

IN THE SUPREME COURT OF FLORIDA

JOHN F. MOSLEY JR.,

Appellant,

vs.

CASE NO. SC20-195

L.T. 16-2004-CF-6675

STATE OF FLORIDA,

Appellee.

_____ /

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA

AMENDED INITIAL BRIEF OF APPELLANT

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PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

John F. Mosley, Defendant below, is appealing a sentence of death imposed after a *Hurst* resentencing. The record on appeal consists of consecutively paginated Record volumes, including a supplemental volume (R.), and a transcript of Mr. Mosley's penalty phase trial (T.).

STATEMENT OF THE CASE

This is an appeal from a final order of the circuit court for Duval County, Florida, sentencing John F. Mosley Jr. to death for the killing of Jay-Quan Mosley. (R. 2019-40.) The order was entered following a second penalty phase trial after Mr. Mosley's original death sentence was vacated pursuant to *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). This Court has jurisdiction pursuant to article V, section 3(b)(1) of the Florida Constitution.

I. Prior Proceedings.

Mr. Mosley was convicted of two counts of first-degree murder on November 18, 2005, following a jury trial, for the murders of Linda Wilkes and her son, Jay-Quan Moseley. On the count involving Jay-Quan Mosley, the jury recommended a sentence of death by a vote of 8 to 4. This Court affirmed the convictions and death sentence on direct appeal. *See Mosley v. State*, 46 So. 3d 510 (Fla. 2009). On January 14, 2014, the trial court denied Mr. Mosley's motion for

post-conviction relief. This Court affirmed the decision as to Mr. Mosley's guilt phase and granted Mr. Mosley a new penalty phase based on *Hurst v. Florida*, 136 S. Ct. 616 (2016) and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). See *Mosley v. State*, 209 So. 3d 1248 (2016).

II. Proceedings Below.

At a status hearing on April 12, 2017, with Judge Linda McCallum presiding, Mr. Mosley was represented by James Hernandez. (R. 1468-69.) The court took under advisement an ore tenus motion to appoint as co-counsel Patrick Korody. (R. 1473-76.) On May 17, 2017, the court noted it had appointed co-counsel and also indicated it would sign an order for a mitigation specialist if the defense provided one. (R. 1484.) The parties discussed a possible trial date of February 2018. (R. 1485.) At the next status hearing on September 25, 2017, the trial judge disclosed that her ex-husband had been an investigator with the State Attorney's office and worked on Mr. Mosley's case. (R. 1494-95.) On November 7, 2017, counsel indicated the defense would not be filing a motion to recuse the judge. (R. 1500.) In December the court granted a continuance and extension to the defense for filing witness names. (R. 1508.)

Mr. Mosley filed a Motion for New Discovered Evidence — Not Known Before Trial alleging the State had failed to disclose that Dr. Margarita Arruza, the chief medical examiner who testified at Mr. Mosley's original trial, was suffering

from dementia and had displayed various indicators of incompetence. (R. 30-65.) An amended motion was filed noting that Mr. Mosley required the services of an investigator to develop additional supporting documentation for the motion. (R. 263-79.) The trial court issued an Order Striking Defendant's Amended Motion for New Discovered Evidence — Not Known Before Trial on February 14, 2018, stating Mr. Mosley was represented by counsel and counsel had failed to adopt the motion; therefore, it was a nullity. (R. 368-69.) The next day, February 15, 2018, counsel filed a Notice of Death Penalty Motions calling for a motion hearing on February 26. (R. 377-38.)

On February 26, 2018, Defendant filed a Motion to Instantly (Right Now) Represent Myself (Pro Se) in "All" Matters/Manner of this Case in Postconviction, New Trial/New Judgment, and/or Current Proceedings. (R. 380-91.) The motion stated counsel had not adopted the Amended Motion for New Discovered Evidence because counsel were appointed only for purposes of resentencing, not for the underlying collateral proceedings. (R. 383-91.) The court then entered an amended order striking the Amended Motion for New Discovered Evidence as premature because Defendant's sentence was not yet final. (R. 392-93.) Mr. Mosley filed a pro se motion for rehearing (R. 406-23), which was denied (R. 446-47).

At a motion hearing on March 1, 2018, at which Mr. Mosley was not present, the court noted it was aware Mr. Mosley had filed a motion based on

newly discovered evidence, but was not aware until the motion hearing of his request to represent himself. (R. 1545.) The parties agreed to address that request when Mr. Mosley could be transported to court. (R. 1545-48.)

During a *Faretta* hearing on March 20, 2018, Mr. Mosley requested appointment of standby counsel as well as a mitigation specialist and a private investigator; the court granted his request for standby counsel but told him he would have to file written motion with his other requests. (R. 478, 487.) The court ruled he would be allowed to represent himself and that he was knowingly, willingly, and intelligently waiving the right to counsel. (R. 487.) However, after further discussion of Mr. Mosley's requests, the court reversed itself and denied his request to proceed pro se:

Mr. Mosley, it's kind of clear to me that you really tell me — you tell me all the right words, but you don't really seem to understand them. So, in an unusual move, because I've never done this before, I think you're saying all the right words but in your mind you don't really have an understanding of what it means to waive your right to counsel and you don't really know what you're doing, and it is not a voluntary decision because you just don't seem to have a concept of how it's going to impact you.

(R. 497.)

On March 26, 2018, the trial court entered an order holding in abeyance Defendant's Motion to Instantly (Right Now) Represent Myself, noting that a *Faretta* inquiry had been conducted on March 20, but that a new judge was going

to be assigned and would have to conduct a new *Faretta* inquiry to determine whether Mr. Mosley was competent to waive his right to counsel. (R. 452-53.) On April 12, 2018, the case was assigned to Senior Judge Michael R. Weatherby. (R. 502.)¹

Mr. Mosley sought rehearing of his Amended Motion for New Discovered Evidence (R. 504-52, 555-62), which was denied (R. 553-54, 568-70.) He also sought two extensions of time in which to file a motion for disqualification of Judge Weatherby (R. 563-67, 576-77), which were stricken as nullities (R. 571-72, 579-80). Finally, at a case management proceeding on June 13, 2018, the court heard Mr. Mosley's request for self-representation. (R. 1553, 1559-73.) Mr. Mosley indicated he did not have a conflict with Mr. Korody, only with Mr. Hernandez, but because Mr. Korody was not death qualified he could not take over as lead counsel. (R. 1564-65.) When Mr. Mosley asked whether a different attorney could replace Mr. Hernandez, the court replied "No. You don't get to pick and choose your attorney." (R. 1565.) Mr. Mosley told the court Mr. Hernandez was not filing "necessary motions to go forward with my case" (R. 1566) and "not doing what he's supposed to do" (R. 1567). The court stated "if you have a dispute with Mr. Hernandez because he has refused to file motions that you want him to file, I can only assume that that's because Mr. Hernandez knows, one, they're not

¹ Judge Weatherby presided over Defendant's original trial in 2006. (R. 1342-47.)

appropriate; two, they're not within the law; or three, they may be more damaging to you than you think they are." (R. 1570-71.) After denying Mr. Mosley's request to appoint different lead counsel, the court asked "So, bottom line, shall I allow Mr. Hernandez to proceed?" (R. 1573.) Mr. Mosley replied "I have no choice." (R. 1573.) At the same proceeding the court asked "Do we need to discuss at this point mitigation experts, investigators?" (R. 1574.) Counsel replied that the previous judge had already appointed a mental health expert, Dr. Bloomfield, who had seen Mr. Mosley. (R. 1574.) No other mitigation specialists were discussed. (R. 1574.)

After the proceeding on June 13, 2018, the court entered an order dismissing Defendant's Motion to Instantly (Right Now) Represent Myself, stating Mr. Mosley had "decided to continue to be represented" by appointed counsel. (R. 583-84.)

In August 2018 the parties agreed the penalty phase trial would need to take place in late 2019. (R. 1583-91.) After several additional case management conferences the trial date was set for December 2, 2019. (R. 1618-21.) In July 2019 the court set a deadline of October 1, 2019 for the defense to list witnesses, including mitigation witnesses. (R. 1639-41.) At a status hearing on October 20, 2019 it was noted that two mitigation reports had been presented. (R. 1649.) Lead defense counsel noted that Mr. Mosley wanted to request a continuance and that

counsel had not “gotten full cooperation” from Mr. Mosley. (R. 1651.) The court replied “It ain’t going to happen.” (R. 1651.)

At a final pretrial conference on November 20, 2019, with Mr. Mosley present, the court granted a defense motion in limine to prevent the State from admitting evidence of Mr. Mosley’s prior arrests after the defense affirmatively waived the mitigating circumstance of no significant prior criminal history. (R. 1679.) The court granted in part a motion in limine to preclude evidence of extramarital relationships. (R. 1684.) The court denied a motion in limine regarding potentially cumulative testimony relating to the circumstances of the death of the two named victims. (R. 1691.) The court took under advisement a motion to limit a specific portion of the anticipated victim impact testimony to refer only to Jay-Quan. (R. 1692-94.) The parties also discussed the HAC and pecuniary gain aggravators (R. 1695-1706) as well as the treatment of mitigating factors in the instructions and verdict form (R. 1706-15). A motion to allow Mr. Mosley to allocute was granted with certain limitations. (R. 1715-21.) The parties agreed on a statement of the case to be read to the venire at jury selection. (R. 1721-23.)

