IN THE SUPREME COURT OF FLORIDA

SCOTTIE D. ALLEN,

Appellant,

v. Case No. **SC19-1313**

STATE OF FLORIDA,

Appellee.

On Appeal from the Circuit Court of the Second Judicial Circuit in and for Wakulla County, Florida

INITIAL BRIEF OF APPELLANT

Andy Thomas
Public Defender
Second Judicial Circuit

Richard M. Bracey, III
Assistant Public Defender
Florida Bar No. 76419
Leon County Courthouse
301 S. Monroe St., Suite 401
Tallahassee, Florida 32301
(850) 606-1000
mose.bracey@flpd2.com

Counsel for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CONSTITUTIONS

STATUTES

RULES

CASES

OTHER AUTHORITIES

INTRODUCTION

This case arose when a man who had endured a dysfunctional childhood, including sexual abuse, killed a fellow inmate who was in prison for child-sex-related offenses. The man later waived his right to counsel, demanded a speedy trial, and presented no case. With that in mind, this appeal is mainly about (1) whether a failure to renew the offer of counsel–prior to a penalty-phase trial at which a single juror's vote could determine life or death–vitiates the basic validity of that trial; and (2) whether, without the assistance of comments that affirmatively misled the jury regarding its role in the sentencing process so as to diminish its sense of responsibility, the jury's determination here that the man should be sentenced to death could have been obtained.

* * * * * * * * * * *

Scottie Allen was charged with the first-degree murder of Ryan Mason. The court subsequently accepted Allen's waiver of his right to counsel at a pretrial hearing. Allen immediately demanded a speedy trial.

When Allen later appeared without counsel prior to the guilt-phase trial, the court renewed the offer of counsel. At trial, Allen presented no case. During the guilt-phase final instructions, the court declared: "It is the judge's job to determine a proper sentence if the defendant is found guilty." Allen was found guilty as charged.

When Allen subsequently appeared without counsel prior to the penalty-phase trial, the court failed to renew the offer of counsel. Shortly thereafter, during its second-phase opening statement, the State advised the jury that the State would later ask the jury to return a "recommendation" that Allen be sentenced to death. At trial, Allen presented no case.

During the penalty-phase final instructions, the court instructed the jury that, if it found at least one aggravating factor, it had to engage in a weighing process after making additional findings. Those additional findings included (1) whether the aggravating factors were sufficient to justify the death penalty, and (2) whether those factors outweighed the mitigating circumstances. But the court did not inform the jury that, to make those additional findings, it had to reach a particular subjective state of certitude, such as beyond a reasonable doubt.

In its verdict, the jury found four aggravating factors: (1) under sentence of imprisonment; (2) prior violent felony conviction; (3) especially heinous, atrocious, or cruel; and (4) cold, calculated, and premeditated. The jury further found the aggravating factors were sufficient to warrant a death sentence and outweighed the mitigating circumstances. Finally, it determined Allen should be sentenced to death.

Subsequent to the penalty-phase trial, the court addressed its earlier failure to renew the offer of counsel. It also announced it had appointed special counsel to present mitigating evidence at the *Spencer* hearing.

At the *Spencer* hearing, the special counsel presented mitigating evidence, including psychiatric evidence. Other than a brief allocution, Allen presented no case. Following the special counsel's evidentiary presentation, the State asked to continue the *Spencer* hearing to allow its expert, Dr. Greg Prichard, to prepare.

The State requested Prichard be allowed to interview Allen. Allen protested. After a discussion, the court ordered Allen to submit to an interview with Prichard. Prichard later interviewed Allen at the county jail and testified for the State.

The court subsequently sentenced Allen to death. It found established and weighed the four aggravating factors. It also found established and weighed multiple mitigating circumstances, including (1) Allen's capacity to conform his conduct to the requirements of the law was substantially impaired, and (2) Allen was raised in a dysfunctional family setting. This appeal follows.

* * * * * * * * * * *

Allen's death sentence should be vacated. And this case should be remanded for a new penalty-phase trial. As to **Issue I**, the court failed to renew the offer of counsel prior to the penalty-phase trial. First, under Article I, Section 16, of the Florida Constitution, the court was required to renew that offer prior to that trial because the penalty-phase trial was a subsequent crucial stage of the proceedings.

Second, the court's failure to renew the offer of counsel prior to the penalty-phase trial amounted to fundamental error because it vitiated the basic validity of that

trial. Finally, a multitude of decisions by Florida district courts of appeal–involving facts analogous to those of the present case–should persuade this Court to conclude reversible error occurred here.

As to **Issue II**, the court instructed the jury that the court's job was to determine the sentence, and the State later indicated it would ask the jury to return a "recommendation" of death. First, those comments affirmatively misled the jury regarding its role in the sentencing process so as to diminish its sense of responsibility. Second, taken together, the court's instruction and the State's remark amounted to fundamental error because, without the assistance of those comments, the jury's determination that Allen should be sentenced to death could not have been obtained.

Finally, as to **Issue IV**, the court failed to instruct the jury to determine beyond a reasonable doubt whether the aggravating factors were sufficient to justify the death penalty and whether those factors outweighed the mitigating circumstances. First, those determinations are the functional equivalents of elements. Second, even if those determinations are not purely factual and involve normative judgment, they are subject to the constitutional requirement of proof beyond a reasonable doubt. Third, this Court should reconsider its prior contrary decisions. Last, the court's failure here to provide the necessary instruction amounted to fundamental error.

* * * * * * * * * * *

Alternatively, this case should be remanded for a new *Spencer* hearing followed by the issuance of a revised sentencing order, or at a minimum, for reevaluation of the mitigating evidence and the sentence. As to **Issue III**, the court allowed the State to introduce Dr. Prichard's testimony at the *Spencer* hearing. First, by introducing Prichard's testimony, the State used Allen's compelled statements to Prichard against Allen. Second, the introduction of Prichard's testimony amounted to fundamental error.

STATEMENT OF THE CASE AND FACTS

I. Pretrial Proceedings.

A. Indictment, appointment of counsel, request to represent self, and order for competency evaluation.

On June 25, 2018, Allen was charged with the first-degree murder of Mason. [R53] The indictment alleged the incident occurred on October 2, 2017. [R53]

On October 2, 2018, counsel was appointed for Allen. [R 919] A few weeks later, Allen filed a request to waive his right to counsel and represent himself. [R57]

Shortly thereafter, the court ordered Allen be evaluated to determine if he was competent to proceed and competent to represent himself "in accordance with the provisions of *Indiana v. Edwards*."[1] [R71-74]

---

[1]In *Indiana v. Edwards*, the United States Supreme Court concluded "the Constitution permits States to insist upon representation by counsel for those competent . . . to stand trial . . . but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves." 554 U.S. 164, 178

B. Subsequent court appearance and competency reports.

On December 20, 2018, the court solicited information from Allen related to his mental state and ability. [R867-69] It also informed Allen of his right to counsel, some advantages of being represented by counsel, some disadvantages of representing oneself, and the pending charge. [R859-67, 871-78] Allen acknowledged, both orally and in writing, that he understood that information. [R80-81, 869-78] At the conclusion of the colloquy, the court deferred ruling on Allen's request to waive counsel and represent himself until the competency evaluation was completed. [R858, 869, 878]

On January 17, 2019, Dr. Jennifer Meyer submitted two reports. [R100-14] The reports were based on a clinical interview of Allen, brief conversations with jail officials, and a review of case documentation. [R101, 108] Meyer diagnosed Allen with a depressive disorder, antisocial personality disorder (ASPD), cannabis use disorder, and opioid use disorder. [R104, 111] One report concluded Allen was competent to proceed, and the other concluded he was competent to represent himself in accordance with the provisions of *Edwards*. [R106, 113]

Among other information concerning Allen's background, the reports contained the following. Allen had limited contact with his father from birth. [R102, 109] His mother and stepfather divorced when Allen was six. [R102, 109]

(2008).

