

In the Supreme Court of Florida

MATTHEW LEE CAYLOR,

Appellant,

v.

CASE NO.: SC2023-0338
CAPITAL CASE

STATE OF FLORIDA,

Appellee.

_____/

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

ANSWER BRIEF

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PRELIMINARY STATEMENT

The record on appeal will be referred to as “Res. DAR” for direct appeal of the resentencing, followed by the appropriate page number. Appellant, MATTHEW LEE CAYLOR, the defendant in the trial court, will be referred to as appellant, the defendant, or by name. The initials “IB” refers to the initial brief, followed by the appropriate page number. All double underlined emphasis is supplied.

STATEMENT REGARDING ORAL ARGUMENT

This Court typically conducts an oral argument in the direct appeal of a capital case, including in the direct appeal of a resentencing.

STATEMENT OF THE FACTS AND PROCEDURAL HISTORY

This is the direct appeal of a *Hurst* resentencing. *Caylor v. State*, 218 So.3d 416, 425 (Fla. 2017) (concluding, in a state habeas petition, Caylor was “entitled to a new penalty phase” based on *Hurst v. State*, 202 So.3d 40 (Fla. 2016)).

Facts of the crimes

In June of 2008, thirteen-year-old Melinda Hinson was living with her mother, her mother’s boyfriend, her fifteen-year-old brother, and Daryl Lawton, a family friend, at the Valu-Lodge Motel near the beach in Panama City, Florida. Matthew Caylor checked into the same motel on June 25, 2008. Melinda disappeared on July 8, 2008, and her body was discovered on the morning of July 10, 2008, under the bed in another room of the motel by a maid. Caylor confessed to her murder to Detective Mark Smith of the Panama City Police Department and to Investigator Mike Wesley of the Bay County Sheriff’s Department. Caylor admitted that at some point during having sex with the victim, he “just started choking her” with his

hands. He also admitted that when they fell from the bed onto the floor, he unplugged the phone cord from the wall and wrapped the cord around her neck, choking her with the cord until she was dead. Caylor then put the victim's naked body under the bed and left that motel room. Caylor explained to Detective Smith and Investigator Wesley that he murdered the victim because he was already in trouble and was likely to go to jail due to his fleeing from his probation in Georgia for previously molesting a fourteen-year-old girl. *See also Caylor v. State*, 78 So.3d 482, 486-89 (Fla. 2011).

Procedural history

A jury convicted Caylor, as charged, of first-degree murder, based on both premeditation and felony murder theories; sexual battery involving great physical force; and aggravated child abuse. *Caylor*, 78 So.3d at 486 (Fla. 2011). Caylor was sentenced to death for the murder; to life for the sexual battery and to 30 years for the aggravated child abuse. *Id.* at 486. On October 27, 2011, the Florida

Supreme Court affirmed the convictions and sentences. *Id.* at 486, 502.

On May 14, 2012, the United States Supreme Court denied certiorari from the direct appeal. *Caylor v. Florida*, 566 U.S. 1000 (2012).

On May 2, 2013, Caylor filed his original initial state postconviction motion raising six claims. *Caylor v. State*, 218 So.3d 416, 422 (Fla. 2017). On September 9, 2015, the trial court denied the postconviction motion. *Id.* at 423.

On appeal to the Florida Supreme Court, Caylor raised five issues regarding the denial of his postconviction motion. *Caylor*, 218 So.3d at 423. He also filed a state habeas petition raising three claims including a right-to-a-jury-trial claim based on *Hurst v. State*. *Caylor*, 218 So.3d at 424. The Florida Supreme Court granted habeas relief on the *Hurst* issue and ordered a new penalty phase. *Id.* at 425.

Resentencing proceedings

Caylor was represented by David Collins and Charles Collins at the resentencing. State Attorney Larry Basford prosecuted. Judge Christopher Patterson presided over the resentencing proceedings.

Waiver of penalty phase jury

On October 27, 2020, Caylor filed a pro se “notice” of his intent to waive a penalty phase jury and his personal presence at the *Hurst* resentencing. (Res. DAR 275-77). He cited and quoted § 921.141, Florida Statutes. *Id.* at 275-76. He also cited Florida Rule of Criminal Procedure 3.260, which permits the waiver of a jury trial by written notice, if signed the notice is signed by the defendant himself.¹ Caylor wrote that the pro se notice was valid, despite his being represented by counsel, because the right to a jury trial was a personal right. *Id.* at 276. The pro se notice explicitly stated that he was not waiving the presentation of mitigation. *Id.* at 276.

¹ *State v. Upton*, 658 So.2d 86, 87 (Fla. 1995) (holding a written waiver of a jury must be signed by the defendant, not merely by defense counsel).

But, on May 19, 2021, at a motion hearing, the defendant withdrew his prior pro se request to waive a penalty phase jury and his presence. (Res. DAR 310-29). Defense counsel explained to the trial court that, while Caylor originally wanted to waive the penalty phase with a jury and directly proceed to the *Spencer* hearing, the defendant had changed his mind. *Id.* at 311-12. Caylor stated that he now wanted a penalty phase with a jury. *Id.* at 314. After a brief colloquy to clarify, the trial court allowed the defendant to withdraw his prior pro se written waiver of a penalty phase jury. *Id.* at 315-16. The trial court then discussed the defense motion to hire a neuropsychological expert, Dr. Joseph Sesta, and the costs to do so. *Id.* at 316. Earlier, on March 11, 2021, the defense had filed a motion to hire to hire a neuropsychological expert. (Res. DAR 281-83). The trial court granted the motion to hire the expert. (Res. DAR 317). Caylor then moved to replace his current attorney, Mr. Collins, asserting had “zero” confidence in his attorneys which was one of the reasons he wanted to waive a jury. *Id.* at 318-19. Caylor also noted that another reason he wanted to waive a jury was that he had told

the victim's family that he would not appeal anything, so the family could "find some closure." *Id.* at 319. But, he then stated, that because his sentence was unconstitutional under *Hurst*, he had "to fight for a life sentence" but he could not effectively do so with the Collins firm as his attorneys. *Id.* at 319-20. Caylor vaguely referred to "issues" he had "in the past" with his attorneys and nothing between him and them had "ever changed." *Id.* at 320. Caylor stated he wanted a "jury trial" and an opportunity to present a mitigation case but he had no confidence in his attorneys to do so. *Id.* at 320. He asked the trial court to remove the Collins firm as his attorneys and replace them with new attorneys who would put together a mitigation case. *Id.* at 320-21.

The trial court then started to conduct a *Nelson* hearing² to address Caylor's complaints about his current attorneys. Caylor complained that he had only seen his attorneys "maybe four times." (Res. DAR 321). Caylor also complained that he had never had an

² *Hardwick v. State*, 521 So.2d 1071, 1074-75 (Fla. 1988) (approving the procedure provided in *Nelson v. State*, 274 So.2d 256, 258-59 (Fla. 4th DCA 1973), for inquiries pre-trial into the effectiveness of trial counsel).

attorney in the past who asked as their first question if he wanted to waive his appeals which is what Collins had done. *Id.* at 322. He additionally complained that his attorneys had not told him that the State had filed a motion to reinstate his death sentence but the trial court pointed out that that motion had been denied. *Id.* at 323; (Res. DAR 287-288). Caylor referred to the investigator, Rosalie Bolin, wanting to use a doctor for mitigation that the attorneys did not want to use and other unidentified differences of opinions between the mitigation investigator and his attorneys. *Id.* at 323-24. He stated that trying to put a mitigation case together with his attorneys was a “mess.” *Id.* at 324. The trial court requested that Caylor put all of his concerns regarding his attorneys in writing in a pro se motion for a future *Nelson* hearing. *Id.* at 324. The trial court pointed out Caylor’s history “of being able to write very coherent and poignant motions.” *Id.* at 327. The trial court stated the next step would be the *Nelson* hearing. *Id.* The trial court delayed his ruling on counsel’s motion to hire an expert pending the outcome of the *Nelson* hearing. *Id.* at 325.

On May 24, 2021, the trial court entered an order noting that the defendant had withdrawn his pro se motion to waive a jury trial and his presence at the May 2021 hearing. (Res. DAR 330-31).

Waiver of mitigation

On July 1, 2021, however, Caylor wrote a letter to the trial court that he was withdrawing his request for a *Nelson* hearing. (Res. DAR 352). He sought to reinstate his prior request to waive a penalty phase jury and his presence. He requested a ZOOM sentencing hearing and wrote “let’s get this over with.” *Id.* at 352. He was sorry for all the “back and forth” and also wrote that there was no need to appoint Dr. Sesta because he did not wish to “present any mitigation.” *Id.* So, Caylor was now requesting to waive a penalty phase jury, his presence, and the presentation of mitigation.