After the above matters were resolved Mr. Mosley asked to address the court and stated “I have irreparable — irreconcilable differences with my counsel.” (R. 1731.) He requested an immediate *Nelson* hearing, which the court denied. He then

requested to represent himself, and was placed under oath and questioned. (R. 1732.) After further discussion he repeated his request to represent himself and requested a *Faretta* hearing. (R. 1736-37.) He withdrew the *Nelson* request. (R. 1736, 1740.) He repeated “I want to represent myself,” even after the court stated “Well, you know what they say about he who represents himself has a fool for a client, and I suspect that that may be the situation here.” (R. 1742.) The court allowed Mr. Mosley to represent himself, with counsel remaining as stand-by counsel. (R. 1745.)

Mr. Mosley then requested an extension of time in which to prepare, noting the State had from June 2018, when a new prosecutor was assigned, until December 2019, to prepare for the penalty phase trial. (R. 1746.) The court denied the request: “No. If this is a Motion to Continue it’s denied. We’re here for trial, We’re going to start on Monday, the 2nd. What else?” (R. 1746.) The court added, “You’ve had 15 years to prepare for this, Mr. Mosley. You’ve gone through what, six different counsel that I know of or at least four so, no. The Motion to Continue is denied. Now are you ready to start on Monday, the 2nd?” (R. 1746.) When Mr. Mosley repeated that the State had had a year and a half, the court replied “I’ve ruled. The Motion to Continue is denied, D-E-N-I-E-D. We will start on Monday, the 2nd.” (R. 1747.) At the end of the hearing Mr. Mosley asked “But I am representing myself, correct?” The court replied “Regrettably.” (R. 1749.)

Mr. Mosley filed Defendant's Motion for a Short Eleven Months Extension for New Penalty Phase for "Fair Due Process" to Prepare a Defense on November 27, 2019. (R. 756-60.) He also filed an Ex Parte Motion for Cost to Appoint a Private Investigator, Paralegal, IT Computer Tech, and Mitigation Specialist and to Incur Cost. (R. 761.)

When the parties arrived for jury selection on December 2, 2019, Mr. Mosley renewed his motions for a continuance and for the assistance of an investigator, paralegal, computer tech, and mitigation specialist. (T. 9-10.) Both motions were summarily denied. (T. 9-10; R., 938, 943.) Regarding the latter motion, the court stated "That motion is denied, also, Mr. Mosley. I appointed competent counsel. They retained one of the best private investigators in the circuit to work with them and you have fired them." (T. 10.) The court also denied Mr. Mosley's motion based on newly discovered evidence about the competence of the medical examiner who testified in his original trial. (T. 17-18.) The court stated for the record that the medical examiner had suffered from Alzheimer's disease, but her competence was never questioned until after his original trial. (T. 18.) Mr. Mosley argued the medical examiner had been investigated as early as 2001, before his trial; the court responded "if that's your motion then it's denied. There is no further discovery in that particular issue." (T 18.)

Later, during a break in jury selection, Defendant asked the court to confirm that it had considered all of his motions; the court reiterated that they were denied. (T. 84.) Defendant repeated that he needed more time to prepare and said “I mean I can’t tell you where to go from this point. I’m not participating.” (T. 88.) He said he wanted to represent himself if he had sufficient time; the court said “That is over.” (T. 89.) The court repeatedly asked him whether he was requesting that counsel be reappointed. (T. 90-94.) Finally Mr. Mosley said “They can handle the case. I wanted a Nelson hearing.” (T. 95.)

At the State’s request the court then conducted a *Nelson* inquiry into Defendant’s complaints regarding the assistance he was receiving from counsel. (T. 95-98.) Mr. Mosley stated there were witnesses he had asked them to call who hadn’t been called, and his attorneys had not adopted his motion based on newly discovered evidence. (T. 96.) The court replied “Let me be the first to tell you if you haven’t figured it out they don’t have to do everything you tell them.” (T. 96.) Mr. Mosley also represented that Mr. Hernandez had told him Mr. Hernandez would file a motion to recuse Judge Weatherby, but never did. The court replied “There were no grounds for that to happen which is why Mr. Hernandez...didn’t file it would be my guess.” (T. 97-98.) Counsel agreed there were three witnesses Mr. Mosley had wanted to call, without referring to the motion based on new evidence. (T. 98.)

The court ruled “All right. Mr. Hernandez and Mr. Korody are reappointed in this particular case. There’s nothing that Mr. Mosley has advanced that in any way make me question their ability or their veracity or their ethics in this particular matter.” (T. 98-99.)

During the proceedings that day Defendant said “I’m not happy with this counsel” and asked to return to representing himself pro se. (T. 147-48.) The court denied the request, saying “You were warned.” (T. 148.)

When jury selection continued on December 3 the court renewed the inquiry as to whether Defendant wanted to continue having counsel with him or wanted to represent himself. (T. 286.) Defendant stated “I want to represent myself.” (T. 287.) Defendant represented himself for the remainder of jury selection and a jury was accepted. (T. 350-52.) The offer of counsel was renewed when the penalty phase trial began (T. 382-83) as well as at the end of the first day of testimony (T. 676-77); at the beginning of the second day of the penalty phase trial (T. 685-86); at the beginning of the third day of the penalty phase trial (T. 786-87). It was not renewed at the beginning of the fourth day of trial, when the parties presented closing arguments. (T. 887-98.)

STATEMENT OF THE FACTS

Summary of Penalty Phase Testimony

Lieutenant Mark Romano, Jacksonville Sheriff's Office. Lieutenant Romano was working as a homicide detective in 2004 and became involved in a missing persons case involving Lynda Wilkes and Jay-Quan Mosley. (T. 420-24.) Ms. Wilkes was Jay-Quan's mother; he was ten months old, and she had named Mr. Mosley as his father. (T. 423-25.) After she did not pick her older children up from school on April 22, 2004, it was determined that Mr. Mosley was the last person seen with her. (T. 424-25.) Eventually the sheriff's office was contacted by Bernard Griffin and his sister Vicki Griffin, who was also involved with Mr. Mosley. (T. 426-28.) Ms. Griffin told them Mr. Mosley had told her he wanted to "get back at" a woman who had stolen from him and asked if she knew anyone who would kill a baby. (T. 428-29.) Later Bernard Griffin told them Mr. Mosley had asked him if he would kill a baby for \$1500, and pointed out where Ms. Wilkes lived. (T. 430-32.) A day later he returned and confessed that he had been present when Mr. Mosley strangled Ms. Wilkes and helped put Jay-Quan into a garbage bag. (T. 433-36.) He helped dispose of the bodies and provided information that led to the discovery of Ms. Wilkes's body. (T. 437-47.) The body had been burned using an accelerant and had to be identified with dental records. (T. 449, 451, 455.) He said Jay-Quan's body was thrown into a dumpster; despite

extensive searching, the body was never found. (T. 438, 444.) Lieutenant Romano said telephone records confirmed that Mr. Mosley and Mr. Griffin were having repeated communications during the time of Ms. Wilkes's disappearance, and cell phone location data was consistent with Mr. Griffin's confession. (T. 456-60.) Ms. Wilkes's DNA was also found in the back of Mr. Mosley's SUV. (T. 464-66.)

Bernard Griffin. Mr. Griffin met Mr. Mosley through Mr. Griffin's sister, Vicky. (T. 525-26.) Mr. Griffin had known Mr. Mosley a short time when Mr. Mosley asked him if Mr. Griffin could "get rid of a baby and anybody else that's inside the house." (T. 529.) Mr. Mosley made a diagram of the house and drove past it with Mr. Griffin. (T. 529-30.) Mr. Griffin did not know the connection between Mr. Mosley and Ms. Wilkes or Jay-Quan. (T. 530-31.) Mr. Griffin did not meet Ms. Wilkes or Jay-Quan until the day they disappeared, when Mr. Mosley picked him up in a maroon SUV with Ms. Wilkes and Jay-Quan sitting on the front passenger side. (T. 532-36.) Mr. Griffin asked Ms. Wilkes how she was, and she said she was "all right." (T. 537.) Mr. Griffin expected Mr. Mosley to drop him off at some apartments but instead Mr. Mosley drove to a wooded area, where he strangled Ms. Wilkes. (T. 537-39.) She was holding Jay-Quan at the time and standing outside of the SUV. (T. 539-40.) Mr. Griffin watched as Ms. Wilkes struggled until she stopped moving; Jay-Quan was on the ground crying. (T. 540-52.) Mr. Mosley placed a plastic shopping bag over her head and put her in the

back of the SUV. (T. 542.) Then Mr. Mosley got a black garbage bag out of the SUV and told Mr. Griffin to hold it open; Mr. Mosley put Jay-Quan into the bag, tied it, and put it in the back of the SUV, with Jay-Quan still crying and moving. (T. 542-44.) Then Mr. Mosley drove Mr. Griffin to his original destination; at some point during the drive the baby stopped crying and moving. (T. 545.)

Later that night Mr. Mosley picked up Mr. Griffin and took him to a remote location, where they dragged Ms. Wilkes's body from the SUV and set the body on fire using some gasoline. (T. 546-51.) Mr. Griffin immediately went back to the car. (T. 551.) They drove to an area Mr. Griffin said was near Gainesville, although he did not know the exact location, and pulled up next to a dumpster at a Winn-Dixie store; Mr. Mosley took their shoes and gloves and put them inside the dumpster with the bag in which he had placed Jay-Quan. (T. 552-53.) After one other stop Mr. Mosley dropped Mr. Griffin off at home and gave him \$200. (T. 553-55.)

After Mr. Griffin saw reports about Ms. Wilkes's disappearance, he told his mother what had happened and then went to the police with his mother and sister. (T. 555-56.) After telling them what he knew he was arrested as an accessory after the fact to two counts of first-degree murder and was prosecuted as an adult, leading to ten years of probation. (T. 556-60.) At the time of the penalty phase trial

he was in prison for violating his probation by being arrested for aggravated assault and possession of a firearm by a convicted felon. (T. 560.)