At age eight, Allen was sexually abused by his cousin, who himself had been abused by Allen's grandfather. [R102, 109] Once Allen's grandfather learned Allen had been abused by his cousin, Allen's grandfather began sexually abusing Allen. [R102, 109] That sexual abuse continued for a number of years. [R102, 109]

Around age nine, Allen "tried alcohol." [R103, 110] He also became involved with the juvenile justice system and spent time in "structured and supervised living environments for juveniles." [R102, 109]

At age twelve, Allen began using marijuana on a daily basis. [R103, 110] And he attended counseling related to being sexually abused. [R103, 110]

Beyond that, he "received intermittent mental health services as a juvenile." [R103, 110] In school, though Allen was gifted academically, he got into trouble, including multiple suspensions. [R102, 109] Allen dropped out after eleventh grade, but later obtained his GED. [R102, 109]

In terms of employment, Allen held "jobs in construction, as a restaurant cook, and briefly working with mentally diminished veterans in a convalescent home." [R102, 109]

As a young adult, Allen began abusing Oxycontin. [R103, 110] He subsequently relocated to Florida "in an effort to detox from Oxycontin by changing his environment." [R102, 109] Allen had two children himself. [R102, 109]

At the time of the evaluation, Allen was serving a twenty-five year prison

sentence. [R104, 111] While in prison, Allen "received episodic mental health services," including to treat clinical depression, and he was prescribed "various psychotropic medications." [R103, 110]

C. Finding of competency, waiver of right to counsel, and demand for speedy trial.

On February 6, 2019, Allen reaffirmed his desire to waive counsel and represent himself. [R931-32] Based on Meyer's report, the court found Allen competent to proceed. [R118-19, 933-35]

The court solicited information from Allen related to his mental state and ability, as well as his prior experience with the criminal justice system. [R936-39] Allen again confirmed his desire to waive counsel and represent himself. [R939] He also indicated standby counsel was not "necessary." [R939-41] The court relieved Allen's counsel and did not appoint standby counsel. [R939-41]

Based on Meyer's report, the court also found Allen competent to represent himself in accordance with the provisions of *Edwards*. [R118-20, 941-42] And the court found Allen's waiver of his right to counsel to be knowing, voluntary, and intelligent. [R942-43]

Allen immediately filed a demand for speedy trial. [R98, 944] He indicated he did not plan on calling any defense witnesses. [R951] And he confirmed he did not intend to present any mitigating evidence. [R945]

II. Jury Selection.

On February 18, 2019, Allen appeared for jury selection. [R1250] The court reminded Allen of his right to counsel and offered to appoint counsel to represent him at trial. [R1250] Allen renewed his waiver of that right. [R1250] The court found Allen's renewed waiver to be knowing, voluntary, and intelligent. [R1250]

III. Guilt-phase Trial.

A. Preliminary discussion and opening statements.

On February 19, 2019, the guilt-phase trial began with a preliminary discussion followed by opening statements. [T4-19] During his opening, Allen simply stated he was representing himself; he would not be presenting any evidence; and the State had to prove he was guilty. [T19]

B. State's case.

Correctional Officer Gray. On October 2, 2017, at Wakulla Correctional Institution, Gray conducted the "morning count" in the dorm in which Allen and Mason shared a cell. [T21-26] At approximately 8:30 a.m., Gray saw both sitting on their bunks in their cell. [T26, 32-33] That afternoon, after being alerted there was an issue with an inmate in the dorm, Gray discovered Mason deceased and lying on his bunk with a T-shirt tied tightly around his neck. [T40-46, 50, 80-82, 96-97, 163-66]

Correctional Officer Jordan. Jordan testified that, on the afternoon of October 2, 2017, Allen approached her and stated: "I just murdered my roommate." [T55-56]

Medical Examiner Clark. Clark opined the cause of Mason's death was ligature strangulation. [T162-63, 171-74, 181-82] He claimed it takes three to five minutes of constant strangulation to cause death, and the individual being strangled could remain conscious for thirty seconds to a minute. [T178-80] During the autopsy, Clark observed nothing to indicate Mason had experienced sexual trauma. [T180]

FDLE Agent Lapointe. Lapointe investigated Mason's death. [T184-85] On October 2, 2017, he interviewed Allen.[2] [T186] Allen waived his *Miranda* rights and agreed to speak with Lapointe. [T186-87, 189-90]

During the interview, Allen denied having told Jordan he had killed his roommate. [T190] Instead, he simply advised her that his roommate was dead. [T190] Allen stated he woke up that morning and found Mason deceased and lying in his bed with a shirt wrapped around his neck. [T190-93] Mason was in prison for possession of child pornography and traveling to meet a minor. [T194]

On October 23, 2017, the state attorney's office received a letter from Allen. [R352-53; T142-43, 198-99, 213-16] In the letter, Allen claimed to have planned to kill Mason for a few weeks and to have raped him four times in a two-day period prior to October 2, 2017. [R352] Allen denied being "high" at the time of Mason's

---

[2]The record on appeal includes an audio recording of Lapointe's October 2, 2017, interview of Allen. [R1502] That recording can be found on a copy of the disc that was introduced at trial as State Exhibit 15. [T187-88] That recording was also transcribed at trial. [T188-97]

death, but admitted smoking "K-2" at times. [R352]

Allen stated he strangled Mason. [R353] Allen maintained he had planned to have sex with Mason post-mortem, but did not follow through when Mason defecated on himself. [R353] At the end of the letter, Allen expressed a desire to communicate further with the state attorney's office. [R353]

On March 9, 2018, Lapointe interviewed Allen again.[3] [T199] Allen waived his *Miranda* rights and agreed to speak with Lapointe. [T199-202] During the interview, Allen indicated he sent the October 2017 letter to the state attorney's office because he "got tired of the charade." [T202]

Allen then stated he killed Mason because Mason was a child molester and "deserved it." [R202-03] Allen felt Mason was "a waste of space." [T203] Allen denied being a "drug addict." [T204-05]

Allen went on to explain that, a couple weeks prior to October 2, 2017, he decided to kill Mason when he found out Mason had been lying about why Mason was in prison. [T206-07] Allen claimed he raped Mason four times as "retribution." [T206-07] On October 2, 2017, Allen woke up planning to kill Mason that day. [T207]

At approximately 8:40 a.m., after the "morning count," Allen attacked Mason.

---

[3]The record on appeal includes an audio recording of Lapointe's March 9, 2018, interview of Allen. [R1500] That recording can be found on a copy of the disc that was introduced at trial as State Exhibit 16. [T200-01] That recording was also transcribed at trial. [T201-13]

[T207] The pair struggled. [T207-08] Allen eventually pinned Mason on the floor; told Mason "I'm going to strangle the life out of you"; and strangled Mason until he fell unconscious. [T208] Allen then tied a T-shirt around Mason's neck and put him in his bed. [T209]

Allen later left the cell to go to morning break. [T209] Allen maintained he was going to do some "awful stuff" to Mason, but when he got back to the cell, Mason had defecated on himself. [T209] That afternoon, Allen approached Jordan and told her that he had killed his roommate. [T211] An investigation of Mason's death ensued. [T211-12]

C. Defense case.

Allen presented no case. [T223]

D. Final instructions, closing arguments, and verdict.

On the morning of February 20, 2019, during the final instructions, the court declared: "It is the judge's job to determine a proper sentence if the defendant is found guilty." [R153; T251]

Allen waived closing argument. [T270] He was found guilty as charged. [R160; T288-89]

E. Concluding discussion.

Immediately after the jury returned its verdict, the court advised the jury that the proceedings were about to enter a "second phase," which was a "separate

proceeding." [T289, 293] The court then dismissed the jurors and instructed them to return that afternoon to begin the second-phase trial. [T293]

IV. Penalty-phase Trial.

A. Preliminary discussion and opening statements.

On the afternoon of February 20, 2019, the penalty-phase trial began with a brief discussion of evidentiary matters. [T318-23] At the end of its opening, the State advised the jury that the State would later ask the jury to return a "recommendation" that Allen be sentenced to death. [T333]

Allen waived opening statement. [T334]

B. State's case.

State Attorney Investigator Lee. In June 2018, the state attorney's office received a second letter from Allen. [R405; T338-39, 345-46] In the letter, Allen insisted he had planned Mason's murder and taken steps to ensure Mason suffered. [R405]

Officer Smith. In 2003, Smith investigated the death of Karen Abtan. [R359-71; T348] Her body was discovered in a townhouse in Broward County, Florida. [T347-48] Allen and his girlfriend, Katie Cardino, were later found in possession of Abtan's vehicle, and they were taken into custody. [T348-50]

Smith interviewed them. [T350] Allen and Cardino indicated they had been helping Abtan move out of the townhouse. [T350] An argument ensued between

Abtan and Cardino, and Cardino prevented Abtan from leaving the room. [T350] When Abtan went to a window to yell, Allen strangled her. [T350] He was subsequently convicted of second-degree murder and sentenced to twenty-five years in prison. [R359-67; T351-52]

C. Defense case.

Allen presented no case. [T359]

D. Final instructions, closing arguments, and verdict.

During the final instructions, the court advised the jury that it was their "duty to make a decision as to the appropriate sentence." [R161-66; T359-367, 376-80] And the court later mentioned the jury should "realiz[e] a human life was at stake" and "bring [its] best judgment to bear." [R166; T367] The court also instructed the jury as to the following aggravating factors: (1) under sentence of imprisonment; (2) prior violent felony conviction; (3) pecuniary gain; (4) especially heinous, atrocious, or cruel; and (5) cold, calculated, and premeditated. [R161-63; T360-62] The court informed the jury that, to find such a factor, it had to be convinced beyond a reasonable doubt that it existed. [R163; T363-64, 376-77]

The court also instructed the jury that, if it found at least one aggravating factor, it had to engage in a weighing process after making additional findings. [R164-65; T376-80] Those additional findings included (1) whether the aggravating factors were sufficient to justify the death penalty, and (2) whether those factors

outweighed the mitigating circumstances. [R164-65; T376-80] But the court did not inform the jury that, to make those additional findings, it had to reach a particular subjective state of certitude, such as beyond a reasonable doubt. [R164-65; T376-80]

Finally, the court declared: "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." [R165; T380]

During its closing, the State argued multiple aggravating factors existed and outweighed any mitigating circumstances. [T391] Allen waived closing argument. [T391-92]

In its verdict, with the exception of the pecuniary gain factor, the jury found the proposed aggravating factors. [R169-70; T396-98] It found no mitigating circumstances. [R170; T398] The jury further found the aggravating factors were sufficient to warrant a death sentence and outweighed the mitigating circumstances [R170-71; T398] Finally, it determined Allen should be sentenced to death. [R171; T398]

E. Concluding discussion.

Immediately after the jury returned its verdict, the court ordered a pre-sentence investigation (PSI). [R414; T401-02]

The State then asked that "the Court inquire and that Mr. Allen reaffirm that he . . . wanted to represent himself and did not want counsel at the penalty phase."

