IN THE SUPREME COURT OF FLORIDA

JESSE BELL,

Appellant,

vs.

CASE No. SC20-472
L.T. No. 19-55-CF

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRD JUDICIAL CIRCUIT,
IN AND FOR LAFAYETTE COUNTY, FLORIDA

# INITIAL BRIEF OF APPELLANT

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## STATEMENT OF THE CASE AND FACTS

This is an appeal from a final order of the circuit court for Santa Rosa County, Florida, sentencing Jesse Bell to death for killing Donald H. Eastwood, Jr., a fellow inmate in the Florida Department of Corrections, on June 26, 2019. (R. 339-357, 376-403.) This Court has jurisdiction pursuant to article V, section 3(b)(1) of the Florida Constitution.

### I. Pretrial proceedings.

Mr. Bell and his co-defendant, Barry Noetzel, were in custody at Mayo C.I. Annex when Mr. Eastwood was killed. Mr. Bell was subsequently transferred to Florida State Prison. On October 15, 2019, Mr. Bell filed a Demand for Speedy Trial asserting he was "in custody" for speedy trial purposes and making a standing objection to any violation of his speedy trial rights. (R. 11-13.) An Indictment against both co-defendants was filed October 29, 2019, charging them with one count of first-degree murder, one count of attempted first-degree murder of a correctional officer, one count of conspiracy to commit first-degree murder, and possession of contraband in a prison. (R. 368-70.)

On December 5, 2019, regional conflict counsel entered an appearance for Mr. Bell and filed a written plea of not guilty. (R. 21.) On the same date the State filed a Notice to Seek Death Penalty. (R. 22-23.) The Notice alleged five aggravating factors:

> 1. The capital felony was committed by persons previously convicted of a felony and under sentence of imprisonment.
> 2. The Defendants were previously convicted of a felony involving the use or threat of violence to a person.
> 3. The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.
> 4. The capital felony was especially heinous, atrocious, or cruel.
> 5. The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense or moral or legal justification.

(R. 22-23.)

At an arraignment hearing conducted on December 5, 2019, before Judge Darren Jackson (R. 624-25), the trial court first appointed the Office of the Public Defender to represent Mr. Bell and then, based on conflict, allowed that office to withdraw and appointed the Office of Regional Conflict Counsel. (R. 627-30.) A representative of that office, Robert Baker, was present, and entered an oral plea on Mr. Bell's behalf. (R. 630.) Mr. Bell stated he had

already filed a speedy trial demand. (R. 631.) When the court asked him whether he intended to represent himself and plead guilty, like his co-defendant, he replied "I want to plead guilty, but I want the sentencing — a jury for the sentencing phase, because this is a death penalty case, right?" (R. 632.) A discussion of Mr. Bell's pro se demand for speedy trial and the effect of appointing counsel on that demand followed, and the court declined to address any issue other than Mr. Bell's first appearance and arraignment. (R. 633-40.) The possibility of Mr. Bell's representing himself and his speedy trial demand were deferred to a hearing before Judge Fina. (R. 641-43.) The court confirmed that the Office of Regional Conflict Counsel was appointed, at least until the later hearing. (R. 643.) Mr. Baker was provided with a copy of the Indictment. (R. 644.)

A week later Mr. Bell filed a Demand for Speedy Trial, Motion to Discharge, Written Objection, and Motion to Proceed Pro Se. (R. 52-65.) The Written Objection asserted Mr. Bell had not been afforded the opportunity to waive the appointment of counsel and objected to counsel being appointed. (R. 59-61.) The trial court considered Mr. Bell's filings at a motion hearing on December 13, 2019. (R. 128.) Mr. Bell stated he had not requested appointment of counsel at an earlier proceeding and that he had been informed of

the appointment without doing anything to request it. (R. 131-33.) The trial court went through a colloquy with Mr. Bell concerning his understanding of his right to counsel, the penalties he was facing, and the potential pitfalls of representing himself. (R. 134-51.) The colloquy included questions about his educational background and mental state to determine his competency to make a knowing and intelligent waiver. (R. 143-45). Mr. Bell was 45, had a GED he obtained in prison, and was taking medication for depression but said the medication did not cloud his ability to understand. (R. 143-45.) The court allowed him to proceed pro se:

> The Court does find Mr. Bell is competent to represent himself, that he has made a clear determination understanding all of the disadvantages of proceeding on his own and the rights that he has to have a lawyer represent him and the advantages that he would obtain by having counsel to represent him and has made a clear and decisive uncoerced decision to proceed on his own and the Court does at this point and time must and does grant the request.
> Any prior order that appoints counsel that was not done at the request of Mr. Bell is set aside.

(R. 151.)

The court then set aside the plea of not guilty previously entered by counsel, and Mr. Bell stated he wanted to enter a no contest plea to the charges against him. (R. 152, 163.) The court

renewed the offer of counsel or standby counsel, which was refused. (R. 152-53, 156.) The court also questioned Mr. Bell about his understanding of the consequences of entering a plea. (R. 153-59, 162-64.) At the State's request the court also asked Mr. Bell specifically whether he understood the purpose of a penalty phase trial. (R. 164-67.) Mr. Bell reviewed a plea form (R. 69-72) and stated he had no questions about it; the court asked whether he wanted a lawyer to assist him in understanding the document and he said "No, sir." (R. 169.) After reviewing what it would mean to enter an open plea (R. 170-71), the court accepted it:

> The plea is accepted. The Court does find it to be freely and voluntarily made. There are facts to support the plea in each count of the indictment, and everything is done with the intelligent, knowing waiver of counsel, and that Mr. Bell is alert and intelligent in the Court's opinion based on upon the inquiry and colloquy that has taken place and observations made by the Court as well. The plea is accepted.

(R. 172.)

Mr. Bell stated he wanted to waive a jury for the penalty phase trial. (R. 172.) He said he understood he would have the right to call witnesses but did not plan to call any; he said he would testify himself. (R. 173.) At the suggestion of regional conflict counsel, and

over Mr. Bell's objection, the court ordered a competency evaluation to take place before the penalty phase trial. (R. 174-79, 182.) The court reiterated that Mr. Bell could have the assistance of an attorney in deciding whether to waive a jury trial, and he confirmed he understood. (R. 179-80.) The court accepted his waiver of a jury trial:

> The Court does accept the waiver as well of his right to a jury and subject to any constitutional prohibitions that may otherwise require a jury determination and I will honor his request.

(R. 180.)

A competency evaluation was conducted on February 1, 2020 by Dr. Umesh Mhatre, a psychiatrist. (R. 198-204.) The materials reviewed were limited to the arresting officers' reports and DOC records, along with a clinical interview of Mr. Bell. (R. 199.) The examiner noted DOC records indicated Mr. Bell had been sexually abused when he was five years old, although he denied a history of abuse in the clinical interview. (R. 199.) Mr. Bell acknowledged a history of depression, reporting that "he has received some kind of outpatient treatment all his adult life." (R. 201.) DOC records also indicated a diagnosis of Generalized Anxiety Disorder and Major Depressive Disorder. (R. 201.) The examiner concluded Mr. Bell was

competent to proceed and did not meet criteria for involuntary hospitalization. (R. 204.)