The court sustained a State objection when Defendant attempted to cross-examine Mr. Griffin about a history of drug dealing. (T. 562-63.) During the cross-examination Mr. Griffin read to the jury the text of an affidavit prepared in connection with Mr. Mosley's postconviction hearing. (T. 567-70.) In the affidavit Mr. Griffin stated he was told, before Mr. Mosley's original trial, that he would be charged with first-degree murder if he did not cooperate and testify against Mr. Mosley. (T. 568.) The prosecutor was concerned about his prior inconsistent statements, and told him if he cooperated he would not "do a lot of time." (T. 568.) She repeatedly assured him he would get "little time and probation or only probation" for his testimony. (T. 568.) During his testimony in court he was asked whether he had a deal; he said he did not, but he knew at the time that he did that he would probably just be put on probation. (T. 569.) After Mr. Mosley's trial he entered a plea and was sentenced to community control and probation. (T. 569.)

The court would not allow Mr. Mosley to question Mr. Griffin about any expectation he had of special treatment from the State in exchange for his testimony at the penalty phase trial. (T. 571-72.) Without any objection from the State, the court interjected: "Okay, let me — let me assure the jury right now...Mr. Griffin is under a 20-year sentence. There is no legal avenue for that sentence to be

changed at all except perhaps by his death in custody. Next topic, Mr. Mosley.” (T. 571.) Mr. Mosley noted that the State could write a letter asking to reduce Mr. Griffin’s term; the court said “Mr. Mosley, next topic or you’ll sit down.” (T. 572.) When Mr. Mosley said he was trying to establish a motive for Mr. Griffin’s testimony, the court said “I am not going to let you establish something that is non-existent.” (T. 572.) On redirect Mr. Griffin stated he had testified truthfully at the original trial, and that he had no promise of special treatment for testifying at the penalty phase trial. (T. 573-75.)

Lieutenant Craig Waldrup, Jacksonville Sheriff’s Office. Lieutenant Waldrup described participating in the search for Ms. Wilkes’s and Jay-Quan’s bodies, with the assistance of Mr. Griffin. (T. 588-610). Officers were able to find the Winn-Dixie where Mr. Griffin said Jay-Quan’s body had been placed in a dumpster, but when they searched the dumpster they were unable to find any evidence. (T. 596.) After one unsuccessful attempt Mr. Griffin was able to locate a dirt road several miles south of Waldo; he became extremely emotional, to the point where he could not walk further. (T. 605-07.) Lieutenant Waldrup and two other officers continued in the direction Mr. Griffin indicated, and found Ms. Wilkes’s body off the side of a grass road. (T. 608.)

Wesley Owens. Mr. Owens, a teacher in Duval County, was working as an attorney in 2004 for a firm that contracted with the Florida Department of Revenue

to pursue child support cases. (T. 614-15.) Linda Wilkes had initiated an application for public assistance that led to his firm filing a paternity action seeking to name Mr. Mosley the father of Jay-Quan. (T. 616-20.) His file indicated Mr. Mosey was served with a petition in that action on December 27, 2003. (T. 620.) Mr. Mosley failed to respond and, pursuant to a default judgment, was ordered by pay \$1,000 in retroactive child support and \$35 weekly for the duration of Jay-Quan's childhood. (T. 620-22.) Mr. Mosley filed a motion to vacate that judgment in March 2004; a scheduled hearing took place after Ms. Wilkes and Jay-Quan disappeared. (T. 623-26.) The next step in that proceeding would have been to order paternity testing. (T. 625.)

Dr. Margarita Arruza, Chief Medical Examiner. Dr. Arruza was not available and her testimony from a prior proceeding was read to the jury. (T. 638-39.) At the time she testified she was the chief medical examiner in Jacksonville, and conducted 300 autopsies a year. (T. 640-42.) On May 1, 2005, she was called to the location where Ms. Wilkes's body was found and observed skeletonized remains; she conducted an autopsy the next day. (T. 642-44.) Three rings were found on Ms. Wilkes's hand, along with a broken watch that had stopped at 2:29 p.m., and the remains of some jeans. (T. 644-48.) Dr. Arruza was not able to determine whether Ms. Wilkes died of strangulation because of the condition of the remains. (T. 649.) She stated it would not be uncommon for a bloody discharge to

come from a body if the body was prone in a car for 12 hours, and opined that Ms. Wilkes died of “homicidal violence of unspecified means.” (T. 651.) Dr. Arruza was also asked if a ten-month-old baby was placed into a garbage bag and the bag was tied shut, how long the baby would be expected to live. (T. 652.) She stated “The child is not going to live very long,” and that the manner of death in that case would be a homicide. (T. 652.)

Dr. Randell Alexander. Dr. Alexander, a pediatrician with a specialty in child abuse, was called to describe the process of asphyxiation. (T. 657-65.) He stated that, for a child like Jay-Quan, he would expect it to take about four minutes after being placed in the bag for the child to become unconscious and then die. (T. 665-66.) He also opined that a child in that situation would experience fear and pain before losing consciousness. (T. 667-70.)

Marquita Wilkes. Marquita Wilkes, Ms. Wilkes’s daughter and Jay-Quan’s oldest sister, presented a victim impact statement. (T. 688-91.)

Nakita Wilkes. Nakita Wilkes, Jay-Quan’s second-oldest sister, also presented a victim impact statement. (T. 691-94.)

The State rested after presenting the two victim impact statements.

Barbara McKinney Mosley. Mrs. Mosley, Mr. Mosley’s mother, stated he was a loving, patient, helpful son. (T. 705-06.) His father was not active in his life and when they were together, was physically abusive, using beatings as a form of

discipline. (T. 706-07.) Mr. Mosley graduated from high school, attended college, and attended police academies in two or three cities; he was also a certified firefighter. (T. 707, 710.) He was an emergency medical technician and served as a Navy medical corpsman. (T. 708.) From her observation he was a very good father. (T. 708.) She said he would be able to help other inmates. (T. 711.)

Later Mrs. Mosley was recalled; Defendant proffered her testimony before the jury heard it. (T. 827-32.) The court ruled she would not be allowed to testify about the alleged sexual abuse of Mr. Mosley's sisters by his father, even though Mr. Mosley stated it had affected him, because his father's credibility was not at issue. (T. 830-32.) With the jury present, Mrs. Mosley then stated that Mr. Mosley's father was not an active part of his life and that he had been both mentally and physically abusive towards Mr. Mosley, including beating him with "belts or whatever else he could get his hands on." (T. 832-33.) Mr. Mosley's father would also verbally abuse him and his mother. (T. 833.) Mrs. Mosley said her mother, Mr. Mosley's grandmother, was murdered by her husband, Mrs. Mosley's stepfather, when Mr. Mosley was 10 years old; he and his grandmother were very close, sharing a birthday, and her death affected him mentally. (T. 834.)

Carolyn Mosley. Mrs. Mosley, Mr. Mosley's wife, said they had been married about 30 years. (T. 714-15.) She described him as "an attentive father": "You were once the president of the P.T.A. to our of our girls' schools. You would

drive them to school. You helped with homework. You just showed — you showed a lot of love to our girls.” (T. 715.) She said Mr. Mosley continued to have a relationship with her and their daughters after his incarceration and that he was helping them “meet the challenges of life.” (T. 715-16.) She also said he was a good father to his sons, born before their marriage, and said they had both spent time at the Mosleys’ home. (T. 716.) She said he was in the Navy and inspired their younger daughter to enlist in the Navy as well. (T. 716-17.) He attended police academies in Jacksonville, Tampa, and Lake City, as well as the Jacksonville Firefighter Academy. (T. 717, 720-22.) He served as a father figure to a young man named Derrale, and Mrs. Mosley said Derrale’s mother was very appreciative of the time Mr. Mosley spent with him. (T. 717-18.)

Amber Mosley. Amber Mosley, Mr. Mosley’s daughter, described him as “a great dad, always there for me and my siblings,” who “raised us and participated in everything in our lives. (T. 725.) She remembered him serving as vice president of the P.T.A. for her elementary school as well as attending many of her field trips. (T. 726.) Ms. Mosley was a gifted student and had earned one Associate and two Bachelor’s degrees, she was employed as a nurse. (T. 726-27.) Her father was an influence in helping her achieve those goals. (T. 727.) She remembered her older brothers spent a lot of time at the Mosleys’ home when they were small, and that he coached Pop Warner football. (T. 727-28.)

Lieutenant Mark Romano. Before Defendant recalled Lieutenant Romano the court cautioned Defendant that the questioning needed to be limited to mitigation, and that he risked opening the door to negative testimony if he went into other matters. (T. 730-33.) The court also gave the jury an opportunity to ask him a question, which was whether a tarp was ever recovered; he said tarps were recovered from the landfill but none of them were proved to be related to this case. (T. 735.) Mr. Mosley then questioned Lieutenant Romano about discrepancies between what Mr. Griffin told Lieutenant Romano and what he told another officer, Officer T.L. Tyson, who said Mr. Griffin told him Jay-Quan was sitting in the back seat of the SUV rather than on his mother's lap in the front seat, and that the child was suffocated in the back seat with a plastic bag. (T. 735-39.) The court would not allow further questioning after Lieutenant Romano said he did not remember Officer Tyson's report. (T. 739-40.)