The trial court set a waiver hearing in light of the July 2021 pro se letter. (Res. DAR 354). On August 4, 2012, the defendant wrote another letter inquiring about the hearing on his “waiver of his jury trial, physical presence and mitigation.” (Res. DAR 355). He wanted

to “go forward with the waivers” and stated there was no need to remove his current attorneys. *Id.* at 355.

Waiver colloquy

On August 18, 2021, three months prior to the penalty phase, the trial court conducted a waiver colloquy. (Res. DAR 358-402). Caylor stated that he no longer wanted to discharge his attorneys. *Id.* at 361. The trial court inquired of Caylor whether he wanted to waive the penalty phase jury, his presence, and the presentation of mitigation. *Id.* at 362. Caylor specifically noted that his original waiver motion did not include a waiver of the presentation of mitigation but he now wanted to add mitigation to the requested waivers. *Id.* at 363.

The trial court then conducted a full waiver colloquy with Caylor. *Id.* at 363-87. Caylor stated that he had been previously diagnosed as bipolar II and as having a personality disorder but he had not been on any medications for his mental illness in the past several years. *Id.* at 367-68. Defense attorney Collins stated that he had no concerns regarding Caylor’s competency to waive. *Id.* at 374.

Caylor explained his reason for wanting to waive a jury and mitigation was his promise to the victim's mother, Rhonda McNalin, not to drag her family through the appeals process and wanting the victim's family to have closure. *Id.* at 375-78. Defense attorney Collins noted that Caylor refused to meet with Dr. Sesta. *Id.* at 385. The trial court found the waiver of the penalty phase jury to be voluntary. *Id.* at 379; 397.

Regarding the waiver of mitigation, Caylor stated that he did not want to present mitigation because that he did not want to do that to **his** own family. *Id.* at 384. Defense counsel Collins identified one potential additional piece of mitigation that the defense was exploring which was the evaluation with Dr. Sesta but Caylor refused to meet with Dr. Sesta. *Id.* at 385. The trial court found the waiver of the presentation of mitigation to be voluntary. *Id.* at 388; 397.

Regarding his right to be present, Caylor stated that he also wanted to waive his right to testify. *Id.* at 393. The trial court then found Caylor's waiver of his right to be present to be voluntary. *Id.* at 394-95; 397.

The trial court warned Caylor that he would not be allowed to change his mind regarding these waivers in the future. *Id.* at 396.

During the waiver colloquy hearing, the trial court also denied the outstanding motion to appoint a mental health expert based on the voluntary waiver of mitigation. *Id.* at 399. Then a few days later, on August 26, 2021, months before the bench penalty phase, the trial court entered a written order denying defense counsel's motion for a forensic neuropsychological expert, Dr. Joseph Sesta, based on the defendant's prior waiver of mitigation. (Res. DAR 403).

Bench penalty phase

On November 17, 2021, the trial court conducted a bench penalty phase. (Res. DAR. 459-482). Caylor was present for the penalty phase virtually, not physically. *Id.* at 462. At the start of the bench penalty phase, the trial court reaffirmed with Caylor his prior waivers of a jury, his physical presence, and the presentation of mitigation. *Id.* at 461-62.

The prosecutor informed the trial court and the defendant that the victim's mother, Rhonda McNalin, had died but that her prior victim

impact statement would be read by a victim's advocate. *Id.* at 463. The prosecutor requested, "in light of the waiver" of mitigation, that the trial court take judicial notice of the transcripts of the prior proceedings, including those of the prior penalty phase where mitigation was presented and the prior *Spencer* hearing,³ as required by *Muhammad v. State*, 782 So.2d 343 (Fla. 2001).⁴ *Id.* at 463-64. Defense counsel took no position on the issue and the trial court took judicial notice of the prior proceedings. *Id.* at 465.

The prosecutor also referred to Dr. Pritchard's forthcoming report, which would summarize Caylor's voluminous mental health records from the Florida Department of Corrections (DOC) including the records regarding Caylor's behavior in the years since the original trial proceedings. The trial court stated it would consider the report at the

³ *Spencer v. State*, 615 So.2d 688 (Fla. 1993).

⁴ *Muhammad*, 782 So.2d at 363-64 (requiring "the State to place in the record all evidence in its possession of a mitigating nature such as school records, military records, and medical records."); *Caylor*, 78 So.3d at 490 (summarizing the testimony of four lay mitigation witnesses presented by the defense during the first penalty phase and the defendant's own testimony at the first *Spencer* hearing regarding his drug use and his remorse for the murder).

future *Spencer* hearing. *Id.* at 466-67. Defense counsel did not object. *Id.* at 467. The prosecutor informed the trial court that Dr. Pritchard's report would probably not be completed until January. The State then proposed to rest its case in aggravation after the victim impact statements were read into the record. *Id.* at 468. The State's victim advocate then read victim impact statements from: (1) the victim's mother, Rhonda McNalin; (2) the victim's step-brother, Brennan Hinson; (3) the victim's step-mother, Brandy Hinson; and (4) the victim's grandfather, Ron Perkins. *Id.* at 472-75.

Defense counsel stated that, due to his client's waiver of mitigation, the defense would not be presenting a mitigation case. *Id.* at 468. Caylor told the trial court that he wanted to make an unsworn statement at the future *Spencer* hearing. *Id.* at 469-71.

The prosecutor gave closing arguments. *Id.* at 476. The elected State Attorney detailed the three aggravating factors the State was seeking. *Id.* at 476-79. The prosecutor addressed the mitigation case that had been presented in the prior proceedings. *Id.* at 479-80. Defense counsel Collins gave a brief closing argument relying on the

biblical injunction that God says we “shall not kill” as an argument for a life sentence. *Id.* at 480.

Withdrawal of prior waivers

On March 23, 2022, over four months after the bench penalty phase was completed, but before the *Spencer* hearing was held, which was scheduled to be held 14 days later on April 6, 2022, defense counsel, after a conversation with Caylor, filed a motion to withdraw the prior waivers of a penalty phase jury; the presentation of mitigation; and the defendant’s physical presence at the penalty phase. (Res. DAR. 494-96). The motion to withdraw the waivers relied on Florida Rule of Criminal Procedure, 3.170(f), governing the withdrawal of a plea.

The State objected in writing to the belated withdrawal of the various waivers. (Res. DAR. 497-570). The State pointed out that the trial court had informed the defendant that he would not be permitted to change his mind later and withdraw the waivers during the colloquy. *Id.* at 497; 512-13. The State asserted the motion to

withdraw the waivers was untimely. *Id.* at 497; 509-11. The State also argued that a defendant cannot “willy-nilly leap back and forth” between rights, which Caylor had previously done. *Id.* at 513 (citing *Waterhouse v. State*, 596 So.2d 1008, 1014 (Fla.1992)). The State also argued that rule 3.170(f), governing the withdraw of pleas, did not apply to the withdrawal of these waivers. *Id.* at 516-17. The State noted that Caylor did not waive the penalty phase entirely, unlike the situation of a plea, and argued, while the law favored trials on the merits, Caylor would receive a trial on the merits already, in the form of the bench penalty phase and the *Spencer* hearing. *Id.* at 517. The State asserted that the waivers should be enforced and the untimely motion that was merely a delay tactic. But, in the alternative, the State did not object to the withdrawal of the waivers to the extent that the withdrawals would not delay the *Spencer* hearing scheduled to begin in two weeks, such as allowing Caylor to withdraw the waiver of his right to be physically present and to testify at the upcoming *Spencer* hearing. *Id.* at 519-21. The State only objected to the withdrawal of the waiver of mitigation to the extent it would require a

continuance of the scheduled *Spencer* hearing. *Id.* at 520-23. The State did not object to the presentation of mitigation that was readily available to be presented at the upcoming *Spencer* hearing.

On April 6, 2022, the defendant wrote a pro se letter to the trial court averring that he would not have waived any of these rights, if he had known the victim's mother had died. (Res. DAR 572-73). He also again requested his attorneys be removed and replaced with new attorneys. The trial court continued the *Spencer* hearing.