[T403] In response to the court's subsequent queries, Allen maintained he had not wanted to be represented by counsel during the second-phase trial. [T403-04]

V. Post Penalty-phase Trial Hearing.

On February 21, 2019, the court held a previously unannounced hearing. [R891] At the outset, the court announced: "Looking back at my trial notes late yesterday, there were . . . some loose ends I wanted to tie up." [R891]

Shortly thereafter, the court addressed Allen:

> [Court]: Well, when I was going back through my notes, 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 wh[y] I am bringing that up is, had I formally renewed it at that time, would you have accepted the appointment of counsel?
>
> [Allen]: No, sir.
>
> [Court]: Okay. And like I've made before, I'll make a finding that . . . you certainly continue to be competent to make that decision to waive counsel and that you did so freely, knowingly, voluntarily, and intelligently.

[R892-93]

The court went on to announce it had appointed special counsel to present mitigating evidence at the *Spencer* hearing. [R416-17, 893-97] At that point, the State asked the court to conduct a "nunc pro tunc *Faretta* hearing" regarding Allen's right to counsel during the second-phase trial. [R897-900]

In response, the court solicited information from Allen related to his mental state and ability, as well as his prior experience with the criminal justice system. [R905-07] It also informed Allen of his right to counsel, some advantages of being

represented by counsel, and some disadvantages of representing oneself. [R900-905] At the conclusion of the colloquy, Allen insisted he did not want the court to appoint a lawyer to represent him. [R908] Allen also claimed that, if the court had gone through such a colloquy prior to the second-phase trial, he would have "answered in the same way" and would have "continued to want to represent" himself. [R908]

VI. *Spencer* Hearing.

A. Preliminary discussion.

On June 7, 2019, Allen appeared for the *Spencer* hearing. [R979] The court reminded Allen of his right to counsel and offered to appoint counsel to represent him at trial. [R979] Allen renewed his waiver of that right. [R979] The court found Allen's renewed waiver to be knowing, voluntary, and intelligent. [R979]

B. Special counsel's case.

***Monica Jordan*.** Jordan was a licensed investigator and mitigation specialist. [R983-84] She met with Allen, got a brief social history, and obtained extensive documentation related to Allen's background. [R996-97]

Among other things, Jordan's investigation indicated the following. Allen's father had "extreme alcohol, drug, [and] mental health issues," as well as an extensive criminal history. [R482, 609, 620-747, 999-1003] Allen's parents divorced when he was 18 months old. [R481, 486, 998] Allen subsequently had limited contact with his father. [R998-99] Following the divorce, Allen's mother remarried. [R1003-04]

When Allen was seven years old, his mother and stepfather divorced. [R486, 998, 1004] Allen and his mother fell on "very hard times." [R998, 1005-06] "They couldn't make ends meet." [R998] So they moved in with Allen's maternal grandparents. [R998, 1005]

Shortly thereafter, Allen's grandfather–who had been abusing two of Allen's cousins–began sexually abusing Allen. [R481, 487, 498-507, 998, 1006, 1008-09] Allen's grandfather was later convicted of molesting multiple children. [R497-513, 523-80, 1008-10]

Around age nine, Allen's mother began smoking marijuana with Allen. [R482, 490, 1005, 1010] Over time, Allen came to use marijuana on a daily basis. [R482,490-91, 1016] Allen went on to regularly use cocaine. [R482, 1016]

Allen eventually became involved with the criminal justice system. [R482, 490, 755-92, 1015-18] At one point, he was sentenced to a "boys' home" and became a ward of the state. [R1017-18, 1046-47] From there, he was sent to a foster home. [R1018-19]

As a young adult, Allen began using opiates intravenously. [R482, 491, 1019] In late 2002, Allen traveled to Florida. [R481-82, 491, 1019-20] He met Cardino. [R1020] They were later charged in connection with Abtan's death. [R1020-21]

And Allen "was adamant that he was going to protect his girlfriend and her role in" Abtan's death. [R1023] Shortly thereafter, against his lawyer's advice, Allen

entered an "open plea" to second-degree murder. [R483, 1021-23] He was sentenced to prison. [R1024-25] In prison, Allen used drugs extensively. [R1025-36]

Dr. Martin Falb. Falb was a psychologist. [R1067] He reviewed extensive documentation related to Allen's background. [R1074-76] Falb also interviewed Allen. [R1077]

Falb emphasized Allen had "suffered extreme measures of trauma in terms of emotional abuse, physical abuse, and sexual abuse beginning at a young . . . age, along with substance abuse." [R1077-78, 1082] Falb diagnosed Allen with ASPD. [R1077, 1095-96] Falb also stressed Allen was forced to endure significant childhood adversity. [R1078-1080]

With that mind, Falb indicated Allen suffered from post-traumatic stress disorder (PTSD) with the possibility of dissociative effects. [R1081, 1094] And Falb went on to opine that a person who suffered from PTSD and addiction would struggle to cope and function in a prison setting. [R1085]

C. Allen's allocution.

Allen clarified that he had some sporadic contact with his biological father as a child. [R1058-59] Allen was placed in a foster home as a child at his own request because he did not want to go back to his own home. [R1059]

Allen received counseling related to being sexually abused by his grandfather. [R1059] Prior to being sexually abused by his grandfather, Allen was sexually abused

by his older cousin. [R1059-60]

When Allen was in prison as a young adult, he attempted suicide. [R1061] As a result, he was sent to a mental health facility. [R1061]

D. Discussion and recess in proceedings.

Following the special counsel's evidentiary presentation on June 7, 2019, the State indicated it intended to present a rebuttal case, but it needed to continue the *Spencer* hearing for two weeks to allow its expert, Dr. Greg Prichard, to prepare. [R1107-09]

The State then requested Prichard be allowed to interview Allen. [R1109] Allen responded: "I will not submit to an interview by prosecution's doctor." [R1109]

The State proceeded to highlight that, under Rule 3.202 of the Florida Rules of Criminal Procedure, the court can impose consequences on the defense if the defendant refuses to cooperate with the State's mental health expert. [R1110] And the State posited that, if Allen refused to be interviewed by Prichard, the court could limit or exclude Falb's testimony. [R1110] But the court pointed out that the court itself had appointed special counsel because Allen "waived mitigation," and thus, the situation was in "another posture." [R1111]

The court subsequently asked Prichard, who was present in the courtroom, regarding the anticipated scope of his interview with Allen. [R1113] Prichard responded that the interview would be "fairly narrow in scope . . . probably an hour

and a half to two hours." [R1113]

At that point, the court ordered Allen to submit to an interview with Prichard. [R1114] The court advised Allen:

> I think just out of a matter of fundamental fairness, so what I'm going to do is based on what Dr. Prichard has told me, I'm fine with that scope, but because Dr. Falb didn't have the benefit of doing any testing instruments or anything like that, let's try to keep a level playing field with respect to that.
>
> . . . .
>
> . . . If 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.