Alexis Mosley. Alexis Mosley, Mr. Mosley's younger daughter, described him as a "great father...always very supportive and protective and very intelligent, and he just always been — been there as a father is supposed to, always providing guidance and everything." (T. 743.) She had a good childhood. (T. 743.) She denied knowing about the paternity issue involving Jay-Quan. (T. 743-44.) She remembered her older brothers, John Mosley III and Roman Mosley, spending a lot of time with her family growing up, and described Derrale Lee as a

“godbrother” to whom Mr. Mosley was a father figure. (T. 744-45.) She remembered attending one of his police academy graduations and that he served in the Navy Reserves, which is where she served as well. (T. 746.) Ms. Mosley held two college degrees, made the dean’s list in college, and worked for the Duval County court system; she agreed Mr. Mosley was instrumental in helping her achieve those goals and said he continued to give her valuable life advice even after he was incarcerated. (T. 746-47.)

Joel Jackson. Mr. Jackson, Mr. Mosley’s brother, described Mr. Mosley as an “exceptional brother” who was very close to Mr. Jackson and helped raise him as an elder brother would. (T. 755-57.) Mr. Mosley and Mr. Jackson grew up without fathers; Mr. Jackson recalled Mr. Mosley riding back and forth to football practice with him when that was the only way Mr. Jackson would be able to play. (T. 758-59.) Mr. Jackson graduated from high school and served in the military; he was honorably discharged from the Army. (T. 761.)

Marven Baker. Ms. Baker was raised in the same neighborhood with Mr. Mosley and described him as “[v]ery kindhearted.” (T. 790-91.) She used to babysit his children. (T. 791.) Ms. Baker said Mr. Mosley was raised by his grandmother; his father was not active in his life, and the few times he saw his father, his father was abusive to him. (T. 791.) She said Mr. Mosley was a good father to his daughters and sons. (T. 791.) The court would not allow Mr. Mosley

to question her about whether his sisters had talked to her about being sexually abused by his father. (T. 792.) On cross-examination she said Mr. Mosley was a close friend who spent a lot of time with her sons and taught them how to play ball. (T. 793.) She was not aware of his relationship with Ms. Wilkes or that he had a son with her. (T. 793.)

Jeff Pace. Jeff Pace was the recruiter who recruited Mr. Mosley to join the Navy Reserves and became a personal friend. (T. 794-95.) Mr. Mosley was a groomsman at Mr. Pace's wedding and helped Mr. Pace and his wife move. (T. 796.) Mr. Pace reviewed documents related to Mr. Mosley's service in the reserves, including one that described his volunteer activities in the community, including volunteer firefighting, coaching in youth sports programs, serving as a mentor with the Big Brother program. (T. 799.) He also verified that Mr. Mosley attended boot camp at Great Lakes, Illinois. (T. 800.) Records indicated Mr. Mosley was honorably discharged. (T. 810.) He had received an age waiver to enlist. (T. 820-21.) On cross-examination Mr. Pace stated Mr. Mosley had served for two years and then took inactive status. (T. 802-05.) Mr. Pace had moved to Atlanta by the time of the events involving Ms. Wilkes and did not know her; Mr. Mosley never told him about Jay-Quan. (T. 806.)

Eric Roper. Mr. Roper had no personal knowledge of Mr. Mosley; he was currently a member of the Navy Reserves and explained a “leave and earning” statement detailing Mr. Mosley’s reserve service. (T. 822-24.)

Dr. Stephen Bloomfield. Dr. Bloomfield is a forensic psychologist who first evaluated Mr. Mosley in 2005 and 2006, in connection with his first trial, and then evaluated him again more recently. (T. 836-37.) The more recent evaluation did not involve psychological testing; he evaluated Mr. Mosley for competence, mental status, and any impairing psychological traits. (T. 837-38.) He stated Mr. Mosley’s mental status was “well within normal limits” with no major pathology, psychosis, or cognitive disorders. (T. 838.) He observed Mr. Mosley had “obsessive compulsive traits” including being very exacting, being a loner, and being private. (T. 838-39.) He became aware that Mr. Mosley suffered childhood abuse, and that Mr. Mosley sought out a number of “prosocial activities” such as attempting to be a police officer or firefighter, as well as volunteering in the community. (T. 839-40.) Dr. Bloomfield also said Mr. Mosley had a strong, close relationship with his children. (T. 840.) On cross-examination Dr. Bloomfield agreed Mr. Mosley had declined psychological testing in 2018 because he was fearful the results would be used against him. (T. 841.)

Dr. Steven Gold. Dr. Gold is a trauma psychologist who was retained to evaluate Mr. Mosley to learn about any history of traumatic experiences and their

impact on him. (T. 848-49.) He stated Mr. Mosley had “a number of traumas” in his history. (T. 849.) He grew up with a maternal grandmother and two older sisters, and his grandmother was both physically and verbally abusive to him. (T. 850-51.) Not only did she beat him, but she sometimes called his father to beat him, and most of his interactions with his father involved beatings. (T. 851.) His grandmother was also neglectful, often failing to feed him, and treated his two sisters much better than she treated him. (T. 851.) His mother provided some support but had little interaction with him. (T. 851.) He was often required to work with his grandfather, who worked as a janitor, with the result that he was up from 6 a.m. until 10:00 or 11:00 p.m. (T. 852.) Dr. Gold said he was struck by the degree to which Mr. Mosley volunteered in the community:

One of the things that struck me about your history is the degree to which consistently over time in being a volunteer firefighter, vice president of P.T.A., mentoring teenage boys, going into the military, into the Navy, that wanting to be a police officer that fairly consistently you were taking on roles were you were contributing to the community, mentoring young people, helping people out to a — to a very unusual degree and it struck me. My impression was that you were trying to provide to other people what had not been provided to you which is one of the more adaptive ways that people deal with growing up with emotional deprivation.

(T. 853-54.)

On cross-examination Dr. Gold said Mr. Mosley’s “great efforts to function well” did not mean “that he was left unscarred by his history.” (T. 859.) He

concluded that “what he has been through growing up, the inadequacy of his growing up environment, the degree to which despite that environment he made efforts to be a productive citizen there are reasons for the jurors to consider sentencing Mr. Mosley to life instead of death.” (T. 860.)

Verdict and Sentence

The jury returned the following verdict on December 9, 2019 (R. 2000-20, T. 966-72):

A. **Aggravating Factors:** the jury unanimously found four aggravating factors had been proved beyond a reasonable doubt. (R. 2000-01.) These were that Mr. Mosley was previously convicted of another capital felony; that the murder was especially heinous, atrocious, or cruel; that the murder was committed in a cold, calculated, a premeditated manner, without any pretense of moral or legal justification; and that Jay-Quan Mosley was a person less than 12 years of age. As to the factor that the murder was committed for financial gain, the jury voted 7-5 that the factor had been established beyond a reasonable doubt.

B. **Sufficiency of the aggravating factors:** as to the sufficiency of the aggravating factors, the jury unanimously found that the aggravating factors were sufficient to warrant a possible sentence of death. (R. 2001.)

C. **Mitigating Circumstances:** as to the mitigators presented by Mr. Mosley, the jury indicated the votes listed below. (R. 2002-09.)

1. That Mr. Mosley was emotionally neglected as a child by his caregiver. 0 yes, 12 no.
2. That Mr. Mosley was abandoned by his father. 0 yes, 12 no.
3. That Mr. Mosley was physically abused by his father as a child. 0 yes, 12 no.
4. That Mr. Mosley grew up in a dysfunctional family environment. 0 yes, 12 no.
5. That Mr. Mosley honorably served his country as a member of the United States Naval Reserve. 2 yes, 10 no.
6. That Mr. Mosley has great love and concern for his daughters. 0 yes, 12 no.
7. That Mr. Mosley graduated from high school. 0 yes, 12 no.
8. That Mr. Mosley was affected by seeing physical and/or mental abuse at an early age. 0 yes, 12 no.
9. That Mr. Mosley has the love and support of his family members. 1 yes, 11 no.
10. That Mr. Mosley was a good parent to his daughters Amber and Alexis. 0 yes, 12 no.
11. That Mr. Mosley was a good and respectful son to his mother, grandmother and other family members. 0 yes, 12 no.

12. That Mr. Mosley was a good friend to many. 0 yes, 12 no.
13. That while in the Naval Reserves he was never disciplined or reprimanded for his performance of his duties. 0 yes, 12 no.
14. That Mr. Mosley successfully completed an extended program provided by the Florida Junior College and graduated with an Emergency Medical Care (EMC) certificate of completion. 0 yes, 12 no.
15. That Mr. Mosley maintained steady employment throughout his adult life. 0 yes, 12 no.
16. That Mr. Mosley was vice-president of programs for PTA at Twin Lakes Elementary School and participated in PTA activities on the local and state level. 0 yes, 12 no.
17. That Mr. Mosley volunteered as a Recreational Coordinator for the Tenant Advisory Council. 0 yes, 12 no.
18. That Mr. Mosley successfully completed an extensive program and received a diploma certificate from the Division of State Fire Marshal (Volunteer Basic Course). 0 yes, 12 no.
19. That Mr. Mosley was a volunteer fireman. 0 yes, 12 no.
20. That Mr. Mosley successfully completed the Certified Nursing Assistant Program, Department of Health, State of Florida. 0 yes, 12 no.

21. That Mr. Mosley was a mentor of Derrale Lee and took an interest in his well-being. 0 yes, 12 no.

22. That Mr. Mosley's psychological profile indicates he has the potential to be a productive inmate. 0 yes, 12 no.

23. That Mr. Mosley successfully completed law enforcement training. 0 yes, 12 no.

24. That Mr. Mosley coached neighborhood youth in sports and recreation. 0 yes, 12 no.

25. That Mr. Mosley encouraged others to remain in school and complete their education. 0 yes, 12 no.

26. That Mr. Mosley helped his daughters with their school work while growing up. Mr. Mosley's daughters were in the gifted program in High School. 0 yes, 12 no.

