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IN THE SUPREME COURT OF FLORIDA

RODERICK MICHAEL ORME,

Appellant,

CASE NO. SC22-338
L.T. No. 92-444-CFMA

v.

STATE OF FLORIDA,

DEATH PENALTY CASE

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTEENTH JUDICIAL CIRCUIT,
IN AND FOR BAY COUNTY, FLORIDA

# ANSWER BRIEF OF APPELLEE

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## PRELIMINARY STATEMENT

Appellant, RODERICK MICHAEL ORME, was the Defendant in the trial court; this brief will refer to Appellant as such, Defendant, or by name.

Appellee, the State of Florida, was the prosecution below; the brief will refer to Appellee as such, the State, or the Prosecution.

All references to the trial transcript will be by a citation to "T-" followed by any appropriate page number(s), all in parentheses.

All other references to the Record on Appeal will be by a citation to "R-" followed by any appropriate page number(s), all in parentheses.

"IB-" will designate Appellant's Initial Brief, followed by any appropriate page number(s), all in parentheses.

Absent an indication to the contrary, emphasis by italicization is contained within the original quotation.

## STATEMENT OF THE CASE AND FACTS

On March 3, 1992, Appellant, Roderick Michael Orme, arrived at Lee's Motel with approximately $500.00, which he used to rent a room, hire a prostitute, and purchase drugs. (R-1591). Later that day, Appellant, who was experiencing a "bad high" from freebasing cocaine, telephoned the victim and requested medical assistance. Orme v. State, 677 So. 2d 258, 260 (Fla. 1996). The victim, a nurse on her way to the hospital for the evening shift, stopped to see Appellant in his motel room. (R-1588).

Shortly after her arrival, the victim flushed Appellant's crack cocaine down the toilet. (R-1588). Appellant became enraged; he beat, raped, and manually and fatally strangled the victim. (R-899); Orme, 677 So. 2d at 260. The victim suffered extensive bruising and hemorrhaging on her face, skull, chest, arms, left leg, and abdomen. Id. The abdominal hemorrhaging extended into her right kidney and into her back. Id.

A sample from the victim's underwear contained material matching the pattern of Orme's DNA. Id. Orme's underwear had a mixed blood stain that matched the victim's blood and his own. Id. Appellant's DNA was found under the victim's fingernails; semen was found in her mouth, vagina, and anus. (R-1589). Appellant's checkbook and identification card were found in the victim's vehicle,

which was parked outside Appellant's motel room. Orme, 677 So. 2d at 260. Orme admitted taking the victim's purse and driving away in her vehicle. Id.

On March 6, 1992, Appellant was arrested; later that month, he was charged by indictment with premeditated or felony murder, robbery, and sexual battery. Id.

In February of 1993, Appellant proceeded to trial. A state witness testified that he saw Orme leave and return from the motel room several times, including once in the victim's vehicle. Id. at 261. At the close of the State's case, Appellant moved for a judgment of acquittal, maintaining that the evidence against him was wholly circumstantial and that the State had never disproven his hypothesis of innocence: after Orme fought with the victim, robbed her, and then left the motel, an unknown assailant entered Appellant's room, encountered the victim, murdered her, and left without being seen. Id. at 261. The motion was denied. Appellant was found guilty on each count. (R-1589). The jury recommended death, seven to five. (R-318, 1589).

In March of 1993, the trial court sentenced Appellant to death on the first-degree murder, concluding that each aggravating factor[1] alone outweighed all

[1] The Court found the following aggravating factors: (i) the crime for which the Defendant was sentenced was committed during a sexual battery; (ii) it was committed for pecuniary gain; and (iii) it was especially heinous, atrocious, or cruel.

mitigating circumstances.[2] (R-1589). This Court affirmed on direct appeal.[3] Orme, 677 So. 2d at 264.

In 1997, the United States Supreme Court denied Appellant's petition for writ of certiorari. Orme v. Florida, 519 U.S. 1079 (1997).