On April 6, 2022, instead of conducting the *Spencer* hearing as scheduled, the trial court held a hearing to resolve the issues of the withdrawal of the waivers and to consider conducting a *Nelson* hearing. (Res. DAR 576-602). Defense counsel acknowledged he had no caselaw to support withdrawing a waiver of a jury trial after the bench trial had been completed. *Id.* at 578-79. Caylor then testified that he should be permitted to withdraw his prior waivers because the "entire" reason he waived his rights was a promise he had made to the victim's mother years ago and now that she was dead, he wanted to withdraw all the prior waivers. *Id.* at 580-81. He asserted that no one

told him about her death before the waivers. *Id.* at 581-82. Caylor attempted to explain why he did not seek to withdraw his waivers at the bench penalty phase where the victim's mother's death was mentioned twice, by stating that he did not speak up at the bench penalty phase because that was his "attorney's job" and he was caught "off guard" by the information. *Id.* at 587, 589. He now wanted to withdraw the waivers and fight for his life. *Id.* at 583.

The prosecutor did not object to the withdrawal of the waiver of his physical presence at the upcoming *Spencer* hearing or to withdrawal of the waiver of available mitigation but did object to the presentation of any mitigation that would delay the proceedings. *Id.* at 592.

The trial court asked whether the defense was asking to postpone the *Spencer* hearing to gather more mitigation or to start over completely with another penalty phase with a jury. *Id.* at 595. The defense wanted to start over completely and conduct a jury penalty phase. *Id.* at 595. Caylor wanted another penalty phase with a jury. *Id.* at 599. The trial court took the motion to withdraw the waivers under advisement. *Id.* at 599.

On May 26, 2022, the trial court denied the motion to withdraw the waiver of the jury at the penalty phase but allowed the defendant to withdraw the prior waiver of mitigation and to present mitigation at the rescheduled *Spencer* hearing. (Res. DAR. 603-07). The trial court denied the motion for a new penalty phase reasoning that a defendant cannot withdraw a waiver of a jury trial after the State has rested its case. *Id.* at 604 (citing *Jones v. State*, 20 So.2d 901, 902 (Fla. 1945)). The trial court noted that the motion to withdraw the waiver of a jury was made four months after the bench penalty phase had been held. *Id.* at 605. The trial court specifically found the request to withdraw the waiver of a jury was made in “bad faith for purposes of obtaining a delay” and also noted the defendant’s “history of changing his mind.” *Id.* at 605. The trial court rejected any reliance on rule 3.170(f) because there would be a trial on the merits in this case. *Id.* at 605. The trial court rejected the victim’s mother’s death as good cause to withdraw the waivers because Caylor made the promise to the whole family, not simply to the victim’s mother. *Id.* at 605.

On June 21, 2022, the trial court conducted a *Nelson* hearing. (Res. DAR. 613-627; 636-50). On July 27, 2022, the trial court entered an order denying the request for substitute counsel. (Res. DAR. 634-35).

On July 27, 2022, the trial court entered an order requiring Caylor to be personally present at upcoming *Spencer* hearing and rescheduled the *Spencer* hearing for September 7, 2022. (Res. DAR. 630-33).

In July and August of 2022, the defense filed motions to retain a forensic pharmacological expert for the upcoming *Spencer* hearing. (Res. DAR. 653-56; 657-58). On August 17, 2022, the trial court granted the defense motion to retain a forensic pharmacological expert for the upcoming *Spencer* hearing. (Res. DAR. 659).

On September 22, 2022, the defendant wrote a pro se motion renewing his motion to withdraw his prior waiver of a penalty phase jury. (Res. DAR. 664-807). On October 6, 2022, the trial court denied the renewed pro se motion. (Res. DAR. 808).

On August 17, 2022, the trial court entered an amended order rescheduling the *Spencer* hearing a second time from September until November 18, 2022. (Res. DAR. 660-61).

On November 2, 2022, the defense filed a motion to incur additional costs for the mitigation specialist for the upcoming *Spencer* hearing. (Res. DAR. 809-10). On November 3, 2022, the trial court granted the defense motion to incur additional costs for the mitigation specialist. (Res. DAR. 811-12).

***Spencer* hearing**

On November 18, 2022, the trial court held a *Spencer* hearing. (Res. DAR 939-1290). Caylor was personally present. *Id.* at 942.

The defense presented a mitigation case at the *Spencer* hearing. The defense presented eight witnesses, which included both lay and expert witnesses, as well as the defendant himself. The defense presented four lay witnesses: (1) Kimberly A. Caylor, the defendant's mother *Id.* at 955; (2) Kerry W. Caylor, the defendant's father *Id.* at 979; (3) Sara Tokarsy, who was pen pals with the defendant *Id.* at

1009; and (4) Devin L. McCloud, who is Caylor's son *Id.* at 1265. The defense presented three expert witnesses: (1) Dr. Jethro Toomer, a forensic psychologist *Id.* at 1017; (2) Dr. Daniel E. Buffington, a pharmacologist *Id.* at 1070; and (3) Ronald D. McAndrew, a former warden at Florida State Prison and a former director of the Orange County Jail as an expert in Florida's prisons, who testified Caylor had exhibited "no violence throughout his incarceration." *Id.* at 1214. Caylor himself also testified at the *Spencer* hearing. *Id.* at 1127. And the prosecutor cross-examined him. *Id.* at 1184.

The defense also presented three letters that were read by mitigation specialist Bolin to the court: (1) Kristi Brock, the mother of Caylor's son *Id.* at 946; (2) Eva Tracy Ray, whose son was also on death row *Id.* at 949; and (3) Barbara Shelton, who knew Caylor for 20 years. *Id.* at 951; (Res. DAR 816; 817-818; 819-820; 821-822). The defense additionally presented Caylor's disciplinary records while on death row from 2010 until the present from the Department of Corrections. *Id.* at 953; (Res. DAR 823-828). The defense presented the original 2009 jury recommendation of eight to four. *Id.* at 1271-72;

(Res. DAR 831-836). The defense also introduced the written sentencing order from a different capital case which the defense considered to be similar to this case, *State v. John William Campbell*, 2010-CF-1012 (Citrus Cty.) *Id.* at 1272-73⁵; (Res. DAR 831-836).

Defense counsel presented closing argument in support of a life sentence. *Id.* at 1274-82. The prosecutor presented closing argument in support of the death penalty. *Id.* at 1283-88.

Sentencing order⁶

On February 9, 2023, the trial court entered the sentencing order from the resentencing. (Res. DAR 1295-1307). The trial court noted the prior waivers of a penalty phase jury and the presentation of

⁵ The case number and county recited orally by defense counsel are incorrect.

⁶ This Court's docketing contains the judgment & sentence instead of the sentencing order. Including the sentencing order in the docketing is this Court's standard practice in capital cases. The order sentencing the defendant to death, which contains the trial court's findings regarding aggravation and mitigation, is in the record at Res. DAR 1295-1307. For the convenience of this Court and the parties in the future, this Court should correct its docketing to include the sentencing order rather than the judgment & sentence.

mitigation and quoted the defendant at the waiver colloquy explaining that he wanted to take responsibility and to fulfill a promise he made to the victim's mother. *Id.* at 1296. The sentencing order recited the facts of the crime and detailed the evidence including the confession and the DNA evidence. *Id.* at 1298-1300.

The trial court found three aggravating factors: (1) felony probation aggravator based on a prior Georgia conviction for felony child molestation based on Probation Officer Shakita's testimony that Caylor had absconded from his probation; (2) the felony murder aggravator based on the sexual battery conviction, rejecting Caylor's claim of consensual sex as incredible; and (3) the heinous, atrocious, or cruel aggravator (HAC), based on the rape and strangulation of the young victim first by hand and then with a telephone cord. (Res. DAR 1300-02). The trial court gave "great weight" to all three aggravators.

The trial court found one statutory mitigating circumstance: (1) extreme mental or emotional disturbance, based on Caylor's parents' testimony including possible sexual abuse and Dr. Toomer's testimony at the *Spencer* hearing, including a possible diagnosis of

PTSD, which it gave “medium” weight. *Id.* at 1302-04. The trial court also found seven non-statutory mitigating circumstances: (1) learning difficulties in school, which it gave little weight *Id.* at 1304; (2) dysfunctional family, which it gave “medium” weight *Id.* at 1304; (3) good employee and good with animals, which it gave little weight *Id.* at 1305; (4) good father, when not on drugs, which it gave little weight *Id.* at 1305; (5) remorse based on the defendant’s taking responsibility, which it gave little weight *Id.* at 1305; (6) drug use, which it gave little weight *Id.* at 1305-06; and (7) good prison conduct, which it gave little weight. *Id.* at 1306. The trial court concluded that “the aggravating factors far outweigh the mitigating circumstances. *Id.* at 1306.

Sentencing

On February 9, 2023, the trial court conducted a formal sentencing hearing. (Res. DAR 1320-24). The trial court gave counsel a copy of the written sentencing order imposing a death sentence. *Id.* at 1322; (Res. DAR 1295-1307).