[R1114]

E. State's rebuttal.

On June 21, 2019, the State presented the testimony of Prichard. [R1172-73] Prichard was a psychologist. [R1174] He reviewed documentation, heard the earlier *Spencer* hearing testimony, and interviewed Allen "at the Wakulla County Jail for about two hours." [R1177-78]

During Prichard's interview of Allen at the local jail, they "went over a general history." [R1178, 121-22] Prichard also conducted a "mental status examination." [R1178] And Prichard spoke with Allen about "the instant case, the murder at Wakulla Correctional Institution." [R1178]

Prichard diagnosed Allen with ASPD. [R1179-85] That conclusion was based on Prichard's discussion with Allen concerning "the current case." [R1183-84]

Prichard also diagnosed Allen with "periodic depression," cannabis use

disorder, and possibly alcohol use disorder. [R1185-86] Moreover, Prichard disputed that Allen suffered from PTSD. [R1186-90, 1204-13, 1223-29, 1232-35]

Further, Prichard opined that (1) the homicide of Mason was not committed while Allen was under the influence of an extreme mental or emotional disturbance; (2) Allen's capacity to appreciate the criminality of his conduct or to conform his conduct to the law was not substantially impaired; and (3) Allen had not acted under extreme duress. [R1191, 1194-95, 1998-99] Those conclusions were based on Prichard's questioning of Allen regarding the incident in which Mason was killed, as well as the events leading up to that incident. [R1191-99]

VII. Imposition of Sentence.

The court sentenced Allen to death. [R820-21, 826, 973] In doing so, the court considered Prichard's testimony. [R817]

More specifically, in imposing death, the court found established and weighed the following aggravating factors: (1) under sentence of imprisonment (great weight); (2) prior violent felony conviction (great weight); (3) especially heinous, atrocious, and cruel (great weight); and (4) cold, calculated, and premeditated (great weight). [R814-17, 965-68]

In addition, the court found established and weighed the following mitigating circumstances: (1) Allen's capacity to conform his conduct to the requirements of the law was substantially impaired (moderate weight); (2) Allen had been diagnosed with

major depression (moderate weight); (3) Allen had been diagnosed with alcohol abuse and drug dependency (some weight); (4) Allen did not want his family contacted for mitigation purposes (some weight); (5) Allen was courteous, respectful, and considerate at every court appearance (some weight); and (6) Allen was raised in a dysfunctional family setting (great weight). [R818-20, 970-73]

Allen filed a notice of appeal. [R841] This appeal follows.

SUMMARY OF THE ARGUMENT

Allen's death sentence should be vacated. And this case should be remanded for a new penalty-phase trial.

As to **Issue I**, the court failed to renew the offer of counsel prior to the penalty-phase trial. First, under Article I, Section 16, of the Florida Constitution, the court was required to renew that offer prior to that trial. In short, the penalty-phase trial was a crucial stage of the proceedings because it significantly affected the outcome of the proceedings. The penalty-phase trial was also a stage subsequent to any stage at which Allen had waived his right to counsel because it had a separate function and consequence from those earlier stages.

Second, the court's failure to renew the offer of counsel prior to the penalty-phase trial amounted to fundamental error. In short, that error vitiated the basic validity of that trial. And its effects are almost impossible to measure. Finally, a multitude of decisions by Florida district courts of appeal–involving facts analogous

to those of the present case–should persuade this Court to conclude reversible error occurred here.

As to **Issue II**, the court instructed the jury that the court's job was to determine the sentence, and the State later indicated it would ask the jury to return a "recommendation" of death. First, those comments affirmatively misled the jury regarding its role in the sentencing process so as to diminish its sense of responsibility.

In short, those comments allowed the jury to feel less responsible for the sentencing decision. They also improperly described the role assigned to the jury by Florida law. More specifically, under Florida law, it is not the court's responsibility alone to make the sentencing decision, and the jury's role goes beyond simply recommending the court reach a particular sentencing decision.

Second, taken together, the court's instruction and the State's remark amounted to fundamental error because, without the assistance of those comments, the jury's determination that Allen should be sentenced to death could not have been obtained. In short, if a single juror had disagreed that Allen should be sentenced to death, that determination would not have been obtained. And, as the United States Supreme Court has recognized, comments that diminish jurors' sense of responsibility can lead jurors who are reluctant to vote for death to "give in."

Finally, as to **Issue IV**, the court failed to instruct the jury to determine beyond

a reasonable doubt whether the aggravating factors were sufficient to justify the death penalty and whether those factors outweighed the mitigating circumstances. First, those determinations must be made beyond a reasonable doubt because they are the functional equivalents of elements. Second, even if those determinations are not purely factual and involve normative judgment, they are subject to the constitutional requirement of proof beyond a reasonable doubt.

Third, this Court should reconsider its prior decisions that essentially conclude the determinations at issue are neither the functional equivalents of elements nor subject to proof beyond a reasonable doubt. Last, in the present case, the court's failure to provide the necessary instruction amounted to fundamental error.

* * * * * * * * * * *

Alternatively, this case should be remanded for a new *Spencer* hearing followed by the issuance of a revised sentencing order, or at a minimum, for reevaluation of the mitigating evidence and the sentence. As to **Issue III**, the court allowed the State to introduce Dr. Prichard's testimony at the *Spencer* hearing.

First, by introducing Prichard's testimony, the State used Allen's compelled statements to Prichard against Allen. In short, Allen's statements to Prichard were compelled because the court ordered Allen to submit to an interview with Prichard and Prichard subsequently interviewed Allen at the county jail. Further, Prichard's later testimony was based on Allen's statements to Prichard during the interview.

Second, the introduction of Prichard's testimony amounted to fundamental error. In short, without the assistance of Prichard's testimony, the court's decision to sentence Allen to death could not have been obtained.

ARGUMENT

I. Reversible Error Occurred When the Court Failed To Renew the Offer of Counsel Prior to the Penalty-Phase Trial Because, as a Matter of Law, Renewing That Offer Was Required at That Stage of the Proceedings, and the Error Was Fundamental.

The right to counsel is "fundamental." *Luis v. United States*, 136 S.Ct. 1083, 1089 (2016); *see also Jackson v. State*, 983 So.2d 562, 575 (Fla. 2008). Its "'core purpose' . . . is to assure aid at trial, 'when the accused [is] confronted with both the intricacies of the law and the advocacy of the public prosecutor.'" *United States v. Gouveia*, 467 U.S. 180, 188-89 (1984). The right "is indispensable to the fair administration of our adversary system of criminal justice." *Brewer v. Williams*, 430 U.S. 387, 398 (1977).

Not surprisingly, the right to counsel is guaranteed by the United States Constitution. Amend. VI, U.S. Const. It is also guaranteed by the Florida Constitution. Art. I, § 16, Fla. Const.

Moreover, the right to counsel "does not depend upon a request by the defendant." *Brewer*, 430 U.S. at 404. On that note, the "failure of a defendant to request appointment of counsel . . . shall not, in itself, constitute a waiver of counsel at any stage of the proceedings." Fla. R. Crim. P. 3.111(d)(1).

That said, as a general matter, a defendant can affirmatively waive his or her right to counsel. *See, e.g.*, *Faretta v. California*, 422 U.S. 806, 834-35 (1975); *McCray v. State*, 71 So.3d 848, 864 (Fla. 2011); *see also* Fla. R. Crim. P. 3.111(d)(3). But a waiver of the right to counsel "will not be 'lightly presumed.'" *Boyd v. Dutton*, 405 U.S. 1, 3 (1972).

Further, in Florida, 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." Fla. R. Crim. P. 3.111(d)(5); *see also Traylor v. State*, 596 So.2d 957, 968 (Fla. 1992).

In the present case, the court accepted Allen's waiver of his right to counsel at a pretrial hearing. [R936-43] When Allen later appeared without counsel prior to the guilt-phase trial, the court renewed the offer of counsel. [R1250] However, when Allen subsequently appeared without counsel prior to the penalty-phase trial, the court failed to renew the offer of counsel. [T318-23]

In those circumstances, reversible error occurred. First, under Article I, Section 16, of the Florida Constitution, the court was required to renew the offer of counsel at the penalty-phase trial because that trial was a subsequent crucial stage of the proceedings. Second, the court's failure to renew the offer of counsel prior to the penalty-phase trial amounted to fundamental error because that error vitiated the basic validity of that trial. Finally, a multitude of decisions by Florida district courts of

appeal should persuade this Court to conclude reversible error occurred here.

A. Under Article I, Section 16, of the Florida Constitution, the court was required to renew the offer of counsel at the penalty-phase trial because the penalty-phase trial was a subsequent crucial stage of the proceedings.

"Once the defendant is charged–and the [Article I,] 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." *Traylor*, 596 So.2d at 968; *see also Ibar v. State*, 938 So.2d 451, 469 (Fla. 2006). In particular, where "the right to counsel has been properly waived, the State may proceed with the stage in issue; but the waiver applies only to the present stage and must be renewed at each subsequent crucial stage where the defendant is unrepresented." *Traylor*, 596 So.2d at 968; *see also Muehleman v. State*, 3 So.3d 1149, 1156 (Fla. 2009).

Rule 3.111 of the Florida Rules of Criminal Procedure reflects this reality: "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." Fla. R. Crim. P. 3.111(d)(5).

Applying those principles here, for purposes of Article I, Section 16, the penalty-phase trial was a crucial stage of the proceedings. It was also a stage subsequent to any stage at which Allen had waived his right to counsel.

1. For purposes of Article I, Section 16, of the Florida Constitution, the penalty-phase trial was a crucial stage of the proceedings.