In his initial motion for postconviction relief, Appellant raised twenty-five claims, four of which were considered at an evidentiary hearing. The trial court denied the motion. On appeal, this Court reversed and remanded for a new penalty

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[2] The Court found the following mitigating circumstances: (i) the age of the Defendant at the time of the crime; (ii) the capacity of the Defendant to appreciate the criminality of his conduct or to conform it to the requirements of law was substantially impaired; and (iii) the crime for which the Defendant was sentenced was committed while he was under the influence of extreme mental or emotional disturbance.

[3] This Court found no error in any of the eight issues Appellant raised: (i) whether there was competent, substantial evidence supporting the trial court's determination that there was a prima facie inconsistency between Orme's theory of the case and the evidence viewed in the light most favorable to the State, (ii) whether there was competent, substantial evidence supporting the trial court's determination that Appellant knowingly and voluntarily waived his right to silence, (iii) whether the sentence was proportionate, (iv) whether Appellant's mental state allowed him to form the design to inflict a high degree of suffering on the victim, (v) whether the trial court erred in giving no weigh to Orme's lack-of-criminal-history mitigation where trial counsel expressly waived that factor for strategic reasons, (vi) whether the trial court erred in refusing to instruct the jury that postmortem acts perpetrated on the victim are irrelevant with respect to the HAC aggravator, (vii) whether the HAC instruction that Orme himself requested violates Espinosa v. Florida, 505 U.S. 1079 (1992), and (viii) whether there was competent, substantial evidence that Appellant had the specific intent necessary for first-degree murder. Orme v. State, 677 So. 2d 258, 259–64 (Fla. 1996)

phase, finding that Appellant's trial counsel was ineffective for failing to investigate and present evidence of his bipolar diagnosis. Orme v. State, 896 So. 2d 725, 731 (Fla. 2005).

In May of 2007, the trial court conducted the second penalty phase, at the conclusion of which, the jury recommended death, eleven to one. (R-319).

In July of 2007, the trial court sentenced Appellant to death for the first-degree murder, again concluding that each aggravating factor[4] alone outweighed all mitigating circumstances.[5] On direct appeal, Appellant raised nine issues.[6] This Court affirmed. Orme v. State, 25 So. 3d 536 (Fla. 2009).

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[4] The Court found the following aggravating factors: (i) the capital felony was committed for pecuniary gain; (ii) it was committed during a sexual battery; and (iii) it was especially heinous, atrocious, or cruel.

[5] The Court found the following mitigating circumstances: (i) the Defendant had no significant criminal history; (ii) the capital felony was committed while the Defendant was under the influence of extreme mental or emotional disturbance; and (iii) the capacity of the Defendant to appreciate the criminality of his conduct or to conform it to the requirements of the law was substantially impaired.

[6] Orme argued that the trial court erred in (i) refusing to allow him to exercise a for-cause challenge on prospective jurors who could not consider remorse as a mitigator, (ii) refusing to allow him to inquire of prospective jurors whether they could consider recommending a life sentence as a matter of mercy even if the aggravators outweighed the mitigators, (iii) failing to dismiss the venire after one prospective juror revealed that Orme had a prior conviction, (iv) refusing to allow Orme to waive his right to the sentencing option of life in prison without the possibility of parole for twenty-five years in favor of a harsher punishment of life in prison without the possibility of parole, (v) failing to give weight to Orme's

In June of 2010, the United States Supreme Court denied Orme's petition for writ of certiorari. Orme v. Florida, 560 U.S. 956 (2010).

Appellant then filed a motion for postconviction relief in which he raised six claims. Following an evidentiary hearing, the motion was denied. Appellant appealed and filed a petition for a writ of habeas corpus. This Court granted the latter, concluding that Orme's sentence should be vacated in light of Hurst v. Florida, 577 U.S. 92 (2016) and Hurst v. State, 202 So. 3d 40 (Fla. 2016). Orme v. State, 214 So. 3d 1269 (Fla. 2017).

On April 1, 2021, the trial court accepted Orme's waiver of his right to a penalty-phase jury and his waiver of the right to present mitigating circumstances. (R-561). At a hearing held to determine whether Orme was competent to waive his rights, Appellant stated, "if I can bring any peace or solace to [the victim's] family by giving up my life, then I feel that's the right course of action . . . . I can't bear what I have done any longer, and I'm ready to accept whatever punishment that the Court sets forth." (R-521-22).

