what I mean, in the same manner in which this one was done except without the ligature. You know what I mean?

JT Vol. III, p.299.

When asked by the trial court whether his thought process has “anything to do with where you'd be housed,” Appellant explained to the court why he would prefer to be on death row. *See* JT Vol. III, p.301:

[If I wasn't on death row,] I would be on the compound.... Compounds generally now are war zones.... On death row, you're in a cell by yourself. It's quiet. You have your own space. I do very good in seclusion. I do very good by myself, you know, not around other people. I'm — like, when I'm at [Florida State Prison] on CM, right, close management, I never get in trouble because I enjoy the solitude. I enjoy being in my own little world doing my own little thing. Know what I mean?

On the compound, that's absolutely impossible. That's absolutely impossible. You've got this new generation coming in. They're the

most disrespectful, “the world owes me something” people you’ve ever seen in your life, and they would keep me on CM irregardless [sic]. If you look at my past history in DOC, I have aggravated batteries, possessions of weapons, because they make you hurt them and — just on how they act. I want to relax.

Appellant then informed the trial court that he had “no objection” to the proposed instructions for the penalty phase. JT Vol. III, pp.302, 310. Additionally, Appellant had no objection to the penalty phase verdict form. JT Vol. III, p.312.

After the State rested, Appellant once again informed the trial court that he would not be presenting any mitigating evidence. JT Vol. IV, p.353. Appellant then repeated that he had no objection to the penalty phase verdict form. JT Vol. IV, p.354. And, Appellant indicated that he had no objection to the final instructions for the penalty phase. JT Vol. IV, p.356. Also, Appellant declined to present any testimony or any evidence in the penalty phase. JT Vol. IV, p.359. Finally, Appellant did not make any closing argument. JT Vol. IV, p.392.

The jury unanimously found that the State established beyond a reasonable doubt the following four aggravators: Appellant was previously convicted of a felony and under a sentence of imprisonment; Appellant was previously convicted of a felony involving the use or threat of violence to another person; the murder was especially heinous, atrocious, and cruel; and the murder was committed in a cold, calculated, and premeditated manner, without any pretense of moral or legal justification. R-169-70; JT Vol. IV, p.397. The jury did not find that “one or more

mitigating circumstances was established by a greater weight of the evidence.” JT Vol. IV, p.397. And, the jury unanimously found that Appellant “should be sentenced to death.” JT Vol. IV, p.397.

After the jury was excused, the trial court informed the parties that it would order a presentence investigation report (PSI) and would “need it to include information such as previous mental health problems, school records, and relevant family background.” JT Vol. IV, p.401. Appellant then expressed a concern with the trial court regarding the PSI: “Under no circumstances do I want my family contacted.” JT Vol. IV, p.401. The trial court responded: “You’re entitled to that.” JT Vol. IV, p.402. When asked if he had any issues with “school records or anything like that,” Appellant responded “No, sir.” JT Vol. IV, p.402. The trial court then asked Appellant if his family was aware of the “current situation.” JT Vol. IV, p.402. Appellant responded: “No, sir... My mother is very sick and I — as I expressed to Ms. Showalter and the — Ms. Meyer, I feel that this would push her over the edge and I don’t want to be responsible for that.” JT Vol. IV, p.402.

The trial court informed the parties that “I haven’t made up my decision today about whether I’m going to appoint counsel for the sole purpose of providing me any potential mitigation and argument.” JT Vol. IV, p.402. The trial court then assured Appellant that “I will not have the — whoever is doing the investigation

reach out to your family at your request based on what you just told me.” JT Vol. IV, p.402.

The trial court then engaged in a colloquy with Appellant regarding his right to counsel:

THE COURT: ... [W]e’ve talked about this over and over and over again, but I think certainly I’m going to raise that with you again. I just need for you to affirmatively respond that during the course of this trial, you have not wanted counsel to represent you; is that correct?

THE DEFENDANT: That is correct, sir.

THE COURT: Have you ever once wavered from that?

THE DEFENDANT: No, sir.

THE COURT: Have you ever once indicated to the Court that you wanted counsel?

THE DEFENDANT: I have not, sir.

THE COURT: Have you ever indicated to the Court that you wanted standby counsel?

THE DEFENDANT: No, sir.

THE COURT: Has your mind changed with respect to that?

THE DEFENDANT: Not at all.

THE COURT: Looking back now with the benefit of hindsight, do you wish you had asked for counsel?

THE DEFENDANT: No, sir.

THE COURT: It’s my understanding you do not want me to appoint counsel for you at the *Spencer* hearing; is that correct?

THE DEFENDANT: That is correct, sir.

THE COURT: And you understand that I may very well exercise my discretion in doing that for the purposes of providing me any potential mitigation argument?

THE DEFENDANT: I do.

JT Vol. IV, pp.403-04.

The trial court then set the date for the *Spencer* hearing as April 3, 2019. JT Vol. IV, p.408.

### **Hearing on 2/21/19**

The trial court engaged in the following dialog with Appellant regarding a renewal of the offer for appointment of counsel:

THE COURT: Well, when I was going back through my notes, I — I didn't see where between — at least I couldn't find, and I didn't talk to the court reporter but I couldn't find where I had renewed my offer to appoint counsel to you between the guilt phase and the penalty phase, and so what I'm bringing that up is, had I formally renewed it at that time, would you have accepted the appointment of counsel?

DEFENDANT: No, sir.

THE COURT: Okay. Or standby counsel?

DEFENDANT: No, sir.

R-892. The trial court then renewed an offer to appoint counsel for the *Spencer* hearing, and Appellant declined. R-893. Appellant then declined the offer for standby counsel. R-893.

The trial court then discussed the appointment of special counsel to present mitigation. *See* R-893 (“I’m going to appoint a friend of the court to present mitigation evidence, and I want you to know that that particular person is going to be specifically told not to reach out to your family.”). With regard to the court-ordered PSI, the trial court assured Appellant that the “Department of Corrections is going to be specifically told in the presentence investigation not to reach out to your family....” R-894. The trial court then explained the purpose of the upcoming *Spencer* hearing, which was scheduled for April 3, 2019. R-895-96. Appellant then expressed his continuing desire to represent himself. R-896.

Concerned about tying up loose ends, the State asked the trial court to conduct a third *Faretta* inquiry. R-898-99. Appellant responded: “But I would say I’ve been through two *Faretta* hearings. I’ve reaffirmed at least ten times and I reaffirm right now. I would like to represent myself. I do not need or want an attorney or standby counsel.” R-899. Nonetheless, the trial court conducted another *Faretta* inquiry. R-900-08. Appellant indicated that he was “absolutely certain” that he did not want the court to appoint counsel for him. R-908. The trial court then asked Appellant the following question: “had I gone through this entire thing with you between the — between the guilt phase and the penalty phase, would you have answered in the same way?” R-908. Appellant answered “Yes, sir.” R-908.

### **Appointment of Counsel as *Amicus Curiae* in a Capital Case**

On February 21, 2019, the trial court issued “Order Appointing Counsel as *Amicus Curiae in a Capital Case.*” R-416-17. The court explained the reason for the order as follows: “The Court finds that the appointment of counsel as *amicus curiae* is appropriate to gather potential mitigation information for presentment to the Court at the *Spencer* hearing.” R-416. That same day, the trial court issued an “Order for Presentence Investigation.” R-414-15.

On March 25, 2019, *amicus* counsel filed a “Notice of Appearance as Amicus Curiae.” R-420.

On March 29, 2019, *amicus* counsel filed the “Status Report, Request for Case Management and Suggestion That a Continuance of the Currently Scheduled *Spencer* Hearing is Appropriate.” R-431-37. *Amicus* counsel requested a continuance in order “to adequately afford ... additional time to prepare [mitigation].” R-432. In the filing, *amicus* counsel noted Appellant’s objection to any continuance. R-433.

On April 1, 2019, the trial court issued an “Order Continuing *Spencer* Hearing.” R-438. The court continued the *Spencer* hearing until June 7, 2019, and explained the reason for the order as follows: “A continuance is without question necessary based on the Status Report [filed by *amicus* counsel].” *Id.*

### ***Spencer* Hearing**

On June 7, 2019, the trial court conducted the *Spencer* hearing. R-477. At the start of the hearing, the trial court renewed the offer of counsel and Appellant declined. R-979. The State did not present any evidence, nor did Appellant. R-981. Appellant also indicated that he had “no argument” to make. R-981.

Appellant informed the trial court that he reviewed the material acquired by *amicus* counsel and had “no objection” to its presentation. R-982. *Amicus* counsel called a mitigation specialist as a witness, and that witness testified to the following: Appellant’s “biological father has got extreme alcohol, drug, mental health issues”; he is a registered sex offender in Michigan because he sexually abused a thirteen-year-old girl; and he has a “significant” criminal history involving felony and misdemeanor convictions (R-999, 1000, 1003); Appellant had limited interactions with his biological father (R-1044); sometime between the ages of seven and nine, Appellant started smoking marijuana with his biological mother (R-1005); Appellant started smoking marijuana around that same time that his mother fell on hard times economically and moved in with her mother and step-father (R-1005-06); during this time, Appellant’s step-grandfather sexually abused him (R-998, 1005-06); when he got older but was still a minor, Appellant stole cars and set the corner of the junior high school on fire (R-1015); at some point in his youth, Appellant “became a ward of the State” and lived in a “boys’ home,” which he described as the best period of his life (R-1015, 1018); Appellant lived in a boys’ home because “he was sanctioned

to something based on his juvenile adjudication” (R-1047); Appellant transitioned from the boys’ home to a foster home, not to his biological family (R-1018); Appellant admitted that his drug use escalated “into an almost chronic daily marijuana and at a later part of that time, cocaine” (R-1016); in April 2002, Appellant was abusing prescription drugs like Lorcet, Darvocet, Hydrocodone, and Oxycodone (R-1019); in September 2002, Appellant moved to Florida to kick his drug habit (R-1019); against the advice of counsel, Appellant entered an open plea of guilty in the second-degree murder case in Broward County (R-1023); Appellant was found competent to enter his plea, but a report indicated bipolar disorder, depression, and drug addiction (R-1024); “Based upon inmate testimony surrounding the investigation of this case, [Appellant] had extensive drug use of ... synthetic drugs [like K2, Flakka, and Spice]” (R-1024-25); a “possible motivation” for Appellant’s murder of Mr. Mason was “[d]rug debt and [Appellant’s] drug use” (R-1033); “Based on what the inmates told law enforcement, [Appellant and Mr. Mason] were in a relationship, that [Appellant] actually cared very much for Mr. Mason. [Appellant] had a pretty heavy drug use of K2. [Appellant] also had drug debt, and Mr. Mason was not tolerant of that because he did not like drugs, did not want [Appellant] using drugs, and was not going to cover this drug debt.” (R-1034); Appellant initially explained the death of Mr. Mason as “I was high and I snapped.” (R-1065); Appellant indicated that it “is very difficult to do a life sentence in general

population.” (R-1065); “A drug issue and potentially being seen as being in a same-sex relationship with somebody else within the facility” would make it difficult to serve a life sentence in the prison’s general population (R-1065); and, being on death row would bring “isolation” and possible safety. R-1036.

During allocution, Appellant clarified some of the testimony by the mitigation specialist who was called to testify by *amicus* counsel: except for time spent in prison or jail, Appellant’s biological father lived in the same town as Appellant (R-1058); “There was never a very long period of time where [Appellant and his biological father] didn’t have contact.” (R-1058-59); although Appellant’s biological father was unreliable at times, Appellant moved in with his father at the age of sixteen “because of difficulties [Appellant] was having with [his] mother” (R-1059); Appellant’s male and female cousins were sexually abused by Appellant’s grandfather (R-1060, 1061); when Appellant was eight years old and his male cousin was thirteen years old, Appellant’s male cousin started sexually abusing Appellant (R-1059-60); Appellant’s male cousin told Appellant’s grandfather, and then Appellant’s male cousin and Appellant’s grandfather started to sexually abuse Appellant together (R-1060); when he was in a juvenile home due to “grand theft auto,” Appellant “reported the molestation from [his] grandfather” (R-1059); Appellant’s grandfather entered into a plea agreement for the molestation of Appellant’s male cousin, but never had to account for his molestation of Appellant

or Appellant's female cousin (R-1061); during the end of his time at the juvenile home, Appellant was "basically begging" to be put in a foster home instead of his family home (R-1059); Appellant was placed in the foster home because "they had just come up with a new program for sexual victims" (R-1060); Appellant spent eighteen months in the foster home, which he described as "the best part of my childhood" (R-1060); at age twelve, Appellant was caught with "an ounce of marijuana," but the drug use started well before then (R-1062, 1064); while in prison in Michigan, Appellant attempted suicide, which led to a 30-day observation in a "mental health facility" (R-1061); and, Appellant "wasn't intoxicated during Mr. Mason's murder." R-1062.

