IN THE SUPREME COURT OF FLORIDA

RODERICK MICHAEL ORME,

Appellant,

vs.

CASE No. SC22-338
L.T. No. 92-0000-442 CFMA

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTEENTH JUDICIAL CIRCUIT,
IN AND FOR BAY 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 Bay County, Florida, sentencing Roderick Michael Orme to death for killing L.R., a friend who came to help him during a moment of extreme cocaine intoxication. (R. 1588-96, 1603-07.) This Court has jurisdiction pursuant to article V, section 3(b)(1) of the Florida Constitution.

I. Previous proceedings.

The lengthy procedural history of this case is set out in the trial court's sentencing order (R. 1589-90). Mr. Orme was charged with first-degree murder, robbery, and sexual battery with great force in March 1992 following the death of L.R., a friend and former romantic partner (R. 1588-89). He was convicted of those charges following a jury trial, and the jury recommended death by a vote of seven to five. (R. 318, 1589.) The court imposed that sentence, and it was affirmed on appeal. *See Orme v. State*, 677 So. 2d 258 (Fla. 1996). Post-conviction proceedings resulted in a reversal of the sentence and remand for a new penalty phase. *See Orme v. State*, 896 So. 2d 725 (Fla. 2005).

The second penalty phase proceeding did not take place until 2007 and resulted in a jury recommendation of death by a vote of eleven to one. (R. 319, 1589.) The trial court again imposed a death sentence, and that sentence was affirmed on appeal. *See Orme v. State*, 25 So. 3d 536 (Fla. 2009). Although post-conviction claims raised after his resentencing did not result in reversal of the second death sentence, the Florida Supreme Court ordered resentencing in 2017 based on the requirement of jury unanimity established in *Hurst v. Florida*, 577 U.S. 92 (2016), and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). *See Orme v. State*, 214 So. 3d 1269 (Fla. 2017).

II. Pretrial issues/Penalty phase/*Spencer* hearing.

Defense counsel filed a number of motions in 2018, including motions to preclude the State from seeking the death penalty for failure to file timely notice of its intent (R. 249-72) and on double jeopardy grounds (R. 276-81). The court denied the motions in written orders dated January 17, 2019. (R. 311-15, 331-34.) At several status conferences in 2019 and 2020 the parties discussed the potential effect of an issue then pending before this Court involving the retroactivity of *Hurst* relief and whether it would affect the resentencing. (R. 391-92, 405-07, 412-13, 419-20, 444-45.) The

State filed a Motion to Reinstate Death Sentence on January 29, 2020. (R. 422-24.)

On March 1, 2020, Mr. Orme filed a handwritten "Notice by Defendant of his knowing, intelligent and voluntary waiver of a sentencing proceeding by a jury, waiver of all mitigating circumstances, and waiver of his presence at the sentencing before the Court." (R. 430-33.) The filing was dismissed because Mr. Orme was represented by counsel. (R. 436.) The State's motion was alluded to at a status conference in June, but Mr. Orme's notice was not. (R. 439-40.) The defense also noted the pandemic was affecting its ability to work with its experts. (R. 439.) On January 21, 2021, the court vacated its order dismissing Mr. Orme's pro se notice and ordered a hearing on his waiver of a sentencing jury, presentation of mitigating circumstances, and presence at sentencing. (R. 447.) The court also denied the State's motion to reinstate the death sentence. (R. 450.)

A hearing took place on March 30, 2021. (R. 513.) Mr. Orme appeared via Zoom. (R. 514.) The parties agreed the court would first determine Mr. Orme's competency to make the requested waivers. (R. 515-16.) During that colloquy Mr. Orme explained his reasoning:

> I've thought hard and long about this for a long time. Originally I had planned on doing this from the beginning. My parents asked me if I could do one last thing for them and not cause them to have to bury me. My parents are now deceased. I've carried this thing as long as I can; if I can bring any peace or solace to [L.R.]'s family by giving up my life, then I feel that's the right course of action. I'm not suicidal; I don't want to die, but 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.)

After further questioning the court asked defense counsel whether counsel had any concerns about Mr. Orme's competency to proceed with the waivers. Counsel responded he had no reason to believe Mr. Orme was incompetent and no expert opinions to that effect. (R. 525.) Counsel added Mr. Orme's request was against the advice of counsel. (R. 525.)