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difficult childhood, the fact that Orme was a model prisoner, his potential for rehabilitation, and Orme's attempt to get the victim help, (vi) finding that the pecuniary gain aggravator applied, (vii) finding that the HAC aggravator applied, and (viii) finding that the "murder was committed in the course of a sexual battery" aggravator, and (ix) that Orme's death sentence violated Ring v. Arizona, 536 U.S. 584 (2002). Orme v. State, 25 So. 3d 536 (Fla. 2009).

On October 6, 2021, the trial court conducted the third penalty phase. (R-816). The Court took judicial notice of the entirety of the record. The State introduced victim-impact statements and the testimony of one expert witness. The defense requested that the Court consider all relevant mitigating evidence already in the record; no new evidence was introduced by the defense. At the Spencer hearing, the defense requested that the court consider Breyer's dissenting opinion in Elledge v. State, 525 U.S. 944 (1998), as mitigation. (R-922).

On March 3, 2022, the trial court sentenced Appellant to death, finding that three aggravating factors had been proven beyond a reasonable doubt. First, the trial court afforded great weight to the fact that the murder was committed during a sexual battery. (R-1591, 1608). The victim's autopsy "revealed hemorrhaging from the lining of the rectum and small tears between the anus and rectum-injuries that . . . were consistent with rough blunt trauma to the area." (R-1591). The judge noted that Appellant's DNA was found under the victim's fingernails and that semen consistent with Orme's was found in the victim's vagina, mouth, and rectum. (R-1591). Further, the trial court noted the bruising on the back of the victim's arms, suggesting that Orme pinned her down with his knees while he anally raped her. (R-1591).

Second, the trial court afforded great weight to the fact that the murder was committed for pecuniary gain. (R-1592). Appellant stole the victim's purse, left the motel in her vehicle, and then "partied" with another woman. (R-1592). The trial court concluded that the items stolen from the victim were likely used for purchases that allowed Orme "to continue his cocaine binge." (R-1592).

Third, the trial court afforded very great weight to the heinous-atrocious-and-cruel aggravating factor. (R-1592). "The victim's effort to show kindness . . . was repaid with . . . a brutal rape and a senseless murder." (R-1592). In addition to the anal, oral, and vaginal rape, the victim was "beaten mercilessly" and consequently suffered "blunt force injuries on both sides of her head, significant bruising on her chest and extremities, and a severe blunt force injury to . . . her abdomen . . . caus[ing] her kidney to hemorrhage." (R-1592). From the manual strangulation, the victim "suffered severe injuries to her trachea . . . the blood vessels in her eyes and eyelids ruptured . . . and the inner lining of her carotid artery was torn . . . ." (R-1592). There was evidence that the victim —for at least a minute and a half— was conscious and aware of her impending death. (R-1592). Even after the victim lost consciousness, it took another three minutes of manual strangulation to kill her. (R-1592).

With respect to the statutory mitigators, the trial court concluded that three had been proven by the greater weight of the evidence. First, noting Appellant's drug use and his "unremarkable" criminal record, the trial court afforded little weight to Orme's lack of significant criminal history. (R-1592-93). Second, the trial court afforded little weight to the substantial impairment of Appellant's capacity to appreciate the criminality of his conduct or to conform it to the requirements of law. Lastly, the trial court afforded little weight to the other mitigating factors in Appellant's background: his parents' untimely divorce, his separation from his mother, and his abusive father. (R-1594).