## II. Penalty phase/*Spencer* hearing.

On February 21, 2020, Mr. Bell and his co-defendant were both present for a sentencing hearing. (R. 432.) The court asked Mr. Bell whether he remembered the earlier colloquy about "the pitfalls and the dangers" of representing himself, and he said he did. (R. 437.) The court renewed the offer of court-appointed counsel, which Mr. Bell declined. (R. 437.) Mr. Bell noted that Mr. Baker had been helping him, and the court appointed Mr. Baker as standby counsel, telling Mr. Bell "if you wish at any point in time to confer with him about any legal matter or anything else, just let me know, we'll take a recess and you can do so." (R. 438.) The court then instructed both defendants about the procedure they would follow for the hearing. (R. 438-39.) The court also confirmed with both defendants that they had no objections to anything in the reports of competency evaluations that had been ordered. (R. 440.)

The court then made an express finding that "each and both of you are competent to proceed and there's no indication of any sort of mental infirmity or defect that would prevent you from doing so." (R. 440-41.) Mr. Bell asked that his report be entered into evidence

as mitigation, and the court replied that he would be able to do that after the State rested its case. (R. 441.)

The court then reiterated that it could appoint counsel for both defendants:

> The advantages of having counsel, the disadvantages and dangers of proceeding without counsel, the nature of the charges and possible consequences, which I've explained to you, are you certain that you want me — that you want to waive your right to have an attorney and not appoint an attorney to represent you?

(R. 442-43.)

Mr. Bell responded affirmatively. (R. 443.) A sidebar conference followed, in which Mr. Baker informed the court he was not death qualified; the court responded, "I didn't appoint you, I appointed your office." (R. 444.) After some further discussion the court informed Mr. Bell that another member of the Regional Conflict Counsel's office could be called to assist if necessary:

> Your standby counsel is what's called regional conflict counsel. Mr. Baker, who you said has been conferring with you regarding these proceedings in your case, is not death qualified by the Supreme Court of Florida. Members of his office are. […] And although he'll be here to assist you, I want to make you aware of the fact that he is not certified as a death qualified attorney and if you wish for him to provide legal assistance to you that you feel would be

> more prudently answered by someone that is death qualified, there are members of his office, as I indicated, that can be summonsed here to assist if you insist. Do you follow me?

(R. 446-47.) Mr. Bell responded, "Yes, sir. I'm good with Mr. Baker, Your Honor." (R. 447.)

Mr. Bell reserved his opening statement, and the State presented the following evidence:

**Officer Colin Woodle.** Officer Woodle was employed at Mayo Correctional Institution in June 2019 and responded to an emergency call about an incident in the chow hall at about 7:00 a.m. (R. 456-58.) When he arrived, chemical agents had already been employed and officers let inmates out of the chow hall before he entered. (R. 458.) When he entered, he saw Officer James Newman "slumped over" and bleeding from several wounds. (R. 459.) Officer Newman was having a hard time breathing because of the chemical agents; he helped Officer Newman out of the room, where medical personnel took over. (R. 460-61.) Officer Woodle also saw Mr. Bell and his co-defendant in the room when he arrived. (R. 459-60.) They had been handcuffed by the time he returned from assisting Officer Newman. (R. 461.) In the chow hall he found two

homemade knives beside a pool of blood where Officer Newman had been. (R. 461-62.)

Officer Woodle went to the showers, where Mr. Bell and his co-defendant were washing off, and was preparing to speak to Mr. Bell when Mr. Bell said "Hey, LT," and told him there was a "dead chomo" in his cell. (R. 463.) Officer Woodle explained a chomo is prison slang for child molester. (R. 463.) Officer Woodle asked Mr. Bell what cell he meant, and Mr. Bell repeated there was someone in his cell, underneath the bunk. (R. 464.) Officer Woodle went to Mr. Bell's cell and did not immediately see a body. (R. 464-65.) Another officer entered the cell and told him to come back; when he entered the cell he could see a blanket wrapped around what appeared to be a body. (R. 465.) A medical team was called and verified the individual was dead, and the cell was sealed for investigators. (R. 466.)

Mr. Bell asked Officer Woodle only one question: "Before this incident have you ever had any problems with me"? (R. 467.) Officer Woodle replied "Didn't know who you was." (R. 467.)

Officer Krystal Johnson. Officer Johnson was in the dining hall during the incident and said Officer Newman was assigned as the kitchen officer. (R. 468-71.) She heard a noise, turned around,

and saw Officer Newman in a fetal position with Mr. Bell and Mr. Noetzel stabbing him. (R. 472.) Officer Johnson said the two men were detained and she escorted Officer Newman to get medical attention; he was bleeding and still had a "homemade weapon" in his neck. (R. 474.)

During Officer Johnson's testimony the court overruled Mr. Bell's objection to testimony about the attack on Officer Newman; Mr. Bell argued it was inflammatory and that the incident with Officer Newman happened hours after the original crime. (R. 470-71.)

Officer Johnson also discovered the body in Mr. Bell's and Mr. Noetzel's cell. (R. 474-76.) Although she did not initially see the body, when she looked again she saw a pile of what appeared to be laundry between their bunks, and then saw the body. (R. 476.)

On cross-examination Mr. Bell asked Officer Johnson whether she had ever had any problems with him or whether she herself felt threatened during the incident in the chow hall; she responded "no" to both questions. (R. 480-81.) When he asked "you didn't feel threatened in any type of way?" she responded "I was pulling him away the whole time and I was never one time attacked or proceeded to be attacked." (R. 481.)

**David Craig Riley.** Agent Riley, with the Florida Department of Law Enforcement (FDLE), was sent to Mayo CI to investigate Mr. Eastwood's death. (R. 483.) When he got to the cell where Mr. Eastwood was found he saw a body, with quite a bit of blood on the floor. (R. 483.) The victim had injuries to his face and eyes. (R. 484.) A note on the wall said "God hates fags, fags hate God, kill all fags and chomos and any COs who fuck with you." (R. 484.) A homemade weapon was found underneath Mr. Noetzel's bunk. (R. 484.) During Agent Riley's testimony Mr. Bell renewed his objection to any testimony relating to the events involving Officer Newman. (R. 486-87.)

Agent Riley identified a "to do" list found in the cell that contained 12 items. (R. 488-89.) He also conducted an interview with Mr. Bell, and a video recording was published in court. (R. 489-90.) Mr. Bell was read his Miranda rights at the beginning of the interview. (R. 491.) Present with Agent Riley was another agent, Agent Bunton. (R. 491.)

During the interview Mr. Bell made admissions about planning to kill Mr. Eastwood and Officer Newman. (R. 492-509.) Mr. Bell stated the killing was planned (R. 493, 495, 506), and that Mr. Bell held Mr. Eastwood down and choked him while Mr. Noetzel stabbed

him (R. 493, 496, 507-08). Mr. Bell wrote the note officers found in the cell. (R. 498.) He described obtaining the homemade weapons that were used. (R. 498-500.) Mr. Bell also said the assault on Officer Newman was intentional, stating he didn't have a record of assaulting officers, but that Officer Newman had been "busting" him every day. (R. 500-02.)