*Amicus* counsel called Dr. Falb, who is a licensed psychologist practicing in the area of forensic psychology. R-1067, 1068. According to Dr. Falb, records pertaining to Appellant clearly indicated that Appellant was "violating societal norms at quite an early age." R-1076. After age fifteen, Appellant's behavior "moves him into the criteria of what we call antisocial personality disorder." R-1077. Dr. Falb did not diagnose Appellant with antisocial personality because the psychologist who performed the competency evaluation in the case already reached that conclusion. R-1095 ("I didn't do it because she did it.").

According to Dr. Falb, the "symptoms characteristic of antisocial personality is [sic] impulsivity, inability to learn over time right from wrong, to correct one's

mistakes, violation of societal norms.” R-1086. Dr. Falb testified that “[t]here’s no curing [antisocial personality disorder].” R-1087. At best, a person with antisocial personality disorder “can eventually, over long periods of time and intervention and possible therapy, learn how to control impulsivity or to develop coping strategies that are considered appropriate rather than what they may resort to otherwise to get away with something or to do something that is self-serving.” R-1087.

Initially, Appellant told Dr. Falb that he killed Mr. Mason because he was “mad at him for lying to me for nine months.” R-1099. According to Dr. Falb, that statement “isn’t inconsistent with somebody rising to a level of anger if they’re antisocial.” R-1099. Dr. Falb opined that, due to his antisocial personality disorder, Appellant is “likely unable” to comport his conduct with the requirements of the law. R-1087.

Additionally, the information available to Dr. Falb indicates that Appellant “suffered some extreme measures of trauma in terms of emotional abuse, physical abuse, and sexual abuse beginning at a young enough age, along with substance abuse....” R-1077-78. Appellant told Dr. Falb that, during the instances of sexual abuse, Appellant “was crying.” R-1090.

Dr. Falb testified that he administered the ten-question Adverse Childhood Experiences (ACE) test to Appellant, who scored a six — which is “very, very high.” R-1079, 1222. After listening to the *Spencer* hearing testimony presented earlier,

Dr. Falb opined that Appellant's ACE score could be as high as eight out of ten. R-1080. Dr. Falb testified that a healthy childhood "was likely non-existent" for Appellant. R-1080.

A 2003 mental health report concluded:

There are no indications that [Appellant] suffers from a severe mental illness, nor does he have any significant psychiatric problems such as his competency would be compromised. Although he claimed to be diagnosed with something akin to bipolar disorder, he is not prescribed a mood stabilizer but rather had previously been given an antidepressant and an anxiolytic.

R-1091. Although Appellant may have suggested a diagnosis of bipolar disorder back in 2003, Dr. Falb opined that post-traumatic stress disorder (PTSD) was more likely. R-1081, 1092, 1094. Although Dr. Falb mentioned the possibility of dissociative effects attendant to PTSD, he did not opine that Appellant was suffering from a dissociative episode when Appellant murdered Mr. Mason. R-1081.

After the testimony of Dr. Falb, *amicus* counsel rested. R-1105. Next, Appellant clarified that, although DOC diagnosed him with major depression and anxiety, those two diagnoses did not impact Appellant's ability to proceed *pro se*. R-1106-07.

The State raised an issue regarding the ability of its expert to examine Appellant. *See* R-1109 ("[T]his is a little bit unusual because the Court has *amicus* presenting mitigation; whereas, normally, if the defense does it, then the Defendant generally has to be available, or there are consequences under the rule."). Appellant

responded: “I will not submit to an interview by prosecution’s doctor.” R-1109. The State’s expert informed the trial court that the scope of any interview would be limited to the PTSD diagnosis and a “couple more mitigators mentioned.” R-1113. The trial court indicated that it was “fine with that scope,” ordered Appellant to submit to an interview with the State’s expert on the morning of June 21, 2019, but informed Appellant that “[i]f you get to a situation where you think, you know, that we’re getting outside what you want to answer, then you just tell them that.” R-1114, 1115. Appellant responded with “All right.” R-1114. The trial court then continued the *Spencer* hearing until the afternoon of June 21, 2019. R-1115.

When the *Spencer* hearing started back up on June 21, 2019, the trial court immediately renewed the offer of court-appointed counsel to Appellant. R-1172. Appellant declined. R-1172.

The State called Dr. Prichard, who is a licensed psychologist. R-1174. Dr. Prichard currently has a “full-time forensic private practice.” R-1174. On the morning of his testimony, Dr. Prichard met with Appellant and discussed the following:

We went over a general history. He, you know, sorted his upbringing out to me, so we talked about where he lived, who raised him. We talked about his educational experience. We talked about the fact that he has two children. Previous employment. Substance use historically. Psychiatric treatment historically. Medications he has taken, either in the community or while he was in some form of institution. Criminal history and medical history. That — that was basically the background information we went through.

R-1178. When he discussed the childhood sexual abuse with Dr. Prichard, Appellant cried. R-1197, 1224. Appellant told Dr. Prichard that Mr. Mason “wasn’t gay” and that Appellant used the threat of a knife to “force” Mr. Mason into engaging in sexual activity. R-1198.

Dr. Prichard testified that he agreed “with Dr. Falb in antisocial personality disorder.” R-1179-80, 1234. Dr. Prichard then explained why. *See* R-1180:

That’s pretty apparent with [Appellant]. It’s apparent because of the chronicity of his criminal offending beginning when he was about nine years old. He indicated his first arrest was for shooting the neighbor’s dog and killing the neighbor’s dog that was barking too much. So that was the first time he was arrested. Didn’t get much of a sanction. But after that point, there was a number of juvenile arrests. He estimated 10 to 15.

A lot of those concerns associated with truancy where they would arrest him, but there really wouldn’t be any consequences. But, also, arrests for things like — setting something in the school on fire when he was in sixth grade. Grand theft auto. Breaking and entering. So a lot of criminal conduct that’s very unusual when we evaluate people or — and very unusual for kids to engage in this kind of chronic criminal conduct. And, of course, kids that engage in that conduct, sometimes they don’t do it once they get a little older; but in [Appellant’s] case, he continued the criminal conduct to include the homicide in 2003 and this current case. So there — there doesn’t seem to be much question that this personality disorder, antisocial personality disorder, is very much a driving factor for him. So I think that’s primary.

According to Dr. Prichard, “the problem with some individuals who have antisocial personality disorder is — is that they lie and they manipulate, that’s one of their issues. So it’s hard to sort out what’s exactly true.” R-1217. Nonetheless,

Dr. Prichard opined that Appellant has “been pretty consistent in his story about how [the murder] evolved.” R-1218.

During his interview with Dr. Prichard, Appellant denied that he killed Mr. Mason “so that he could be put on death row.” R-1183. Rather, Appellant indicated that “[h]e did the homicide because Mr. Mason lied to him for nine months, and that he was a — he was a, you know, cockroach, a dirty, filthy cockroach and deserved what he got.” R-1183.

After he killed Mr. Mason, Appellant then concluded that he would “much prefer to go to death row.” R-1183. Appellant communicated to Dr. Prichard: “I don’t have a death wish.” R-1183. But given the fact that he did kill Mr. Mason, Appellant would rather live out his remaining years on death row than in the prison system’s general population. R-1183, 1184. In other words, being on death row was not the goal at the time of the murder, but it became a goal afterward. R-1214. The letters sent to the State Attorney’s Office were a way to attain that goal. R-1215-16. Threatening to kill again and characterizing his sexual activities with Mr. Mason as “rape” could also be ways that Appellant sought to attain his goal of being on death row. R-1217. Dr. Prichard viewed this as “very self-serving,” manipulative, and consistent with antisocial personality disorder. R-1184; *see also* R-1196 (“[M]aybe he’s just trying to manipulate to get to death row because he thinks that’s going to be a much more comfortable environment for him.”).

Because antisocial personality is a disorder of the personality, someone who has it can still control his behavior. R-1182. Although people with antisocial personality disorder are “maladaptive” and “often very destructive,” “they understand what they’re doing” and act with “a clear goal in mind.” R-1182. Hence, Appellant “could conform [his conduct to the requirements of law] and he did understand [the criminality of his conduct].” R-1195. In short, Appellant “could have conformed if he wanted to conform.” R-1195.

Dr. Prichard did not see any evidence indicating that Appellant was suffering from a “mental, emotional disturbance anywhere around the time of the offense.” R-1193. To the contrary, Dr. Prichard testified that Appellant’s actions were “very calculated,” “very calm,” and “pretty well planned out.” R-1193.

While he did not think that Appellant was currently suffering from depression, Dr. Prichard testified that “there has been some ... depression historically.” R-1185. Even though Appellant experienced childhood trauma, Dr. Prichard disagreed with Dr. Falb’s recent diagnosis of PTSD. R-1190, 1195, 1204. According to Dr. Prichard, “there wasn’t a post-traumatic response to that trauma.” R-1208. Despite all of the observations made by mental health providers and correctional staff during Appellant’s life, only Dr. Falb diagnosed Appellant with PTSD. R-1188-90, 1210; *see also* R-1211 (“My contention is that he had a lot of professional eyes on him.”).

Because the murder “was very calculated,” and because Appellant “has perfect recollection of it” to include the ability to “recite every ... agonizing detail,” Dr. Prichard did not see any evidence supporting dissociation. R-1195. Additionally, Dr. Prichard did not see anything suggesting that Appellant was under duress when he murdered Mr. Mason. R-1198.

At the conclusion of the *Spencer* hearing, the trial court set the due date for the sentencing memoranda at “no later than the close of business on July 15th.” R-1237. Appellant informed the trial court “I would like to take a shot at doing the sentencing memorandum myself.... But if along the way, I run into difficulty and realize that it’s beyond my scope, can I then contact you and ask for counsel to prepare one?” R-1239. The trial court responded that it was “certainly willing to consider that.” R-1240. Appellant clarified that he was “not asking for [court-appointed counsel] now, I was just wondering if that was an option if I needed it, which, under the — under the directions you gave me as far as what it pertains to and how it’s set up, I don’t see my having a problem preparing it myself.” R-1242. The trial court concluded the discussion of the issue by stating: “If you feel the need to have counsel assist you in preparing the sentencing memorandum, you let me know that in writing, and we’ll all get back together again.” R-1244.

### **Sentencing Memoranda**

On July 10, 2019, Appellant filed his “Sentencing Memorandum.” R-795-801. With regard to the evidence supporting the conviction and the four aggravators, Appellant wrote: “I cannot refute the evidence that was presented which led to a finding of guilt nor can I argue against the four aggravating factors in which led [sic] to a 12-0 jury verdict for a sentence of death.” R-799. With regard to the performance of *amicus* counsel, Appellant wrote: “I believe the *amicus curiae* you appointed for mitigation did a great job given the material and restrictions they had to contend with.” R-799. Appellant only expressed one concern: he found the testimony of Dr. Prichard “to be ¾ truths and spin.” R-799.

On July 12, 2019, the State filed “State’s Memoranda in Response to *Spencer* Hearing.” R-803.