With respect to non-statutory mitigators, the trial court concluded that four had been proven by the greater weight of the evidence. First, the trial court afforded some weight to Appellant's having been under the influence of a (non-extreme) mental or emotional disturbance at the time of the crime. (R-1593). Second, the trial court afforded little weight to Appellant's positive relationship with his child. (R-1594). Third, noting Appellant's statement that he "can't bear [his actions] any longer," the trial court afforded little weight to Appellant's remorse. (R-1594). Fourth, the trial court, "remain[ing] unconvinced that [Appellant] suffers from bipolar disorder," afforded some weight to Orme's mental-health diagnosis contributing to his substance abuse. (R-1595). The judge

acknowledged that Appellant "has long suffered from a dependence on both legal and illicit substances." (R-1595).[7]

The trial court concluded that both collectively and individually, the aggravating factors were sufficient to warrant the death penalty. (R-1596). Further, the trial court concluded that both collectively and individually, the aggravating factors "far outweigh" the mitigating circumstances. (R-1596). Accordingly, death was "the only appropriate penalty . . . ." (R-1596).

[7] The trial court afforded no weight to the following: Appellant's age, his potential for rehabilitation, his conduct while awaiting trial, his behavior in the Department of Corrections, and his attempt to aid the victim. (R-1594-95).

## SUMMARY OF THE ARGUMENT

**Issue I:** Under this Court's well-settled case law, a Lackey claim is facially invalid. Time on death row, however prolonged, cannot constitute an Eighth-Amendment violation. Even if a sufficiently lengthy stay on death row could constitute cruel and unusual punishment, Appellant still could not establish a constitutional violation given this Court's repeated rejection of Lackey claims from defendants on death row longer than he. Moreover, Appellant cannot prevail since he bears responsibility for the delay.

Orme cannot distinguish the binding precedent, nor can he present a compelling reason to depart therefrom. Appellant contends that this Court should reexamine its prior holdings in light of "the totality of the circumstances." But Appellant's circumstances are insufficient to compel this Court to reconsider precedent, and even if they were not, Orme still could not prevail since the conformity clause precludes a ruling in his favor. Given the foregoing, the Lackey claim is without merit.

**Issue II:** Consistent with the holdings of the United States Supreme Court, this Court has repeatedly held that the sufficiency and weighing determinations of section 921.141, Florida Statutes, are not elements and accordingly that they are not subject to the beyond-a-reasonable-doubt standard. Further, this Honorable

Court has concluded that there is no reason to depart from its precedent on this issue, declining to revisit what has been well-settled: *only* the existence of an aggravating factor must be found beyond a reasonable doubt.

Given the holdings of the Florida Supreme Court and those of the United States Supreme Court, the trial court did not err. It found that three aggravating factors had been proven beyond a reasonable doubt and concluded (a) that they were sufficient to warrant the death penalty and (b) that they "far outweighed" all mitigating circumstances. Failing to apply the beyond-a-reasonable-doubt standard to the sufficiency and weight was not error.

## ARGUMENT

**ISSUE I: APPELLANT'S LACKEY CLAIM IS WITHOUT MERIT AS A MATTER OF WELL-ESTABLISHED LAW.**

**Standard of Review**

The constitutionality of a sentence is reviewed de novo. St. Val v. State, 174 So. 3d 447, 448 (Fla. 4th DCA 2015); Connor v. State, 803 So. 2d 598, 605 (Fla. 2001).

**Preservation**

Appellant's first issue is preserved for appeal. (R-837, 839-40).

**Merits**

Time on death row, however prolonged, cannot constitute an Eighth-Amendment violation. Gore v. State, 964 So. 2d 1257, 1276 (Fla. 2007). No court has accepted the argument that excessive time on death row constitutes cruel and unusual punishment. Muhammad v. State, 132 So. 3d 176, 206 (Fla. 2013); Knight v. Florida, 528 U.S. 990 (1999) (Thomas, J., concurring) (on the denial of certiorari, "I am unaware of any support in the American constitutional tradition or in this Court's precedent for the proposition that a defendant can avail himself of the panoply of appellate and collateral procedures and then complain when his execution is delayed."). Irrespective of the amount of time served, this Honorable Court has consistently rejected the argument that a prolonged stay on death row is

a violation of the Eighth Amendment. Gore, 964 So. 2d at 1276. Under this Court's well-settled case law, a Lackey[8] claim is facially invalid. Valle v. State, 70 So. 3d 530, 552 (Fla. 2011).