A "'crucial stage' is any stage that may significantly affect the outcome of the proceedings." *Traylor*, 596 So.2d at 968. And it is well settled that sentencing is a crucial stage of the proceedings. *See, e.g.*, *Murray v. State*, 265 So.3d 723, 724 (Fla. 2d DCA 2019); *Brooks v. State*, 180 So.3d 1094, 1096 (Fla. 1st DCA 2015); *Hays v. State*, 63 So.3d 887, 888 (Fla. 5th DCA 2011); *see also Gardner v. Florida*, 430 U.S. 349, 358 (Fla. 1977); *Jackson*, 983 So.2d at 575.

The Fourth District Court of Appeal has elaborated on why that is the case.

> Sentencing is a critical and often complicated part of the criminal process involving subtleties that may be beyond the appreciation of the average layperson. A defendant who is unfamiliar with the post-conviction process may inadvertently waive a meritorious argument that he or she might otherwise have raised on appeal. Given these intricacies, it is particularly important that a sentencing court be certain that a defendant understands the perilous path he or she traverses by proceeding to sentencing without the benefit of counsel.

Birlkey v. State, 220 So.3d 431, 435-36 (Fla. 4th DCA 2017).

Applying those standards here, the penalty-phase trial was a crucial stage of the proceedings. It was a stage that significantly affected the outcome of the proceedings. More specifically, if a single penalty-phase juror had found the aggravating factors were not sufficient, they did not outweigh the mitigating circumstances, or death was simply not the appropriate punishment, Allen would have been sentenced to life without parole rather than death. [R165-65, 170-71]

2. For purposes of Article I, Section 16, of the Florida Constitution, the penalty-phase trial was a stage of the proceedings subsequent to any stage at which Allen had waived his right to counsel.

"Where the right to counsel has been properly waived, . . . the waiver applies only to the present stage and must be renewed at each subsequent crucial stage." *Traylor*, 596 So.2d at 968; *see also* Fla. R. Crim. P. 3.111(d)(5). Thus, even "where no intervening event occurs, the court must renew the offer of counsel prior to each critical stage of the proceedings." *Murray*, 265 So.3d at 724.

In particular, the "renewal of the offer of counsel prior to sentencing is required even when the end of the guilt phase and the commencement of the penalty phase are not separated by a temporal break." *Sammons v. State*, 265 So.3d 720, 722 (Fla. 2d DCA 2019); *see also Travis v. State*, 969 So.2d 532, 533 (Fla. 1st DCA 2007). "That is because 'sentencing is a separate critical stage, which has a separate function and consequence from the jury trial itself.'" *Sammons*, 265 So.3d at 722; *see also Travis*, 969 So.2d at 533.

Applying those standards here, the penalty-phase trial was a stage of the proceedings subsequent to any stage at which Allen had waived his right to counsel. As an initial matter, Allen waived his right to counsel at the pretrial stage. [R936-43] He also renewed that waiver prior to the guilt-phase-trial stage. [R1250]

That said, the penalty-phase-trial stage was a stage of the proceedings subsequent to those earlier stages. In short, even though the penalty-phase trial began a few hours following the guilt-phase trial, [T292-94, 313, 315, 318-24], the penalty-phase trial had a separate function and consequence from the guilt-phase trial.

B. The court's failure to renew the offer of counsel prior to the penalty-phase trial amounted to fundamental error.

"The reason that courts correct error as fundamental despite the failure of parties to adhere to procedural rules requiring preservation is not to protect the interests of a particular aggrieved party, but rather to protect the interests of justice itself." *Maddox v. State*, 760 So.2d 89, 98 (Fla. 2000). As a general matter, "to overcome the timely objection rule and be deemed fundamental, 'the error 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.'" *Knight v. State*, SC18-309, 2019 WL 6904690, at *3 (Fla. Dec. 19, 2019). More specifically, fundamental error occurs where "the conviction 'could not have been obtained' without the [error] *or* . . . the error vitiated the basic validity of the trial." *Id.* at *4 (emphasis added).

On the latter note, "an error is deemed fundamental 'when it goes to the foundation of the case or the merits of the cause of action and is equivalent to a denial of due process.'" *F.B. v. State*, 852 So.2d 226, 229 (Fla. 2003); *see also Hopkins v. State*, 632 So.2d 1372, 1374 (Fla. 1994). Stated differently, "for an error to be so fundamental that it can be raised for the first time on appeal, the error must be basic to the judicial decision under review and equivalent to a denial of due process." *State v. Johnson*, 616 So.2d 1, 3 (Fla. 1993); *see also Williams v. State*, 209 So.3d 543, 561 (Fla. 2017).

Applying those standards here, the court's failure to renew the offer of counsel prior to the penalty-phase trial amounted to fundamental error. Again, the "'right to counsel is a fundamental right.'" *Jackson*, 983 So.2d at 575. And, regarding the Article I, Section 16, right to counsel, this Court has long declared: "In order for this right to have meaning, it must apply at least at each crucial stage of the prosecution." *Traylor*, 596 So.2d at 968.

Further, the United States Supreme Court has "noted the possibility that certain errors, termed 'structural errors,' might [amount to plain error] regardless of their actual impact on an appellant's trial." *United States v. Marcus*, 560 U.S. 258, 264 (2010). In that context, the court's failure here to renew the offer of counsel prior to the penalty-phase trial "infect[ed] the entire trial process," *Brecht v. Abrahamson*, 507 U.S. 619, 630 (1993).

More specifically, that "deprivation of the right to counsel affected–and contaminated–the entire criminal proceeding." *Satterwhite v. Texas*, 486 U.S. 249, 257 (1988). In addition, "the effects" of the court's failure to renew the offer of counsel "are simply too hard to measure." *Weaver v. Massachusetts*, 137 S.Ct. 1899, 1908 (2017).

With all that in mind, the court's failure to renew the offer of counsel prior to the penalty-phase trial went to the foundation of the case and was equivalent to a denial of due process. In short, that error vitiated the basic validity of the second-

phase trial.

That conclusion is reinforced by multiple Florida appellate decisions. More specifically, Florida district courts of appeal have repeatedly held that a failure to renew the offer of counsel prior to the sentencing stage of proceedings amounts to *per se* reversible error. *See, e.g,. Murray*, 265 So.3d at 724; *Birlkey*, 220 So.3d at 433-36; *Brooks*,180 So.3d at 1096; *Howard v. State*, 147 So.3d 1040, 1043-44 (Fla. 1st DCA 2014); *Smith v. State*, 41 So.3d 1081, 1088 (Fla. 2d DCA 2010).

C. A multitude of decisions by Florida district courts of appeal should persuade this Court to conclude reversible error occurred when the trial court failed to renew the offer of counsel prior to the penalty-phase trial.

In short, on facts analogous to those of the present case, Florida district courts of appeal have repeatedly concluded reversible error occurred when the trial court failed to renew the offer of counsel prior to the sentencing stage of proceedings. *See, e.g.*, *Sammons*, 265 So.3d at 721-22; *Murray*, 265 So.3d at 723-24; *Birlkey*, 220 So.3d at 432-36; *Howard*, 147 So.3d at 1041-44; *Hays*, 63 So.3d at 888. Those cases should persuade this Court to conclude reversible error occurred here.

The trial court failed to renew the offer of counsel prior to the penalty-phase trial. Allen's death sentence violates his rights to the assistance of counsel, to be free from cruel and unusual punishment, and to due process. Amends. V, VI, VIII, XIV, U.S. Const.; Art. I, §§ 9, 16, 17, Fla. Const.

II. Reversible Error Occurred When the Court Instructed That Its Job Was

To Determine the Sentence and the State Later Indicated the Jury Would Return a "Recommendation" Because Those Comments Misled the Jury Regarding Its Sentencing Role So As To Diminish Its Sense of Responsibility, and the Error Was Fundamental.

The "penalty of death is qualitatively different from a sentence of imprisonment, however long." *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion). Because "there is a qualitative difference between death and any other permissible form of punishment, 'there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.'" *Zant v. Stephens*, 462 U.S. 862, 884-85 (1983). Simply put, the "Eighth Amendment insists upon 'reliability in the determination that death is the appropriate punishment in a specific case.'" *Oregon v. Guzek*, 546 U.S. 517, 525 (2006).

Further, the United States Supreme Court has stressed that the requisite reliability depends on sentencers properly appreciating their role in the sentencing process.

> Belief in the truth of the assumption that sentencers treat their power to determine the appropriateness of death as an "awesome responsibility" has allowed this Court to view sentencer discretion as consistent with–and indeed as indispensable to–the Eighth Amendment's "need for reliability in the determination that death is the appropriate punishment in a specific case."

Caldwell v. Mississippi, 472 U.S. 320, 330 (1985) (plurality opinion).