### **Sentencing**

At the sentencing hearing on July 23, 2019, the trial court orally pronounced Appellant’s sentence of death. R-973. The trial court found four aggravators and weighed them as follows: (1) Appellant was previously convicted of a felony and under sentence of imprisonment (great weight); (2) Appellant was previously convicted of a felony involving the use of threat or violence to another person (great weight); (3) the first-degree murder was especially heinous, atrocious, and cruel (great weight); and (4) the first-degree murder was committed in a cold, calculated,

and premeditated manner, without pretense of moral or legal justification (great weight). R-814-16.

Additionally, the trial court found six mitigators and weighed them as follows: (1) the capacity of Appellant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired (moderate weight); (2) Appellant has been diagnosed with alcohol abuse and drug dependency (some weight); (3) Appellant was diagnosed with major depression (moderate weight); (4) Appellant was reared in a dysfunctional family setting (great weight); (5) Appellant was courteous, respectful, and considerate to the court during every court appearance (some weight); and (6) Appellant did not want his family contacted for mitigation purposes (some weight). R-817-20.

With regard to the first mitigator, the trial court found that “Defendant’s ability to conform his conduct to the requirements of law are substantially impaired by adverse childhood experiences that have rendered him less than effective at making good decisions.” R-818. After weighing the aggravators and mitigators, the trial court sentenced Appellant to death. R-821, 826.

## SUMMARY OF THE ARGUMENT

### **Issue I**

By repeatedly stating that he wanted to represent himself, Appellant waived any claim of fundamental error regarding the failure to renew the offer of court-appointed counsel. Alternatively, reversal in this case would produce an absurd result given the repeated offers of court-appointed counsel. Despite those offers, Appellant repeatedly and consistently chose to represent himself. Rather than reverse and remand, this Court should respect that decision and affirm.

### **Issue II**

Neither the guilt phase jury instruction nor the prosecutor's comment during penalty phase opening statements misled the jury regarding its role in the sentencing process. Assuming arguendo that the guilt phase instruction failed to inform the jury that it could dispense mercy by recommending a life sentence even if the jury determined that the aggravation outweighed the mitigation, no *Caldwell* violation occurred because the penalty phase instruction and penalty phase verdict form specifically informed the jury that: (1) "even if you find that the sufficient aggravators outweigh the mitigators — the law neither compels nor requires you to determine that the defendant should be sentenced to death"; and (2) "If your vote to impose death is less than unanimous, the trial court shall impose a sentence of life without the possibility of parole." And, the prosecutor's comment simply referenced

section 921.141(2)(b)2.c, Fla. Stat., which asks the jury to make a sentencing recommendation to the judge regarding an appropriate sentence.

### **Issue III**

Given the undisputed evidence of Appellant's antisocial personality disorder, given Appellant's undisputed preference to receive a death sentence, given the undisputed evidence of aggravation, and given the weak mitigation presented in the case, Appellant cannot establish that the death sentence could not have been obtained without the *Spencer* hearing testimony of the State's expert.

### **Issue IV**

A defendant in Florida is eligible to receive a death sentence if the jury finds that the State proved at least one aggravator beyond a reasonable doubt.

### **Issue V**

Given the strength of the aggravators and the relative weakness of the mitigators, Appellant's death sentence is proportional in relation to other death sentences this Court has upheld.

### **Issue VI**

Appellant's multiple confessions and the DNA evidence, when viewed in the light most favorable to the State, could lead a rational trier of fact to find the existence of all the elements of the crime of conviction beyond a reasonable doubt.

## ARGUMENT

### **ISSUE I: DID THE TRIAL COURT COMMIT FUNDAMENTAL ERROR BY FAILING TO RENEW THE OFFER OF COURT-APPOINTED COUNSEL BEFORE COMMENCEMENT OF THE PENALTY PHASE OF APPELLANT’S TRIAL? (Restated)**

Appellant argues that the trial court committed fundamental error when it failed to renew the offer of court-appointed counsel before commencement of the penalty phase of Appellant’s trial. *See* IB, p.27. Of note, Appellant does not argue that the trial court committed *per se* reversible error. *See, e.g., Murray v. State*, 265 So.3d 723 (Fla. 2d DCA 2019).

#### **Standard of Review**

The standard of review for Appellant’s claim of fundamental error is *de novo*. *See State v. Smith*, 241 So.3d 53, 55 (Fla. 2018).

#### **The State law requirement to renew the offer of counsel**

After the knowing and intelligent waiver of the right to court-appointed counsel by a competent defendant, the Florida Constitution requires a trial court to renew the offer of counsel at each crucial stage of the proceedings. *See Traylor v. State*, 596 So.2d 957, 968 (Fla. 1992) (“Once the defendant is charged—and the Section 16 rights attach—the defendant is entitled to decide at each crucial stage of the proceedings whether he or she requires the assistance of counsel. At the commencement of each such stage, an unrepresented defendant must be informed of the right to counsel and the consequences of waiver.”); *see also* Fla. R. Crim. P.

3.111(d)(5) (“If a waiver is accepted at any stage of the proceedings, the offer of assistance of counsel shall be renewed by the court at each subsequent stage of the proceedings at which the defendant appears without counsel.”).

At the outset, the State acknowledges that “sentencing is a critical stage of the criminal proceeding at which [a defendant] is entitled to the effective assistance of counsel.” *Gardner v. Florida*, 430 U.S. 349, 358 (1977). And, the State recognizes that “[t]he Sixth Amendment guarantees capital defendants the effective assistance of counsel during the penalty phase of trial.” *Hodge v. Kentucky*, 568 U.S. 1056 (2012). However, neither *Gardner* nor *Hodge* require trial courts to renew the offer of court-appointed counsel prior to commencement of the penalty phase of trial.

In reaching its decision in *Traylor*, this Court used article I, section 16 of the Florida Constitution, not the Sixth Amendment, to impose the requirement that trial courts renew the offer of court-appointed counsel. *See Traylor*, 596 So.2d at 968, *supra*; *see also Travis v. Tucker*, 4:09CV327-RH/WCS, 2011 WL 7403061, at \*4 (N.D. Fla. Dec. 14, 2011), report and recommendation adopted, 4:09CV327-RH/WCS, 2012 WL 555713 (N.D. Fla. Feb. 21, 2012) (observing that the *Traylor* decision was based entirely upon state law and was construing both article I, section 16 of the Florida Constitution, and Rule 3.111(d)(5), not the federal constitution).

Thus, the “right” to the renewal of the offer of counsel is a non-textual right found in the state constitution, not the federal constitution. *See generally Moore v.*

*Sec’y, Dep’t of Corr.*, 4:10-CV-249-MW/CAS, 2013 WL 2456242, at \*6-\*7 (N.D. Fla. June 6, 2013) (explaining that, while Florida law requires that trial courts renew offers of counsel at each stage, there is “no U.S. Supreme Court precedent” that requires renewals and denying habeas relief on that claim).

**Appellant waived any claim of fundamental error**

During the February 21 hearing, Appellant waived any claim of fundamental error regarding renewal of the offer of court-appointed counsel. At the start of that hearing, the trial court engaged in the following dialog with Appellant regarding a renewal of the offer for appointment of counsel:

THE COURT: Well, when I was going back through my notes, I — I didn’t see where between — at least I couldn’t find, and I didn’t talk to the court reporter but I couldn’t find where I had renewed my offer to appoint counsel to you between the guilt phase and the penalty phase, and so what I’m bringing that up is, *had I formally renewed it at that time, would you have accepted the appointment of counsel?*

DEFENDANT: No, sir.

THE COURT: Okay. Or standby counsel?

DEFENDANT: No, sir.

R-892 (emphasis added). Later during the hearing, the court asked Appellant: “[H]ad I gone through this entire thing with you between the — between the guilt phase and the penalty phase, would you have answered in the same way?” R-908. Appellant answered “Yes, sir.” R-908. With these affirmative answers, Appellant waived any claim of error on appeal. *Cf. Universal Ins. Co. of N. Am. v. Warfel*, 82

So.3d 47, 65 (Fla. 2012), citing *State v. Lucas*, 645 So.2d 425, 427 (Fla. 1994) (“Fundamental error is also waived where defense counsel affirmatively agrees to an improper instruction.”).

### **Reversal would produce an absurd result in this case**

Even if Appellant’s answers do not constitute a waiver, the multiple exchanges regarding the right to counsel show that reversal would “produce an absurd result” in this case. *State v. Roberts*, 677 So.2d 264, 265 (Fla. 1996) (“We agree that under normal circumstances, rule 3.111(d)(5) requires a trial court to advise a *pro se* defendant of the right to counsel at each subsequent stage of trial. However, to apply the rule strictly in this case would produce an absurd result.”).

During Appellant’s trial, the court conducted three *Faretta* inquiries over the course of two months: at the pretrial hearing on December 20, 2018 (R-858-71); at the pretrial hearing on February 6, 2019 (R-936-41); and, at the post-trial hearing on February 21, 2019 (R-900-08). Additionally, the trial court made numerous offers of court-appointed counsel prior to commencement of the penalty phase. *See* R-1128, 1250. Furthermore, Appellant clearly communicated to the trial court that he never changed his mind nor had any regrets regarding the decision to represent himself. *See* JT Vol. IV, pp. 403-04; *see also* R-899.

During the first *Faretta* inquiry on December 20, 2018, the trial court specifically addressed Appellant’s ability to ask for court-appointed counsel at any

time — even if he previously waived such counsel. *See* R-859 (“Primarily I want you to understand that you — you’ll be going through this scenario with me, or with a judge, at every opportunity, because you have a right to change your mind. If you are granted the right to represent yourself, you can change your mind and ask for an attorney at that point.”); *see also* R-860 (“And as I’ve said before, at any point in the process if you wish to — if you’re allowed to proceed by yourself and you wish to have someone else — have someone represent you at the time, then all you need to do is inquire — just state it.”).

At the start of the second *Faretta* inquiry on February 6, 2019, the trial court asked Appellant to review the “Self-Representation Advisory Form/Trial” that he previously completed on December 20, 2018. *See* R-932. The final advisory line on that form states: “If I represent myself at trial, and if I am convicted, I will have the right to an appointed lawyer for sentencing. Sentencing is a separate proceeding.” R-81. After reviewing the form, Appellant informed that trial court that he “wouldn’t change anything.” R-932.

In addition to the two *Faretta* inquiries highlighted above, the trial court subsequently renewed the offer of court-appointed counsel two times prior to commencement of the penalty phase: (1) at the February 13, 2019 hearing – which was exactly one week prior to commencement of the penalty phase on February 20, 2019; and, (2) at the start of jury selection on February 18, 2019 — which was only

two days before the penalty phase started. *See* R-1128, 1250. And at the conclusion of the penalty phase, Appellant clearly communicated to the trial court that he never changed his mind about wanting to represent himself at any time during the trial.

*See* JT Vol. IV, pp.403-04 (emphases added):

THE COURT: ... [W]e've talked about this over and over and over again, but I think certainly I'm going to raise that with you again. I just need for you to affirmatively respond that *during the course of this trial, you have not wanted counsel to represent you; is that correct?*

THE DEFENDANT: *That is correct, sir.*

THE COURT: *Have you ever once wavered from that?*

THE DEFENDANT: *No, sir.*

THE COURT: Have you ever once indicated to the Court that you wanted counsel?

THE DEFENDANT: I have not, sir.

THE COURT: Have you ever indicated to the Court that you wanted standby counsel?

THE DEFENDANT: No, sir.

THE COURT: Has your mind changed with respect to that?

THE DEFENDANT: Not at all.

THE COURT: Looking back now with the benefit of hindsight, do you wish you had asked for counsel?

THE DEFENDANT: No, sir.

Finally, just prior to the third *Faretta* inquiry, Appellant clearly indicated that he understood his right to counsel — and that he did not want one. *See* R-899 (“But I would say I’ve been through two *Faretta* hearings. I’ve reaffirmed at least ten times and I reaffirm right now. I would like to represent myself. I do not need or want an attorney or standby counsel.”).