Even if sufficient time on death row could constitute cruel and unusual punishment, Appellant still could not establish an Eighth Amendment violation given this Court's repeated rejection of Lackey claims from defendants on death row longer than he. See, e.g., Id. (rejecting claim that thirty-three years on death row constitutes cruel and unusual punishment); Ferguson v. State, 101 So. 3d 362 366-67 (Fla. 2012) (rejecting claim that over three decades of incarceration on death row violates the Eighth Amendment); Lambrix v. State, 217 So. 3d 977, 988 (Fla. 2017) (same).

Over a dozen times, this Court has rejected a Lackey claim. See, e.g., Booker v. State**,** 969 So. 2d 186, 200 (Fla. 2007) (nearly thirty years); Correll v. State, 184 So. 3d 478, 486 (Fla. 2015) (over twenty-nine years); Lucas, 841 So. 2d at 389 (over twenty-five years); Johnston v. State, 27 So. 3d 11, 27 (Fla. 2010) (almost twenty-five years); Pardo v. State, 108 So. 3d 558, 569 (Fla. 2012) (almost twenty-four years); Rose v. State, 787 So. 2d 786, 805 (Fla. 2001) (almost twenty-

[8] After Justice Stevens' memorandum opinion regarding the Supreme Court's denial of certiorari review in Lackey v. Texas, 514 U.S. 1045 (1995), death-row inmates began arguing that a prolonged period before execution constitutes a violation of the Eighth Amendment.

four years); Gore, 964 So. 2d at 1276 (twenty-three years); Foster v. State, 810 So. 2d 910, 916 (Fla. 2002) (twenty-three years); Tompkins v. State, 994 So. 2d 1072, 1085 (Fla. 2008) (twenty-three years).

Appellant recognizes the well-settled case law above but contends that this Court should reexamine its precedent given "the totality of the circumstances": (i) the fact that some of Appellant's appeals have been meritorious, (ii) Appellant's claim that he has "changed" and "taken responsibility for his actions," (iii) the jury's non-unanimous recommendations of death, and (iv) the portion of the thirty-year delay that is not attributable to Appellant. (IB-21-23).

But Appellant's Eighth Amendment claim fails irrespective of circumstance. There are no circumstances under which a stay on death row constitutes cruel and unusual punishment. Gore, 964 So. 2d at 1276; Elledge v. State, 911 So. 2d 57, 76 (Fla. 2005) (finding no merit in constitutional claim predicated on the cruel and unusual nature of a prolonged stay on death row); Lucas, 841 So. 2d at 389 (recognizing the "numerous occasions" on which this Court has held Lackey claims to be "meritless.").

Even if such circumstances existed, Appellant still could not prevail since, without question, he bears responsibility for the delay. Knight v. State, 746 So. 2d 423, 437 (Fla. 1998) (noting that no court has accepted a Lackey claim, especially

where both parties bear responsibility for the long delay); Valle, 70 So. 3d at 552 (rejecting Lackey claim where the defendant contributed to a portion of the delay by challenging his convictions and sentence).

Following his 1993 trial and death sentence, Appellant raised eight issues, including the following: (i) whether the trial court erred in giving no weight to a mitigating circumstance *that Appellant expressly waived*, (ii) whether the trial court erred in giving an instruction *that Orme requested*, (iii) whether taped statements and officer testimony that Appellant was "coherent and responsive" constituted competent, substantial evidence supporting the conclusion that Orme properly waived his right to silence, and (iv) whether there was competent, substantial evidence supporting the conclusion that there was a prima facie inconsistency between the evidence viewed in the light most favorable to the State and Orme's reasonable hypothesis of innocence: after Orme fought with the victim, robbed her, and then left the motel, an unknown assailant entered Appellant's room, encountered the victim, murdered her, departed, and did the foregoing without being seen or leaving any evidence of his presence at the scene of the crime. Orme, 677 So. 2d 260-62. Having raised the weak issues above, Orme contributed to the delay. Appellant further contributed when he filed a petition for writ of certiorari and when, after his second death sentence, he raised

nine issues and this Court denied relief on each. Orme, 25 So. 3d at 553; Orme, 560 U.S. at 956.