The court ruled Mr. Orme was competent to proceed and scheduled a second hearing on the waivers themselves. (R. 527.) On April 1, 2021, when Mr. Orme was again present via Zoom, the court questioned him about his understanding of what he was waiving. (R. 535-56.) Defense counsel summarized the mitigation the defense would present if the court held a full penalty phase trial. (R. 539-43.) Mr. Orme testified he was aware of this mitigation

and chose not to present it. (R. 544.) The court conducted a colloquy with Mr. Orme regarding his understanding of the rights he was waiving. (R. 545-56.) The court then accepted Mr. Orme's waivers:

> I have had the opportunity to observe Mr. Orme Tuesday afternoon, which I believe was March 30. Today's April 1st. I have had an opportunity to listen to the questions — to listen to the answers that he has given to my questions, to the questions of Mr. Collins, to the questions of Mr. Basford.
>
> I have had an opportunity to basically, to listen to his explanation of why he wants to do this. I've had an opportunity to listen to the answers to the questions as far as his competency and ability to make this decision. I've also had the opportunity to observe or listen to the answers he has given in response to what he's giving up, what Mr. Collins and Mr. David Collins are prepared to do at the trial. Also he understands that he's giving up the right to have 12 people decide whether he's placed under, placed, given the death penalty and leaving it up to the Court. I'm prepared to find that Mr. Orme is competent and has been advised and is able to make this decision. That it's knowingly, it's without duress and it's after he's had an opportunity to speak with counsel.

(R. 556-57.) The court also ordered a presentence investigation. (R. 558.)[1] The court subsequently entered a written order granting the waivers. (R. 561-62.)

The trial court conducted a penalty phase trial on October 6, 2021. (R. 816.) Mr. Orme, who was scheduled to be present via Zoom, declined to attend, and defense counsel objected to proceeding without a colloquy to confirm that he did not want to participate. (R. 818.) Counsel also presented the court with an email in which Mr. Orme stated he was refusing to be interviewed. (R. 820.) The court called, via telephone, Assistant Warden Tiffany Knox, who was sworn in and stated she had personal knowledge that Mr. Orme had been given an opportunity to participate and refused to leave his cell. (R. 823-27.) The court requested Ms. Knox to submit an affidavit confirming her testimony. (R. 828.) The court then overruled the defense objection and continued with the trial. (R. 828-29.)

The State reviewed what it believed the evidence would show about L.R.'s death, particularly the three alleged aggravating

[1] The PSI was filed on March 2, 2022 but does not appear to have been included in the Record on Appeal. Counsel for Appellant will file a separate motion to have the document added to the record.

factors: that Defendant committed a sexual battery on her, which was established by DNA evidence; that the killing was committed for pecuniary gain, because her money, jewelry, and car were taken; and that it was committed in an especially heinous, atrocious, and cruel manner. (R. 830.) In support of these allegations the State offered trial transcripts and photographs from Defendant's previous trials. (R. 829-30, 834-36.) The State also summarized mitigation from previous trials. (R. 831-32, 833-34.)

Defense counsel did not present mitigation, but argued in favor of a life sentence, noting that the original jury had sentenced Mr. Orme to death by a vote of 7 to 5. (R. 836.) Later, because of ineffective assistance of trial counsel, Mr. Orme was sentenced to death by a vote of 11 to 1. (R. 837.) Counsel expressed the wish that the case could have reached finality much sooner, adding, "sometimes I believe our Constitution's run amuck, that we're 30 years later and basically deciding still the fate of one person, when the victim's fate was determined 30 years ago." (R. 837.) Counsel argued that the original 7 to 5 vote reflected a fuller picture of the case because that vote followed a guilt phase trial, not a penalty phase in a vacuum. (R. 838.) He pointed out that Mr. Orme had no significant criminal history, was a veteran, and was under the

influence of both substance abuse and mental and emotional disturbance. (R. 838.) Counsel concluded:

> But 30 years later, after this torturous past, for this man to be executed I would suggest is not only cruel, it is unusual, and I believe to not give him what he wants would be far more punishment. He wants to have the death penalty imposed, that's what it indicates by his refusal to participate in any of these proceedings; I say don't give him what he wants, let him sit there for the rest of his life thinking about it, and that he cannot control his fate, that the People of Florida are now going to control his fate and we're not going to give him what he wants. We want him to sit there and rot in that cell for the rest of his life, and that's what I propose that this Court should do. Thank you.

(R. 839-40.)