Under these facts, Appellant cannot demonstrate that the failure to renew the offer of counsel prior to the commencement of the penalty phase constitutes fundamental error. *Cf. Roberts*, 677 So.2d at 265-66 (“In addition, Roberts had been given three *Faretta* hearings, and he opted to represent himself once again, even after the public defender’s office had been reappointed.... The record reflects that Roberts clearly and repeatedly argued that he should be permitted to exercise his right to self-representation.”). Put simply, Appellant clearly understood his Sixth Amendment rights and chose self-representation over court-appointed counsel at every turn. *Cf. Muehleman v. State*, 3 So.3d 1149, 1160 (Fla. 2009):

The record is replete with clear indications that Muehleman knew he had a right to appointed counsel, was offered counsel at every critical stage of the proceedings, and was advised of the risks of self-representation, but expressly and unequivocally rejected counsel in favor of self-representation at every turn. Muehleman made clear, over and over, that he did not want counsel forced upon him and that it was his personal and constitutional right to represent himself.

### **Appellant ignores the right to self-representation**

Focusing almost entirely on the right to counsel under the state constitution, Appellant never addresses the right to self-representation guaranteed by the federal constitution. *See generally Roberts*, 677 So.2d at 265 n.1 (“*Faretta v. California*, 422 U.S. 806, 807 (1975), provides that defendants in state criminal trials have a constitutional right to proceed without counsel so long as their choices are made voluntarily and intelligently.”). This remains an important point, as a *Faretta* inquiry is not an all or nothing affair (i.e., a defendant keeps “X” or waives “X”). *Cf. McCoy v. Louisiana*, 138 S. Ct. 1500, 1508 (2018). Unlike other inquiries, trial courts must balance competing constitutional rights: the right to court-appointed counsel and the right to self-representation. *See generally McDowell v. United States*, 484 U.S. 980 (1987) (White, J., dissenting as to the denial of certiorari) (“Since *Faretta*, lower federal and state courts have sought to arrive at the proper balance between allowing an accused to exercise his right of self-representation, and at the same time, insuring that a waiver of a defendant’s right to counsel is only made when ‘knowing and intelligent’ and ‘with eyes open.’”).

In some ways, the Sixth Amendment requires a balancing act not unlike that required under the First Amendment. *Compare Comm. for Pub. Ed. & Religious Lib. v. Nyquist*, 413 U.S. 756, 802 (1973) (Burger, C.J., concurring in part and dissenting in part) (“The answer, I believe, lies in the experienced judgment of various members of this Court over the years that the balance between the policies

of free exercise and establishment of religion....”), with *Cross v. United States*, 893 F.2d 1287, 1290 (11th Cir. 1990):

Because self-representation necessarily entails the waiver of the sixth amendment right to counsel, a trial court can commit reversible constitutional error by either improperly granting a request to proceed pro se—and thereby depriving the individual of his right to counsel—or by denying a proper assertion of the right to represent oneself, and thereby violating *Faretta*.

As another analogy, the balance between the right to court-appointed counsel and the right to self-representation is not unlike the balance that must be struck between the government’s regulatory powers and private property rights. *See Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (“The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking [of private property without just compensation].”).

To the extent that Rule 3.111(d)(5) requires a trial court to renew the offer of court-appointed counsel prior to every crucial stage of the proceedings, those repetitive inquiries “go too far” and interfere with a defendant’s right of self-representation. *Cf. McCoy*, 138 S. Ct. at 1507 (“[A]n accused may insist upon representing herself—however counterproductive that course may be....”).

Some courts may view Rule 3.111(d)(5) as a beneficial layer of additional protection against the loss of the right to court-appointed counsel. *See, e.g., Traylor*, 596 So.2d at 968, citing *Brewer v. Williams*, 430 U.S. 387, 404 (1977) (“Any waiver

of this right must be knowing, intelligent, and voluntary, *and courts generally will indulge every reasonable presumption against waiver of this fundamental right.*") (emphasis added); *but see Fields v. Murray*, 49 F.3d 1024, 1041 (4th Cir. 1995), citing *Faretta*, 422 U.S. at 835 ("Although we have been instructed to 'indulge in every reasonable presumption against waiver' of the right to counsel, *Brewer v. Williams*, 430 U.S. 387, 404 (1977), at a certain point a defendant's 'intentional relinquishment or abandonment of a known right or privilege' requires this court to respect his or her decision.").

However, *Traylor's* reliance on *Brewer v. Williams* to support state waiver protections remains misplaced as the latter case involved the right to counsel during a de facto police interrogation. *See Brewer v. Williams*, 430 U.S. at 401. An important point, *Brewer v. Williams* did not involve *Faretta* or the right to self-representation. In other words, *Brewer v. Williams* did not require the court to engage in any kind of balancing act between two competing constitutional rights. *See generally Gibbs v. State*, 623 So.2d 551, 553 (Fla. 4th DCA 1993) ("A criminal defendant has both a constitutional right to representation by counsel and a constitutional right to self-representation."); *see also Durocher v. Singletary*, 623 So.2d 482, 483 (Fla. 1993) ("Competent defendants have the constitutional right to refuse professional counsel and to represent themselves, or not, if they so choose.").

Because it does not address the tension between those competing rights, *Brewer v. Williams* cannot support the overly-broad holding of *Traylor*.

Unrecognized by the Court in *Traylor*, paternalistic waiver protections interfere with a defendant's ability to exercise his Sixth Amendment right of self-representation. *Cf. State v. Bowen*, 698 So.2d 248, 250 (Fla. 1997) (“The federal Court in *Faretta* made no provision for an additional layer of protection requiring courts to ascertain whether the defendant is intellectually capable of conducting an effective defense. Such a requirement would be difficult to apply and would constitute a substantial intrusion on the right of self-representation.”).

Thus, even though the Florida Constitution does not contain a conformity clause for the Sixth Amendment, the right to self-representation may prevent a state court from affording greater protections over the right to court-appointed counsel. *Cf. Hooks v. State*, 236 So.3d 1122, 1129 (Fla. 1st DCA 2017), approved, 286 So.3d 163 (Fla. 2019), quoting *Potts v. State*, 718 So.2d 757, 760 (Fla. 1998) (emphasis added):

A requirement that trial courts ask certain questions of the defendant verbatim is contrary to the Florida Supreme Court's recognition that “self-representation is best safeguarded not by an arcane maze of magic words and reversible error traps, but by reason and common sense.” Moreover, *these sorts of requirements may very well frustrate the purpose and intent of Faretta* itself.

The State acknowledges that this Court's decision in *Traylor* suggests otherwise. *See Travis*, 2011 WL 7403061, at \*4, report and recommendation

adopted, 2012 WL 555713 (“At the outset the court acknowledged [in *Traylor*] that state law implementation of a right to counsel could be more protective of the right than federal law.”). Nonetheless, the State maintains that *Traylor*’s unbalanced expansion of the right to counsel under the Florida Constitution interferes with the right to self-representation under the federal constitution. In other words, the right to self-representation under the Sixth Amendment limits the ability of this Court to impose additional protections on the right to counsel under article I, section 16.

By requiring renewals of the offer of court-appointed counsel, *Traylor* strikes an unbalanced approach. In doing so, *Traylor* fails to respect the dignity of the individual defendant, which forms the basis for the right to self-representation. *See generally McKaskle v. Wiggins*, 465 U.S. 168, 176-77 (1984) (“The right to appear *pro se* exists to affirm the dignity and autonomy of the accused....”); *see also Indiana v. Edwards*, 554 U.S. 164, 186-87 (2008) (Scalia, J., dissenting) (“[T]he dignity at issue is the supreme human dignity of being master of one’s fate rather than a ward of the State — the dignity of individual choice.”).

As to this point, the frustration expressed by the defendant in *Muehleman* highlights how waiver protections can tip the balance too far in the wrong direction. In that case, the Court affirmed the defendant’s conviction and death sentence on direct appeal. *See Muehleman v. State*, 503 So.2d 310, 317 (Fla. 1987). In the defendant’s post-conviction appeal, the Court “reversed the death sentence and

ordered that a new penalty phase proceeding be held.” *Muehleman*, 3 So.3d at 1152-53, citing *Muehleman v. State*, 833 So.2d 774 (Fla. 2002). Prior to the Court’s announcement of the September 17, 2002, order in the post-conviction appeal, however, “Muehleman was granted leave to represent himself by the trial court in an order dated March 31, 1999, which was entered after a *Faretta* hearing held during relinquishment of jurisdiction from this Court [for determination of a public records issue].” *Muehleman*, 3 So.3d at 1156; *see also id.* at 1153.

As part of the order directing a new penalty phase, and even though the trial court previously conducted a *Faretta* inquiry, the Court “directed the trial court to ‘immediately advise Muehleman of his right to counsel.’” *Muehleman*, 3 So.3d at 1153, 1156. On December 12, 2002, the trial court conducted a hearing in which the defendant indicated “that he desired to represent himself.” *Id.* at 1157. At a hearing on January 21, 2003, “the issue of waiver of counsel was again discussed briefly.” *Id.* At a February 12, 2003, hearing, the defendant “objected to any further *Faretta* inquiry, arguing that the prior *Faretta* inquiry ‘is still in force.’” *Id.* During an April 15, 2003, hearing, the defendant “again objected to any *Faretta* type inquiry.” *Id.* At a May 16, 2003, hearing, the defendant once again “objected to any counsel being forced on him.” *Id.* And on May 19, 2003, the trial court conducted a *Faretta* inquiry even though the defendant “objected to the *Faretta* inquiry and refused to answer many of the questions posed to him.” *Id.* at 1158.

On appeal, the defendant argued that the trial court: failed to follow this Court's September 17, 2002, order; and, failed to conduct an adequate *Faretta* inquiry. *Muehleman*, 3 So.3d at 1156. Rejecting those claims, the Court held that "the trial court adequately followed our September 17, 2002, directive that Muehleman be immediately advised of his right to counsel and that he was afforded a proper *Faretta* hearing before the commencement of the penalty phase trial." *Id.* In reaching its conclusion, the Court focused on the totality of the interactions between the trial court and the defendant. *See Id.* at 1160:

The record is replete with clear indications that Muehleman knew he had a right to appointed counsel, was offered counsel at every critical stage of the proceedings, and was advised of the risks of self-representation, but expressly and unequivocally rejected counsel in favor of self-representation at every turn. Muehleman made clear, over and over, that he did not want counsel forced upon him and that it was his personal and constitutional right to represent himself.

Unrecognized by the Court, however, all of this interference with the right of self-representation was unnecessary because the original *Faretta* inquiry was still valid under the federal constitution. *Cf. United States v. McBride*, 362 F.3d 360, 367 (6th Cir. 2004); *United States v. Nunez*, 137 F. App'x 214 (11th Cir. 2005). And because that inference tipped the scales too heavily in favor of the right to court-appointed counsel, it went "too far" and violated the defendant's right to represent himself. *Cf. Pennsylvania Coal Co. v. Mahon*, 260 U.S. at 415.

In the case at bar, Appellant expressed frustrations similar to those communicated by the defendant in *Muehleman*. At the start of the third *Faretta* inquiry, Appellant said: “But I would say I’ve been through two *Faretta* hearings. I’ve reaffirmed at least ten times and I reaffirm right now. I would like to represent myself. I do not need or want an attorney or standby counsel.” R-899. Although Appellant cooperated with the trial court in a way that the defendant in *Muehleman* did not, the same type of unnecessary interference occurred during Appellant’s trial.

Finally, Appellant does not argue in his Initial Brief that the offers of court-appointed counsel impermissibly interfered with his right to self-representation. Consequently, no such claim can form the basis for reversal in this case. Furthermore, no fault lies with the trial court. Rather, this Court’s decision in *Traylor* provides the source of error. Instead of reversing in this case, this Court should affirm Appellant’s conviction and sentence but recede from *Traylor*.

## **Conclusion**

By repeatedly stating that he wanted to represent himself, Appellant waived any claim of fundamental error. Alternatively, reversal in this case would produce an absurd result given the repeated offers of court-appointed counsel. Despite those offers, Appellant repeatedly and consistently chose to represent himself. This Court should respect that decision and deny the claim of fundamental error.