Because Appellant is responsible for the very delay of which he now complains, he cannot prevail. Marek v. State, 8 So. 3d 1123, 1131 (Fla. 2009) (rejecting Lackey claim noting that defendant contributed to the delay). With or without the Hurst relief and the successful ineffective-assistance claim, Orme bears responsibility for the delay; accordingly, he cannot persuasively argue that his punishment has been illegally prolonged. Tompkins, 994 So. 2d at 1085 (concluding that defendant, having contributed to the delay, cannot contend that his punishment has been unconstitutionally prolonged); Gore, 964 So. 2d at 276.

Given the foregoing, the State respectfully maintains that Appellant's Lackey claim is without merit. Orme cannot distinguish the binding precedent, nor can he present any compelling reason for this Honorable Court to reexamine its well-settled case law. Even if Appellant had presented a compelling reason to reconsider precedent, this Honorable Court could not do so given that the United States Supreme Court has never held that a prolonged stay on death row constitutes cruel and unusual punishment. See Art. I, § 17 Fla. Const. ("[t]he prohibition against cruel or unusual punishment, and the prohibition against cruel and unusual punishment, shall be construed in conformity with decisions of the United States

Supreme Court which interpret the prohibition against cruel and unusual punishment provided in the Eighth Amendment to the United States Constitution."). This Court should affirm.

**ISSUE II: APPELLANT CANNOT ESTABLISH FUNDAMENTAL ERROR; THE TRIAL COURT DID NOT ERR IN FAILING TO APPLY THE BEYOND-A-REASONABLE-DOUBT STANDARD IN DETERMINING (A) THE SUFFICIENCY OF THE AGGRAVATING FACTORS AND (B) WHETHER THEY OUTWEIGH THE MITIGATING CIRCUMSTANCES.**

**Standard of Review**

Fundamental error is a pure question of law and therefore is reviewed de novo. Cromartie v. State, 70 So. 3d 559, 563 (Fla. 2011). Fundamental error goes to the foundation of a case, should be used very guardedly, and only on errors so basic to the judicial decision under review that they are equivalent to a denial of due process. Hopkins v. State, 632 So. 2d 1372, 1374 (Fla. 1994).

**Merits**

Orme erroneously contends that the trial court committed fundamental error by failing to apply the beyond-a-reasonable-doubt standard to what he describes as the "functional elements" of section 921.141, Florida Statutes: (i) whether there are aggravating factors sufficient to warrant the death penalty and (ii) whether the aggravating factors outweigh the mitigating circumstances reasonably established by the evidence. (IB-35). Further, Appellant incorrectly maintains that the precedent of United States Supreme Court is irreconcilable with Rogers v. State, 285 So. 3d 872 (Fla. 2019) and State v. Poole, 297 So. 3d 487 (2020), both of

which establish that the sufficiency and weight determinations are not elements and therefore are not subject to the beyond-a-reasonable-doubt standard. (IB-27).

Only the *existence* of an aggravating factor must be found beyond a reasonable doubt. Ring v. Arizona, 536 U.S. 584, 609 (2002). The Sixth Amendment requires only that the jury (or, in the case of a bench trial, the judge) find proof beyond a reasonable doubt of each fact necessary to constitute a statutory offense. Apprendi v. New Jersey, 530 U.S. 466, 483-84 (2000); Sullivan v. Louisiana, 508 U.S. 275, 277-78 (1993); In re Winship, 397 U.S. 358, 364 (1970) ("[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.").

The United States Supreme Court has never held that the beyond-a-reasonable-doubt standard applies to the weighing of the aggravating factors; it has held precisely the opposite: "*Ring* and *Hurst* d[o] not require jury weighing of aggravating and mitigating circumstances." McKinney v. Arizona, 140 S. Ct. 702, (2020). This Court, in Rogers and Poole, established that neither the sufficiency nor the weight of the aggravating factors is an element and therefore that neither requires proof beyond a reasonable doubt. Rogers, 285 So. at 886; Poole, 297 So. 3d at 507-08 (receding from Hurst v. State, 202 So. 3d 40 (Fla. 2016) only to the

extent that a jury is required to unanimously find the existence of at least one aggravating factor beyond a reasonable doubt). Contrary to what Appellant maintains, McKinney is clearly consistent with both Poole and Rogers. Owen v. State, 304 So. 3d 239, 241-42 (Fla. 2020) ("McKinney confirms that we correctly interpreted Hurst v. Florida in Poole").