The court then took judicial notice of the entire case file in Case 92-442-CF, without objection. (R. 841.) The court also accepted the State's exhibits without objection. (R. 841-45.) Defense counsel specifically noted he was not objecting to any photographic evidence. (R. 844.) The court also prospectively accepted, without objection, a forensic report to be prepared by Dr. Gregory Pritchard and filed as State's Exhibit 4. (R. 849-50.) The hearing concluded with victim impact testimony from several members of L.R.'s immediate and extended family. (R. 846-97.)

In closing, the State argued the transcripts already in the case file would show that L.R. was on her way to work as a nurse when Mr. Orme called her during a cocaine binge, and that she went to help him. (R. 899.) When she flushed some of his drugs down the toilet, he "became enraged and thereafter inflicted all of this torturous punishment on her, before she was ultimately killed." (R. 899.) She was beaten and sexually assaulted, and some of her property was taken as well. (R. 899-900.) The State also pointed to the previous sentencing proceedings and noted the Florida Supreme Court had upheld two previous death sentences and had agreed the aggravating circumstances outweighed the mitigation. (R. 900-02.)

Defense counsel argued the justice system was unfair to both the victims and the defendant:

> I understand the victim's family's quest for justice, I do, but the State has not taken five minutes to kill the defendant, it will take over 30 years to. There will be more appeals after, this case is far from concluded at this level.
>
> Why? What benefit to justice does this do? Is that not cruel: Once Orme was proven sane and guilty beyond a reasonable doubt, he should have been executed in a reasonable time, not over 30 years later; there's no way he's the same person. I understand the victims' quest for justice, I believe he should have been executed a long time ago if justice

> was going to be served. But the system doesn't work that way. […]

(R. 903.) Counsel noted that if Mr. Orme had not appealed his first death sentence he would be serving a life sentence already, and asked the court to "stop the appeals and let Mr. Orme rot in prison on death row until he dies" to provide finality for the victim's family. (R. 904-05.)

A separate *Spencer* hearing took place on February 23, 2022. Mr. Orme was present by Zoom. (R. 922.) The report of Dr. Prichard that the court had prospectively accepted at the sentencing hearing was received before the hearing, and defense counsel had no objection to its contents. (R. 919-20, 929-36.)

In his report, Dr. Prichard noted he was asked to review Department of Corrections (DOC) files from 2007 through the present to determine whether there were any "significant potential mitigating or aggravating factors that should be known to the Judge for the resentencing hearing." (R. 930.) He did not speak directly with Mr. Orme or assess him before preparing the report. (R. 930.)

The report noted Mr. Orme's parents divorced when he was three or four years old; he was "kidnapped" by his mother for approximately six months when he was in the first grade but

otherwise lived with his father and stepmother, had had no contact with his mother after that until he was 18. He received a GED and had an IQ in the "high average" range. He was married once, divorced in 1988, and had one son with whom he was not in contact. At the time of his arrest he was working full time as a merchant seaman and had held a variety of other jobs. He enlisted in the Marines on reserve status in 1979 and was discharged in 1980. (R. 931.)

The report summarized Mr. Orme's substance abuse history as "significant," beginning at the age of 18; his "drug of choice" was cocaine, but he also used alcohol, marijuana, acid, mushrooms, and quaaludes, and attended both outpatient and inpatient substance abuse programs without achieving sobriety. (R. 931.) DOC records indicated he was disciplined for using unauthorized substances or beverages in 1994, 1995, 1998, and 2008. (R. 931.)

Mr. Orme's psychiatric treatment history was also summarized and included outpatient mental health services beginning in 1994 with a primary diagnosis of Unspecified Mood Disorder or Unspecified Bipolar Disorder, along with diagnoses of Depressive Disorder and Antisocial Personality Disorder. (R. 932.) Before Mr. Orme began to decline psychotropic medication in 2012 he was

prescribed Lithium, Zoloft, Depakote, Tegretol, and Geodon; he attempted suicide in 1981. (R. 932.) The report noted "resistance to treatment" and "a history of noncompliance with mental health treatment" in available DOC records. (R. 932.)

The report noted that Mr. Orme received 11 disciplinary reports between 1994 and 2011, and had received no disciplinary reports since stopping psychotropic medication in 2012. (R. 933.) Several of the disciplinary reports were related to investing intoxicants; the report stated there was no indication of using any intoxicants after 2008. (R. 935.) Since 2012 he had generally declined mental health services, although he sought specific medical services for physical issues including chronic back pain. (R. 933-34.)