**ISSUE II: DID THE GUILT PHASE JURY INSTRUCTION OR THE PROSECUTOR’S COMMENT DURING THE PENALTY PHASE VIOLATE CALDWELL V. MISSISSIPPI? (Restated)**

Appellant argues that fundamental error occurred when, on two separate occasions, the jury was misled “regarding its role in the sentencing process so as to diminish its sense of responsibility.” IB-35. First, Appellant argues that the trial court inaccurately described the jury’s sentencing role by providing the following, generalized instruction *during the guilt phase*: “Your duty is to determine if the defendant has been proven guilty or not, in accord with the law. It is the judge’s job to determine a proper sentence if the defendant is found guilty.” R-153; IB-35. Second, Appellant claims that the prosecutor mischaracterized the jury’s sentencing role during opening statements for the penalty phase by commenting:

So — and at the conclusion of presentation of the evidence, I’ll have another opportunity to get up and speak with y’all. And at that time I will be asking you, based upon the aggravating circumstances of this crime and compared to any mitigating circumstances you may think exist in this case, that the appropriate sentence in this case is a recommendation that the defendant be sentenced to — sentenced to death for the crime he committed in this case based upon the aggravating circumstances that were proven in this trial.

JT Vol. IV, p.333; IB-35.

**Standard of Review**

The standard of review for Appellant’s claim of fundamental error is *de novo*.

*See Knight v. State*, 286 So.3d 147, 151 (Fla. 2019).

***Caldwell***

In *Caldwell v. Mississippi*, 472 U.S. 320, 323 (1985), the United States Supreme Court addressed the following issue: “whether a capital sentence is valid when the sentencing jury is led to believe that responsibility for determining the appropriateness of a death sentence rests not with the jury but with the appellate court which later reviews the case.”

After the presentation of the aggravation and mitigation evidence in *Caldwell*, the prosecutor rebutted the defendant’s closing argument by stating: “[T]hey would have you believe that you’re going to kill this man and they know — they know that your decision is not the final decision.... For they know, as I know, and as Judge Baker has told you, that the decision you render is automatically reviewable by the Supreme Court.” *Caldwell*, 472 U.S. at 325-26.

Reversing the death sentence, the United States Supreme Court concluded “that it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant’s death rests elsewhere.” *Caldwell*, 472 U.S. at 328-29. In reaching its decision, the Court identified the problem with mischaracterizing the state supreme court as “alternative decision-makers.” *See Id.* at 333:

[T]he uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize the importance of its role. Indeed, one can easily imagine that in a case in which the jury

is divided on the proper sentence, the presence of appellate review could effectively be used as an argument for why those jurors who are reluctant to invoke the death sentence should nevertheless give in.

### ***Romano***

In *Romano v. Oklahoma*, 512 U.S. 1 (1994), the United States Supreme Court addressed the following question: “Does admission of evidence that a capital defendant already has been sentenced to death in another case impermissibly undermine the sentencing jury’s sense of responsibility for determining the appropriateness of the defendant’s death, in violation of the Eighth and Fourteenth Amendments?” *Id.* at 6. In that case, the defendant argued to the Court that “the evidence of his death sentence in the [first murder] case impermissibly reduced the [second murder case] sentencing jury’s sense of responsibility for its decision, in violation of *Caldwell*....” *Id.*

Rejecting the claim of error, the Court concluded: “Here, the jury was not affirmatively misled regarding its role in the sentencing process. The evidence at issue was neither false at the time it was admitted, nor did it even pertain to the jury’s role in the sentencing process. The trial court’s instructions, moreover, emphasized the importance of the jury’s role.” *Romano*, 512 U.S. at 9. In reaching its decision, the Court cited to a prior case that accurately describes the requirement for a successful *Caldwell* claim: “[t]o establish a *Caldwell* violation, a defendant necessarily must show that the remarks to the jury improperly described the role

assigned to the jury by local law.” *Id.*, quoting *Dugger v. Adams*, 489 U.S. 401, 407 (1989).

### **Fundamental error**

In order to constitute fundamental error, an unobjected-to error in a jury instruction “must reach 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.” *Brown v. State*, 124 So.2d 481, 484 (Fla. 1960).

In order to show that the verdict could not have been obtained without the assistance of the alleged error, the error must involve a disputed element of the crime of conviction. *See Knight*, 286 So.3d at 151:

Properly understood, the fundamental error test for jury instructions cannot be met where, as in this case, there was no error in the jury instruction for the offense of conviction and there is no claim that the evidence at trial was insufficient to support that conviction. In such circumstances, one cannot plausibly claim that the conviction “could not have been obtained” without the erroneous lesser included offense instruction or that the error vitiated the basic validity of the trial.

*See also State v. Delva*, 575 So.2d 643, 645 (Fla. 1991) (“Failing to instruct on an element of the crime over which the record reflects there was no dispute is not fundamental error and there must be an objection to preserve the issue for appeal.”).

### **Analysis**

#### **Prosecutor’s comment**

The prosecutor in no way mischaracterized the jury's role in the sentencing process; rather, the prosecutor simply communicated that he would ask the jury to recommend a death sentence to the trial court. Despite Appellant's claim to the contrary, this remark did not improperly describe the role assigned to the jury by Florida law. *Romano*, 512 U.S. at 9, quoting *Dugger v. Adams*, 489 U.S. at 407.

Under section 921.141(2)(b)2, a defendant is "eligible" to receive a death sentence if the jury unanimously finds that the State proved at least one aggravating factor beyond a reasonable doubt. After eligibility is established, the jury must make a recommendation to the court regarding an appropriate sentence. In making that recommendation, the jury must answer three questions: (1) whether sufficient aggravating factors exist; (2) whether aggravating factors exist which outweigh the mitigating circumstances found to exist; and (3) whether the defendant should be sentenced to life imprisonment without the possibility of parole or to death. With his comment, the prosecutor simply let the jury know that he would ask the jury to answer the third question by recommending death, not life. Thus, the comment did not improperly describe the role assigned to the jury by Florida law. *Romano*, 512 U.S. at 9.

### **Jury Instruction**

Similarly, the guilt phase jury instruction challenged by Appellant did not mislead the jury regarding its role in the penalty phase. When properly viewed

within the context of the trial as a whole, the general comment challenged by Appellant did not overshadow the specific instructions provided to the jury during the penalty phase. *Cf. Barrientes v. Johnson*, 221 F.3d 741, 777 (5th Cir. 2000) (“[L]ooking at the total trial scene, it is clear that the jury was not misinformed.”); *cf. also Belcher v. Sec’y, Dep’t of Corr.*, 427 F. App’x 692, 695 (11th Cir. 2011) (“Having reviewed the record, we cannot say that the state misrepresented the law regarding the jury’s role. The remarks made by the prosecutor, *viewed in context*, accurately portrayed the relationship between the judge and jury and did not denigrate the jury’s role in the proceedings.”) (emphasis added).

Nonetheless, Appellant argues that, by stating “it is the judge’s job to determine a proper sentence,” the guilt phase instruction failed to inform the jury that it could dispense mercy by recommending a life sentence; and by statute, any such recommendation would prevent the trial court from imposing a death sentence. *See* IB-37. Stated somewhat differently, Appellant claims that the guilt phase jury instruction failed to inform the jury about its power under section 921.141(3)(a)1, which states: “If the jury has recommended a sentence of ... [I]f imprisonment without the possibility of parole, the court *shall* impose the recommended sentence.” (Emphasis added.)

Because of the language of section 921.141(3)(a)1, it does not appear that Appellant raises a jury pardon claim. *See generally Knight*, 286 So.3d at 151-52

(Rejecting the jury pardon doctrine and describing it as “a device without legal foundation,” “a not guilty verdict rendered contrary to the law and evidence,” an “aberration,” and claim to “a fundamental right to instructions that facilitate partial jury nullification.”). In other words, Appellant does not complain that the guilt phase instruction failed to inform the jury that it could dispense mercy by finding Appellant guilty of a lesser included offense — even if the evidence clearly proved the charged offense. Rather, Appellant argues that the guilt phase instruction failed to inform the jury that it could dispense mercy by recommending life, thereby foreclosing the possibility of a death sentence — even if the evidence of aggravation clearly outweighed the mitigation.

Returning to the three questions that the jury must answer in order to make a recommendation to the trial court regarding an appropriate sentence, a “no” to first question means that the jury must recommend a life sentence. Similarly, a “no” to the second question removes the possibility of a death sentence. But, just because a jury answers “yes” to the first and second questions does not necessarily mean that it must recommend death when answering the third. In other words, a jury could answer “yes” to the first and second questions but still recommend a life sentence. Thus, a jury need not resort to its “pardon power” in order to recommend a life sentence in a case where the aggravation outweighs the mitigation.

Unacknowledged by Appellant, the court correctly instructed the jury during the penalty phase that a juror could recommend a life sentence even if he or she believed that the aggravation outweighed the mitigation. *See* R-165; JT Vol. IV, p.380 (“Regardless of the results of each juror’s individual weighing process — even if you find that the sufficient aggravators outweigh the mitigators — the law neither compels nor requires you to determine that the defendant should be sentenced to death.”). To the extent that Appellant argues that the guilt phase jury instruction failed to inform the jury that a life sentence recommendation would preclude the judge from imposing death, the verdict form provided during the penalty phase communicated this point to the jury as well. *See* R-171; JT Vol. IV, p.367 (“If your vote to impose death is less than unanimous, the trial court shall impose a sentence of life without the possibility of parole.”).

### **Entirety of the case**

In *Barrientes v. Johnson*, 221 F.3d 741 (5th Cir. 2000), the defendant claimed a *Caldwell* error by highlighting “comments made by the prosecutor during voir dire.” *Id.* at 776. During jury selection, the prosecutor asked a juror the following question: “Do you understand, sir, that you as an individual, or the jurors, collectively, you do not assess the death penalty. If anyone does that it is the judge. You understand that?” *Id.* Subsequently, the prosecutor made the following

statement to a different juror: “You never assess the death penalty. That’s up to the Judge.” *Id.*

Quoting from one of its prior decisions, the Fifth Circuit highlighted the need to view a *Caldwell* claim within the context of the entire trial. *See Barrientes v. Johnson*, 221 F.3d at 777, quoting *Montoya v. Scott*, 65 F.3d 405, 420 (5th Cir. 1995) (“In evaluating a *Caldwell* claim, we look to the ‘total trial scene,’ including jury selection, the guilt phase of the trial, and the sentencing hearing, examining both the court’s instructions and counsel’s arguments to the jury.”).

With that in mind, the Fifth Circuit quoted comments from the trial court to the jury just prior to jury selection:

In an ordinary case after hearing that evidence you as a jury would go out and decide his punishment. That is whether he’s going to get ten years or twenty years or life in the penitentiary, depending on how you feel about the seriousness of the offense and the character of the defendant.

In a capital murder case the jury does not decide the punishment, and I’ll say that again: In a capital murder case at the end of the punishment stage the jury does not decide the punishment, rather, I, as the Judge, ask you two fact questions and you, as a jury, will either answer those questions yes or no.

....

However, our law provides that you must know that if you answer yes to both of those questions the Judge must impose the death penalty upon the defendant.

If you answer the two questions, both of them yes, then the Judge must assess the punishment of death. If you answer either or both of the questions no then the Judge must assess the penalty of life in prison.

So while you do not assess punishment our law says you must know and understand that you answers as given will determine whether the Judge gives death or life....

*Barrientes v. Johnson*, 221 F.3d at 777. Pointing to the entirety of the record, the Fifth Circuit rejected the *Caldwell* claim and explained its reasoning as follows: “looking at the total trial scene, it is clear that the jury was not misinformed.” *Id.*

### **No *Caldwell* violation in Appellant’s case**

Just as the “total trial scene” indicated that no *Caldwell* error occurred in *Barrientes*, so too the entirety of the record clearly shows that the jury in Appellant’s case was not misled regarding its role in the sentencing process. Any possible confusion created by the general comment in the guilt phase jury instruction was certainly eliminated by the specific and accurate instructions given to the jury during the penalty phase. Therefore, no *Caldwell* violation occurred.