27. That Mr. Mosley still gives "life advice and counsel" to his wife and two daughters even though he is in prison. 2 yes, 10 no.

28. That Mr. Mosley's daughter Alexis went into the U.S. Naval Reserves upon the advice of her father. 0 yes, 12 no.

29. That Mr. Mosley's daughter Amber became a Registered Nurse. 0 yes, 12 no.

30. That Mr. Mosley at age 10 experienced trauma of knowing his maternal grandmother was killed by his maternal step-grandfather. 2 yes, 10 no.

D. Eligibility for the death penalty: The jury checked “yes” under “We, the jury, unanimously find that the aggravation factors that were proven beyond a reasonable doubt in Section A above outweigh the mitigating circumstances established in Section C above.” (R. 2009.)

E. Jury Verdict as to Death Penalty: The jury checked “yes” under “Having unanimously found that at least one aggravating factor has been established beyond a reasonable doubt in Section A above; that the aggravating factors are sufficient to warrant a sentence of death in Section B above; and that the aggravating factors outweigh the mitigating circumstances in Section D above; we, the jury, unanimously find that the Defendant, JOHN FRANKLIN MOSLEY, should be sentenced to death.” (R. 2010.)

Immediately following the verdict, the court asked Mr. Mosley if he wanted to have counsel appointed for purposes of a *Spencer* hearing. (T. 976.) He agreed, and the court reappointed counsel. (T. 977.) On January 21, 2020, Mr. Mosley submitted both a handwritten and a typed document titled Unequivocal Demand to Immediately Represent Myself Pro Se. (R. 2012, 2014-15.) The handwritten document was stamped “Filed” on January 23, 2020 (R. 2012); the typed document was filed January 29, 2020 (R. 2014).

A *Spencer* hearing was conducted on January 30, 2020. (R. 1751.) The defense presented no additional witnesses. Before hearing argument the court noted the denial of a pro se pleading Mr. Mosley had filed seeking a new hearing, titled Motion for Mistrial Before Jury Deliberation. (R. 1755-56, 2011.) The State also noted that Mr. Mosley had filed a pro se pleading on January 23, 2020, and said “I believe prior to addressing the pleadings that have been filed by Mr. Hernandez we need to address that request.” (R. 1755.)² The court stated “Sure. That’s fine. And I intend to do so.” (R. 1755.) However, the court then proceeded to ask counsel what arguments they wanted to make. (R. 1756.) Perhaps recognizing that a demand for self-representation was pending, counsel asked “Your Honor, do you want me to go ahead with the Motion for New Penalty Phase argument?” and the court replied “yes.” (R. 1756.)

Counsel then presented a Motion for New Penalty Phase and argued error in acceptance of the verdict, on the grounds that the way the jury had voted on mitigating circumstances showed the jury had not followed the law in deciding Mr. Mosley should be sentenced to death. (R. 1756-64.) The court denied the motion. (R. 1767.) Defense counsel submitted testimony of Ms. McKinney from the original trial in which she talked about the effect on Mr. Mosley of his father’s

² Although the prosecutor did not read the title of the pro se pleading, the date of filing and the context make clear he was referring to the Unequivocal Demand to Immediately Represent Myself Pro Se.

arrest for sexually abusing his two sisters. (R. 1385-1435, 1767.) Counsel noted the court had prevented Mr. Mosley from introducing that evidence in mitigation, although it had been allowed in the previous penalty phase trial. (R. 1768.)

The court proceeded to impose sentence, saying it did not require sentencing memoranda from the parties. (R. 1769.) It reimposed a death sentence:

Mr. Mosley, you having been found by a guilty —
having been found by guilty — a jury to be guilty of
these charges and upon the verdicts that have been
rendered by the jury during the penalty phase rehearing I
hereby sentence you to death and remand you to the
custody of the Sheriff of Duval County and then to the
Department of Corrections for the sentence to be carried
out.

(R. 1770.)

After imposing sentence the court asked Mr. Mosley about a=the written document the court had received that morning titled “Unequivocal Demand to Immediately Represent Myself Pro Se,” and asked whether he intended to represent himself on appeal. (R. 1770, 2012, 2014.) Mr. Mosley replied he had intended the request to apply to the *Spencer* hearing. (R. 1771.) The court responded “there’s no provision for you representing yourself under the present circumstances...given the fact that I gave you the opportunity to represent yourself during the course of the trial and then you asked me to reappoint your attorneys which I’ve done I am not now going to reappoint you to handle the matter today.” (R. 1771.) When Mr. Mosley repeated he wanted to handle his own *Spencer*

hearing, the court said “No, no, no. We’re past that, Mr. Mosley.” (R. 1772-73.)

The hearing was concluded.

Mr. Mosley filed an original and Amended Motion for Prohibition and Mandamus and Notice of Appeal seeking to prohibit the trial court from proceeding further with the penalty phase proceedings until Mr. Mosley had an evidentiary hearing on his claim of newly-discovered evidence regarding the medical examiner. (R. 1348-57, 1358-74.)

The trial court entered a Sentencing Order on February 11, 2020. (R. 2019-40.) The written order agreed with the jury’s conclusion regarding the four aggravating factors and assigned each of the factors great weight. (R. 2024-27.) The court noted Mr. Mosley had presented mitigation evidence under the “catch all” statutory mitigator set out in section 941.121(7)(h), Florida Statutes (2019), adding, “[i]n an abundance of fairness, the Court has reviewed each remaining statutory mitigating circumstance and finds there is no evidence to support mitigation in these.” (R. 2028.) Despite the jury findings, the court found Mr. Mosley had established a number of mitigating circumstances under the “catch all” provision, and assigned them the weight indicated below (R. 2028-37):

The court gave moderate weight to the factors that Defendant was emotionally neglected as a child by his caregiver; Defendant was physically abused

as a child by his father; and Defendant, at age ten, experienced the trauma of knowing his maternal grandmother was killed by his maternal step-grandfather.

The court gave slight weight to the factors that Defendant was abandoned by his father; Defendant honorably served his country as a member of the United States Naval Reserve; Defendant has great love and concern for his daughters; Defendant has the love and support of his family members; Defendant was a good parent to his daughters Amber and Alexis; Defendant was a good and respectful son to his mother, grandmother, and other family members; Defendant was a good friend to many; Defendant was never disciplined or reprimanded for performing his duties in the Naval Reserve; Defendant successfully completed an extended program provided by the Florida Junior College and graduated with an Emergency Medical Care (EMC) certificate of completion; Defendant was vice-president of programs for the PTA at Twin Lakes Elementary School and participated in PTA activities on the state and local level (established in part); Defendant volunteered as a Recreational Coordinator for the Tenant Advisory Council; Defendant successfully completed an extensive program and received a diploma certificate from the Division of State Fire Marshal (Volunteer Basic Course); Defendant was a volunteer fireman; Defendant was a mentor to Derrale Lee and took an interest in his well-being; Defendant's psychological profile indicates he has the potential to be a productive inmate; Defendant successfully completed law enforcement

training; Defendant coached neighborhood youth in sports and recreation; Defendant encouraged others to remain in school and complete their education; Defendant helped his daughters with their work while growing up, and Defendant's daughters were in the gifted program in high school; Defendant still gives "life advice and counsel" to his wife and two daughters even though he is in prison; and Defendant's daughter Alexis went into the U.S. Naval Reserves upon the advice of her father.

The court gave minimal weight to the factor that Defendant graduated from high school. Five proposed factors either were not established, were only partially established, or were already addressed in other mitigating circumstances, and were given no weight. These were: Defendant grew up in a dysfunctional family environment; Defendant was affected by seeing physical and/or mental abuse at an early age; Defendant maintained steady employment throughout his adult life; Defendant successfully completed a Certified Nursing Assistant Program; and Defendant's daughter Amber became a registered nurse.

The court noted the jury had unanimously found the aggravating factors outweighed the mitigating circumstances, adding, "[a]lthough the Court through its own review of the record has found certain mitigating circumstances exist that the jury did not find to exist, the Court concludes that the aggravating factors that exist

outweigh the mitigating circumstances that exist.” (R. 2037.) Finally, the order reimposed a death sentence:

In determining the appropriate sentence, the Court cannot focus solely on the consequences of Defendant’s action, Jay-Quan Mosely’s murder. The Court must also consider Defendant’s intent as to each action he took during the crime.

Defendant set out to murder Jay-Quan. He solicited Bernard Griffin to kill Jay-Quan and provided Griffin with a map to and diagram of Linda Wilkes’s home. When Griffin refused to murder a baby, Defendant killed Jay-Quan.

The Court gives great weight to the jury’s recommendation to impose the death penalty and wholly agrees with the jury’s recommendation based on an assessment of the aggravating factors and mitigating circumstances presented. The Court finds the aggravating factors heavily outweigh the mitigating circumstances, and death is the proper penalty for the murder of Jay-Quan Mosley.

(R. 2037-38.)

SUMMARY OF THE ARGUMENT

Issue I: During the penalty phase trial, the court abused its discretion in preventing Mr. Mosely from cross-examining Bernard Griffin, the only purported eyewitness to the crimes for which Mr. Mosley was convicted, about his potential bias or ulterior motive in testifying. This was a violation of Mr. Mosely's rights of confrontation and due process.

Issue II: During the penalty phase trial, the court erred in precluding proffered mitigation evidence relating to Mr. Mosely's abusive childhood and the home atmosphere in which he was raised, namely evidence that Mr. Mosely's father sexually abused his sisters. This was a violation of Mr. Mosely's constitutional right to present all available mitigation.