The report concluded:

> [H]is time in Department of Corrections since 2007 has been fairly unremarkable with respect to Mr. Orme demonstrating behavioral issues related to any kind of mental health condition. As mentioned, he has been on no psychotropic medications since 2012. There has been no psychological emergency declared for Mr. Orme, and no significant symptoms were noted aside from some "Vague" reports of depression and/or mood swings. He is best described as generally noncompliant with any type of proposed mental health intervention.

> He is also generally noncompliant with any kind of routine medical intervention as well.
>
> I was not able to identify any significant mitigators for Mr. Orme related to his lack of substantial mental health symptoms reported by Department of Corrections mental health staff. He has not taken psychotropic medications since 2012, had his last disciplinary report in 2011, and was disciplined for use of intoxicants the last time in 2008. There is no evidence of potential ongoing psychiatric issues in Mr. Orme, and therefore no evidence of substantial mitigation of which the court should be aware.

(R. 935.)

At the *Spencer* hearing defense counsel made an argument, based on Justice Breyer's dissent in *Elledge v. Florida*, that the lengthy delay between the charged offense and the sentencing violated the Eighth Amendment. (R. 924-25.)

III. Sentencing.

Sentencing took place on March 3, 2022, thirty years after the date of the original offense. (R. 1608.) Mr. Orme was present. (R. 1609.) L.R.'s sister was allowed to make a brief statement. (R. 1609-10.) Defense counsel informed the court Mr. Orme had instructed counsel "that he would not like me to make any other further statements today." (R. 1610.) The court noted it had prepared a

written sentencing order (R. 1610) and then pronounced sentence: "As to the charge of First Degree Murder of [L.R.] the Court sentences you, Michael Roderick Orme, to death in a manner prescribed by law." (R. 1611.)

The court entered a written sentencing order (R. 1588-96) contemporaneously with the Judgment and Sentence (R. 1603-07). The written sentencing order included a notification that "this sentence is subject to automatic review by the Florida Supreme Court." (R. 1596.)

In the written order, the court found three aggravating factors had been established beyond a reasonable doubt: that the capital felony was committed during a sexual battery (great weight); that the capital felony was committed for pecuniary gain (great weight); and that the capital felony was extremely heinous, atrocious, or cruel (very great weight). (R. 1591-92.)

The court also found four statutory mitigating factors had been established by the greater weight of the evidence: that Defendant had no significant prior criminal history (little weight); that Defendant's capacity to appreciate the criminality of his conduct or confirm his conduct to the requirements of law was substantially impaired (little weight); and that Defendant was

separated from his mother after his parents' divorce, so that he was raised by a demeaning and verbally abusive father (little weight). The court rejected the statutory mitigator that the capital felony was committed while Defendant was under the influence of extreme mental or emotional disturbance, stating the expert testimony presented demonstrated Defendant was suffering from substance abuse, but did not demonstrate "extreme" mental or emotional disturbance. However, the court recognized, "it is appropriate to treat any lesser level of mental or emotional disturbance as a non-statutory mitigator," and accorded it "some weight." The court also determined the Defendant's age was not a mitigating circumstance. (R. 1592-94.)

In addition to the statutory mitigation, the court found several non-statutory mitigating circumstances had been established by a greater weight of the evidence: that Defendant had been married and maintained a positive relationship with his child after the marriage ended (little weight); Defendant's remorse (little weight); and the contribution of Defendant's mental health diagnosis to his substance abuse issues (little weight). The court also found several non-statutory mitigators were not relevant: Defendant's potential for rehabilitation; Defendant's conduct while awaiting trial;

Defendant's minimal prison disciplinary history; and Defendant's attempt to get help for the victim when he arrived at a drug treatment facility. (R. 1594-95.)

The court then found that the aggravating factors, collectively and individually, were sufficient to warrant death, and that they "far outweigh[ed]" the mitigating circumstances. Accordingly, the court imposed a sentence of death. (R. 1596.)

SUMMARY OF THE ARGUMENT

Issue I. Mr. Orme has been resentenced twice because of deficiencies in his original and second sentencing proceeding. His most recent sentence was handed down 30 years after the original offense; he has been on Death Row for almost that entire time. The length of time it has taken between the offense and the sentence now under appeal makes the sentence itself cruel and unusual, in violation of the Eighth Amendment and, though the Conformity Clause, the Florida Constitution.

Issue II. 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. 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 make the requisite findings beyond a reasonable doubt, and imposing sentence without meeting that burden of proof was fundamental error.