### **No fundamental error outside of *Caldwell***

To the extent Appellant raises a jury instruction claim outside of *Caldwell*, Appellant never disputed that he should receive anything other than a death sentence. Instead of disputing that point with evidence of mitigation or argument to the jury or judge, Appellant expressed a desire to receive a death sentence so that he could serve out the remainder of his time on death row:

[If I wasn’t on death row,] I would be on the compound.... Compounds generally now are war zones.... On death row, you’re in a cell by yourself. It’s quiet. You have your own space. I do very good in seclusion. I do very good by myself, you know, not around other

people. I'm — like, when I'm at [Florida State Prison] on CM, right, close management, I never get in trouble because I enjoy the solitude. I enjoy being in my own little world doing my own little thing. Know what I mean?

On the compound, that's absolutely impossible. That's absolutely impossible. You've got this new generation coming in. They're the most disrespectful, "the world owes me something" people you've ever seen in your life, and they would keep me on CM irregardless [sic]. If you look at my past history in DOC, I have aggravated batteries, possessions of weapons, because they make you hurt them and — just on how they act. I want to relax.

JT Vol. III, p.301. Without any dispute as to the appropriateness of a death sentence, any such claim of fundamental error must fail. *Delva*, 575 So.2d at 645. Finally, any such claim was waived when Appellant agreed to the guilt phase jury instruction. *See* JT Vol. III, pp.239, 272; *see generally Knight*, 286 So.3d at 150-51.

## **Conclusion**

Neither the guilt phase jury instruction nor the prosecutor's comment during penalty phase opening statements misled the jury regarding its role in the sentencing process. Even if the guilt phase instruction failed to inform the jury that it could dispense mercy by recommending a life sentence, no *Caldwell* violation occurred because the penalty phase instruction and verdict form specifically informed the jury that it could. And, the prosecutor's comment simply referenced section 921.141(2)(b)2.c, Fla. Stat., which asks the jury to make a sentencing recommendation to the judge.

**ISSUE III: DID THE TRIAL COURT COMMIT FUNDAMENTAL ERROR BY ALLOWING THE STATE’S EXPERT TO TESTIFY DURING THE *SPENCER* HEARING REGARDING INFORMATION OBTAINED IN VIOLATION OF APPELLANT’S RIGHT AGAINST SELF-INCRIMINATION? (Restated)**

Appellant claims that the trial court committed fundamental error when it allowed the State, through an expert witness during the *Spencer* hearing, to introduce evidence that violated Appellant’s right against self-incrimination under the Fifth Amendment. *See* IB-41.

**Factual background**

Appellant, who chose to represent himself, repeatedly informed the court that he did not want to present any mitigation evidence. *See* R-945, 951, 1146; JT Vol. III, p.286. In response, the trial court appointed an *amicus* counsel to develop mitigation and present it to the court during the *Spencer* hearing. *See* R-893. At the *Spencer* hearing, *amicus* counsel called Dr. Falb, a psychologist who had previously interviewed Appellant. *See* R-1067.

After *amicus* counsel concluded his presentation of evidence, the prosecutor raised an issue regarding the ability of its expert to examine Appellant. *See* R-1109 (“[T]his is a little bit unusual because the Court has *amicus* presenting mitigation; whereas, normally, if the defense does it, then the Defendant generally has to be available, or there are consequences under the rule.”). Appellant responded: “I will not submit to an interview by prosecution’s doctor.” R-1109.

The State's expert, Dr. Prichard, informed the trial court that the scope of any interview would be limited to the PTSD diagnosis and a "couple more mitigators mentioned." R-1113. The trial court indicated that it was "fine with that scope," ordered Appellant to submit to an interview with the State's expert on the morning of June 21, 2019, but informed Appellant that "[i]f you get to a situation where you think, you know, that we're getting outside what you want to answer, then you just tell them that." R-1114, 1115. Appellant responded with "All right." R-1114.

On the morning of his *Spencer* hearing testimony, Dr. Prichard met with Appellant and discussed the following:

We went over a general history. He, you know, sorted his upbringing out to me, so we talked about where he lived, who raised him. We talked about his educational experience. We talked about the fact that he has two children. Previous employment. Substance use historically. Psychiatric treatment historically. Medications he has taken, either in the community or while he was in some form of institution. Criminal history and medical history. That — that was basically the background information we went through.

R-1178.

During his testimony at the *Spencer* hearing, Dr. Prichard opined that Appellant suffers from antisocial personality disorder. R-1180. Additionally, Dr. Prichard referred to Appellant's statements indicating a preference to serve his sentence on death row instead of the within the prison system's general population. R-1183. And, Dr. Prichard disagreed with Dr. Falb's recent diagnosis of PTSD. R-1190, 1195, 1204.

With regard to mitigation, Dr. Prichard opined that Appellant “could conform [his conduct to the requirements of law] and he did understand [the criminality of his conduct].” R-1195. Dr. Prichard did not see any evidence indicating that Appellant was suffering from a “mental, emotional disturbance anywhere around the time of the offense.” R-1193. To the contrary, Dr. Prichard testified that Appellant’s actions were “very calculated,” “very calm,” and “pretty well planned out.” R-1193.

### **The Fifth Amendment right against self-incrimination and the Sixth Amendment right to self-representation**

“A criminal defendant, who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence, may not be compelled to respond to a psychiatrist if his statements can be used against him at a capital sentencing proceeding.” *Estelle v. Smith*, 451 U.S. 454, 468 (1981).

The Sixth Amendment right to self-representation is a personal right that belongs to a defendant. *See Fareta*, 422 U.S. at 834, quoting, *Illinois v. Allen*, 397 U.S. 337, 350-51 (1970) (Brennan, J., concurring) (“The right to defend is personal.... And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of ‘that respect for the individual which is the lifeblood of the law.’”); *see also McCoy*, 138 S. Ct. at 1507 (same).

As a personal right, the consequences of that decision on a defendant are irrelevant — even in a capital case. *See McCoy*, 138 S. Ct. at 1505 (“With individual liberty—and, in capital cases, life—at stake, it is the defendant’s prerogative, not

counsel's, to decide on the objective of his defense...."); *see also id.* at 1507 (“[A]n accused may insist upon representing herself—however counterproductive that course may be.”); *Silagy v. Peters*, 905 F.2d 986, 1007-08 (7th Cir. 1990) (Holding that the right to self-representation applies in capital sentencing proceedings.); *Potts*, 718 So.2d at 759, citing *Faretta*, 422 U.S. at 834 (“The Sixth Amendment grants to each criminal defendant the right of self-representation, regardless of the consequences.”).

### **There’s no such thing as a waiver of mitigation in a capital case**

Some courts view the strategic choice by a *pro se* capital defendant to forgo the presentation of mitigation evidence as the “waiver” of a right. *See, e.g., Soto v. Commonwealth of Ky.*, 139 S.W.3d 827, 855 (Ky. 2004) (“The United States Supreme Court has yet to address this particular issue; however, many jurisdictions have upheld a defendant’s right to voluntarily and intelligently waive the presentation of mitigating evidence.”); *see also State v. Arguelles*, 63 P.3d 731, 753 (Utah 2003):

Although the United States Supreme Court has never decided whether a defendant may waive the presentation of mitigating evidence, its opinions suggest that such a right naturally extends from the Sixth Amendment. The Court has emphasized that the right to represent oneself is at the very core of the Sixth Amendment. *Faretta v. California*, 422 U.S. 806, 832 (1975). The right to counsel, the Court has said, is a personal right and may be waived by the defendant. *Id.* at 834. Further, the Court has determined that a capital defendant may waive the right to appeal, *Gilmore v. Utah*, 429 U.S. 1012, 1015 (1976), and that a self-representing defendant must be allowed to control the

course of the proceedings. *McKaskle v. Wiggins*, 465 U.S. 168, 179-81 (1984). Given the importance of the right to represent oneself and direct the proceedings, we are loathe to take a stance that would run directly contrary to this right.

Unfortunately, this approach misconstrues the nature of the decision. Instead of the waiver of a constitutional right under the Eighth Amendment, forgoing mitigation simply represents the exercise of a choice under the Sixth Amendment right to self-representation. *Cf. People v. Bloom*, 774 P.2d 698, 718 (Cal. 1989) (“[A] judgment of death may not be regarded as unreliable in a constitutional sense merely because a self-represented defendant chose not to present mitigating evidence at the penalty phase.”); *see also State v. Hugueley*, No. W2004-00057-CCA-R3CD, 2005 WL 645179, at \*5 (Tenn. Crim. App. Mar. 17, 2005), *aff’d*, 185 S.W.3d 356 (Tenn. 2006) (“[T]he decision of a competent capital defendant not to present mitigating evidence does not deprive the State of its interests in seeing that his sentence was imposed in a constitutionally acceptable manner.”).

Thus, the “waiver” approach improperly elevates a defendant’s permissive right to present mitigation evidence over his personal right to be the captain of his own ship and navigate the waters of his own trial. *Cf. California v. Brown*, 479 U.S. 538, 541 (1987) (“[T]he capital defendant generally *must be allowed* to introduce any relevant mitigating evidence.”) (emphasis added); *cf. also Boyde v. California*, 494 U.S. 370, 377-78 (1990) (“The Eighth Amendment requires that the jury be able to consider and give effect to all relevant mitigating evidence *offered by petitioner.*”)

(emphasis added); *Arguelles*, 63 P.3d at 753 n.19 (“When considering the role of mitigating evidence in capital cases, the Court has phrased the presentation of mitigating evidence as a permissive right.”) (citations omitted); *Wallace v. State*, 893 P.2d 504, 510 n.4 (Okla. Crim. App. 1995) (“Of course, the Supreme Court has not required a defendant to present mitigating evidence. Rather, a survey of relevant cases reveals statements concerning the ability of a defendant to present such evidence are phrased permissively.”).

### **Appointment of *amicus* counsel interferes with the right to self-representation**

Because the “right” to present mitigation evidence is permissive, the appointment of *amicus* counsel to present mitigation evidence — even if only to the trial court — interferes with a defendant’s personal right to self-representation under *Faretta*. See *United States v. Davis*, 285 F.3d 378, 381 (5th Cir. 2002) (District court’s decision to appoint independent counsel for *pro se* defendant at the penalty phase of a capital murder case, in order to present mitigating evidence of kind that defendant had specifically declined to present, violated defendant’s Sixth Amendment right to self-representation).

Initially, this Court’s caselaw correctly balanced the personal right to self-representation under the Sixth Amendment against the permissive right to present mitigation under the Eighth Amendment. See, e.g., *Hamblen v. State*, 527 So.2d 800, 804 (Fla. 1988):

Hamblen had a constitutional right to represent himself, and he was clearly competent to do so. To permit counsel to take a position contrary to his wishes through the vehicle of guardian ad litem would violate the dictates of *Faretta*. In the field of criminal law, there is no doubt that “death is different,” but, in the final analysis, all competent defendants have a right to control their own destinies....

We hold that there was no error in not appointing counsel against Hamblen’s wishes to seek out and to present mitigating evidence and to argue against the death sentence.

*See also Lockhart v. State*, 655 So.2d 69, 74 (Fla. 1995) (“A defendant has a constitutional right to represent himself when competent to do so. Allowing counsel to take a position contrary to the defendant’s wishes through the vehicle of guardian ad litem would violate the dictates of *Faretta*.”).

Subsequently, however, the Court gradually adopted the dissenting view articulated by Justice Barkett in *Hamblen*. *Compare Hamblen*, 527 So.2d at 806 (Barkett, J., dissenting):

Despite the majority’s focus on the application of *Faretta*, the issue in this case is not a defendant’s right to represent himself.... The core issue, rather, is whether the state has an independent interest in presenting a case for mitigation in those rare instances when the defendant chooses not to present one for himself. Although the majority concedes that the state or society has the obligation not to administer the death penalty by default and to prevent executions from becoming a vehicle by which a prisoner can commit suicide, it fails to address the question of how the state is to meet that obligation in a case such as this.