On February 20, 2023, the trial court also entered an amended judgment and sentence. (Res. DAR 1325-28).

On March 3, 2023, Caylor, represented by trial counsel, filed a notice of appeal. (Res. DAR 1329). This appeal follows.

SUMMARY OF THE ARGUMENT

ISSUE I

Caylor asserts the trial court abused its discretion in refusing to allow him to withdraw his waiver of a penalty phase jury which was filed four months after the bench penalty phase had been held. The motion to withdraw the waiver of a jury was untimely because it was filed months after the bench penalty phase was held. Furthermore, the mother's death was referred to twice at the bench penalty phase yet Caylor remained silent both times and did not file the motion to withdraw until months later. On the merits, Caylor is bound by his waiver. Allowing a defendant to withdraw a waiver of a jury after the bench penalty phase was completed would not only negate the completed bench penalty phase entirely but would also require the trial court to conduct a new penalty phase which would now include the additional time required to select a 12-person capital jury. The victim's mother dying does not render the prior waiver of a jury involuntary. Subsequent changes in the law or the facts do not render a prior waiver invalid. And, the error, if any, was harmless. The trial

court did not abuse its discretion in denying the motion to withdraw the waiver of a penalty phase jury and refusing to conduct another penalty phase.

ISSUE II

Caylor asserts the trial court abused its discretion by not granting a motion to withdraw a prior waiver of the presentation of mitigation at the penalty phase, made months after the penalty phase was completed. The motion to withdraw the prior waiver of mitigation was untimely as it was filed over four months after the bench penalty phase was completed. While Caylor frames the issue as the trial court erred in enforcing the waiver of mitigation, that is not the actual issue before this Court. The trial court granted the motion to withdraw the waiver of mitigation and allowed Caylor to present any mitigation at the later *Spencer* hearing. The trial court did not prevent Caylor from presenting any available mitigation at the *Spencer* hearing. The waiver of mitigation was not enforced. Because the penalty phase was a bench penalty phase, it matters not whether the mitigation was

presented to the judge at the earlier bench penalty phase or later, to the same judge, at the *Spencer* hearing. The error, if any, was harmless. The trial court did not abuse its discretion in not conducting a second penalty phase but instead allowing the presentation of mitigation at the *Spencer* hearing.

ISSUE III

Caylor asserts that the judge must determine that the aggravators are sufficient and perform the weighing of the aggravation against the mitigation at the beyond a reasonable doubt standard of proof. But, as the United States Supreme Court has explained, it is doubtful any standard of proof applies to the determination of mitigation and to the other determinations that are part of the “selection phase” of a capital sentencing proceeding. The only finding that an element of capital murder which must be found at a particular standard of proof is the finding of one aggravating factor under both the United States Supreme Court precedent and under this Court’s precedent. Furthermore, this Court has repeatedly rejected this same claim of

fundamental error based on the same arguments presented in this appeal in numerous other capital cases. Opposing counsel presents no novel arguments that would undermine this Court's precedent. The trial court properly did not invoke any standard of proof regarding either sufficiency or weighing.

ARGUMENT

ISSUE I

Whether the Trial Court Abused its Discretion in Denying the Untimely Motion to Withdraw the Prior Waiver of a Penalty Phase Jury Filed After the Bench Penalty Phase Had Already Been Completed? (Restated)

Caylor asserts the trial court abused its discretion in refusing to allow him to withdraw his waiver of a penalty phase jury which was filed four months after the bench penalty phase had been held. IB at 24. The motion to withdraw the waiver of a jury was untimely because it was filed months after the bench penalty phase was held. Furthermore, the mother's death was referred to twice at the bench penalty phase yet Caylor remained silent both times and did not file the motion to withdraw until months later. On the merits, Caylor is bound by his waiver. Allowing a defendant to withdraw a waiver of a jury after the bench penalty phase was completed would not only negate the completed bench penalty phase entirely but would also require the trial court to conduct a new penalty phase which would now include the additional time required to select a 12-person capital jury. The victim's mother dying does not render the prior waiver of a

jury involuntary. Subsequent changes in the law or the facts do not render a prior waiver invalid. And, the error, if any, was harmless. The trial court did not abuse its discretion in denying the motion to withdraw the waiver of a penalty phase jury and refusing to conduct another penalty phase.

The trial court's ruling

On March 23, 2022, four months after the bench penalty phase was held in November of 2021, the defense filed a motion to withdraw the prior waiver of a penalty phase jury. (Res. DAR 494-96).

The trial court denied the motion for a new penalty phase reasoning that a defendant cannot withdraw a waiver of a jury trial after the State has rested its case. (Res. DAR at 604 citing *Jones v. State*, 20 So.2d 901, 902 (Fla. 1945)). The trial court rejected any reliance on the rule governing the withdrawal of pleas, rule 3.170(f), because there would be a trial on the merits in this case. *Id.* at 605. The trial court noted that the motion to withdraw the waiver of a jury was made four months after the bench penalty phase had been held.

Id. at 605. The trial court specifically found the request to withdraw the waiver was made in “bad faith for purposes of obtaining a delay” and noted the defendant’s “history of changing his mind.” *Id.* at 605. The trial court rejected the mother’s death as good cause to withdraw the waiver because Caylor made the promise to the victim’s whole family, not simply to the victim’s mother. *Id.* at 605.

Preservation

The issue is preserved. § 924.051(1)(b), Fla. Stat. (2022) (defining preserved as meaning the “issue, legal argument, or objection to evidence was timely raised before, and ruled on by, the trial court, and that the issue, legal argument, or objection to evidence was sufficiently precise that it fairly apprised the trial court of the relief sought and the grounds therefor”); § 924.051(3), Fla. Stat. (2022) (stating an “appeal may not be taken from a judgment or order of a trial court unless a prejudicial error is alleged and is properly preserved or, if not properly preserved, would constitute fundamental error” and a “judgment or sentence may be reversed on appeal only

when an appellate court determines after a review of the complete record that prejudicial error occurred and was properly preserved in the trial court or, if not properly preserved, would constitute fundamental error.”). This Court’s “precedent is clear that to be preserved, the issue or legal argument must be raised and ruled on by the trial court.” *Ritchie v. State*, 344 So.3d 369, 378 (Fla. 2022) (quoting *Rhodes v. State*, 986 So.2d 501, 513 (Fla. 2008)). Caylor filed a motion to withdraw his waiver of a penalty phase jury and properly obtained a ruling from the trial court denying that motion. (Res. DAR 603-07). The issue is preserved.

Untimely

The motion to withdraw the prior waiver of a penalty phase jury, however, was untimely. In *United States v. Jackson*, 2022 WL 6861556 (8th Cir. Oct. 12, 2022), the Eighth Circuit held the district court properly denied a motion to withdraw the prior waiver of a jury trial in a federal Hobbs Act robbery prosecution. Two weeks before the jury trial was scheduled to begin, Jackson decided to waive his

right to a jury trial. *Id.* at *1. The district court conducted a colloquy, accepted the waiver of a jury trial, and scheduled a bench trial. On the morning of the bench trial, he changed his mind and wanted a jury trial. The district court denied the motion to withdraw the prior waiver of a jury trial because it “would cause significant delay.” On appeal, the circuit court agreed reasoning that the trial court had good reason to hold the defendant to his prior waiver of a jury trial “rather than delay the proceedings any further.” *Id.* at *1; *see also Zemunski v. Kenney*, 984 F.2d 953 (8th Cir. 1993) (finding, in federal habeas review of a burglary conviction, that a motion to withdraw a prior waiver of a jury trial, made on the first day of the bench trial, was untimely and properly denied because it would delay the proceedings); *Honie v. Powell*, 58 F.4th 1173 (10th Cir. 2023) (rejecting, in a capital case, a claim of ineffectiveness for not filing a motion to withdraw a prior waiver of a penalty phase jury one week before the bench trial began, despite the defendant’s instruction to his attorney a few days before trial to file the motion, which was, in counsel’s words, “too late” to file such a motion).

This Court has stated that a trial court may deny a motion to withdraw a waiver of a jury trial, if the motion was “not seasonably made in good faith” or was made “to obtain a delay” or if there is “unreasonable delay” or “interruption of the administration of justice” causing real inconvenience to the court and the State. *Floyd v. State*, 90 So.2d 105, 106 (Fla. 1956) (reversing for a new trial).

Here, the trial court specifically found that the motion to withdraw was made in “bad faith for purposes of obtaining a delay.” (Res. DAR at 605). While this Court, in *Floyd*, found an abuse of discretion in denying a motion to withdraw the waiver of a jury trial because there was no showing that the State or the court would be inconvenienced in any way or that justice would have been delayed or impeded in that case, the motion to withdraw in *Floyd* was filed by new counsel the day of the bench trial, not months afterwards, after the trial was complete, as is the situation in this case.