In the present case, during the guilt-phase final instructions, the court declared:

"It is the judge's job to determine a proper sentence if the defendant is found guilty." [R153; T251] Shortly thereafter, during its penalty-phase opening statement, the State advised the jury that the State would later ask the jury to return a "recommendation" that Allen be sentenced to death. [T333]

In those circumstances, reversible error occurred. First, those comments affirmatively misled the jury regarding its role in the sentencing process so as to diminish its sense of responsibility. Second, taken together, those comments amounted to fundamental error.

A. The court's instruction that it was "the judge's job to determine a proper sentence" and the State's later indication that it would ask the jury to return a "recommendation" of death affirmatively misled the jury regarding its role in the sentencing process so as to diminish its sense of responsibility.

A capital jury must not be "affirmatively misled . . . regarding its role in the sentencing process so as to diminish its sense of responsibility." *Romano v. Oklahoma*, 512 U.S. 1, 10 (1994) (citing *Caldwell*, 472 U.S. at 336). More specifically, this *Caldwell* principle is "'relevant only to certain types of comment–those that mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision.'" *Id.* at 9. Moreover, to "'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.*

Applying those principles here, the court's instruction that it was "the judge's job to determine a proper sentence" and the State's later indication that it would ask the jury to return a "recommendation" of death affirmatively misled the jury regarding its role in the sentencing process so as to diminish its sense of responsibility. First, those comments allowed the jury to feel less responsible for the sentencing decision. In short, the court itself instructed the jury that it was the court's responsibility to make the sentencing decision. By the same token, the State suggested the jury's role in the sentencing process would be to simply recommend the court reach a particular sentencing decision.

Second, the comments by the court and State improperly described the role assigned to the jury by Florida law. As just mentioned, those comments indicated it was the court's responsibility to make the sentencing decision and described the jury's role as simply recommending the court reach a particular sentencing decision.

But such descriptions are inconsistent with the roles assigned by Florida law. More specifically, a capital jury determines whether the defendant is even eligible for a sentence of death. *See* § 921.141(2), Fla. Stat. (2019); *see also* discussion *infra* pp. 47-49. Moreover, if a capital jury fails to unanimously determine the defendant should be sentenced to death, the court is required to impose life without the possibility of parole. *See* § 921.141(2)-(3).

As a result, it is not the court's responsibility alone to make the sentencing

decision. Further, the jury's role goes beyond simply recommending the court reach a particular sentencing decision. In fact, if a capital jury fails to unanimously determine the defendant should be sentenced to death, the sentencing decision has been made; the defendant receives life in prison without the possibility of parole.

Caldwell itself dictates a conclusion that the comments by the court and State affirmatively misled the jury regarding its role in the sentencing process so as to diminish its sense of responsibility. In *Caldwell*, the prosecutor advised the jury that its decision was "not the final decision" and would be reviewed by an appellate court. 472 U.S. at 325-26. The court also instructed the jury that its decision would be reviewed by an appellate court. *Id.* at 325. Caldwell was later sentenced to death. *Id.* at 324.

On appeal, the United States Supreme Court concluded those comments were misleading and caused the death sentence "to rest . . . 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." *Id.* at 328-29, 336.

Like the comments in *Caldwell*, the comments in the present case inaccurately suggested the jury's decision was not the "final" decision and a court would later make the "final" decision. As a result, if the comments there affirmatively misled the jury regarding its role in the sentencing process so as to diminish its sense of responsibility, the comments here did as well.

B. Taken together, the court's instruction that it was "the judge's job to determine a proper sentence" and the State's later indication that it would ask the jury to return a "recommendation" of death amounted to fundamental error.

As a general matter, "to overcome the timely objection rule and be deemed fundamental, 'the error 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.'" *Knight*, 2019 WL 6904690, at *3; *see also* discussion *supra* p. 31.

Applying that principle here, taken together, the court's instruction that it was "the judge's job to determine a proper sentence" and the State's later indication that it would ask the jury to return a "recommendation" of death amounted to fundamental error. More specifically, without the assistance of those comments, the jury's determination that Allen should be sentenced to death could not have been obtained.

As an initial matter, for the jury's determination that Allen should be sentenced to death to be obtained, the jury had to unanimously determine Allen should sentenced to death. *See* § 921.141(2)-(3), Fla. Stat. In other words, if a single juror had disagreed that Allen should be sentenced to death, the jury's determination that Allen should be sentenced to death would not have been obtained.

Further, the United States Supreme Court has elaborated on why comments that diminish jurors' sense of responsibility could lead "jurors who are reluctant to invoke the death sentence" to "give in." *Caldwell*, 472 U.S. at 333.

A capital sentencing jury is made up of individuals placed in a very

> unfamiliar situation and called on to make a very difficult and uncomfortable choice. They are confronted with evidence and argument on the issue of whether another should die, and they are asked to decide that issue on behalf of the community. Moreover, they are given only partial guidance as to how their judgment should be exercised, leaving them with substantial discretion. Given such a situation, the 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 [further review by a court] could effectively be used as an argument for why those jurors who are reluctant to invoke the death sentence should nevertheless give in*.
>
> This problem is especially serious when the jury is told that the alternative decision-maker[is the trial] court. It is certainly plausible to believe that many jurors will be tempted to view th[is] respected legal authorit[y] as having more of a "right" to make such an important decision than has the jury.

Id. (emphasis added) (internal citations omitted).

With all that in mind, the court's instruction that it was "the judge's job to determine a proper sentence" and the State's later indication that it would ask the jury to return a "recommendation" of death effected the jury's determination that Allen should be sentenced to death. In fact, without the assistance of those comments, that determination could not have been obtained.

The comments by the court and State affirmatively misled the jury regarding its role in the sentencing process so as to diminish its sense of responsibility. Allen's death sentence violates his rights to be free from cruel and unusual punishment and to due process. Amends. V, VIII, XIV, U.S. Const.; Art. I, §§ 9, 17, Fla. Const.

III. Reversible Error Occurred When the Court Allowed the State To

Introduce Dr. Prichard's Testimony Because, By Introducing That Testimony, The State Used Allen's Compelled Statements to Prichard Against Allen, and the Error Was Fundamental.

"The essence of [the Fifth Amendment] is 'the requirement that the State which proposes to convict *and punish* an individual produce the evidence against him by the independent labor of its officers, not by the simple, cruel expedient of forcing it from his own lips.'" *Estelle v. Smith*, 451 U.S. 454, 462 (1981). And "the Fifth Amendment [i]s applicable at a capital-sentencing hearing." *Buchanan v. Kentucky*, 483 U.S. 402, 421 (1987).

With that in mind, "under the Fifth Amendment, when a criminal defendant 'neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence,' his compelled statements to a psychiatrist cannot be used against him." *Kansas v. Cheever*, 571 U.S. 87, 93 (2013) (citing *Estelle*, 451 U.S. at 468); *see also Erickson v. State*, 565 So.2d 328, 331 (Fla. 1990).

In the present case, the court itself appointed special counsel to present mitigating evidence at the *Spencer* hearing. [R416-17, 893-97] The special counsel later initiated a psychiatric evaluation and introduced psychiatric evidence at the *Spencer* hearing. [1067-1105] But Allen neither initiated a psychiatric evaluation nor attempted to introduce psychiatric evidence. And the court recognized that "posture." [R1111]

Even so, the court ordered Allen to submit to an interview with Prichard.

[R1114] And Prichard later testified for the State at the *Spencer* hearing. [R1173-1235]

In those circumstances, reversible error occurred. First, by introducing Prichard's testimony, the State used Allen's compelled statements to Prichard against Allen. Second, the introduction of Prichard's testimony amounted to fundamental error.

A. By introducing Prichard's testimony, the State used Allen's compelled statements to Prichard against Allen.

Again, "under the Fifth Amendment, [a criminal defendant's] compelled statements to a psychiatrist cannot be used against him." *Cheever*, 571 U.S. at 93 (citing *Estelle*, 451 U.S. at 468).

Applying that principle here, Allen's statements to Prichard were compelled. In addition, Prichard's testimony was based on Allen's statements to Prichard. Finally, *Estelle*, 451 U.S. at 454, dictates a conclusion that, by introducing Prichard's testimony, the State used Allen's compelled statements to Prichard against Allen.

1. Allen's statements to Prichard were compelled.

As an initial matter, "'the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves.'" *Estelle*, 451 U.S. at 466.