ARGUMENT

I. The Totality of the Punishment Imposed and The Thirty-Year Delay Between the Original Offense and the Current Sentence Violate the Prohibition Against Cruel and/or Unusual Punishment Under the Federal and State Constitutions.

This case has been litigated for three decades and Mr. Orme has twice been sentenced in a manner later found to be erroneous and/or unconstitutional. The length of time it has taken to arrive at the most recent death sentence makes the sentence itself cruel and unusual, in violation of the Eighth Amendment (and, though the Conformity Clause, the Florida Constitution).

The Eighth Amendment guarantees the right not to be subjected to punishment that is so excessive as to be cruel and unusual. *See Roper v. Simmons*, 543 U.S. 551, 560-61 (2005); *see also Hall v. Florida*, 572 U.S. 701, 707-08 (2014). The United States Supreme Court has explained:

> [T]he Eighth Amendment guarantees individuals the right not to be subjected to excessive sanctions. The right flows from the basic "precept of justice that punishment for crime should be graduated and proportioned to [the] offense." By protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the

> government to respect the dignity of all persons.

Roper, 543 U.S. at 560-61.

In *Lackey v. Texas*, 514 U.S. 1045, 115 S. Ct. 1421 (Mem.) (1995), Justice Stevens commented on the denial of certiorari in a case involving a prisoner who had spent 17 years on death row in Texas. Justice Stevens noted the "importance and novelty of the question presented," but agreed there was "a principled basis for postponing consideration of the issue." 115 S. Ct. at 1421. He continued that the claim was "not without foundation":

> In *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976), this Court held that the Eighth Amendment does not prohibit capital punishment. Our decision rested in large part on the grounds that (1) the death penalty was considered permissible by the Framers, *see id.*, at 177, 96 S. Ct., at 2927 (opinion of Stewart, Powell, and STEVENS, JJ.), and (2) the death penalty might serve "two principal social purposes: retribution and deterrence," *id.*, at 183, 96 S. Ct., at 2929-2930.
>
> It is arguable that neither ground retains any force for prisoners who have spent some 17 years under a sentence of death. Such a delay, if it ever occurred, certainly would have been rare in 1789, and thus the practice of the Framers would not justify a denial of petitioner's claim. Moreover, after such an extended time, the acceptable state interest in retribution has arguably been satisfied by the

> severe punishment already inflicted. Over a century ago, this Court recognized that "when a prisoner sentenced by a court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it." *In re Medley*, 134 U.S. 160, 172, 10 S. Ct. 384, 388, 33 L. Ed. 835 (1890). If the Court accurately described the effect of uncertainty in *Medley*, which involved a period of four weeks, *see ibid.*, that description should apply with even greater force in the case of delays that last for many years. Finally, the additional deterrent effect from an actual execution now, on the one hand, as compared to 17 years on death row followed by the prisoner's continued incarceration for life, on the other, seems minimal.

Lackey, 115 S. Ct. at 1421-22. Justice Stevens also noted the concurring opinion of Justice White in *Furman v. Georgia*, 408 U.S. 238, 312 (1972), that when the imposition of the death penalty no longer furthers the purposes of retribution and deterrence, "its imposition would then be the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes," which would in turn violate the Eighth Amendment. *See Lackey*, 115 S. Ct. at 1422.

Joined by Justice Breyer, Justice Stevens quoted a decision of a California state court describing the brutality of lengthy incarceration under sentence of death:

> The cruelty of capital punishment lies not only in the execution itself and the pain incident thereto, but also in the dehumanizing effects of the lengthy imprisonment prior to execution during which the judicial and administrative procedures essential to due process of law are carried out. Penologists and medical experts agree that the process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture.

Lackey, 115 S. Ct. at 1421 fn. (quoting *People v. Anderson*, 6 Cal. 3d 628, 649, 100 Cal. Rptr. 152, 166, 493 P.2d 880, 894 (1972)).

A little over a year later, Justice Breyer similarly dissented from a denial of certiorari in *Elledge v. Florida*, 525 U.S. 944, 119 S. Ct. 366 (Mem.) (1998), characterizing the claim that a delay of 23 years before execution as "a serious one." Justice Breyer noted that the petitioner had faced the threat of death in prison "for nearly a generation." 119 S. Ct. at 366-67. The delay was due to "the State's own faulty procedures," evidenced by the fact that the petitioner had brought three successful appeals accounting for 18 of the 23 years. *Id.* at 367.