A defendant may not seek to undo a prior waiver after the proceeding at issue is completed. Caylor attempted to retract his prior voluntary waiver of a penalty phase jury four months after the bench

penalty phase had been completed. Such a motion made on the eve of the bench trial would be untimely, because it would require that a jury be impaneled, but a motion to withdraw a waiver of a jury made months after a bench trial is complete is beyond untimely. And while defendants can certainly file such wildly untimely motions in the hope that some trial court somewhere might grant it, they cannot hope to obtain a reversal on appeal on such facts under the applicable standard of review. The motion to withdraw the waiver of a penalty phase jury was untimely and made in bad faith. On that basis alone, the trial court properly denied the motion.

Standard of review

The standard of review of a motion to withdraw a valid prior waiver is an abuse of discretion. *United States v. Vizcarra-Millan*, 15 F.4th 473, 497 (7th Cir. 2021) (reviewing “only for an abuse of discretion” a district court’s refusal to allow the withdrawal of a valid prior waiver of the right to conflict-free counsel), *cert. denied*, *Grundy v. United States*, 142 S. Ct. 838 (2022); *Tanzi v. State*, 964 So.2d 106, 112 (Fla.

2007) (employing the abuse of discretion standard in the review of a claim that the trial court erred in denying a motion to withdraw a guilty plea to first-degree murder). An abuse of discretion occurs only when “the judge adopts a view that no other reasonable person would take.” *Loyd v. State*, 2023 WL 7815783, *3 (Fla. Nov. 16, 2023) (citing *Singleton v. State*, 783 So.2d 970, 973 (Fla. 2001)).

Merits

In *United States v. Vizcarra-Millan*, 15 F.4th 473 (7th Cir. 2021), *cert. denied*, *Grundy v. United States*, 142 S.Ct. 838 (2022), the Seventh Circuit held the waiver of the right to conflict-free counsel was voluntary, despite his attempt to withdraw his prior waiver. *Id.* at 495-500. During the first waiver colloquy conducted by a prior judge, Vizcarra-Millan waived his right to conflict-free counsel. *Id.* at 492, 493. The prior judge ordered him to sign a written waiver but he did not. Later, during the second colloquy in front of a different judge, he stated that he was in a tough position because if he did not waive conflict-free counsel, he would have to hire new counsel with the trial

just a few months away. *Id.* at 493. Vizcarra-Millan then changed the subject to wanting to negotiate a plea deal instead of going to trial. But ultimately he “clearly and unequivocally” waived his right to conflict-free counsel and later filed a written waiver as well. *Id.* at 494. Five weeks before trial, his attorney filed a motion seeking to withdraw the prior waiver of the conflict, arguing the defendant felt pressured into the waiver because the Government would not negotiate with him about the plea while the issue of his attorney’s conflict was outstanding. *Id.* at 495. The district court denied the motion to withdraw the waiver, without conducting a hearing, noting the request to withdraw was “flatly inconsistent” with statements the defendant had made throughout the case. The district court also found the “eleventh-hour” motion to withdraw a prior waiver was “suspect” because it was made over three weeks after he had rejected the plea offer and was viewed, by the court, as a last-minute gambit to postpone the trial. *Id.* at 495.

On appeal, he argued that the district court held him to too high a standard for withdrawing his waiver. *Vizcarra-Millan*, 15 F.4th at

496. The Seventh Circuit held that district courts “are entitled to treat such waivers as binding.” *Id.* at 497. The Seventh Circuit also noted that district courts have the “discretion to deny bad-faith attempts to manipulate judicial proceedings or to undermine the integrity of the judicial process.” *Id.* at 497. *See also United States v. Gonzalez-Lopez*, 548 U.S. 140, 152 (2006) (noting the trial court may balance the right to counsel of choice against “the demands of its calendar” citing *Morris v. Slappy*, 461 U.S. 1, 11-12 (1983)).

Caylor’s waiver of a penalty phase jury was binding. A defendant cannot “willy-nilly leap back and forth” between rights. *Waterhouse v. State*, 596 So.2d 1008, 1014 (Fla.1992) (stating a "defendant may not manipulate the proceedings by willy nilly leaping back and forth" between choices of self-representation and appointed counsel quoting *Jones v. State*, 449 So.2d 253, 259 (Fla.1984)). The trial court warned Caylor that he would not be permitted to change his mind regarding any of the waivers near the end of the waiver colloquy. (Res. DAR at 396). A defendant may not withdraw a waiver of a jury if the withdrawal would mandate the trial court to reschedule the penalty

phase, much less after the bench penalty phase is completed, which would require a complete redo of the penalty phase.

Moreover, it is not a good faith request to attempt to withdraw a prior waiver of a jury after the entire bench penalty phase had been completed. As the trial court found, such a request being made at such a time is a bad-faith attempt to manipulate judicial proceedings and obtain a delay. *Vizcarra-Millan*, 15 F.4th at 497.

Rule 3.170(f) does not apply. While the law favors trials on the merits which is why the rule governing the withdraw of pleas often allows defendant to withdraw a prior plea and proceed to trial, Caylor received a trial on the merits in the form of both a bench penalty phase and a *Spencer* hearing.

Subsequent changes and valid waivers

Subsequent changes in the law or changes in the facts do not render a prior voluntary waiver invalid. *Brady v. United States*, 397 U.S. 742, 757 (1970) (holding a voluntary plea “intelligently made in the light of the then applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a

faulty premise”); *United States v. Cardenas*, 230 Fed. Appx. 933, 935 (11th Cir. 2007) (stating a guilty plea is not invalidated by a later change in the law citing *Brady* and *United States v. Sanchez*, 269 F.3d 1250, 1283-85 (11th Cir. 2001) (en banc)). That principle applies with greater force to a mere change in the defendant’s mind regarding a prior waiver.

Even if subsequent events could render a prior waiver invalid, the death of the victim’s mother does not render the prior waiver of a jury involuntary nor does it amount to good cause to withdraw the prior waiver of a jury or justify holding a new penalty phase with a jury. At the waiver colloquy, Caylor stated, as an explanation for withdrawing his prior request to waive a jury, that due to the *Hurst* decision, he believed he should fight for a life sentence. (Res. DAR at 319-20). While Caylor had also stated that his promise to the victim’s mother was his reason for waiving a jury and mitigation during the colloquy, at the very start of the bench penalty phase, right after the trial court reaffirmed Caylor’s waivers of a jury and mitigation, the prosecutor informed the trial court and the defendant that the victim’s mother,

Rhonda McNalin, had died. (Res. DAR 463). If Caylor's sole motivation for waiving a jury was a concern to keep his promise to the victim's mother alone, this information about the death of the victim's mother should have provoked him to immediately speak up and withdraw his prior waiver at the start of the bench penalty phase. But Caylor remained silent. And shortly later in the bench penalty phase, the victim's grandfather, in his victim impact letter, which was read out loud, stated that the victim's mother, Rhonda McNalin, was now dead. *Id.* at 475. And, again, Caylor remained silent. Two different sources informed Caylor that the victim's mother had died but he did not object to conducting the penalty phase as a bench penalty phase. Caylor knew the victim's mother was dead four months before he filed the motion to withdraw his prior waiver of a jury.

The trial court properly denied the motion to withdraw the waiver of a penalty phase jury.

Harmless error

The denial of a jury trial is subject to harmless error analysis. *Neder v. United States*, 527 U.S. 1, 18 (1999) (explaining if the jury has not been instructed to find an element of the offense, the test for harmless error asks whether it is clear beyond a reasonable doubt that a rational jury would have found the element of the offense). The United States Supreme Court has observed that for every argument why juries are more accurate factfinders than judges, there is another one why they are less accurate. *Schriro v. Summerlin*, 542 U.S. 348, 356-57 (2004). The *Summerlin* Court also observed that the Court would not assert that a criminal trial or any proceedings held before a judge alone was unfair or that a defendant would never be treated as fairly by a judge as by a jury. *Summerlin*, 542 U.S. at 357. The Court reasoned that because they have previously ruled that a trial held entirely without a jury was not impermissibly inaccurate, it is hard to see how a penalty phase in which a judge makes the findings could be. A proceeding at which the judge, rather than the jury, made the necessary findings is subject to harmless error analysis,

A jury at a third penalty phase would find an aggravating factor and recommend a death sentence. The jury would find an aggravator. Indeed, Caylor's first jury convicted him of sexual battery involving great physical force which is equivalent of a finding of the aggravating factor of felony murder. *Caylor*, 78 So.3d at 486 (noting the first jury convicted him of first-degree murder, sexual battery involving great physical force, and aggravated child abuse).