Issue III: At Mr. Mosley's Spencer hearing, the court ignored his unequivocal request to resume representing himself. Mr. Mosley had represented himself during the penalty phase and allowed counsel to be appointed for purposes of the *Spencer* hearing, but then rescinded that agreement and requested to represent himself in advance of the hearing. The court did not act on the request and proceeded to hold the hearing and pronounce sentence before asking Mr. Mosely about it. This was a violation of Mr. Mosely's constitutional right of self-representation and due process and requires granting a new hearing.

Issue IV: The court did not follow established procedures during the *Spencer* hearing; the court told the parties sentencing memoranda were not necessary and imposed sentence at the conclusion of the hearing without recessing to consider the evidence, and without preparing a written order. The court's written order was clearly not prepared before the oral pronouncement of sentence; precedent requires vacating the sentence and remanding for the imposition of a mandatory life sentence.

Issue V: Fundamental error occurred when the jury was not instructed that findings regarding the sufficiency of the aggravating factors and the weighing of aggravating factors against mitigating circumstances had to be made beyond a reasonable doubt. Although this Court has rejected the reasonable doubt standard for the findings in question, application of that standard is consistent with United States Supreme Court precedent.

ARGUMENT

I. The court abused its discretion in preventing Mr. Mosley from cross-examining the key witness against him about that witness's motivation to testify and in telling the jury that there was no potential that the witness could benefit from testifying.

The court abused its discretion in denying Mr. Mosley the opportunity to cross-examine Bernard Griffin about any potential benefit he hoped to gain by testifying at Mr. Mosley's penalty phase trial. The court further abused its discretion by abandoning impartiality and sua sponte informing the jury that there was no potential of mitigating Mr. Griffin's sentence when, in fact, Florida law allows a final sentence to be mitigated if the defendant provides substantial assistance in another felony case. The error undermined Mr. Mosley's right of confrontation of the key witness against him and violated his right to due process and a fair sentencing hearing.

A. It is always proper to question the motivation or potential bias of a witness.

Mr. Mosley was entitled to explore the motivation and potential bias of the main witness against him as part of his constitutionally protected right of cross-examination. *See Davis v. Alaska*, 415 U.S. 308 (1974). The right of cross-examination is not limited to testing "the witness' perceptions and memory":

A more particular attack on the witness' credibility is effected by means of cross-examination directed towards revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand. The partiality of a witness is subject to exploration at trial, and is 'always relevant as discrediting the witness and affecting the weight of his testimony.'

Id. at 316 (citation omitted); *see also, e.g., Steinhorst v. State*, 412 So. 2d 332, 337 (Fla. 1982) (noting “[t]he right of a criminal defendant to cross-examine adverse witnesses is derived from the Sixth Amendment and due process right to confront one's accusers.”).

A defendant's confrontation rights in a capital case “apply to the guilt phase, the penalty phase, and sentencing.” *Rodgers v. State*, 948 So. 2d 655, 663 (Fla. 2006) (citing *Rodriguez v. State*, 753 So. 2d 29, 43 (Fla. 2000)); *see also Bullington v. Missouri*, 451 U.S. 430, 446 (1981) (“The Court already has held that many of the protections available to a defendant at a criminal trial also are available at a [capital] sentencing hearing”); *Specht v. Patterson*, 386 U.S. 605, 608-10 (1967) (holding that where a sentencing proceeding depends on “a new finding of fact...that was not an ingredient of the offense charged,” the defendant is “entitled to the full panoply of the relevant protections which due process guarantees in state criminal proceedings...[including] the right to confront and cross-examine the witnesses against him”); *Proffitt v. Wainwright*, 685 F.2d 1227, 1254-55 (11th Cir.

1982) (holding the constitutional right of cross-examination applies in capital sentencing hearings).

Having established that Mr. Griffin signed an affidavit attesting that he had falsely denied having an expectation of favorable treatment for his testimony at Mr. Mosley's original trial, Mr. Mosley was entitled to cross-examine him to determine any biases or ulterior motives that may have affected Mr. Griffin's testimony in the penalty phase.

B. The trial court misinformed the jury that the only way Mr. Griffin could avoid serving his full sentence was by dying in prison.

When Mr. Mosley suggested that the State could "write a letter" on Mr. Griffin's behalf, although his sentence was final, the court informed the jury "There is no legal avenue for that sentence to be changed at all except perhaps by his death in custody. Next topic, Mr. Mosley." (T. 571.) This was an incorrect statement of Florida law, as section 921.186, Florida Statutes, creates a mechanism for doing just what Mr. Mosley suggested:

Notwithstanding any other law, the state attorney may move the sentencing court to reduce or suspend the sentence of any person who is convicted of violating any felony offense and who provides substantial assistance in the identification, arrest, or conviction of any of that person's accomplices, accessories, coconspirators, or principals or of any other person engaged in criminal activity that would constitute a felony. The arresting agency shall be given an opportunity to be heard in aggravation or mitigation in reference to any such

motion. Upon good cause shown, the motion may be filed and heard in camera. The judge hearing the motion may reduce or suspend the sentence if the judge finds that the defendant rendered such substantial assistance.

§ 921.186, Fla. Stat. (2019).

In *McFadden v. State*, 177 So. 3d 562 (Fla. 2015), this Court quashed an order denying a motion to reduce or suspend the defendant's sentence after the defendant testified against a co-defendant. The defendant was serving 55 years for several offenses involving a firearm, and his sentence had become final, when the State approached him about testifying. *Id.* at 564. The trial court denied the motion after questioning the use of the statute and speculating about why the defendant had not previously provided substantial assistance. *Id.* at 565. This Court held the order denying modification was an appealable final order, and remanded for the trial court to exercise its discretion without considering improper reasons. *Id.* at 566-67.

Under the plain terms of the statute, and consistent with *McFadden*, the trial court was incorrect when it told the jury the only way Mr. Griffin would serve less than his full sentence was by dying in prison. The misstatement of law was harmful whether or not the State had already offered to file a substantial assistance motion for Mr. Griffin — the only eyewitness to the allegations against Mr. Mosely, and the witness whose testimony was crucial not only to Mr. Mosley's guilt in the original trial, but also to the aggravating circumstances the State had to prove in

the resentencing proceeding. The misstatement of law both misled the jury about the existence of a potential benefit to Mr. Griffin, and suggested to the jury that Mr. Mosley was pursuing an improper line of questioning.

C. The court abused its discretion in telling the jury Mr. Mosley's cross-examination was without a legal basis.

Telling the jury there was no way Mr. Griffin would serve less than a full term except by dying in prison, and castigating Mr. Mosley for attempting to cross-examine Mr. Griffin on this point, was an abuse of the trial court's discretion. The trial court abandoned its neutral role not only to stop a line of questioning, but also to affirmatively tell the jury the witness could not be biased by the hope of mitigating his sentence. The court's comments deprived Mr. Mosely of the right of full cross-examination. Moreover, they were not harmless because they had the effect of bolstering the witness's credibility in the eyes of the jury.

II. The trial court erred in granting a State objection when Defendant attempted to introduce mitigation evidence that his father had sexually abused his two sisters.

The trial court abused its discretion when it prevented Mr. Mosley from presenting evidence that his father had sexually abused his two sisters, and that the knowledge of this abuse affected him. It is well established that the death penalty cannot constitutionally be imposed without offering the accused the opportunity to present potentially mitigating evidence. *See, e.g., Lockett v. Ohio*, 438 U.S. 586, 603-04 (1978). The “qualitative difference between death and other penalties” requires consideration of the individual character and history of each offender. *Id.* (citing *Woodson v. North Carolina*, 428 U.S. 280, 284 (1976)). Thus, the court’s normal discretion to rule on the admissibility of evidence is circumscribed when admitting potential mitigation evidence: “the need for treating each defendant in a capital case with that degree of respect due the individual is far more important than in non-capital cases.” *Id.* at 605. Denying Mr. Mosely the opportunity to present this evidence the jury violated his due process right to a full and fair penalty phase.

A. The court cannot preclude the consideration of any aspect of a defendant’s history that might support the imposition of a sentence less than death.

The prohibition against cruel and unusual punishment and the Due Process clause do not allow limitations on what type of evidence can be considered in mitigation in a particular case:

[T]he Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.

Id. at 604.

“Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence.” *Eddings v. Oklahoma*, 455 U.S. 104, 113-14 (1982). This typically includes “[e]vidence of a difficult family history.” *Id.* at 115; *see also Hitchcock v. Dugger*, 481 U.S. 393, 398-99 (1987) (reversing death sentence under then-current Florida law because the trial judge considered only the mitigating factors specifically enumerated in the applicable statute); *Skipper v. South Carolina*, 476 U.S. 1, 4-5 (1986) (noting if a fact would allow the jury to draw an inference favorable to the defendant, that inference is potentially mitigating and may not be excluded from consideration). The sentencer can decide to give a mitigating factor little or no weight, but cannot exclude the factor from

consideration altogether. *See Trease v. State*, 768 So. 2d 1050, 1055 (Fla. 2000); *see also Eddings*, 455 U.S. at 115 (noting mitigation evidence might be given greater or less weight depending on the circumstances of a particular case).