The video was paused, without objection, with approximately six minutes remaining, and both defendants waived playing it in its entirety. (R. 510.) A similar recording of Agent Riley's interview with Mr. Noetzel was entered into evidence but was not played at the hearing, again without objection. (R. 511.)

**James Theodore Williams II.** JT Williams, an investigator with the Third Circuit State Attorney's Office, also took part in the investigation of Mr. Eastwood's death and interviewed both co-defendants. (R. 514-15.) Mr. Williams interviewed both Mr. Bell and Mr. Noetzel. (R. 515.) Audio recordings of both interviews were entered into evidence but, with the consent of both defendants, were not published in their entirety. (R. 515-16, 560-62, 587.)

During Mr. Bell's interview with Mr. Williams, Mr. Bell said he and Mr. Noetzel planned to attack Officer Newman because Officer Newman went out of his way to give them a hard time for no reason.

(R. 565-68.) Mr. Bell said he wrote the "to do" list that was found in his cell, containing a list of the steps he and Mr. Noetzel took to prepare for attacking both Officer Newman and Mr. Eastwood. (R. 569-76.) He described Mr. Eastwood as a "practice run." (R. 576.) They had decided to kill a "dick sucker" before selecting Mr. Eastwood. (R. 577-78.) Mr. Bell also described the attack on Mr. Eastwood, saying he grabbed Mr. Eastwood in a choke hold and Mr. Noetzel stabbed him while Mr. Eastwood struggled. (R. 580-86.)

**Dr. Anthony J. Clark.** Dr. Clark, an associate medical examiner for the District II Medical Examiner's Office, performed an autopsy on Mr. Eastwood. (R. 589, 592.) Mr. Eastwood had a perforating stab wound to the left eye, which penetrated the left frontal lobe of the brain. (R. 592.) He also observed hemorrhaging on the right eye and around both eyes, as well as "intense congestions" of the head and neck, and injuries to the neck "suggestive of neck compression." (R. 592-94.) The hyoid bone was fractured which, combined with petechiae in the face and eyes, was consistent with manual strangulation. (R. 594.) Dr. Clark said the injury to Mr. Eastwood's eye, although extremely painful. would not have been immediately fatal and probably could have been survived with medical attention. (R. 594-95, 596-97.) In his opinion the neck

compression resulted in irreversible brain damage, causing death. (R. 595-96, 597.) Mr. Bell had no questions of Dr. Clark. (R. 597.)

The State rested after introducing certified copies of Mr. Bell's prior judgments and sentences. (R. 598.) Mr. Bell declined to make an opening statement, but elected to testify on his own behalf. (R. 599.)

**Jesse Lee Bell.** Mr. Bell was sworn and gave the following testimony:

> I had a pretty good childhood, really no abuse, nothing to speak of.
>
> I've been in prison a long time. My behavior hasn't been really good in prison, but I've never assaulted any officers besides Mr. Newman, which was brought up. I had my reasons for that. He knows what they are.
>
> Well, I suffer from depression and I would like the competency doctor's diagnosis to be put into evidence. [The report of Dr. Mhatre was admitted.]
>
> I came forward. I pled guilty. I've had good behavior in court. My family loves me.
>
> I've had good prison behavior since this incident. I haven't had any DRs or any kind of problems with the officers.
>
> I have no excuse for what I did. And I understand that according to the law, aggravators versus mitigators, I understand which by law says you're supposed to do.
>
> I'm getting old, so that ain't a good mitigator for me.
>
> That's — I've been through the statutes for statute mitigators and I don't meet any of

> the criteria for any of those, so the only mitigators I've really got is what I've told you.
>
> I've never been a good person, but I've always been an honest person. I don't know if the two of those can go together, but I believe in taking responsibility for what you do.
>
> And everybody has thought it's crazy that me and my codefendant wanted to plead guilty and waive the jury and represent ourselves, but I think society's gone crazy because they've created such political correctness that you can't even take responsibility for yourself anymore without jumping through a whole bunch of hoops. And I think it's a shame we cost the taxpayers extra money and stuff like this when we should be able to plead guilty, get our sentence and go on with whatever we're sentenced to.
>
> It has nothing to do with being crazy or anything like that, what me and him did. We're men and we've always taken responsibility for what we did. That's about it. […] I didn't want to call any witnesses because I don't think it's right to — I ain't from Florida, I'm from Kansas. None of my relatives live anywhere close to here, so it ain't right to pull — grab them out of their life to come say they love me when I know they do. And to put them through this, you know, that's kind of crazy. That ain't being a man, you understand?
>
> That's all I've got to say.

(R. 600-02.) Mr. Bell rested his case without presenting any additional evidence. (R. 602, 606.) The State asked two questions:

> Q: In the report from Dr. Mhatre it gave some biographical information. Is all that biographical information correct?
> A: Yes, sir.

> Q: Okay. There was no mention of any sort of military service. Have you ever been in the military?
> A: No, sir.

(R. 603.)

Following the State's closing argument as to his sentence. Mr. Bell objected to the heinous, atrocious, and cruel aggravator, arguing:

> The same reason how Eastwood died is pretty much how I will die with the legal injection.
> And the point of knowing your impending doom for 20 or 30 seconds is heinous, atrocious, and cruel, then the lethal injection is going to be heinous, atrocious, and cruel.

(R. 614.)

Mr. Bell also objected to the aggravator for disruption of the enforcement of laws, noting he had come forward to tell an officer Mr. Eastwood had been killed. (R. 615.) He renewed his objection to using the incident involving Officer Newman in support of the prior violent felony aggravator. (R. 615-16.)

The court ordered a presentence investigation "in an abundance of caution," noting Mr. Bell had presented some mitigation. (R. 621-22.)

**Presentence Investigation Report.** A six-page Pre-Sentence Investigation (PSI) report was prepared. (R. 647-52.) The PSI

summarized evidence presented against Mr. Bell and noted Mr. Bell had refused to sign a release, preventing the officer completing the report from "doing a thorough investigation." (R. 649.) The PSI next noted that the victim's brother had not responded to an opportunity to comment, and that Officer Newman had reserved comments until sentencing. (R. 649.) The PSI reviewed Mr. Bell's criminal and juvenile history. (R. 650.) The PSI did not include specific dates for Mr. Bell's education (GED) or previous employment. (R. 650.) Under "Supplemental Information," the following statutorily required information was provided: "Offender reports he had a good childhood; Offender declined to provide name of wife and denied to having fathered any children; Offender reports to be in good health excluding being treated for depression; Offender reports he had resided his entire life in Kansas except for this time in Florida State Prison System." (R. 651.) The PSI also provided the following optional information: "Offender reports to having never used any type of illegal drugs." (R. 651.) The PSI then proceeded to recommend that the death penalty was warranted based inter alia on Mr. Bell's prior record, history of escapes, and nature of the current offenses. (R. 652.)