Furthermore, conducting a bench penalty phase was harmless under the current death penalty statute as well. A defendant who brutally rapes a young girl leaving her with a "large" bruise extending the length of her left clavicle and then strangles her to death, while on felony probation for the felony molestation of another young girl, is highly unlikely to receive a life recommendation under the current 8-4 death penalty statute at a third resentencing. *Caylor*, 78 So.3d at 490 (detailing the medical examiner's description of the victim's injuries); *Dobbert v. Florida*, 432 U.S. 282 (1977) (applying the current death penalty statute to a capital case where the murder occurred before the statute had been enacted); *Love v. State*, 286 So.3d 177, 187 (Fla.

2019) (applying an amended statute to a criminal case because it was procedural and because it was not actually being applied retrospectively but to a future phase of the proceedings, relying on *Landgraf v. USI Film Products*, 511 U.S. 244, 269-70 (1994)). Indeed, Caylor's first penalty phase jury recommended a death sentence by a vote of eight to four. *Caylor*, 78 So.3d at 486. The error, if any, in not conducting yet another penalty phase with a jury is harmless.

ISSUE II

Whether the Trial Court Abused its Discretion in Denying the Untimely Motion to Withdraw the Prior Waiver of the Presentation of Mitigation at the Penalty Phase Filed Months after the Penalty Phase was Completed But Instead Allowing the Presentation of Mitigation at the *Spencer* hearing? (Restated)

Caylor asserts the trial court abused its discretion by not granting a motion to withdraw a prior waiver of the presentation of mitigation at the penalty phase, made months after the penalty phase was completed. IB at 30. The motion to withdraw the prior waiver of mitigation was untimely as it was filed over four months after the bench penalty phase was completed. While Caylor frames the issue as the trial court erred in enforcing the waiver of mitigation, that is not the actual issue before this Court. The trial court granted the motion to withdraw the waiver of mitigation and allowed Caylor to present any mitigation at the later *Spencer* hearing. The trial court did not prevent Caylor from presenting any available mitigation at the *Spencer* hearing. The waiver of mitigation was not enforced. Because the penalty phase was a bench penalty phase, it matters not whether the mitigation was presented to the judge at the earlier penalty phase or

later, to the same judge, at the *Spencer* hearing. The error, if any, was harmless. The trial court did not abuse its discretion in not conducting another penalty phase but instead allowing the presentation of mitigation at the *Spencer* hearing.

The trial court's ruling

On March 23, 2022, four months after the bench penalty phase was held in November of 2021 and 14 days before the scheduled *Spencer* hearing, the defense filed a motion to withdraw the prior waiver of the presentation of mitigation. (Res. DAR 494-96).

The trial court granted the motion to withdraw the prior waiver of the presentation of mitigation as to the upcoming *Spencer* hearing. (Res. DAR at 605-06). The trial court allowed the defendant to present mitigation at the *Spencer* hearing. *Id.* at 606. The trial court warned the defense that it would not permit the presentation of mitigation to unnecessarily delay the date of the *Spencer* hearing and unnecessary continuances would not be permitted but that was the only limitation on the presentation of mitigation. *Id.* at 606. The *Spencer* hearing was

rescheduled twice and was finally held in November of 2022, a year after the November 2021 bench penalty phase.

Preservation

Caylor filed a motion to withdraw his waiver of the presentation of mitigation and properly obtained a ruling from the trial court denying that motion. (Res. DAR 603-07); *Ritchie v. State*, 344 So.3d 369, 378 (Fla. 2022) (stating that to be preserved, the issue or legal argument must be raised and ruled on by the trial court” quoting *Rhodes v. State*, 986 So.2d 501, 513 (Fla. 2008)). The issue is preserved.

On appeal, opposing counsel seems to be raising as error the trial court granting the defense motion to withdraw the prior waiver. It is a basic tenet of appellate law, that a defendant can only appeal an adverse ruling. The only limitation that the trial court placed on the presentation of mitigation was that the development of additional mitigation could not cause “unnecessary continuances.”

Untimely

The motion to withdraw his prior waiver of mitigation was untimely. A motion to withdraw a waiver filed after the proceeding at issue has already been completed is beyond untimely. Such a motion by its very nature is really a motion to negate the prior proceeding entirely and conduct yet another proceeding.

The motion to withdraw was untimely as to both the completed bench penalty phase and as to the *Spencer* hearing. Indeed, the motion itself caused the trial court to cancel the upcoming *Spencer* hearing and hold a hearing on the motion to withdraw the waivers a few days later instead.

This Court's recent decision in *Mosley v. State*, 349 So.3d 861, 868 (Fla. 2022), *cert. denied*, *Mosley v. Florida*, 143 S.Ct. 1028 (2023), is not to the contrary. In *Mosley*, this Court held that the trial court erred in failing to address a capital defendant's unequivocal motion to proceed pro se at the *Spencer* hearing, despite the motion being untimely, and remanded for a new *Spencer* hearing. *Mosley*, 349 So.3d at 863, 866-69. The Court discussed the timeliness of motions. *Id.*

at 867. This Court agreed with other courts that a trial court can deny motions that are untimely but noted what counts as “untimely” is unsettled. Motions made on the eve of trial or after trial has begun, make it difficult for a trial court to rule on the motion, without granting a continuance, and therefore are often disruptive of orderly proceedings and may result in unfair delays. This Court found, however, that the trial court had ample time to consider the motion for self-representation as applied to the *Spencer* hearing. *Id.* at 868. The *Mosley* Court stated that there was no contention that consideration of the motion to proceed pro se would have disrupted the proceedings or required any delay. *Id.* at 868.

But, in this case, there would have been a significant delay in the underlying proceedings. Conducting a second penalty phase would have meant a significant delay in these resentencing proceedings and would have also wasted judicial labor by negating the first bench penalty phase entirely. *Mosley* did not involve a motion made months after trial was completed, as this motion to withdraw did. Redos of

penalty phases are unfair to everyone involved, much less redos at resentencings.

Standard of review

The standard of review of a motion to withdraw a valid prior waiver is an abuse of discretion. *United States v. Vizcarra-Millan*, 15 F.4th 473, 497 (7th Cir. 2021) (reviewing “only for an abuse of discretion” a district court’s refusal to allow the withdrawal of a valid prior waiver of the waiver of the right to conflict-free counsel), *cert. denied*, *Grundy v. United States*, 142 S. Ct. 838 (2022); *Tanzi v. State*, 964 So.2d 106, 112 (Fla. 2007) (employing the abuse of discretion standard in the review of a claim that the trial court erred in denying a motion to withdraw a prior guilty plea to first-degree murder).

The standard of review for failing to grant a continuance is also an abuse of discretion, which is a “highly deferential standard.” *Wells v. State*, 364 So.3d 1005, 1013 (Fla. 2023) (concluding there was no abuse of discretion in denying a motion to continue a penalty phase), *cert. denied*, *Wells v. Florida*, 2023 WL 7287192 (U.S. Nov. 6, 2023).

A denial of a motion for continuance should not be reversed by an appellate court unless there has been a “palpable” abuse of the trial court’s discretion that clearly and affirmatively appears in the record. *Jordan v. State*, 2019 WL 8161276, *9 (Fla. Dec. 5, 2019) (quoting *Magill v. State*, 386 So.2d 1188, 1189 (Fla. 1980)). While death penalty cases command this Court’s “closest scrutiny,” it is still the obligation of an appellate court to review with caution the exercise of experienced discretion by a trial judge in matters such as a motion for a continuance. *Jordan*, 2019 WL 8161276 at *9 (quoting *Doorbal v. State*, 983 So.2d 464, 486 (Fla. 2008)).

An abuse of discretion occurs only when “the judge adopts a view that no other reasonable person would take.” *Loyd v. State*, 2023 WL 7815783, *3 (Fla. Nov. 16, 2023) (citing *Singleton v. State*, 783 So.2d 970, 973 (Fla. 2001)).

Merits

Caylor’s waiver of mitigation at the penalty phase was binding. *Vizcarra-Millan*, 15 F.4th at 497 (stating that trial courts “are entitled

to treat such waivers as binding”). A defendant cannot “willy-nilly leap back and forth” between rights. *Waterhouse v. State*, 596 So.2d 1008, 1014 (Fla.1992) (stating a “defendant may not manipulate the proceedings by willy nilly leaping back and forth” between choices of self-representation and appointed counsel quoting *Jones v. State*, 449 So.2d 253, 259 (Fla.1984)). The trial court warned Caylor that he would not be permitted to change his mind regarding the waiver near the end of the waiver colloquy. (Res. DAR at 396).