B. The court erred in excluding evidence that showed Mr. Mosley's family of origin was pervaded by abuse.

Florida courts have recognized a wide variety of evidence as mitigation when it helps the jury understand the defendant's family history. *See, e.g., Sireci v. State*, 587 So. 2d 450, 454 (Fla. 1991) (physical/emotional abuse by the father, sexual abuse by the mother); *Nibert v. State*, 574 So. 2d 1059, 1062 (Fla. 1990) (physical and psychological abuse during defendant's formative years); *Campbell v. State*, 571 So. 2d 415, 419 (Fla. 1990) (abusive or deprived childhood), receded from on other grounds, *Trease v. State*, 768 So. 2d 1050 (2000).

The evidence about the sexual abuse perpetrated by Mr. Mosley's father on his sisters was offered for its effect on Mr. Mosley, not for any reason having to do with his father, and its exclusion cannot be justified by referring to his father's credibility. It was not offered to impeach or discredit his father's veracity; it was offered to give the jury a fuller picture of the abusive environment within which Mr. Mosley was raised. A jury could reasonably infer that a family system where one of the daughters had to be hidden from her father, as testified to by Mr. Mosley's mother, would have deleterious psychological effects on all of the

children in that family. Mr. Mosley was prevented from arguing this to the jury, which was a violation of his right to present all potential mitigation.

III. The trial court failed to address Defendant’s unequivocal request to represent himself at a sentencing hearing prior to hearing argument on, and denying, a defense motion for a new penalty phase, and then imposing sentence.

Mr. Mosley agreed to the reappointment of counsel for purposes of his sentencing hearing. Then, in advance of the hearing, he filed an Unequivocal Demand to Immediately Represent Myself Pro Se. (R. 2012, 2014-15.)³ The demand made clear that Mr. Mosley wanted to revert to the status quo ante and represent himself for purposes of sentencing. However, when the parties arrived for the *Spencer* hearing, the court ignored the demand for self-representation and heard from counsel. The court did not address Mr. Mosley’s demand until after pronouncing sentence. This was reversible error.

The right to self-representation is protected by the Sixth Amendment. Amend. VI, U.S. Const.; *Faretta v. California*, 422 U.S. 806, 833 (1975) (“But it is one thing to hold that every defendant, rich or poor, has the right to the assistance of counsel, and quite another to say that a State may compel a defendant to accept a lawyer he does not want.”). This Court has recognized that “once an unequivocal request for self-representation is made, the trial court is obligated to hold a hearing, to determine whether the defendant is knowingly and intelligently waiving his right

³ This Court held in Mr. Mosley’s post-conviction appeal that saying he wanted to “go pro se” without filing a motion to represent himself was not an unequivocal demand. *See Mosley v. State*, 209 So. 3d 1248, 1271-72 (Fla. 2016).

to court-appointed counsel.” *Tennis v. State*, 997 So. 2d 375, 378 (Fla. 2008). Appellate courts in Florida have repeatedly held that the failure to conduct an adequate *Faretta* inquiry is per se reversible error. *E.g.*, *McKinley v. State*, 261 So. 3d 599, 600 (Fla. 4th DCA 2019); *Davis v. State*, 10 So. 3d 176 (Fla. 5th DCA 2009); *Flowers v. State*, 976 So. 2d 665, 666 (Fla. 1st DCA 2008). The court in *Davis* noted that a “truncated” *Faretta* inquiry can be appropriate in some circumstances. 10 So. 3d at 178-79. In that case, the decision suggests that the trial court may have held an extremely truncated inquiry because the court was weary of dealing with a pro se litigant. *See id.* at 179. The court concluded, however, “that the trial court lacked a proper basis for failing to conduct a *Faretta* inquiry and an inquiry was mandated after Davis’s unequivocal request for self-representation.” *Id.* (citation omitted).

Mr. Mosley’s demand to return to self-representation was unequivocal. This may have been a situation where a truncated inquiry could have been appropriate, given that he had been representing himself through most of the penalty phase and only agreed to the reappointment of counsel for a brief period after the verdict. However, there is nothing in the record justifying the trial court’s decision to ignore his request and proceed to sentencing without any inquiry at all. As in *Davis*, it appears from the record and the interactions between Mr. Mosley and the trial court that the trial court may have been frustrated or fatigued by a persistent

pro se litigant. It also appears from the record that the successor trial judge who presided over the penalty phase trial and sentencing was referring to past experience with Mr. Mosely in ruling on matters in this case; for example, during one of the discussions of Mr. Mosely's right to represent himself and his request for a continuance, the court stated, "You've had 15 years to prepare for this, Mr. Mosley. You've gone through what, six different counsel that I know of or at least four so, no." (R. 1746.) Since Mr. Mosley has had the same two appointed attorneys throughout this proceeding (serving as standby counsel for the penalty phase trial itself), the court was clearly referencing past experience.

Regardless of any frustration on the part of the trial court, proceeding to sentencing in the face of Mr. Mosely's unequivocal demand to resume representing himself was per se reversible error. Mr. Mosley's sentence should be vacated and the case remanded for a new sentencing hearing at which he will have the opportunity to decide whether to represent himself or accept the appointment of counsel.

IV. The trial court violated established procedures for the *Spencer* hearing by imposing sentence without any recess, without the benefit of sentencing memos, and before a sentencing order was prepared.

If a jury returns a verdict authorizing the death penalty after a penalty phase trial, the established sentencing procedure requires convening a separate hearing pursuant to *Spencer v. State*, 615 So. 2d 688 (Fla. 1993), before imposing sentence. Under *Spencer*, three steps take place: first, the trial judge holds a hearing to give the defendant a final opportunity to be heard and to give both parties a final opportunity to present evidence; second, the court recesses to consider all the evidence presented; and third, the court imposes a sentence and files a written order. *Id.* at 690-91. A written order with specific findings justifying the sentence should be prepared before the oral pronouncement of the sentence, but the final decision about the sentence should not be made until the defendant has a final opportunity to be heard. *See id.*; *see also Grossman v. State*, 525 So. 2d 833, 841 (Fla. 1988) (establishing the procedural rule that written orders imposing a death sentence should be prepared before the oral pronouncement). A *Spencer* hearing, unlike the penalty phase, can be reopened for the presentation of additional evidence or argument. *See, e.g., Glover v. State*, 226 So. 3d 795, 802 (Fla. 2017).

The procedure gives effect to the requirement in section 921.141(3)(a)2., Florida Statutes (2019), that if the jury recommends death, the court can impose a

death sentence “after considering each aggravating factor found by the jury and all mitigating circumstances.”

Although section 921.141(4), Florida Statutes (2019), gives the trial court 30 days from the rendition of judgment and sentence to issue its written order, the trial court still must comply with the procedures described above, including preparation of detailed findings, before pronouncing sentence. *Spencer*, 615 So. 2d at 690-91. The reason for the requirement of preparing detailed written findings is to ensure the sentence is the result of the deliberate weighing process mandated by both statute and due process. *See Christopher v. State*, 583 So. 2d 642 (Fla. 1991) (vacating a death sentence where no written findings supporting the sentence were issued for two weeks after the sentence was pronounced); *see also Perez v. State*, 648 So. 2d 715 (Fla. 1995) (following *Grossman* and vacating a death sentence where the trial court did not prepare a written order before pronouncing sentence, but merely had its oral pronouncement transcribed); *Hernandez v. State*, 621 So. 2d 1353 (Fla. 1993) (vacating a death sentence where the trial court failed to provide any reasons for the sentence, either oral or written, until 12 days after the oral pronouncement of sentence). It is reversible error to pronounce sentence without preparing the sentencing order; the remedy is remand for imposition of a mandatory life sentence. *See, e.g., Hernandez*, 621 So. 2d at 1357.

Here, the trial court held a *Spencer* hearing, but the result was a foregone conclusion. The court did not hear argument as to the sentence itself and declined to receive sentencing memoranda from the parties. Although counsel arguably acquiesced to the imposition of a sentence without considering a sentencing memorandum, that cannot be attributed to Mr. Mosely; as discussed above, he had made an unequivocal demand to resume representing himself in advance of the hearing and was waiting for the court to address that demand. Moreover, apart from the court proceeding without sentencing memoranda, the court pronounced a general sentence accepting the jury verdict and imposing death without providing detailed findings as to aggravation and mitigation. The court's written order was within the time limits proscribed by the current sentencing scheme, but those time limits are only one component of the due process protections afforded a defendant before a death penalty is pronounced. Mr. Mosley's sentence should be vacated and the case remanded for the imposition of a life sentence.

V. Fundamental error occurred when the trial court failed to instruct the jury to determine beyond a reasonable doubt that the aggravating factors were sufficient to justify death and that the aggravating factors outweighed the mitigating circumstances.

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

Under Florida’s capital sentencing scheme, a death sentence cannot be imposed for first-degree murder solely on the basis of jury findings that the defendant caused the death of another, the killing was premeditated or committed during a felony, and one or more aggravating factors exist. To increase the penalty from life in prison to a death sentence, the jury must also find that the aggravating

factors are sufficient to justify death, and that the aggravating factors outweigh mitigating circumstances. *See* §§ 775.082, 782.04, & 921.141, Fla. Stat. (2019).

This Court has concluded that the determinations at issue are not the functional equivalent of elements and thus are not subject to proof beyond a reasonable doubt. *See State v. Poole*, 297 So. 3d 487, 503-04 (Fla. 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 set out below, this conclusion is inconsistent with United States Supreme Court precedent.