### III. Sentencing.

The parties returned to court on March 13, 2010. (R. 418.) The court renewed the offer of counsel, noting that stand-by counsel was present and available to answer questions. (R. 419-20.) Mr. Bell declined the appointment of counsel. (R. 420.) The court stated it had taken under advisement all the evidence presented at the penalty phase proceeding. (R. 421.) The State asked for Mr. Bell to be sentenced to death for first-degree murder, as well as a mandatory life sentence for attempted first-degree murder of a correctional officer, 30 years for conspiracy to commit first-degree murder, and 15 years for possession of contraband in a prison. (R. 421-22.) Mr. Bell agreed that a scoresheet prepared for the non-capital offenses was accurate. (R. 422.) He declined to present further mitigation. (R. 422.) He declined to address the court or to make a recommendation for sentencing. (R. 423.) The court proceeded to sentence him to the requested sentences on the non-capital offenses. (R. 423.)

The court then proceeded to the capital sentence. Mr. Bell said he had reviewed the presentence investigation report prepared in connection with that offense and had no objections, notations, or

corrections. (R. 424.) The court then orally pronounced the sentence as follows:

> As to Count I, as to first degree murder, you are adjudicated to be guilty and the Court finds as follows: The State proved beyond a reasonable doubt four of the five aggravators that it presented during the penalty phase.
>
> First, that this offense was committed by you, a person that was previously convicted, under sentence of imprisonment, and assigned great weight to that aggravator. That you committed a prior violent felony offense, and assigned great weight to that aggravator. That the crime that you committed was especially heinous, atrocious, and cruel and assigned very great weight to that aggravator. That the homicide that you committed was cold, calculated, and without any pretense of moral or legal justification and assigned very great weight to that aggravator.
>
> As to the fifth aggravator requested by the State, that you attempted or that you committed this offense in an effort to disrupt or hinder a governmental function, was not proven beyond and to the exclusion of every reasonable doubt and therefore not considered by the Court.
>
> As far as mitigating factors, none of the statutory mitigating factors have been shown or proven and five statutory – non-statutory mitigators have been proven. The first one that you assisted with the discovery of Mr. Eastwood's body and then cooperated during the investigation of and prosecution for the killing, however the Court assigned little weight to that mitigator. That you exhibited appropriate courtroom behavior throughout this proceeding and assigned little weight to that mitigator. That you had never assaulted

> any other prison guards or prison – corrections officers, however assigned no weight because it does not mitigate the killing of Mr. Eastwood. That your family loves you, assigned slight weight to that mitigator. That you were previously diagnosed with and treated for depression, and assigned very little weight to that mitigator.
>
> The aggravating factors clearly, convincingly, and beyond every reasonable doubt outweigh the mitigating factors. The mitigating evidence is minimal and does not come close to outweighing the aggravating factors in this matter. Further analysis of the aggravators, mitigators, and this Court's weighing are contained in a written order of death that has been filed with the clerk contemporaneously with this sentence.
>
> Therefore, it's the judgment and sentence of the Court: As to Count I, you're sentenced to be put to death in a manner prescribed by law. […]

(R. 424-26.)

In response to a question from Mr. Bell, the court informed him that the sentence it had just imposed would take precedence over any sentence he was serving from out of state. (R. 429.)

A Judgment and Sentence signed on March 13, 2020 imposed a sentence of death for Count I; a life sentence for Count II; a 30-year sentence for Count III; and a 15-year sentence for Count IV. All sentences were concurrent. (R. 407-15.)

The written sentencing order was also filed on March 13, 2020. (R. 339-57.) The written order noted the court had "considered the testimony and observed the demeanor of all witnesses, reviewed all exhibits introduced into evidence, weighed the argument by the State and the Defendant, and reviewed the PSI report." (R. 341.) The court found four of the five alleged aggravating factors from the State's Notice to Seek the Death Penalty had been proven beyond a reasonable doubt: that the capital felony was committed by a person under sentence of imprisonment for a previous felony, that the defendant was previously convicted of a prior violent felony, that the capital felony was especially heinous, atrocious, or cruel (HAC), and that the capital felony was committed in a cold, calculated, and premeditated manner (CCP). (R. 341-51). The court assigned great weight to the first two aggravators, and very great weight to the HAC and CCP aggravators. (R. 342, 343, 346, 351.) The court did not find a fifth alleged aggravator had been proven, which was that the capital felony was committed to disrupt or hinder the lawful exercise of any governmental function. (R. 343-44.)

Next, the sentencing order reviewed potential mitigating evidence, noting such evidence had been "very minimal." (R. 351.)

With respect to the statutory mitigating circumstances set out in section 921.141(7), Florida Statutes, the court found they either did not apply, or had not been alleged and proven. (R. 351-53.) The court found five potentially mitigating circumstances in the evidence and arguments. First, the court found Mr. Bell took responsibility for his conduct and cooperated during the investigation and prosecution, and gave this factor little weight. (R. 353-54.) Second, the court found Mr. Bell exhibited appropriate courtroom behavior, and gave this factor little weight. (R. 354.) Third, the court found Mr. Bell had not previously assaulted any correctional officers, but found that did not mitigate the attack on Mr. Eastwood, and assigned it no weight. (R. 354-55.) Fourth, the court found Mr. Bell's family loves him and assigned that factor slight weight. (R. 355.) Fifth and finally, the court found Mr. Bell had likely suffered from depression, and assigned that little weight. (R. 355.) The court then found "that the aggravating factors clearly, convincingly, and beyond a reasonable doubt outweigh the mitigating factors," and sentenced Mr. Bell to be put to death. (R. 356.)

This appeal followed. (R. 361.)

## SUMMARY OF THE ARGUMENT

The trial court failed to guarantee that all available mitigating evidence was presented and considered, which is necessary to ensure that the death penalty is only imposed for the most aggravated and least mitigated of offenses. The safeguards afforded defendants who waive mitigation or who decline to present a full mitigation case were not applied here. When Mr. Bell, a pro se defendant, presented de minimis mitigation, the trial court took no additional steps to ensure the presentation of mitigating circumstances than the preparation of a PSI which, in turn, was so cursory as to add nothing to what was already in the record.

The result was that the trial court lacked sufficient information to determine an appropriate sentence based on individualized circumstances. The principle of respecting an individual defendant's autonomy and allowing him to control his own defense must be balanced with society's expectation that the death penalty is handed down according to well established legal principles. When an individualized sentencing determination is foreclosed through lack of information, the integrity of the sentencing process is called into question.

In addition, Florida's capital sentencing scheme requires multiple determinations before the death penalty can be imposed. These determinations include a finding that one or more aggravating factors are present, a finding that the aggravating factor or factors are sufficient to impose death as a penalty, and a finding that the aggravating factor or factors outweigh any mitigating evidence presented. *See* § 921.141(2), Fla. Stat. A jury can recommend death only after making these findings. *Id.* In a bench trial, although a jury recommendation is necessarily absent, the remaining findings are still required. *Id.* at (3)(b), (4).