But the waiver of mitigation was not enforced. Caylor was permitted to present all his mitigation at the *Spencer* hearing and the defense had nearly six months between the order granting the motion to withdraw the waiver of mitigation as to the *Spencer* hearing and the *Spencer* hearing being held to collect any mitigation in addition to the mitigation presented at the first penalty phase. Because the penalty phase was a bench penalty phase, it matters not whether the mitigation was presented to the judge at the earlier bench penalty phase or later to the same judge at the *Spencer* hearing. The trial court did not abuse its discretion in not conducting a second penalty

phase to present mitigation but instead allowing the presentation of mitigation at the *Spencer* hearing.

There certainly was no abuse of discretion in warning the defense that further continuance of the *Spencer* hearing would not be permitted. Trial courts “necessarily require a great deal of latitude in scheduling trials.” *Morris v. Slappy*, 461 U.S. 1, 11 (1983). The burden of “assembling the witnesses, lawyers, and jurors at the same place at the same time,” means continuances should not be granted “except for compelling reasons.” *Slappy*, 461 U.S. at 11. A trial court is not required to continue a *Spencer* hearing for a defendant to collect additional mitigation that he was not ready to present during the upcoming *Spencer* hearing due to his own decision to waive the presentation of mitigation and that he was given months to develop.

In *Wells v. State*, 364 So.3d 1005 (Fla. 2023), *cert. denied*, *Wells v. Florida*, 2023 WL 7287192 (U.S. Nov. 6, 2023), this Court held that the trial court did not abuse its discretion in denying an open-ended motion to continue the penalty phase. *Id.* at 1012-13. Wells at first chose to represent himself but then two months later he changed his

mind and requested the appointment of counsel. *Id.* at 1012. Three months after that, he changed course again and wanted to proceed pro se and also stated that he wanted to waive the presentation of mitigation. Wells entered a guilty plea appearing pro se with standby counsel. Wells also proceeded pro se at the start of the penalty phase but on the second day of the penalty phase, while the State was presenting its case in aggravation, he asked that standby counsel be reappointed to represent him. The trial court granted the request to appoint standby counsel as counsel and granted a continuance of the penalty phase for reappointed counsel to prepare for the penalty phase. *Id.* at 1012. But eight months later, penalty phase counsel moved to continue the upcoming penalty phase which the trial court denied. *Id.* at 1012. This Court held “that the trial court did not abuse its discretion in declining to grant an undefined additional period of time to prepare.” *Id.* at 1013. This Court explained that counsel had more than eight months after being reappointed to investigate mitigation and prepare for the penalty phase as well as a head start in investigating mitigation from Wells’ prior capital case. This Court

observed that counsel, in fact, presented a significant amount of mitigating evidence at the penalty phase which resulted in the trial court finding eight nonstatutory mitigating circumstances.

As in *Wells*, a trial court is certainly allowed to inform the defense that further continuances of the *Spencer* hearing to develop additional mitigation will not be granted. Furthermore, the defense had a year between the bench penalty phase and the *Spencer* hearing and nearly six months between the order granting the motion to withdraw the waiver of mitigation and the *Spencer* hearing to develop any additional mitigation. The trial court did not abuse its discretion in warning the defense that a third continuance of *Spencer* hearing would not be granted.

Subsequent changes and valid waivers

Subsequent changes in the law or changes in the facts do not render a prior voluntary waiver invalid. *Brady v. United States*, 397 U.S. 742, 757 (1970) (holding a voluntary plea “intelligently made in the light of the then applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a

faulty premise”); *United States v. Cardenas*, 230 Fed. Appx. 933, 935 (11th Cir. 2007) (stating a guilty plea is not invalidated by a later change in the law citing *Brady* and *United States v. Sanchez*, 269 F.3d 1250, 1283-85 (11th Cir. 2001) (en banc)). That principle applies with greater force to a mere change in the defendant’s mind regarding a prior waiver of mitigation.

Even if subsequent events could render a prior waiver invalid, the death of the victim’s mother does not render the prior waiver of mitigation involuntary. Nor does it amount to good cause to withdraw the prior waiver or justify holding another penalty phase. At the waiver colloquy, Caylor stated his reason for wanting to waive mitigation was that he did not want to put his own family through having to testify. (Res. DAR at 375-78). While Caylor had stated that his promise to the victim’s mother was his reason for waiving a jury and mitigation during the colloquy, at the very start of the bench penalty phase, right after the trial court reaffirmed Caylor’s waivers of a jury and mitigation, the prosecutor informed the trial court and the defendant that the victim’s mother, Rhonda McNalin, had died. (Res.

DAR 463). If Caylor's sole motivation for waiving a jury and the presentation of mitigation was a concern to keep his promise to the victim's mother, this information about the death of the victim's mother should have provoked him to immediately speak up and withdraw his prior waiver at the start of the bench penalty phase. But Caylor remained silent. And later in the bench penalty phase, the victim's grandfather, in his victim impact letter, which was read out loud, stated that the victim's mother, Rhonda McNalin, was now dead. *Id.* at 475. And, again, Caylor remained silent. Two different sources informed Caylor that the victim's mother had died. Caylor knew the victim's mother was dead months before he filed the motion to withdraw his prior waiver of mitigation.

Contrary to opposing counsel's argument, a waiver of the right to present mitigation does not implicate any Eighth Amendment concerns. IB at 31. While a capital defendant certainly has an Eighth Amendment right to present mitigation under *Lockett v. Ohio*, 438 U.S. 586 (1978), that right, like most other constitutional rights, is waivable. *Peretz v. United States*, 501 U.S. 923, 936-37 (1991)

(observing that even the most basic rights of criminal defendants may be voluntarily waived citing cases); *Tucker v. State*, 559 So.2d 218, 219 (Fla. 1990) (observing that “even fundamental constitutional rights can be waived when a defendant so chooses” citing *Boykin v. Alabama*, 395 U.S. 238 (1969)).¹⁴ The Eighth Amendment does not prohibit the waiver of mitigation. Nor does the Eighth Amendment mandate that a continuance in a capital case be granted to collect additional mitigation, much less a redo.

The trial court allowed Caylor to present a mitigation case at the rescheduled *Spencer* hearing. The trial court did not abuse its discretion in its handling of the motion to withdraw the waiver of mitigation.

Harmless error

The error, if any, for not continuing the *Spencer* hearing a third time to allow Caylor to develop and present the additional unidentified

¹⁴ The right to present mitigation is not a limitless right as the United States Supreme Court recently explained in *United States v. Tsarnaev*, 595 U.S. 302, 318 (2022). Penalty phases are “not evidentiary free-for-alls” in the words of the High Court. *Id.* at 317.

mitigation at a continued *Spencer* hearing was harmless. The trial court considered and found extensive mitigation in its sentencing order. The sentencing order contains over three single-spaced pages of mitigation. (Res. DAR 1303-06). The trial court found one statutory mitigating circumstance: (1) extreme mental or emotional disturbance, based on Caylor's parents' testimony including possible sexual abuse and Dr. Toomer's testimony at the *Spencer* hearing, including a possible diagnosis of PTSD, which it gave "medium" weight *Id.* at 1302-04. The trial court also found seven non-statutory mitigating circumstances: (1) learning difficulties in school, which it gave little weight *Id.* at 1304; (2) dysfunctional family, which it gave "medium" weight *Id.* at 1304; (3) good employee and good with animals, which it gave little weight *Id.* at 1305; (4) good father, when not on drugs, which it gave little weight *Id.* at 1305; (5) remorse based on the defendant's taking responsibility, which it gave little weight *Id.* at 1305; (6) drug use, which it gave little weight *Id.* at 1305-06; and (7) good prison conduct, which it gave little weight. *Id.* at 1306. The

error in failing to continue the *Spencer* hearing yet again, if any, was harmless.

ISSUE III

Whether the Trial Court Committed Fundamental Error
When it Did Not Instruct the Jury to Determine the
Aggravating Factors Were Sufficient and the Aggravating
Factors Outweigh the Mitigating Circumstances at the
Beyond a Reasonable Doubt Standard of Proof? (Restated)

Caylor asserts that the judge must determine that the aggravators are sufficient and perform the weighing of the aggravation against the mitigation at the beyond a reasonable doubt standard of proof. IB at 33. But, as the United States Supreme Court has explained, it is doubtful any standard of proof applies to the determination of mitigation and to the other determinations that are part of the “selection phase” of a capital sentencing proceeding. The only finding that an element of capital murder which must be found at a particular standard of proof is the finding of one aggravating factor under both the United States Supreme Court precedent and under this Court’s precedent. Furthermore, this Court has repeatedly rejected this same

claim of fundamental error based on the same arguments presented in this appeal in numerous other capital cases. Opposing counsel presents no novel arguments that would undermine this Court's precedent. The trial court properly did not invoke any standard of proof regarding either sufficiency or weighing.