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

The “elements” defining a crime for purposes of conviction and the facts that determine the available sentence for a conviction are not always identical. However, that distinction is not what determines the burden of proof in a criminal trial. *See Apprendi*, 530 U.S. at 495-96 (noting the placement of a hate crime sentence “enhancer” within the sentencing provisions of a criminal statute did not prevent the “enhancer” from functioning as an element of the offense). The legally significant distinction is whether a particular determination increases the available penalty for a crime. *Id.* The due process clauses of the Fifth and Fourteenth

Amendments, coupled with the right to a jury trial under the Sixth Amendment, require any fact increasing the maximum penalty for a crime to be submitted to a jury and proved beyond a reasonable doubt. *Id.* at 476. In the context of capital sentencing, any factor that must be found before the death penalty can be imposed is the “functional equivalent” of an element of the charged offense, at least for sentencing purposes. *See Ring v. Arizona*, 536 U.S. 584, 609 (2002) (citing *Apprendi*, 530 U. S. at 494 n. 19 (“when the term ‘sentence enhancement’ is used to describe an increase beyond the maximum authorized statutory sentence, it is the functional equivalent of an element of a greater offense than the one covered by the jury’s guilty verdict.”)).

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

Similarly, in *Alleyne*, the Court held unconstitutional a statute imposing a mandatory minimum sentence on the basis of judicial fact-finding. 570 U.S. at 103. Although the Court had previously drawn a distinction between facts increasing a statutory maximum and those increasing a mandatory minimum sentence, the Court concluded the distinction was inconsistent with *Apprendi*:

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

Id. (overruling *Harris v. United States*, 536 U.S. 545 (2002)). The Court firmly rejected the argument that the sentence actually imposed in that case could have been imposed even without additional fact-finding. *Id.* at 112-15.

Finally, in *Hurst v. Florida*, 136 S. Ct. 616 (2016), the Court held that Florida’s then-existing capital sentencing scheme violated the Sixth Amendment because it allowed the death penalty to be imposed based on judicial fact-finding. In particular, the statute at issue allowed the trial court, alone, to conclusively determine the existence of an aggravating circumstance after receiving an advisory verdict from the jury. *Id.* at 620 (citing § 921.141(2)-(3), Fla. Stat. (2010)). In response, Florida rewrote its capital sentencing scheme in a manner that does not give the trial court discretion to consider a death sentence until after a jury has made specific findings.

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

Obtaining a conviction for first-degree murder based on premeditation requires the State to establish only the following elements: (1) a victim is dead; (2) the death was caused by the defendant; and (3) the killing was premeditated. *See* Fla. Std. Jury Instr. (Crim.) 7.2 (2019). Therefore, despite the statutory “capital felony” label in section 782.04, Florida Statutes (2019), the findings necessary to convict a defendant of first-degree premeditated murder are insufficient to sentence the defendant to death. *See* § 782.04(1)(b). A separate proceeding must be held, as provided in sections 775.082 and 921.141, Florida Statutes, leading to additional statutorily defined findings.

The provisions of section 921.141 create a system in which the jury makes findings allowing the death penalty to be imposed. Only then, if specific findings are made, does the trial court exercise its discretion to choose between a life sentence and a death sentence. *See* § 921.141(2)-(3). Under these statutory provisions, if a jury finds the existence of an aggravating factor beyond a reasonable doubt, but does not separately and unanimously determine that the aggravating factor is sufficient to impose death and that it outweighs any mitigating evidence, the defendant cannot be sentenced to death, even though the

statute makes the defendant “eligible” for death. Without the additional findings, the jury’s sentencing recommendation must be for a term of life in prison and, in turn, the court has no discretion to impose a death sentence. *See* § 921.141(3)(a)1. Therefore, under *Apprendi* and its progeny, the additional findings must be submitted to a jury and proved beyond a reasonable doubt.

C. Due process requires proof beyond a reasonable doubt of any determination that must be made before the death penalty is available for a particular defendant, which is not limited to historical facts.

To satisfy the Due Process clause of the federal constitution, convicting an individual of a crime requires “proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.” *In re Winship*, 397 U.S. 358, 362 (1970). The stakes involved in depriving a defendant of liberty or, even more of life, require the highest degree of certainty to minimize the risk of error: “To this end, the reasonable-doubt standard is indispensable, for it ‘impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue.’” *Id.* at 364 (citation omitted).

The jury’s role in deciding whether this burden has been met is not limited to finding purely historical facts. If that were the case, juries would not be able to determine guilt or innocence. *See U.S. v. Gaudin*, 515 U.S. 506, 515 (1995). While some determinations involve “evidentiary” or “basic” facts, the jury is responsible for finding “ultimate” facts beyond a reasonable doubt. The ultimate fact that the

aggravating circumstances proved in a particular case justify imposing death is an example of a fact that can, and under Supreme Court precedent must, be made beyond a reasonable doubt.⁴

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

To reach the conclusion that death was an appropriate sentence for Mr. Mosley, the jury had to determine that the aggravating factors were sufficient to justify a death sentence and that they outweighed the mitigating circumstances. Fundamental error occurred when the jury reached that conclusion without being instructed on the appropriate burden of proof. An incomplete or omitted jury instruction creates fundamental error if what is omitted is “pertinent or material to what the jury must consider in order to convict.” *Daughtery v. State*, 211 So. 3d 29, 39 (Fla. 2017) (finding the issue of intent was “pertinent or material” to the jury’s deliberations where the defendant was charged with first-degree murder and convicted of second-degree murder). An instruction is material when it involves a disputed issue. *E.g.*, *Reed v. State*, 837 So. 2d 366, 369 (Fla. 2002). Fundamental

⁴ Numerous jurisdictions require capital sentencing determinations analogous to those at issue here to be made beyond a reasonable doubt. *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).

error is, by definition, harmful. *E.g.*, *Ramroop v. State*, 21 So. 3d 657, 665 (Fla. 2017); *see also Sullivan*, 508 U.S. at 281 (rejecting harmless error analysis for the erroneous description of the burden of proof).

In this case the existence of at least one aggravating factor was not in dispute, and thus the main issues for the jury to resolve were the sufficiency of the aggravating factor(s), the existence of mitigating circumstances, and whether the aggravating factors outweighed those mitigating circumstances. The burden of proof as to these issues was material and the error in omitting it, fundamental. Mr. Mosley's death sentence thus violates his rights to a jury trial and due process under the federal and state constitutions. Amends. V, VI, XIV, U.S. Const.; Art. I, §§ 9, 16, 22, Fla. Const.

VI. The court erred in refusing to consider Mr. Mosley’s motion based on newly discovered evidence about a key witness in the penalty phase trial.

Mr. Mosley repeatedly sought the opportunity to have an evidentiary hearing pursuant to Florida Rule of Criminal Procedure 3.851 on the issue of whether the medical examiner who testified at his first penalty phase trial was already suffering from some degree of impairment at the time of the trial; it was undisputed that she later had to retire because of dementia and was not available at his second trial. In denying these requests as premature, the trial court ignored this Court’s decision in *Farina v. State*, 191 So. 3d 454, 457 (Fla. 2016), that “motions alleging newly discovered evidence should be heard and addressed at the earliest possible opportunity.”

The defendant in *Farina*, like Mr. Mosley, was sentenced to death and later obtained an order vacating his death sentence and remanding his case for a new penalty phase. *Id.* at 455. Before the new penalty phase trial was held, he filed a motion based on newly discovered evidence about a possible relationship between two of the jurors at his original trial and the State Attorney who prosecuted him. *Id.* The trial court denied the motion as premature because resentencing had not yet taken place, and so his conviction was not yet final. *Id.* at 456.

This Court reversed the order denying the motion and remanded the case with instructions for the trial court to consider the motion on its merits. *Id.* at 457.

The Court noted that claims of newly discovered evidence are subject to strict time limits, and that it had previously deemed it appropriate to resolve a motion based on newly discovered evidence before a resentencing proceeding took place. *Id.* at 456 (citing *Way v. State*, 760 So. 2d 903, 907-08 (Fla. 2000)). The Court concluded “We make clear what was not explicitly stated in *Way*: motions for a new trial based on newly discovered evidence should not be delayed until after the death sentence is final, but instead, should be brought as soon as possible after the discovery of the new evidence.” *Id.* The court added that resolving the motion on its merits would remove any possible taint from the conviction. *Id.* at 457.

The newly discovered evidence here similarly calls into question the fairness of Mr. Mosley’s original trial and conviction, and the trial court erred in refusing to consider his motion until after resentencing was final. In its rush to complete the resentencing process, the trial court ignored clear language from *Farina* that motions based on newly discovered evidence should be resolved at the earliest possible opportunity rather than waiting for the conclusion of resentencing proceedings, at which time additional evidence or witnesses may have been lost or made otherwise unavailable by the passage of time. When Mr. Mosley discovered evidence suggesting that the medical examiner who testified against him not only had to retire because of dementia a number of years later, but also may have been experiencing the effects of a cognitive decline long before her retirement became

necessary, he should have been given an evidentiary hearing before defending himself at a second penalty phase trial. The remedy now, as the Court did in *Farina*, is to remand this case to the trial court with instructions to hold the evidentiary hearing Mr. Mosley repeatedly requested. Should the Court disagree, Mr. Mosley specifically requests that any denial of this ground for relief be without prejudice to raising the issue later in a motion for post-conviction relief.

CONCLUSION

Mr. Mosley requests remand for imposition of a sentence of life without parole based on the trial court's failure to comply with established sentencing procedures. In the alternative, he requests that his sentence be vacated and the case remanded for a new penalty phase trial or new sentencing hearing, or he requests remand for an evidentiary hearing on his claim of newly discovered evidence.

CERTIFICATES OF SERVICE AND FONT SIZE

I certify that a copy of the foregoing has been furnished electronically via the Florida Courts e-filing portal to William Chappell, Assistant Attorney General, Capital Appeals Division, on December 29, 2020. I certify that this brief has been prepared using Times New Roman 14-point font.

Respectfully submitted,

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