These findings increase the penalty available for the charged crime and, therefore, must be proven beyond a reasonable doubt. However, here the trial court did not find beyond a reasonable doubt that the aggravating factors were sufficient to impose death, and imposing sentence without that finding was fundamental error.

## ARGUMENT

### I. The Consideration of Mitigating Evidence was Deficient.

Of the principles governing capital sentencing, two are paramount here. First, the death penalty is "reserved for only the most aggravated and least mitigated of first-degree murders." *Urbin v. State*, 714 So. 2d 411, 416 (Fla. 1998) (citing *State v. Dixon*, 283 So. 2d 1, 7 (Fla. 1973) and *Jones v. State*, 705 So. 2d 1364, 1366 (Fla. 1998)). Second, a capital sentencing scheme must allow the court "to render a reasoned, individualized sentencing determination based on a death-eligible defendant's record, personal characteristics, and the circumstances of his crime." *Kansas v. Marsh*, 548 U.S. 163, 173-74 (2006).

The trial court's rulings relating to mitigation are reviewed for abuse of discretion. *E.g.*, *Spann v. State*, 857 So. 2d 845, 854 (Fla. 2003).

#### A. The death penalty must be the result of an individualized sentencing determination despite a pro se defendant's personal choice to present only minimal mitigation evidence.

This Court recognized the tension between a defendant's right to control his own destiny and society's interest in the integrity of the sentencing process in *Hamblen v. State*, 527 So. 2d 800 (Fla. 1988). The defendant in that case exercised his right to represent himself, pleaded guilty, and waived his right to a sentencing jury. *Id.* at 801. He presented no mitigation evidence in the sentencing phase, even agreeing on the record that the State's recommendation of a death sentence was appropriate. *Id.* at 802. The trial included two reports of psychiatric examinations conducted when the defendant still had counsel. *Id.* The trial court imposed a death sentence and an appeal was taken, although the defendant did not request one. *Id.* n.2.

Appellate counsel argued special counsel, similar to a guardian ad litem, should have been appointed to investigate potential mitigation and present it to the court. *Id.* This Court rejected that argument, reasoning that it would "violate the dictates of *Faretta*" to allow counsel to take a position contrary to the defendant's express wishes. *Id.* at 804. However, the Court added, "[t]his does not mean that courts of this state can administer the death penalty by default." *Id.* The Court noted the trial judge had

not "merely rubber-stamp[ed]" the death penalty, but had thoughtfully analyzed the available facts:

> Of course, the common practice in death cases is to introduce evidence of nonstatutory mitigating factors such as the defendant's family background, his work history and the absence of criminal history. Much of this material with respect to Hamblen was contained in the psychological reports. There may have been other factors that Hamblen did not disclose to his doctors, but even if the judge had appointed counsel to argue for mitigation, there is no power that could have compelled Hamblen to cooperate and divulge such information.
>
> We hold that there was no error in not appointing counsel against Hamblen's wishes to seek out and to present mitigating evidence and to argue against the death sentence. The trial judge adequately fulfilled that function on his own, thereby protecting society's interests in seeing that the death penalty was not imposed improperly.

*Id.*

In *Muhammad v. State*, 782 So. 2d 343, 363 (Fla. 2001), the Court recognized that a defendant's refusal to present mitigation could hamper the trier of fact's ability to perform its sentencing responsibilities, and crafted a procedure for addressing the situation in future cases.

The defendant in *Muhammad* wanted to waive a penalty phase jury, which would have been advisory under then-existing law, and did not want to present mitigating evidence. *Id.* at 361. The defendant discharged penalty phase counsel, but not before counsel informed the trial court of potential mitigation he had discussed with the defendant. *Id.* at 350, 361. Although the State did not object to the waiver of an advisory jury, the court denied the request to waive a jury, which then heard only arguments in favor of a death sentence. *Id.* at 350. The jury recommended death by a vote of ten to two. *Id.* In sentencing, the court considered mitigating circumstances set out in the presentence investigation report, which the jury had not seen. *Id.*

On appeal, the Court upheld the denial of the waiver of an advisory jury, but found reversible error in sentencing the defendant based on a recommendation made without any consideration of mitigation:

> [I]n light of Muhammed's requested waiver of both mitigation and an advisory jury and the State's lack of objection to that waiver, we find that reversible error occurred when the trial court gave great weight to the jury's recommendation in imposing the death penalty despite the fact that no mitigating evidence was presented for the jury's consideration.

*Id.* at 361. The Court noted the "failure of the trial court to provide for an alternative means for the jury to be advised of available mitigating evidence." *Id.* at 361-62.

The Court reasoned that the applicable sentencing scheme required the jury to base its advisory sentence on both the sufficiency of the aggravating circumstances and a comparison of the aggravating circumstances with the mitigating circumstances, noting that "[t]he jury's responsibility in the process is to make recommendations based on the circumstances of the offense and the character and background of the defendant." *Id.* at 361 (quoting *Herring v. State*, 446 So. 2d 1049, 1056 (Fla. 1984)). The defendant's decision to present no mitigating evidence, the Court continued, "hindered the jury's ability to fulfill its statutory role in sentencing in any meaningful way." *Id.*

In *Muhammad*, the Court outlined procedures to follow on resentencing in the event the defendant again refused to present mitigating evidence:

> It is clear from our previous cases that we expect and encourage trial courts to consider mitigating evidence, even when the defendant refuses to present mitigating evidence. We have repeatedly emphasized the duty of the trial court to consider all mitigating evidence

> "contained anywhere in the record, to the extent it is believable and uncontroverted." This requirement "applies with no less force when a defendant argues in favor of the death penalty, and even if the defendant asks the court not to consider mitigating evidence."

782 So. 2d at 363-64 (citations omitted).

To foster reliability and fairness in the imposition of death sentences, the Court then decided that a PSI would be required "in every case where the defendant is not challenging the imposition of the death penalty and refuses to present mitigation evidence." *Id.* at 363. The PSI "should be comprehensive and should include information such as previous mental health problems (including hospitalizations), school records, and relevant family background." *Id.* at 363-64. The State could be required to place in the record any potentially mitigating evidence in its possession, including school, military, and medical records. *Id.* at 364. If anything in the PSI or records submitted suggested to the trial court "the probability of significant mitigation," the trial could either call its own witnesses, appoint counsel for the specific purpose of presenting mitigation, or use standby counsel. *Id.*; *see also Sparre v. State*, 164 So. 3d 1183, 1193-95 (Fla. 2015) (reiterating that PSI reports prepared when a

capital defendant waives the right to present mitigation must be "comprehensive"); Fla. R. Crim. P. 3.710(b).

The Court limited one aspect of *Muhammad* in *Marquardt v. State*, 156 So. 3d 464, 490 (Fla. 2015), recognizing "the tension that may exist when standby counsel is appointed by the trial court...to assist the court in its consideration of mitigation evidence." Accordingly, the Court modified the procedures it had established in *Muhammad* to clarify that "independent, special counsel" would "*represent the public interest in bringing forth all available mitigation* for the benefit of the jury, the trial court, and this Court, in order to assist the judiciary in performing its statutory and constitutional obligations in death penalty cases." *Id.* (emphasis added).