With that in mind, Allen's statements to Prichard were compelled. First,

Prichard was the State's expert, and the State requested Prichard be allowed to interview Allen. [R1107-09] Second, the court ordered Allen to submit to an interview with Prichard. [R1114]

Third, Prichard subsequently interviewed Allen "at the Wakulla County Jail" [R1177-78] Finally, during the interview, Prichard spoke with Allen about "the instant case, the murder at Wakulla Correctional Institution." [R1178]

In those circumstances, Prichard's role "became essentially like that of an agent of the State recounting unwarned statements made in a postarrest custodial setting." *Id.* at 467. By the same token, during the interview, Allen "assuredly was 'faced with a phase of the adversary system' and was 'not in the presence of [a] perso[n] acting solely in his interest." *Id.*

2. Prichard's testimony was based on Allen's statements to Prichard.

At the *Spencer* hearing, Prichard testified that he diagnosed Allen with ASPD. [R1179-85] And that conclusion was based on Prichard's discussion with Allen concerning "the current case." [R1183-84]

Prichard also disputed that Allen suffered from PTSD. [R1186-90, 1204-13, 1223-29, 1232-35] Further, Prichard opined that (1) the homicide of Mason was not committed while Allen was under the influence of an extreme mental or emotional disturbance; (2) Allen's capacity to appreciate the criminality of his conduct or to conform his conduct to the law was not substantially impaired; and (3) Allen had not

acted under extreme duress. [R1191, 1194-95, 1998-99] And those conclusions were also based on Prichard's questioning of Allen regarding the incident in which Mason was killed, as well as the events leading up to that incident. [R1191-99]

In those circumstances, Prichard "drew conclusions from the defendant's uncounseled statements." *Penry v. Johnson*, 532 U.S. 782, 794 (2001). In particular, Prichard's opinions "rested on statements [the defendant] made . . . in reciting details of the crime." *Estelle*, 451 U.S. at 464. In short, "the State used as evidence against [Allen] the substance of his disclosures during the . . . psychiatric examination." *Id.* at 465.

3. The United States Supreme Court's decision in *Estelle v. Smith* dictates a conclusion that, by introducing Prichard's testimony, the State used Allen's compelled statements to Prichard against Allen.

In *Estelle*, the court ordered the defendant, Smith, to submit to a psychiatric examination by Dr. Grigson. *Id.* at 456-57. Grigson "interviewed Smith in jail for approximately 90 minutes." *Id.* at 457.

During the subsequent capital sentencing proceeding, the State called Grigson to testify. *Id.* at 459. Grigson's "testimony was based on information derived from his 90-minute 'mental status examination' of Smith." *Id.* at 460.

On certiorari review, the United States Supreme Court concluded that, by introducing Grigson's testimony, the State used Smith's compelled statements to Grigson against Smith. *Id.* at 462-69. In support of that conclusion, the Court

determined Smith's statements to Grigson were compelled. *Id.* at 466-67. It reasoned:

> [Smith] was in custody at the Dallas County Jail when the examination was ordered and when it was conducted. That [Smith] was questioned by a psychiatrist designated by the trial court . . . , rather than by a police officer, government informant, or prosecuting attorney, is immaterial. When Dr. Grigson . . . testified for the prosecution at the penalty phase on the crucial issue of [Smith]'s future dangerousness, his role changed and became essentially like that of an agent of the State recounting unwarned statements made in a postarrest custodial setting. During the psychiatric evaluation, [Smith] assuredly was "faced with a phase of the adversary system" and was "not in the presence of [a] perso[n] acting solely in his interest."

Id. at 467 (internal citations omitted).

In support of its conclusion, the Court also determined Grigson's testimony was based on Smith's statements to Grigson. *Id.* at 464. It reasoned:

> Dr. Grigson drew his conclusions largely from [Smith]'s account of the crime during their interview . . . . Dr. Grigson's prognosis as to future dangerousness rested on statements [Smith] made, and remarks he omitted, in reciting the details of the crime. The Fifth Amendment privilege, therefore, is directly involved here because the State used as evidence against [Smith] the substance of his disclosures during the pretrial psychiatric examination.

Id. at 464-65.

Like Smith, Allen was in custody in the county jail when Prichard conducted his interview, [1178]. In addition, similar to Grigson, Prichard subsequently testified for the State on crucial issues, [R1173-1235], and "became essentially . . . an agent of the State recounting unwarned statements made in a postarrest custodial setting."

As result, like Smith's statements in *Estelle*, Allen's statements to Prichard in the present case were compelled.

Further, like Grigson, Prichard drew his conclusions largely from Allen's account of the crime during the interview, [R1183-84, 1191-99]. Stated differently, like Grigson, Prichard's opinions rested on statements Allen made, [R1183-84, 1191-99]. As a result, like Grigson's testimony in *Estelle*, Prichard's testimony in the present case was based on Allen's statements to Prichard.

All that being the case, if the State used Smith's compelled statements to Grigson against Smith in *Estelle*, the State used Allen's compelled statements to Prichard against Allen in the present case.

B. The introduction of Prichard's testimony amounted to fundamental error.

As a general matter, "to overcome the timely objection rule and be deemed fundamental, 'the error 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.'" *Knight*, 2019 WL 6904690, at *3; *see also* discussion *supra* p. 31.

Applying that principle here, the introduction of Prichard's testimony amounted to fundamental error. More specifically, without the assistance of Prichard's testimony, the court's decision to sentence Allen to death could not have been obtained.

In short, "'[e]xpert evidence can be . . . powerful." *Daubert v. Merrell Dow*

Pharmaceuticals, Inc., 509 U.S. 579, 595 (1993). And Prichard essentially testified Allen was a sociopath; disputed that Allen suffered from PTSD; and opined that multiple "statutory" mitigating circumstances did not exist. [R1179-91, 1194-95, 1998-99, 1204-13, 1223-29, 1232-35] Further, in deciding to impose death, the court considered Prichard's testimony. [R817]

The State used Allen's compelled statements against him. Allen's death sentence violates his rights to not be compelled to incriminate himself, to be free from cruel and unusual punishment, and to due process. Amends. V, VIII, XIV, U.S. Const.; Art. I, §§ 9, 17, Fla. Const.

IV. Reversible Error Occurred When the Court Failed To Instruct the Jury To Determine Beyond a Reasonable Doubt Whether the Aggravating Factors Were Sufficient and Outweighed the Mitigating Circumstances Because Those Determinations Are the Functional Equivalents of Elements, They Are Subject To Proof Beyond a Reasonable Doubt, and the Error Was Fundamental.

A. Determinations as to (1) whether the aggravating factors are sufficient to justify the death penalty, and (2) whether those factors outweigh the mitigating circumstances must be made beyond a reasonable doubt because they are the functional equivalents of elements.

First, it is well-established that, under the Due Process Clause and the Sixth Amendment, determinations as to both elements and their "functional equivalents" must be made beyond a reasonable doubt. *See, e.g.*, *Alleyne v. United States*, 570 U.S. 99, 102 (2013); *Apprendi v. New Jersey*, 530 U.S. 466, 476-77, 484, 490, 494 n.19 (2000); *Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993).

Second, under Florida's capital sentencing scheme, determinations as to whether the aggravating factors are sufficient and outweigh the mitigating circumstances are the functional equivalents of elements because they increase the penalty for first-degree murder. As an initial matter, in ascertaining which determinations increase the penalty for a crime, the appropriate analysis concerns the operation and effect of the statutory scheme at issue. *See Ring v. Arizona*, 536 U.S. 584, 605 (2002); *Apprendi* 530 U.S. at 494; *Mullaney v. Wilbur*, 421 U.S. 684, 699 (1975).

Moreover, "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence [that may be] impose[d] *solely on the basis of the facts reflected in the jury verdict* . . . not the maximum sentence [that may be] impose[d] after finding additional facts." *Blakely v. Washington*, 542 U.S. 296, 303-4 (2004).

With that in mind, under Florida's scheme, determinations as to whether the aggravating factors are sufficient and outweigh the mitigating circumstances increase the penalty for first-degree murder beyond the maximum sentence that may be imposed solely on the basis of determinations that (1) the victim is dead, (2) the defendant caused the death, (3) the killing was premeditated or committed during a felony, and (4) aggravating factor(s) exist.

More specifically, solely on the basis of those four determinations, the maximum sentence is life without parole. At the same time, determinations that the

aggravating factors are sufficient and outweigh the mitigating circumstances increase the penalty for first-degree murder from life without parole to death. *See* §§ 775.082, 782.04, 921.141, Fla. Stat. (2019); *see also* Fla. Std. Jury Instrs. (Crim.) 3.12(e), 7.2, 7.3, 7.11.

Moreover, the United States Supreme Court's reasoning in *Ring* reinforces that determinations as to whether the aggravating factors are sufficient and outweigh the mitigating circumstances increase the penalty for first-degree murder. In short, though section 782.04 declares first-degree murder a "capital felony," § 782.04(1)(a), and section 921.141 declares a defendant eligible for the death penalty if the jury finds "at least one aggravating factor," § 921.141(2), those provisions "'authorize[] a maximum penalty of death only in a formal sense,'" *Ring*, 536 U.S. at 604.