Mr. Orme acknowledges that this Court has repeatedly rejected so-called *Lackey* claims, including in cases involving delays comparable to the delay in this case. *See, e.g.*, *Lambrix v. State*, 217 So. 3d 977, 988 (Fla. 2017). In *Lambrix*, the Court rejected an

argument that spending more than three decades on death row violated the Eighth Amendment. *Id.* (collecting additional cases). The Court opined that the appellant in *Lambrix* had "contributed to the lengthy time and delay by continually challenging his convictions and sentences." *Id.* In contrast with the petitioner in *Elledge*, however, the appellant in *Lambrix* had not filed repeated successful appeals. The appellant in *Lambrix* was sentenced to death for two murders committed in 1983, and this Court upheld that sentence in 1986. *Id.* at 980. After a death warrant was signed in 1988, the appellant filed a postconviction motion that was summarily denied; the denial was affirmed. *Id.* at 981. The appellant then filed "numerous successive petitions for postconviction relief and successive habeas petitions" in state court, all of which were denied. *Id.* at 981-82. Federal habeas proceedings did not lead to any relief from the sentence. *Id.* at 982-83.

In contrast, the situation presented here is more analogous to that present in *Elledge*, where Justice Breyer noted that a large share of the delay was due to successful — that is, meritorious — appeals. Mr. Orme's original sentence was overturned following post-conviction proceedings that established Mr. Orme had received ineffective assistance of counsel in his original penalty phase trial.

See Orme, 896 So. 2d at 735 (holding counsel's decision not to investigate Mr. Orme's bipolar diagnosis constituted deficient performance). Further, both of Mr. Orme's previous death sentences were imposed after a non-unanimous jury recommendation, one of which postdated the United States Supreme Court's decision in *Ring v. Arizona*, 536 U.S. 584 (2002). It cannot be said that Mr. Orme has lacked meritorious grounds for challenging his sentence. Other delays in the most recent resentencing, such as the delay in 2019 and 2020, were attributable to the trial court's decision to wait for this Court to rule on the retroactive availability of *Hurst* relief, and should not be held against Mr. Orme.

The record reflects that Mr. Orme has changed during his 30 years of incarceration. His mental health issues have abated, as has his substance abuse. He has taken responsibility for his actions and has waived nearly all of his penalty phase rights. If this case had not presented meritorious issues, he would not have been eligible for *Hurst* relief; if Florida's sentencing procedures had comported with *Ring*, he would now be serving a life sentence. The delay between the offense and his most recent sentencing was not due to frivolous petitions. These facts provide a reason for the Court to reexamine its precedent regarding *Lackey* claims and consider

the cumulative effect of spending nearly 30 years under sentence of death. Moreover, in this situation the goals of retribution and deterrence will not be furthered by execution.

In the totality of the circumstances, including the 30-year delay between offense and sentencing, Mr. Orme's current sentence violates his right to be free from cruel and unusual punishment under the Eighth Amendment and the Florida Constitution. Amend. VIII, U.S. Const.; Art. I, § 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 current Florida law, 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. Orme due process of law, creating fundamental error.[2] 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 to harmless error review." *Ramroop v. State*, 214 So. 3d 657, 665

[2] *But see, e.g.*, *Craft v. State*, 312 So. 3d 45 (Fla. 2020) (rejecting the argument that the identical omission created fundamental error), *reh'g denied* (Fla. Mar. 4, 2021), and *pet. for cert. denied*, 142 S. Ct. 490 (2021).

(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), cert. denied, 141 S. Ct. 284 (2020), 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), cert. denied, 141 S. Ct. 1051 (2021), 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, the United States Supreme Court has held 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, in a jury trial, does the jury make a recommendation about the sentence. The findings are what allow the trial court to 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. Orme 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 trial 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.

The court's sentencing order found that the State had proved the existence of three alleged aggravating circumstances beyond and to the exclusion of a reasonable doubt. (R. 1596.) The court also found six mitigating factors had been proved by the greater weight of the evidence. (R. 1596.) The court concluded the aggravating circumstances were "sufficient to warrant the death penalty" and "far outweigh[ed]" the mitigating circumstances. (R. 1596.) The court did not apply the standard of proof beyond a reasonable doubt to the latter two findings. Without those express findings, 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. Orme requests that his sentence of death be vacated as unconstitutional.

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 Steven E. Woods, Assistant Attorney General, Capital Appeals Division, on August 17, 2022. I certify that this brief complies with the word count provisions of the Florida Rules of Appellate Procedure.

Respectfully submitted,

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