In applying the rule from *Muhammad*, the Court has repeatedly distinguished between cases in which mitigation was totally waived, and cases in which it was limited. *See, e.g.*, *McCray v. State*, 71 So. 3d 848 (Fla. 2001); *Eaglin v. State*, 19 So. 3d 935 (Fla. 2009); *Boyd v. State*, 910 So. 2d 167 (Fla. 2005).

The defendant in *McCray* was represented by counsel after the court denied multiple requests for self-representation. 71 So. 3d 864-68. At his penalty phase defense counsel informed the court of two expert witnesses who would have testified about the

defendant's mental and emotional health, but stated the defendant did not want to present their testimony. *Id.* at 857. The trial court questioned the defendant about this choice twice, and the defendant "continued to instruct counsel not to allow the experts to testify." *Id.* However, he allowed other mitigation witnesses, including several family members. *Id.* at 857-58. At the *Spencer* hearing defense counsel introduced a ten-page evaluation by a mitigation specialist recounting the defendant's life history and family background, as well as two previously submitted competency reports from experts opining the defendant was not competent. A final report was submitted from two medical experts indicating that the defendant's behavior during the guilt and penalty phases "strengthened the opinion that [he] was not feigning symptoms of mental illness." *Id.* at 859. In its sentencing order, the trial court found seven nonstatutory mitigating factors. *Id.* at 860.

On appeal, *McCray* argued the trial court should have followed the procedures set out in *Muhammad* when he limited the presentation of mitigation evidence. *Id.* at 879. The Court rejected that argument:

> McCray did not waive all mitigation. Although McCray prohibited counsel from presenting the testimony of two expert witnesses who could

> have assisted in establishing mental mitigation, McCray did permit counsel to allow four family members and the mother of his children to testify. For that reason, we conclude that *Muhammad* is inapplicable to this case and reject all aspects of this claim of error.

*Id.* at 880.

Two earlier examples of limited mitigation were presented in *Eaglin*, 19 So. 3d at 935, and *Boyd*, 910 So. 2d at 167. The defense in *Eaglin* presented four witnesses at the penalty phase, but did not present mitigation evidence of the defendant's mental state or family history. 19 So. 3d at 941. The mental mitigation evidence was not presented after counsel informed the court "that he felt that the evidence should not be presented to the jury," without giving specific reasons. *Id.* at 945. The defendant instructed his counsel not to present the family history mitigation. *Id.* A PSI was prepared and the court relied on it to find, as mitigation, that the defendant "suffered from a severely abusive childhood with a severely dysfunctional family." *Id.* at 941. On appeal, the defendant argued the jury had been "unaware of critical mitigating evidence" when it made its sentencing recommendation. *Id.* at 945. The Court ruled the issue of mental health mitigation was actually one of ineffective assistance of counsel and could not be resolved at that stage. *Id.*

The defendant also argued the trial court had failed to consider all available mitigation in the record, but the Court rejected that argument because the referenced mitigation was "not presented to the trial court nor argued as mitigation." *Id.* at 946.

In *Boyd*, 910 So. 2d 167, the defendant argued the trial court did not comply with *Koon v. Dugger*, 619 So. 2d 246 (Fla. 1993), which requires counsel to go through certain steps when a defendant, against counsel's advice, waives the right to present any mitigating evidence:

> When a defendant, against his counsel's advice, refuses to permit the presentation of mitigating evidence in the penalty phase, counsel must inform the court on the record of the defendant's decision. Counsel must indicate whether, based on his investigation, he reasonably believes there to be mitigating evidence that could be presented and what that evidence would be. The court should then require the defendant to confirm on the record that his counsel has discussed these matters with him, and despite counsel's recommendation, he wishes to waive presentation of penalty phase evidence.

*Koon*, 619 So. 2d at 250.

*Boyd* rejected the argument that the trial court should have followed the procedures set out in *Koon*, finding the defendant did not entirely waive his right to present mitigation, but merely limited

the mitigation his counsel was able to present. 910 So. 3d at 188. The defendant and his pastor both testified. *Id.* In addition, defense counsel informed the court of other mitigation witnesses who were available to testify. *Id.*

The instant case presents an example of negligible mitigation and, thus, the issue of "how little is too little." The cases declining to extend the safeguards of *Muhammad* and *Koon*, illustrated by those discussed above, typically involve much more mitigation than was presented here. The mitigation presented in *McCray* was extensive in comparison, including witnesses, two expert reports, and a ten-page report prepared by a mitigation specialist. 71 So. 3d at 857-59. Some of this can be attributed to the efforts of counsel. But even in *Hamblen*, the court had the benefit of two psychiatric evaluations and background information contained in the reports of those evaluations. 527 So. 2d at 804. Here, despite the absence of any witnesses and the scant information Mr. Bell provided in his own statement, the court neither requested that the State add to the record whatever background information was in its possession nor took steps to learn more about two potentially mitigating issues, namely the possibility of childhood abuse and a lifelong history of

depression. This did not allow for the individualized sentencing determination required by both federal and state precedent.

### B. The PSI prepared for Mr. Bell's sentencing added virtually no information to what was already in the record.

The six-page PSI cannot be considered "comprehensive" by any stretch of the imagination. (R. 647-52.) The longest section of the PSI summarized evidence presented against Mr. Bell at trial; the report claimed further investigation was prevented by Mr. Bell's refusal to sign a release. (R. 649.) Other than reviewing Mr. Bell's criminal history, the PSI did not provide any specific information about his background, education, employment, or medical history. (R. 650.) The PSI did refer to Mr. Bell's acknowledgement of a history of depression. (R. 651.)

This negligible summary of the circumstances of Mr. Bell's life, and a previously introduced competency report, contained all the information on which Mr. Bell's sentence was based. Despite his history of depression and a potential history of sexual abuse, all inquiry simply stopped with his non-cooperation.

### C. The sentencing process must be individualized, even when a defendant expressly or implicitly invites a death sentence, to further the public interest in the integrity of the judicial process and the fair imposition of society's highest penalty.

Although Mr. Bell presented only the barest mitigation, and did not argue against a death sentence, his choice in that regard does not obviate "society's duty to see that executions do not become a vehicle by which a person could commit suicide." *Hamblen*, 527 So. 2d at 802. "[T]he waiver concept was never intended as a means of allowing a criminal defendant to choose his own sentence." *Commonwealth v. McKenna*, 383 A.2d 174, 181 (Pa. 1978) (citations omitted); *see also Grasso v. State*, 857 P.2d 802, 811 (Okla. Crim. App. 1993) (Chapel, J., concurring) ("The State must not become an unwitting partner in a defendant's suicide by placing the personal desires of the defendant above the societal interests in assuring that the death penalty is imposed in a rational, non-arbitrary fashion.").

It is undisputed that criminal defendant has an autonomy interest, grounded in the Sixth and Fourteenth Amendments, in acting as his own lawyer in the trial court. *See Martinez v. Ct. of Appeal of California, Fourth App. Dist.*, 528 U.S. 152, 162-63 (2000).