On that note, unlike the provision cross-referenced by the substantive murder statute in *Ring*, section 921.141 requires *more* than just the finding of an aggravating factor before a defendant is eligible for the death penalty. More specifically, the cross-referenced provision in *Ring* provided that, in addition to finding "one or more aggravating circumstances," the court had to determine whether "there are no mitigating circumstances sufficiently substantial to call for leniency." Ariz. Rev. Stat. Ann. § 13-703(F) (West 2001). In contrast, section 921.141 provides that, in addition to finding "at least one aggravating factor," the court must determine (1) whether "there are sufficient aggravating factors to warrant the death penalty," and (2)

whether "the aggravating factors outweigh the mitigating circumstances." § 921.141(3)(b), (4), Fla. Stat.

Finally, instructing the jury to make determinations as to whether the aggravating factors are sufficient and outweigh the mitigating circumstances beyond a reasonable doubt furthers interests underlying the constitutional requirement of proof beyond a reasonable doubt, such as reliability, fairness, and confidence in the criminal law. *See Mullaney*, 421 U.S. at 699; *In re Winship*, 397 U.S. 358, 363-64 (1970).

B. Even if determinations as to (1) whether the aggravating factors are sufficient to justify the death penalty, and (2) whether those factors outweigh the mitigating circumstances are not purely factual and involve normative judgment, they are subject to the constitutional requirement of proof beyond a reasonable doubt.

As an initial matter, the United States Supreme Court has distinguished between "'ultimate' or 'elemental' fact[s]" and "'evidentiary' or 'basic facts.'" *United States v. Gauldin*, 515 U.S. 506, 515 (1995). And it is "'the factfinder's responsibility at trial, based on evidence . . . , to find the *ultimate* facts beyond a reasonable doubt.'" *Id.*

Keeping that in mind, some elements have multiple components. For instance, some–such as materiality–have both a purely factual component and an application-of-a-standard-to-facts component. *See id.* at 511-12, 522-23.

Further, some elements or the functional equivalents of elements–such as

elements of obscenity; the especially heinous, atrocious, and cruel aggravating factor; the necessity defense; and whether "a nonstate prison sanction could present a danger to the public"–have both a purely factual component and an application-of-a-*normative*-standard-to-facts component. *See* Fla. Std. Jury Instrs. (Crim.) 3.6(k), 7.11, 24.5; *see also Brown v. State*, 260 So.3d 147, 149-51 (Fla. 2018).

All that being the case, determinations as to whether the aggravating factors are sufficient and outweigh the mitigating circumstances have both a purely factual component and an application-of-a-normative-standard-to-facts component. In the context of the former component, jurors must determine the historical facts underlying particular aggravating factors and mitigating circumstances. In the context of the latter component, jurors have to determine whether the existing aggravating factors are sufficient and whether they outweigh the existing mitigating circumstances. That inquiry, similar to the inquiry in *Gauldin*, asks jurors to "'draw [inferences] from a given set of facts,'" conduct "'delicate assessments of'" those inferences, and determine "'the significance of those inferences,'" 515 U.S. at 512.

With all that in mind, the determinations at issue are susceptible to proof beyond a reasonable doubt. As an initial matter, in this context, "proof beyond a reasonable doubt" can be interpreted to mean two different things. "[O]ne interpretation focuses on *measuring the balance* between the aggravating factors and the mitigating factors." *State v. Rizzo*, 833 A.2d 363, 377 (Conn. 2003). The "other

interpretation focuses on the *level of certitude* required of the jury in determining that the aggravating factors outweigh the mitigating factors." *Id.*

Considering those two interpretations, the "fallacy of the argument [that the determinations at issue are not susceptible to proof beyond a reasonable doubt] lies in the failure to perceive the standard of proof in terms of the level of confidence which the factfinder should have in the accuracy of his finding." *Ford v. Strickland*, 696 F.2d 804, 879 (11th Cir. 1983) (Anderson, J., dissenting). More specifically, assume "'the relative 'weight' of aggravating circumstances and mitigating circumstances is not susceptible to any quantum of proof,'" *Ex parte Bohannon*, 222 So.3d 525, 529-30 (Ala. 2016). Even then, the determinations at issue are susceptible to a "'subjective state of certitude,'" *In re Winship*, 397 U.S. at 364. In short, jurors could reasonably ask themselves if they have an "abiding conviction," Fla. Std. Jury Instr. (Crim.) 3.7, that the aggravating factors are sufficient and outweigh the mitigating circumstances.

Finally, and reflecting that fact, numerous states require determinations beyond a reasonable doubt as to whether the aggravating factors are sufficient and/or outweigh the mitigating circumstances. *See, e.g.*, Ark. Code Ann. § 5-4-603(a) (2019); N.Y. Crim. Proc. Law § 400.27(11)(a) (2019); Ohio Rev. Code Ann. § 2929.03(D)(2) (2019); Tenn. Code Ann. § 39-13-204(g)(1)(B) (2019); Utah Code Ann. § 76-3-207(5)(b) (2019); *see also Rauf v. State*, 145 A.3d 430, 481-82 (Del.

2016).

C. This Court should reconsider its prior decisions essentially concluding determinations as to (1) whether the aggravating factors are sufficient to justify the death penalty, and (2) whether those factors outweigh the mitigating circumstances are neither the functional equivalents of elements nor subject to proof beyond a reasonable doubt.

This Court has essentially concluded the determinations at issue are neither the functional equivalents of elements nor subject to proof beyond a reasonable doubt. *See, e.g.*, *Poole v. State*, SC18-245, 2020 WL 370302, at *11-12 (Fla. Jan. 23, 2020); *Rogers v. State*, 285 So.3d 872, 885-86 (Fla. 2019); *Foster v. State*, 258 So.3d 1248, 1250-52 (Fla. 2018). For the reasons outlined above, those decisions were wrongly decided.

D. The court's failure to instruct the jury to determine beyond a reasonable doubt (1) whether the aggravating factors were sufficient to justify the death penalty, and (2) whether those factors outweighed the mitigating circumstances amounted to fundamental error.

In short, to conclude Allen should be sentenced to death, the jury had to determine whether the aggravating factors were sufficient and outweighed the mitigating circumstances. And the omission of an instruction that those determinations had to be made beyond a reasonable doubt reduced the burden of proof, and thus, was "'pertinent or material to what the jury must consider in order to convict,'" *Daugherty v. State*, 211 So.3d 29, 39 (Fla. 2017). Further, this case essentially turned on whether the aggravating factors were sufficient and outweighed

the mitigating circumstances. [T391] In those circumstances, the error was fundamental. *See Reed v. State*, 837 So.2d 366, 366-70 (Fla. 2002).

The trial court failed to instruct the jury to make all the determinations that increase the penalty for first-degree murder beyond a reasonable doubt. Allen's death sentence violates his rights to trial by jury and to due process. Amends. V, VI, XIV, U.S. Const.; Art. I, §§ 9, 16, 22, Fla. Const.

CONCLUSION

A few points bear emphasis. Regarding the Article I, Section 16, right to counsel, this Court has long declared: "In order for this right to have meaning, it must apply at least at each crucial stage of the prosecution." *Traylor v. State*, 596 So.2d 957, 968 (Fla. 1992). And no stage of a prosecution could be more crucial than a penalty-phase trial at which a single juror's vote could determine life or death. Finally, "certain errors, termed 'structural errors,' might [amount to plain error] regardless of their actual impact on an appellant's trial." *United States v. Marcus*, 560 U.S. 258, 264 (2010).

With that in mind, multiple errors demand reversal here. First, the court failed to renew the offer of counsel prior to the penalty-phase trial. Second, the court instructed the jury that the court's job was to determine the sentence, and the State later indicated it would ask the jury to return a "recommendation" of death.

Third, the court allowed the State to introduce Dr. Prichard's testimony at the

Spencer hearing. Finally, the court failed to instruct the jury to determine beyond a reasonable doubt whether the aggravating factors were sufficient to justify the death penalty and whether those factors outweighed the mitigating circumstances.

Allen's death sentence should be vacated. And this case should be remanded for a new penalty-phase trial. Alternatively, this case should be remanded for a new *Spencer* hearing followed by the issuance of a revised sentencing order, or at a minimum, for reevaluation of the mitigating evidence and the sentence.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished electronically via the Florida Courts E-filing portal to Michael T. Kennett, Assistant Attorney General, Capital Appeals Division, and by U.S. Mail to Appellant, Scottie D. Allen, #B01314, Union Correctional Institution, P.O. Box 1000, Raiford, FL, 32083, on this 17th day of February, 2020.

CERTIFICATE OF FONT AND TYPE SIZE

I hereby certify that this brief was typed using Times New Roman, 14 point.

Respectfully submitted,

ANDY THOMAS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

/s/ Richard M. Bracey, III
RICHARD M. BRACEY, III
Assistant Public Defender
Fla. Bar No. 76419
Leon County Courthouse
301 S. Monroe St., Suite 401
Tallahassee, Florida 32301
(850) 606-1000
mose.bracey@flpd2.com

COUNSEL FOR APPELLANT