In Lawrence v. State, 308 So. 3d 544, 552 n.8 (Fla. 2020), this Court confirmed that Appellant's "elements" argument is meritless where, as here, the defendant waives the right to a penalty-phase jury. See also § 921.141(3)(b), Fla. Stat. (2019) (subjecting only the trial court's finding of the existence of at least one aggravating factor to the beyond-a-reasonable-doubt standard).

Subsequent decisions too have correctly rejected Appellant's contention that sufficiency and weight are functional elements and therefore require proof beyond a reasonable doubt. Allen v. State, 322 So. 3d 589, 603 (Fla. 2021) (acknowledging that this Court has "repeatedly held that 'these determinations are not subject to the beyond a reasonable doubt standard of proof.'"); Deviney v. State, 322 So. 3d 563, 572 (Fla. 2021) (sufficiency and weighing determinations are not "elements . . . subject to the beyond a reasonable doubt standard of proof," quoting Newberry v. State, 288 So. 3d 1040, 1047 (Fla. 2019)); Bell v. State, 336 So. 3d 211, 217 (Fla. 2022) (weighing determinations in section 921.141 . . . are not subject to a

reasonable doubt standard and there is “no reason to depart from this precedent”); Doty v. State, 313 So. 3d 573, 577 (Fla. 2020) (the reasonable-doubt standard is inapplicable both to sufficiency and to weighing determinations); Santiago-Gonzalez v. State, 301 So. 3d 157, 177 (Fla. 2020) (defendant’s argument that the aggravation-outweighing-mitigation finding was an element requiring proof beyond a reasonable doubt was "without merit"); Bright v. State, 299 So. 3d 985, 998 (Fla. 2020) ("no merit" in defendant’s argument that the trial court erred in failing to instruct the jury that it must determine beyond a reasonable doubt whether the aggravating factors were sufficient to impose a sentence of death and whether those factors outweighed the mitigating circumstances); Davidson v. State, 323 So. 3d 1241, 1247-48 (Fla. 2021) (characterizing as a "faulty premise" Appellant’s position that the sufficiency and weighing determinations of section 921.141 are subject to the beyond-a-reasonable-doubt standard).

More recently, this Honorable Court declined to “revisit what has been settled: only the existence of a statutory aggravating factor must be found beyond a reasonable doubt.” McKenzie v. State, 333 So. 3d 1098, 1105 (Fla. 2022) (citing to Poole, 297 So. 3d at 505). In Joseph v. State, 336 So. 3d 218, 227 (Fla. 2022), this Court addressed the issue at hand only in a footnote and merely to note that it has

"repeatedly rejected these arguments." Id. at. 227. (citing to Rogers, 285 So. 3d at 886.

Appellant cannot establish error, much less can he establish fundamental error. The trial court found three aggravating factors beyond a reasonable doubt and concluded that they (a) were sufficient to warrant the death penalty and (b) “far outweighed” all mitigating circumstances. (R-1596). Given the holdings of the Florida Supreme Court, those of the United States Supreme Court, and the absence of any compelling reason to reconsider the well-established, well-reasoned precedent, the trial court did not err in failing to apply the beyond-a-reasonable-doubt standard to the sufficiency and weight determinations.

## CONCLUSION

Appellee, the State of Florida, respectfully requests this Court affirm the Appellant's conviction and death sentence.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 25th, 2022, I electronically filed the foregoing with the Clerk of the Court by using the Florida Courts E-Portal Filing System which will send a notice of electronic filing to the following: Barbara J. Busharis, Assistant Public Defender, Office of the Public Defender, Leon County Courthouse, 301 South Monroe Street, Suite 401, Tallahassee, Florida 32301, **barbara.busharis@flpd2.com**.

## CERTIFICATE OF FONT AND WORD LIMIT COMPLIANCE

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