However, the defendant's autonomy is not absolute. *See id.* For a number of reasons, including "the overriding state interest in the fair and efficient administration of justice," *id.* at 163, it does not extend to a criminal appeal. In addition, a criminal defendant can be questioned about his desire to represent himself, and must be advised of the dangers of self-representation. *Id.* at 161-62. The trial court can appoint standby counsel, even without the defendant's consent. *Id.* at 162. The trial court can terminate the defendant's self-representation if necessary to ensure the "integrity and efficiency of the trial." *See id.* These procedures do not unduly burden the defendant's Sixth Amendment rights.

In addition, the Eighth Amendment requires consideration of any mitigating circumstances: "the fundamental respect for humanity underlying the Eighth Amendment...requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976).

It follows that, when necessary to ensure the integrity of a penalty phase trial, which necessarily includes a reasoned, individualized sentencing determination, a trial court's respect for

the interest of self-representation does not extend to allowing an individual defendant to circumvent the requirements that capital punishment be imposed "with reasonable consistency, or not at all," as stated in *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982). This is because the death penalty "differs from all forms of criminal punishment, not in degree but in kind." *Furman v. Georgia*, 408 U.S. 238, 306 (1972) (Stewart, J., concurring). The penalty is, and must be, "reserved for a narrow category of crimes and offenders." *Roper v. Simmons*, 543 U.S. 551, 569 (2005). And, as this Court has already recognized, the responsibilities of those involved in sentencing are not "suspended simply because the accused invites the possibility of a death sentence." *Hamblen*, 527 So. 2d at 804.

When a defendant effectively invites a death sentence, the unquestioning acceptance of negligible mitigation is a form of willful blindness. Allowing a defendant to circumvent the protections afforded one who waives all mitigation by presenting the type of mitigation in the record here does exactly what the Court attempted to guard against in *Hamblen*: it allows the defendant to choose the sentence based not on individualized considerations, but the defendant's subjective wishes, which may or may not be grounded in mitigating circumstances such as depression that were not

adequately considered. Acquiescing in this choice means the propriety of Mr. Bell's sentence was not established according to the law. *See Hamblen*, 527 So. 2d at 804 ("A defendant cannot be executed unless his guilt and the propriety of his sentence have been established according to law."). Therefore, although the death penalty in this case may result in part from Mr. Bell's exercise of his autonomy, it violates his rights to due process and to be free from cruel and unusual punishment. Amends. V, VIII, XIV, U.S. Const.; Art. 1, §§ 9, 17, Fla. Const.

## II. Fundamental Error Occurred When the Court Failed to Determine Beyond a Reasonable Doubt that the Aggravating Factors Were Sufficient to Justify Death and that the Aggravating Factors Outweighed the Mitigating Circumstances.

Any determination increasing the penalty for a crime must be found beyond a reasonable doubt by the finder of fact. *Alleyne v. United States*, 570 U.S. 99, 104 (2013) (citing *Apprendi v. New Jersey*, 530 U.S. 466, 483 n.10, 490 (2000)). Under the Florida capital sentencing scheme, as discussed in more detail below, this includes the determination that the aggravating factors were sufficient to justify death. The trial court's failure to make this required finding beyond a reasonable doubt before considering a death sentence reduced the burden of proof on the State and thus denied Mr. Bell due process of law, creating fundamental error.[1] Fundamental error "goes to the foundation of the case…and is equivalent to a denial of due process." *F.B. v. State*, 852 So. 2d 226, 229 (Fla. 2003) (citation omitted). Fundamental error "is not subject

[1] *But see Craft v. State*, __ So. 3d __, 45 Fla. L. Weekly S293, 2020 WL 6788794 (Fla. Nov. 19, 2020) (rejecting the argument that the identical omission created fundamental error). Appellant's Motion for Rehearing in *Craft* is pending as of the date of this brief.

to harmless error review." *Ramroop v. State*, 214 So.3d 657, 665 (Fla. 2017) ("By its very nature, fundamental error has to be considered harmful.").

This Court held in *Rogers v. State*, 285 So. 3d 872, 885-86 (Fla. 2019), that the findings that the aggravating factors are sufficient to impose death, and that the aggravating factors outweigh the mitigating circumstances, are not "elements" that can be subjected to the standard of proof beyond a reasonable doubt. In so holding, the Court receded from language in *Perry v. State*, 210 So. 3d 610, 640 (2016), indicating that these findings had to be made unanimously and beyond a reasonable doubt. The Court also held in *State v. Poole*, 297 So. 3d 487 (Fla. 2020), that any determinations beyond the existence of one or more aggravating factors were not "elements" that had to be proven beyond a reasonable doubt, explicitly receding from *Hurst v. State*, 202 So. 3d 40 (Fla. 2016) (requiring unanimous jury findings that aggravating factors were sufficient to justify imposing death and that aggravating factors outweighed mitigating circumstances before a death sentence could be considered).

However, United States Supreme Court jurisprudence is clear that any determination increasing the penalty for a crime must be

found beyond a reasonable doubt by the factfinder, whether it is called an element or something else. *Alleyne*, 570 U.S. at 104 (citing *Apprendi*, 530 U.S. at 483 n.10, 490). For the reasons set forth below, *Rogers* and *Poole* are incompatible with Supreme Court precedent.

### A. Required findings increasing the penalty for a crime, including findings required to authorize the death penalty after a guilty verdict on the underlying offense, require the same degree of proof as the elements of the underlying offense — i.e., proof beyond a reasonable doubt.

If the "required finding expose[s] the defendant to a greater verdict than that authorized by the [verdict]," the Sixth Amendment and Due Process clauses of the federal constitution require that the finding be subject to the standard of proof beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 494 (2000). That issue is "one not of form, but of effect." *Id.*; *cf. also Jones v. United States*, 526 U.S. 227, 232-33 (1999) (noting, in the context of a federal carjacking statute, "[t]he "look" of the statute, then, is not a reliable guide to congressional intentions").

The functional elements of a crime for sentencing purposes are not limited to the defined elements required for conviction. *See*

*Apprendi*, 530 U.S. at 495-96. In addition, the distinction between conviction and sentencing is not what determines the burden of proof in a criminal trial. The legally significant distinction is whether a particular determination increases the available penalty for a crime. *Id.* (holding 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). In the context of capital sentencing, any factor that must be found before the death penalty can be selected for a particular defendant 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). This does not prevent legislatures from creating sentencing "factors" or "considerations" to guide the exercise of a trial court's discretion in sentencing within an available range. *Alleyne*, 570 U.S. at 116.

The principles set out in *Apprendi* were applied in *Ring v. Arizona* to invalidate a state statute allowing a trial judge to determine the existence of aggravating factors so as to justify imposition of the death penalty. 536 U.S. at 589 (overruling *Walton v. Arizona*, 497 U. S. 639 (1990)). Under the statute at issue in *Ring*, the maximum punishment the defendant could have received

based on the jury's verdict of guilt on a charge of first-degree murder was life in prison. *Id.* at 597. 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. Because an aggravating circumstance had to be found before death could be imposed, the death penalty was authorized "only in a formal sense." *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.