*With Muhammad v. State*, 782 So.2d 343, 363 (Fla. 2001):

With having continued to struggle with how to ensure reliability, fairness, and uniformity in the imposition of the death penalty in these

rare cases where the defendant waives mitigation, we have now concluded that the better policy will be to require the preparation of a PSI in every case where the defendant is not challenging the imposition of the death penalty and refuses to present mitigation evidence.

*And compare with Marquardt v. State*, 156 So.3d 464, 470 (Fla. 2015):

[R]ecognizing the tension that may exist when a trial court appoints standby counsel to present mitigation evidence in these circumstances, as was done in this case, we prospectively modify the *Muhammad* procedures to the limited extent that trial courts should utilize an independent, special counsel—rather than standby counsel—to represent the public interest in bringing forth all available mitigation for the benefit of the jury, the trial court, and this Court.

*But see McKaskle v. Wiggins*, 465 U.S. at 184 (“Nor does the Constitution require judges to take over chores for a *pro se* defendant that would normally be attended to by trained counsel as a matter of course.”).

Indeed, the Court even held that the presentation of mitigation evidence over the objection of the defendant does not violate the Sixth Amendment right to self-representation. *See Barnes v. State*, 29 So.3d 1010, 1022 (Fla. 2010):

Barnes contends that the trial court violated his *Faretta* right to self-representation by appointing special court counsel to investigate and present mitigation over his objection. He argues that as both the client and the attorney, he had the absolute right to limit the court’s consideration of mitigation only to the fact that he came forward to confess to an unsolved crime and took full responsibility for his actions.... We disagree....

In reaching its decision in *Barnes*, the Court distinguished the Fifth Circuit’s decision in *Davis* on two grounds: (1) “the mitigation evidence presented by independent counsel in this case did not conflict with anything presented by Barnes

...”; and, (2) the mitigation evidence in *Barnes* was presented to a judge, not a jury. See *Barnes*, 29 So.3d at 1024.

Unrecognized by the Court in *Barnes*, however, if the right to self-representation is a personal right that belongs to a defendant, then neither of these distinctions matter. To begin with, if *Barnes* did not want *any* mitigation presented, then the fact that the mitigation offered by special counsel did not conflict with anything actually presented by *Barnes* misses the point. It was the existence of the mitigation, not its nature, that interfered with the defendant’s personal right to self-representation. And second, interference with a defendant’s personal right to self-representation is no less problematic just because it occurs in front of a judge instead of a jury. If the dignity of each defendant forms the basis for the right to self-representation, then judge versus jury remains irrelevant; when a personal right is at stake, the focus should be on the individual, not the audience. Thus, neither of the distinctions drawn by the Court in *Barnes* enjoy any meaningful significance.

As with Issue I, no fault lies with the trial court because that court simply followed this Court’s guidance in capital cases. Therefore, instead of reversing and remanding, this Court should affirm Appellant’s conviction and sentence but recede from any decisions that interfere with a defendant’s right to self-representation.

**No fundamental error in this case**

Assuming *arguendo* that Dr. Prichard's testimony violated Appellant's right against self-incrimination, no fundamental error occurred in this case because Appellant would have received the death sentence *he wanted* anyway. Therefore, Appellant cannot establish that the sentencing result could not have been obtained without the assistance of the alleged error.

A large portion of Dr. Prichard's testimony focused on the diagnosis of antisocial personality disorder and its effects on Appellant's behavior both before and after the murder. However, that diagnosis was nothing new. In the pretrial competency evaluation report, a psychologist diagnosed Appellant with "Antisocial Personality Disorder." R-111.

In addition, during the presentation of mitigation evidence by *amicus* counsel, Dr. Falb testified that he did not diagnose Appellant with antisocial personality because the psychologist who performed the competency evaluation already had. R-1095 ("I didn't do it because she did it."). Nonetheless, Dr. Falb testified that records pertaining to Appellant clearly indicated that Appellant was "violating societal norms at quite an early age." R-1076. Dr. Falb even confirmed that, after age fifteen, Appellant's behavior "moves him into the criteria of what we call antisocial personality disorder." R-1077.

Finally, Dr. Falb testified about the impacts of antisocial personality disorder on behavior. According to Dr. Falb, the "symptoms characteristic of antisocial

personality is [sic] impulsivity, inability to learn over time right from wrong, to correct one's mistakes, violation of societal norms." R-1086. Dr. Falb testified that "[t]here's no curing [antisocial personality disorder]." R-1087. At best, a person with antisocial personality disorder "can eventually, over long periods of time and intervention and possible therapy, learn how to control impulsivity or to develop coping strategies that are considered appropriate rather than what they may resort to otherwise to get away with something or to do something that is self-serving." R-1087.

Although stronger, Dr. Prichard's testimony regarding Appellant's antisocial behavior was largely repetitive with Dr. Falb's testimony. Thus, Dr. Prichard's testimony did not provide the only evidentiary pathway for the court to learn of Appellant's antisocial personality disorder and its impacts on behavior.

Another prominent part of Dr. Prichard's testimony involved Appellant's statements regarding a preference to serve prison time on death row instead of within the prison system's general population. However, Appellant explained during the penalty phase why he would prefer to be on death row:

[If I wasn't on death row,] I would be on the compound.... Compounds generally now are war zones.... On death row, you're in a cell by yourself. It's quiet. You have your own space. I do very good in seclusion. I do very good by myself, you know, not around other people. I'm — like, when I'm at [Florida State Prison] on CM, right, close management, I never get in trouble because I enjoy the solitude. I enjoy being in my own little world doing my own little thing. Know what I mean?

On the compound, that's absolutely impossible. That's absolutely impossible. You've got this new generation coming in. They're the most disrespectful, "the world owes me something" people you've ever seen in your life, and they would keep me on CM irregardless [sic]. If you look at my past history in DOC, I have aggravated batteries, possessions of weapons, because they make you hurt them and — just on how they act. I want to relax.

JT Vol. III, p.301. As with the antisocial personality diagnosis, Dr. Prichard's testimony regarding Appellant's preference for death row was nothing new.

Dr. Falb and Dr. Prichard appeared to disagree on only two areas: whether Appellant suffered from PTSD; and, whether Appellant could conform his conduct to the requirements of law. As to Dr. Falb's diagnosis of PTSD, Dr. Prichard acknowledged Appellant's childhood trauma but testified that "there wasn't a post-traumatic response to that trauma." R-1208. Apparently disagreeing with Dr. Prichard, the trial court specifically found that "competent evidence was presented to establish the Defendant has PTSD and Anti-Social Personality Disorder." R-817 (emphasis in original). Although Dr. Falb mentioned the possibility of dissociative effects attendant to PTSD, he never opined that Appellant was suffering from a dissociative episode when Appellant murdered Mr. Mason. R-1081. Accordingly, the court also found that "[t]here was no testimony or other credible evidence that Defendant exhibited any signs of being under the influence of drugs, alcohol or from an episodic PTSD event at the time of the murder." R-817. Thus, any disagreement

between Dr. Falb and Dr. Prichard regarding PTSD did not enjoy any significant impact on the trial court's decision to impose a death sentence.

As to the ability to conform, Dr. Falb opined that, due to his antisocial personality disorder, Appellant was "likely unable" to comport his conduct with the requirements of the law. R-1087. Dr. Prichard disagreed, testifying that Appellant "could have conformed if he wanted to conform." R-1195. In the sentencing order, the trial court appeared to agree with Dr. Falb about Appellant's ability to conform by finding that "the capacity of Appellant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired (moderate weight)." R-818. However, the trial court based its determination, not on the diagnosis of antisocial personality disorder, but on the "Adverse Childhood Experiences (ACE) that have rendered [Appellant] less than effective at making good decisions." R-818. Thus, as with the PTSD diagnosis, any disagreement between Dr. Falb and Dr. Prichard regarding Appellant's ability to conform his conduct to the requirements of the law did not enjoy any significant impact on the trial court's decision to impose a death sentence.

In addition, Appellant conceded that he could not refute the evidence of aggravation in his case: "I cannot refute the evidence that was presented which led to a finding of guilt nor can I argue against the four aggravating factors in which led [sic] to a 12-0 jury verdict for a sentence of death." R-799. Those four aggravators

included: Appellant was previously convicted of a felony and under a sentence of imprisonment; Appellant was previously convicted of a felony involving the use or threat of violence to another person; the murder was especially heinous, atrocious, and cruel; and the murder was committed in a cold, calculated, and premeditated manner, without any pretense of moral or legal justification. R-169-70; JT Vol. IV, p.397.

Although the jury did not find any mitigation, the trial court found six mitigators and weighed them as follows: (1) the capacity of Appellant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired (moderate weight); (2) Appellant has been diagnosed with alcohol abuse and drug dependency (some weight); (3) Appellant was diagnosed with major depression (moderate weight); (4) Appellant was raised in a dysfunctional family setting (great weight); (5) Appellant was courteous, respectful, and considerate to the court during every court appearance (some weight); and (6) Appellant did not want his family contacted for mitigation purposes (some weight). R-817-20.

Given the undisputed evidence of Appellant's antisocial personality disorder, given Appellant's undisputed preference to receive a death sentence, given the undisputed evidence of aggravation, and given the relatively weak mitigation presented in the case, Appellant cannot establish that Dr. Prichard's disagreement

with Dr. Falb's diagnosis of PTSD somehow tipped the scales in favor of a death sentence. Nor can Appellant demonstrate that Dr. Prichard's disagreement with Dr. Falb regarding Appellant's ability to conform his conduct to the law was necessary to obtain the death sentence. In other words, Appellant cannot establish the *sine qua non* necessary for a claim of fundamental error.

## **ISSUE IV: DID FUNDAMENTAL ERROR OCCUR WHEN THE TRIAL COURT INSTRUCTED THE JURY DURING THE PENALTY PHASE?**

### **Standard of Review**

The standard of review for Appellant's claim of fundamental error is *de novo*.  
*See Knight*, 286 So.3d at 151.

### **Appellant's Claim on Direct Appeal**

Appellant argues that, under Florida's capital sentencing scheme, a defendant is not eligible to receive a sentence of death unless a jury unanimously finds that: at least one aggravating factor is sufficient to justify the death penalty; and, the aggravating factors outweigh the mitigating circumstances. *See* IB-47-48.

### **Conclusion**

Contrary to Appellant's suggestion, a defendant in Florida is eligible to receive a death sentence if the jury finds that the State proved at least one aggravator beyond a reasonable doubt. *See State v. Poole*, No. SC18-245, 2020 WL 370302, at \*11 (Fla. Jan. 23, 2020) ("Under longstanding Florida law, there is only one eligibility finding required: the existence of one or more statutory aggravating circumstances."); *accord McKinney v. Arizona*, 140 S. Ct. 702, 705 (2020) ("Under [the United States Supreme] Court's precedents, a defendant convicted of murder is eligible for a death sentence if at least one aggravating circumstance is found."). Therefore, Appellant's claim of fundamental error fails.

## **ISSUE V: IS APPELLANT’S DEATH SENTENCE PROPORTIONAL IN RELATION TO OTHER DEATH SENTENCES THIS COURT UPHELD?**

### **Standard of Review**

*De novo?* Cf. *State v. Markus*, 211 So.3d 894, 900 (Fla. 2017).

### **Preservation**

Not applicable? *But see Harrell v. State*, 894 So.2d 935, 939-40 (Fla. 2005), quoting § 924.051(3), Florida Statutes.

### **Appellant’s Claim on Direct Appeal**

Not raised. *See* Fla. R. App. P. 9.142(a)(5); *but see* Philip J. Padovano, Presumption of correctness, 2 Fla. Prac., App. Practice § 19:2 (2018 ed.); *but see also D.H. v. Adept Cmty. Svcs., Inc.*, 271 So.3d 870, 888 (Fla. 2018) (Canady, C.J., dissenting) (“[I]t is not the role of the appellate court to act as standby counsel for the parties.”).

### **Proportionality Review Unconstitutional**

Because it is not required by the Eighth Amendment to the U.S. Constitution or by the U.S. Supreme Court caselaw interpreting the Eighth Amendment, proportionality review violates the Conformity Clause of the Florida Constitution. *See Yacob v. State*, 136 So.3d 539, 557-58 (Fla. 2014) (Canady, J., dissenting).