The central holding of *Apprendi* was reaffirmed in *Blakely v. Washington*, 542 U.S. 296, 305 (2004), which held a state statute allowing a trial court to impose an "exceptional" sentence in excess of a defined statutory range, and without a jury finding regarding the reasons justifying the exceptional sentence, violated the defendant's right to a trial by jury.

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 (overruling *Harris v. United States*, 536

U.S. 545 (2002)). As it had done before, the Court rejected the argument that the sentence actually imposed in that case could have been imposed in theory even without additional fact-finding. *Id.* at 112-15. And in *United States v. Haymond*, 139 S. Ct. 2369, 2373-74 (2019), the Court held a statute violated the Sixth Amendment and Due Process clause where it authorized a mandatory minimum sentence for a violation of supervised release without requiring jury findings or proof of the violation beyond a reasonable doubt. The Court held that subjecting the defendant to an increased sentencing range based on the trial court's fact-finding violated the Fifth and Sixth Amendments. *Id.* at 2378-79. The plurality rejected an argument that the Sixth Amendment does not apply to post-judgment sentencing proceedings, saying "any 'increase in a defendant's authorized punishment contingent on the finding of a fact' requires a jury and proof beyond a reasonable doubt 'no matter' what the government chooses to call the exercise." *Id.* at 2379 (citing *Ring*, 536 U.S. at 602).

### B. Due process requires proof beyond a reasonable doubt of any determination that must be made before the death penalty can be imposed in a specific case.

Due Process requires proof beyond a reasonable doubt to convict an individual of a crime. *E.g.*, *In re Winship*, 397 U.S. 358, 362 (1970). This means "proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Id.* at 364. The reasonable doubt standard "reflects a profound judgment about the way in which law should be enforced and justice administered." *Id.* at 361-62 (citation omitted). The requirement of proof beyond a reasonable doubt stands between the accused and a conviction based on factual error. *See id.* at 363. It "provides concrete substance for the presumption of innocence." *Id.* (citation omitted). In addition, the reasonable doubt standard has a vital role in maintaining public confidence in the court system. *Id.* at 364.

Society's interest in the reliability of the verdict is even stronger in capital cases than in other criminal cases because of the "qualitative difference between death and other penalties." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion); see also *Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993) (reversing a conviction where

the jury was improperly instructed on the meaning of "reasonable doubt"). Therefore, as a matter of due process, required findings that expose the defendant to a greater punishment than that authorized by the conviction on the underlying offense must be proved beyond a reasonable doubt.

### C. Florida's capital sentencing scheme requires a finding that aggravating factors are sufficient to justify the death penalty before the finder of fact reaches the ultimate decision of whether a death sentence can be imposed.

Under Florida's capital sentencing scheme, the determinations that *the aggravating factors in a particular case are sufficient to justify death* and *the aggravating factors outweigh the mitigating circumstances* increase the maximum authorized penalty from life in prison to death. *See* § 921.141(2)-(3), Fla. Stat. The existence of one or more aggravators in Florida does not allow a death sentence to be imposed *until* other findings are made.

First-degree murder is a "capital felony" under section 782.04(1)(a), Florida Statutes. Obtaining a conviction for first-degree murder based on premeditation requires the State to establish the following elements: (1) a victim is dead; (2) the death was caused by the criminal act of the defendant; and (3) the killing

was premeditated. *See* Fla. Std. Jury Instr. (Crim.) 7.2 (2019). Despite the statutory "capital felony" label, under Florida's capital sentencing scheme, 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.

The provisions of section 921.141 create a system in which the jury (or court, in a bench trial) makes findings allowing the death penalty to be imposed. Only then does the jury make a recommendation about the sentence. Only then does the trial court exercise its discretion to choose between a life sentence and a death sentence. *See* § 921.141(2)-(3). Section 921.141(2)(b) sets out the specific findings required before a death sentence can be considered:

> If the jury:
>
> […] 2. Unanimously finds at least one aggravating factor, the defendant is eligible for a sentence of death and the jury shall make a recommendation to the court as to whether the defendant shall be sentenced to life imprisonment without the possibility of parole or to death. The recommendation shall be based on a weighing of all the following:

> a. Whether sufficient aggravating factors exist.
>
> b. Whether aggravating factors exist which outweigh the mitigating circumstances found to exist.
>
> c. Based on the considerations in sub-subparagraphs a. and b., whether the defendant should be sentenced to life imprisonment without parole or to death.

§ 921.141(2)(b).

The "eligibility" referred to in section 921.141(2)(b) is not dispositive of the available sentencing range, because section 921.141(2) must be read in its entirety, as well as together with section 921.141(3). Under the remaining language in section 921.141(2)(b), the court must make a recommendation by weighing additional factors, and those factors include two additional findings: whether sufficient aggravating factors exist, and whether aggravating factors outweigh the mitigating circumstances.

What this means is that a capital defendant in Florida is not "exposed to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone," *see Apprendi*, 530 U.S. at 483, merely because the finder of fact has determined beyond a reasonable doubt that at least one aggravating factor exists, even though that aggravating factor makes the

defendant "eligible" for death. Without additional findings, the jury cannot make its recommendation, and the court has no discretion to impose the death penalty.

In this case, because Mr. Bell waived his right to a jury determination of the facts allowing a death sentence to be imposed, the Court must also apply section 921.141(3)(b) and (4), requiring the court to make the same findings the jury would have made: "whether there are sufficient aggravating factors to warrant the death penalty, and whether the aggravating factors outweigh the mitigating circumstances reasonably established by the evidence." § 921.141(4).

In summary, absent the further proceedings and findings defined in section 921.141, the maximum available sentence for first-degree murder is Florida is life in prison. *See* § 775.082(1)(a); § 921.141(3)(a). Therefore, for purposes of the burden of proof, these additional findings are treated as elements of the crime, whether they are called "elements" or something else, and require proof beyond a reasonable doubt.

### D. The trial court's sentencing order failed to make required findings before imposing the death penalty.

Here, the court's sentencing order found that the State had proved the existence of four of the five alleged aggravating circumstances beyond a reasonable doubt. (R. 424-26.) The court also found no statutory mitigators had been proved, but that there was evidence of five non-statutory mitigators. (R. 424-26.) The order concluded the aggravators outweighed the mitigating circumstances "clearly, convincingly, and beyond every reasonable doubt" (R. 426), but did not expressly rule on the issue of whether the aggravating circumstances were sufficient to justify death. Without that express finding, subject to proof beyond a reasonable doubt, the death sentence in this case is constitutionally deficient under Amendments V, VI, and XIV to the U.S. Constitution, as well as Article I, section 9, of the Florida Constitution.

## CONCLUSION

Mr. Bell requests a new penalty phase trial.

## 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 Jason Rodriguez, Assistant Attorney General, Capital Appeals Division, on February 15, 2021. I certify that this brief complies with the word count provisions of the Florida Rules of Appellate Procedure.

Respectfully submitted,

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