In reaching its decision in *Yacob*, the majority acknowledged “that the [United States] Supreme Court, in *Pulley v. Harris*, 465 U.S. 37, 50-51 (1984), held that the Eighth Amendment does not require comparative proportionality review by an

appellate court in every case in which the death penalty is imposed and the defendant requests proportionality review of the sentence.” *Yacob*, 136 So.3d at 549, n.2. However, the majority noted that “the Supreme Court also proceeded to list the panoply of ‘checks on arbitrariness’ that existed in the California statute being reviewed, including that at least one ‘special circumstance’ must be unanimously found by the jury in order for the case to proceed to a penalty phase and each ‘special circumstance’ must be proven to the jury beyond a reasonable doubt.” *Id.* The majority then opined that several of those “‘checks on arbitrariness’ identified in *Pulley*... are not present under Florida’s capital sentencing system.” *Id.* Additionally, the majority highlighted that “Florida’s capital sentencing system ... is also currently one of the only death penalty statutes in the country to permit a non-unanimous jury recommendation of death.” *Id.*; *but see Hurst v. Florida*, 136 S. Ct. 616 (2016) (Florida’s capital sentencing scheme, under which an advisory jury makes a recommendation to a judge, and the judge makes the critical findings needed for imposition of a death sentence, violates the Sixth Amendment right to jury trial.).

Assuming arguendo that the capital sentencing system at issue when *Yacob* was decided lacked the procedural safeguards necessary to remove the need for proportionality review on appeal, Florida’s current system remains virtually indistinguishable from the California system analyzed in *Pulley*.

### **Proportionality Review**

“This Court reviews and considers all the circumstances in a case relative to other capital cases when deciding whether death is a proportionate penalty and to ensure uniformity.” *Tai A. Pham v. State*, 70 So.3d 485, 500 (Fla. 2011).

### **This Case**

Appellant committed a gruesome murder while serving a prison sentence for a previous murder. The murder in this case was cold, calculated, and premeditated. A “couple of weeks” prior to the beginning of October 2017, Appellant decided that he was going to kill Mr. Mason because Appellant believed that Mr. Mason “had been lying” to him. JT Vol. II, p.206. Surprised to find out that Mr. Mason was not in prison for home invasion, Appellant thought that Mr. Mason was “a real piece of shit.” JT Vol. II, p.206. Appellant “stewed on it” for a few days, told himself “fuck it,” and then decided to kill Mr. Mason. JT Vol. II, p.206. Appellant thought Mr. Mason deserved to die because he was a “Chomo.” JT Vol. II, p.203. According to Appellant, Mr. Mason as “a waste of space.” JT Vol. II, p.203. Approximately two weeks later on Friday, September 29, 2017, Appellant “raped” Mr. Mason “twice just for a little retribution.” JT Vol. II, p.207. On Saturday, September 30, 2017, Appellant raped Mr. Mason again. JT Vol. II, p.207. On Sunday, October 1, 2017, Appellant “didn’t mess with” Mr. Mason but told himself that he would kill Mr. Mason the next morning. JT Vol. II, p.207. Thus, as this evidence clearly shows, Appellant planned the murder well in advance.

The murder was also especially heinous, atrocious, and cruel. At the start of the attack, Appellant “tapped [Mr. Mason] on the shoulder and ... said ‘You’re it.’” JT Vol. II, p.207. Mr. Mason “tried to fight.” JT Vol. II, p.207. Initially, Mr. Mason got away from Appellant because he “was kicking like crazy.” JT Vol. II, p.207. To keep the noise down, Appellant “grabbed [Mr. Mason] from behind and pulled him over toward the toilet.” JT Vol. II, p.208. Then, Appellant “sat on [Mr. Mason’s] chest and held him.” JT Vol. II, p.208. While Mr. Mason was still conscious, Appellant told him: “I’m going to strangle the life out of you. You’re a piece of shit. You know, tell the devil I said hello.” JT Vol. II, p.208. After that, Mr. Mason fell unconscious. JT Vol. II, p.208. Appellant then tied one of Mr. Mason’s T-shirts around Mr. Mason’s neck. JT Vol. II, p.209. Then, Appellant put Mr. Mason on his bed with “his head facing down.” JT Vol. II, p.209.

The cause of Mr. Mason’s death was “ligature strangulation.” JT Vol. II pp.162, 181. Strangulation occurs when the flow of deoxygenated blood out of the brain is cut off in the neck. JT Vol. II, p.178. When strangulation occurs, “the vertebral arteries are still pumping blood to the brain, but the blood isn’t able to come down; it causes congestion.” JT Vol. II, p.178. When that congestion occurs, the brain starts to swell. JT Vol. II, p.178. As the brain swells, blood vessels inside the brain become compressed. JT Vol. II, p.178. That compression then “causes hypoxia, or a lack of oxygen to the brain.” JT Vol. II, p.178. After one or two

minutes of choking, a victim may lose consciousness — but regain consciousness if the blood flow returns to normal. JT Vol. II, pp.178-79. After three to five minutes of choking, “irreversible brain damage” starts to occur. JT Vol. II, p.178. While losing consciousness, a victim is aware of what is happening. JT Vol. II, p.179.

Mr. Mason’s face was “really red, purple, discolored.” JT Vol. II, p.161. Mr. Mason suffered petechial hemorrhages on his face, caused by “a rupture of small blood vessels due to a marked congestion of the neck.” JT Vol. II, p.161. This occurs “because the blood is going into the head and tissues but not draining out because of the compression of the neck.” JT Vol. II, p.164; *see also* JT Vol. II, p.169 (“Now the intense congestion that you see above the ligature ... is due to the fact that that ligature was on there, compressed the veins, did not compress the vertebral arteries. Blood is going in, but it’s not coming out. So the blood is going to stay in the face and cause the red/purple discoloration.”). Mr. Mason also suffered petechial hemorrhaging in his eyes. JT Vol. II, p.173. Fluid drainage from Mr. Mason’s mouth suggested pulmonary edema, “which is part of the dying process where the blood backs up into the lungs, causing fluid to mix with blood to kind of froth up and come out of the mouth and nose.” JT Vol. II, p.162. And, Mr. Mason’s “C-6 vertebral bony body was fractured.” JT Vol. II, p.171. A C-6 fracture would require “intense pressure ... and hyperextension of the head at the same time.” JT Vol. II,

p.171. Mr. Mason was alive when the fracture occurred “because there’s bleeding into the tissue.” JT Vol. II, p.171.

### **Aggravators and mitigators**

The jury unanimously found that the State established beyond a reasonable doubt the following four aggravators: Appellant was previously convicted of a felony and under a sentence of imprisonment; Appellant was previously convicted of a felony involving the use or threat of violence to another person; the murder was especially heinous, atrocious, and cruel; and the murder was committed in a cold, calculated, and premeditated manner, without any pretense of moral or legal justification. R-169-70; JT Vol. IV, p.397. The jury did not find that “one or more mitigating circumstances was established by a greater weight of the evidence.” JT Vol. IV, p.397.

The trial court found four aggravators and weighed them as follows: (1) Appellant was previously convicted of a felony and under sentence of imprisonment (great weight); (2) Appellant was previously convicted of a felony involving the use of threat or violence to another person (great weight); (3) the first-degree murder was especially heinous, atrocious, and cruel (great weight); and (4) the first-degree murder was committed in a cold, calculated, and premeditated manner, without pretense of moral or legal justification (great weight). R-814-16.

Additionally, the trial court found six mitigators and weighed them as follows: (1) the capacity of Appellant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired (moderate weight); (2) Appellant has been diagnosed with alcohol abuse and drug dependency (some weight); (3) Appellant was diagnosed with major depression (moderate weight); (4) Appellant was reared in a dysfunctional family setting (great weight); (5) Appellant was courteous, respectful, and considerate to the court during every court appearance (some weight); and (6) Appellant did not want his family contacted for mitigation purposes (some weight). R-817-20. With regard to the first mitigator, the trial court found that “Defendant’s ability to conform his conduct to the requirements of law are substantially impaired by adverse childhood experiences that have rendered him less than effective at making good decisions.” R-818.

## **Conclusion**

Given all of these considerations, this case is not one of the least aggravated but most mitigated; furthermore, Appellant’s death sentence is proportional in relation to other death sentences this Court has upheld. *See Robertson v. State*, 187 So.3d 1207 (Fla. 2016) (An inmate planned the murder of his cellmate, who died by strangulation); *see also Gill v. State*, 14 So.3d 946 (Fla. 2009) (same); *Doty v. State*, 170 So.3d 731 (Fla. 2015) (An inmate planned the murder of a fellow inmate, who died from stabbing and strangulation).

## **ISSUE VI: IS THE JURY’S VERDICT SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE?**

### **Standard of Review**

The standard of review is competent, substantial evidence. *Davis v. State*, 2 So.3d 952 (Fla. 2008).

### **Preservation**

Not applicable? *But see Harrell*, supra, quoting § 924.051(3), Fla. Stat.

### **Appellant’s Claim on Direct Appeal**

Not raised. *See Fla. R. App. P. 9.142(a)(5); but see D.H.*, 271 So.3d at 888 (Canady, C.J., dissenting).

### **Sufficiency Review**

“In determining the sufficiency of the evidence, the question is whether, after viewing the evidence in the light most favorable to the State, a rational trier of fact could have found the existence of the elements of the crime beyond a reasonable doubt.” *Bradley v. State*, 787 So.2d 732, 738 (Fla. 2001).

### **This Case**

A rational trier of fact could have found the elements of first-degree murder beyond a reasonable doubt. First, Appellant repeatedly confessed to the murder of the victim. On the afternoon of the murder, Appellant approached Officer Jordan and said: “I really hate to ruin your day, but I killed my roommate six-and-a-half hours ago.” JT Vol. II, pp.210-11, JT Vol. I, p.56. On March 9, 2018, Appellant

told an FDLE Agent: “I did what I did because I felt like [Mr. Mason] deserved it.” JT Vol. II, p.202. In describing how he felt about the murder of Mr. Mason, Appellant said: “I didn’t feel bad to begin with.... I mean, I did what I did, you know, knowingly and intelligently.” JT Vol. II, p.211. On June 4, 2018, Appellant sent a letter to the State Attorney’s Office in Wakulla County. *See* R-402-03:

... I would like to assert the fact that I have given you both a written confession, and a taped clarification of that written confession obtained by F.D.L.E. I made it very clear that I made him suffer physically, mentally, and emotionally in the days leading up to his murder. I also made it very clear that in Ryan Mason’s last moments on Earth I made sure he knew he was going to die. That early morning of October 2nd, 2017, he struggled valiantly in those last moments. Begging me with his eyes as I sat on his chest with my hands around his throat. The last words Ryan Mason heard in his last moment before he succumbed to unconsciousness was “Tell the Devil I said hello.”

In addition to the multiple confessions, the State introduced corroborating DNA evidence. A DNA sample from the shirt around Mr. Mason’s neck matched the DNA profile of Mr. Mason and the profile of Appellant. JT Vol. II, p.138. Additionally, a DNA sample from Mr. Mason’s left-hand fingernails matched the DNA profile of Mr. Mason and the profile of Appellant. JT Vol. II, p.140.

## **Conclusion**

Appellant’s multiple confessions and the DNA evidence, when viewed in the light most favorable to the State, could lead a rational trier of fact to find the existence of all the elements of the crime of conviction beyond a reasonable doubt.

## CONCLUSION

Based on the foregoing arguments and authorities, Appellee, the State of Florida, respectfully requests that this Court affirm the judgment and sentence rendered below.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via the eportal to Richard M. Bracey III, Assistant Public Defender, mose.bracey@flpd2.com, Counsel for Appellant, this 7<sup>th</sup> day of May, 2020.

**CERTIFICATE OF FONT COMPLIANCE**

I HEREBY CERTIFY that the size and style of type used in this brief is 14-point Times New Roman, in compliance with Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

*/s/Michael T. Kennett*  
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