The trial court's ruling

The trial court found three aggravating factors. (Res. DAR 1300-02). The trial court found one statutory mitigating circumstance and seven non-statutory mitigating circumstances. *Id.* at 1302-06. The trial court concluded that "the aggravating factors in this case far outweigh the mitigating circumstances." *Id.* at 1306.

But there is no ruling from the trial court regarding the issue of whether the jury or the judge must determine the aggravators are sufficient or must weigh the aggravation against the mitigation at any particular standard of proof.

Preservation/fundamental error

This issue is not preserved. A motion raising this issue was never filed in the trial court and no ruling from the trial court was ever obtained. § 924.051(1)(b), Fla. Stat. (2022) (defining preserved as meaning the “issue, legal argument, or objection to evidence was timely raised before, and ruled on by, the trial court, and that the issue, legal argument, or objection to evidence was sufficiently precise that it fairly apprised the trial court of the relief sought and the grounds therefor”); § 924.051(3), Fla. Stat. (2022) (stating an “appeal may not be taken from a judgment or order of a trial court unless a prejudicial error is alleged and is properly preserved or, if not properly preserved, would constitute fundamental error” and a “judgment or sentence may be reversed on appeal only when an appellate court determines after a review of the complete record that prejudicial error occurred and was properly preserved in the trial court or, if not properly preserved, would constitute fundamental error.”). This Court’s “precedent is clear that to be preserved, the issue or legal argument must be raised and ruled on by the trial court.” *Ritchie v.*

State, 344 So.3d 369, 378 (Fla. 2022) (quoting *Rhodes v. State*, 986 So.2d 501, 513 (Fla. 2008)).

The issue, however, is being raised as one of fundamental error. This Court has explained that many unpreserved errors can be reviewed for fundamental error. *Smith v. State*, 320 So.3d 20, 27 (Fla. 2021) (“If an issue is not preserved, it is reviewed only for fundamental error”); *Hayward v. State*, 24 So.3d 17, 42 (Fla. 2009) (explaining that unpreserved errors are reviewed for fundamental error); *Baptiste v. State*, 324 So.3d 453, 455 (Fla. 2021) (holding invited error cannot be reviewed as fundamental error). But as Justice Scalia has observed, a federal appellate court’s authority to remedy the unpreserved error is strictly circumscribed and there is a “good reason” for such limitations which is that “errors are a constant in the trial process” but those errors “do not much matter” and a “reflexive inclination by appellate courts to reverse because of unpreserved error would be fatal” to the criminal justice system. *Puckett v. United States*, 556 U.S. 129, 134 (2009).

Standard of review

The standard of review for a claim of fundamental error is de novo. *State v. Smith*, 241 So.3d 53, 55 (Fla. 2018) (stating whether an error is fundamental is a question of law reviewed de novo). Claims of fundamental error are necessarily reviewed de novo because there is no trial court ruling for the appellate court to defer to as required by the abuse of discretion standard of review or the competent substantial evidence standard of review. De novo review naturally flows from the lack of a trial court ruling. But an appellate court must, in addition to the other concerns raised by the concept of fundamental error, be wary of the fact that a defendant has often obtained a more favorable standard of review by not properly raising the issue in the trial court.

Merits

The only factual finding that must be proven at the beyond a reasonable standard of proof is the finding on one aggravating factor

under both the United States Supreme Court precedent and this Court's precedent.

The United States Supreme Court's view

Opposing counsel asserts that any determination in a capital case must be made at the beyond a reasonable doubt standard of proof. IB at 34. But that is not the United States Supreme Court's view of standards of proof regarding mitigation and weighing. As the United States Supreme Court has explained, it is doubtful any standard of proof applies to the determination of mitigation and to the other determination that are part of the "selection phase" of a capital sentencing proceeding. *Kansas v. Carr*, 577 U.S. 108, 119 (2016).

Sufficiency and weighing are selection factors, not eligibility factors and therefore may constitutionally be found by the judge alone under the reasoning of the United States Supreme Court in *McKinney v. Arizona*, 140 S.Ct. 702 (2020). The *McKinney* Court explained that it is the finding of one aggravating circumstance that makes a defendant convicted of murder eligible for a death sentence. *McKinney*, 140 S.Ct. at 705. The High Court held that their prior decision in *Hurst* did not

require jury weighing of the aggravation and mitigation. *McKinney*, 140 S.Ct. at 707 (explaining that a jury “is not constitutionally required to weigh the aggravating and mitigating circumstances.”). The Court noted that “*Ring* and *Hurst* did not require jury weighing of aggravating and mitigating circumstances.” *Id.* at 708. The High Court directly stated that “States that leave the ultimate life-or-death decision to the judge may continue to do so.” *Id.* at 708.

Indeed, the Nebraska Supreme Court has affirmed its death penalty statute, which provides that a death sentence is imposed by a three-judge panel, based on *McKinney*. In *State v. Garcia*, 994 N.W.2d 610, 687-88 (Neb. 2023), the Nebraska Supreme Court rejected a *Hurst* challenge to Nebraska’s death penalty statute. The Nebraska Supreme Court held that “leaving to the three-judge panel the ultimate life-or-death decision upon making the selection decisions of whether the aggravating circumstances justify the death penalty and whether sufficient mitigating circumstances exist that approach or exceed the weight given to the aggravating circumstances, Nebraska’s sentencing scheme does not violate the Sixth Amendment

right to a jury trial or article I, § 6, of the Nebraska Constitution. see also *State v. Trail*, 981 N.W.2d 269, 308 (Neb. 2022) (same quoting *McKinney*).

Nor is it the High Court's view that any and all determinations that influence the final sentence must be made by the jury. Judges alone may make factual determinations that increase a sentence provided those findings are within the discretionary range in a non-capital case or are selection factors in a capital case. The United States Supreme Court has taken "care" to explain its *Apprendi* jurisprudence "does not mean that any fact that influences judicial discretion" regarding sentencing "must be found by a jury." *Alleyne v. United States*, 570 U.S. 99, 116 (2013); *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Rather, the *Alleyne* Court noted that "broad sentencing discretion, informed by judicial factfinding, does not violate the Sixth Amendment." *Id.* at 116. Weighing does not "aggravate," in the words of the *Alleyne* Court, the sentence in a capital case because the permissible sentence has already been increased to death based on the finding of an aggravator which occurs before the weighing is even

performed. While opposing counsel relies on *Alleyne*, she does not account for these observations made by the *Alleyne* majority. IB. at 36.

Opposing counsel asserts that sufficiency and weighing are “functional elements” that are beyond the “defined elements required for conviction” but nonetheless are somehow akin to the elements for purposes of the standard of proof under *In re Winship*, 397 U.S. 358 (1970). IB at 35. That argument is not only internally inconsistent but also contradicts the statutory text of Florida’s death penalty statute. § 921.141(2)(a), Fla. Stat. (2022) (providing: “. . . the jury shall deliberate and determine if the state has proven, beyond a reasonable doubt, the existence of at least one aggravating factor”. . .); § 921.141(2)(b)(1), Fla. Stat. (2022) (providing: “. . . If the jury “does not unanimously find at least one aggravating factor, the defendant is ineligible for a sentence of death”); § 921.141(2)(b)(2), Fla. Stat. (2022) (providing: “. . . If the jury unanimously finds at least one aggravating factor, the defendant is eligible for a sentence of death”). The statute provides for a standard of proof for only one jury finding which is the

aggravating factors. The statute then states in two different ways that the defendant is eligible for a death sentence upon the jury's finding of one aggravating factor. While opposing counsel considers sufficiency and weighing to be "functional" elements of capital murder, the Florida legislature does not.

This Court's precedent rejecting this claim

There is extensive precedent from this Court rejecting this exact same claim. This Court has explained that the finding of one aggravating factor is sufficient as a matter of law. In *State v. Poole*, 297 So.3d 487 (Fla. 2020), this Court explained that "sufficient aggravating circumstances" for purposes of § 921.141(3)(a), means that "one or more" aggravating factors were found. *Id.* at 502 (citing *Miller v. State*, 42 So.3d 204, 219 (Fla. 2010), and *Zommer v. State*, 31 So.3d 733, 754 (Fla. 2010)). This Court, in *Poole*, rejected the argument that "sufficient" implies some sort of "qualitative assessment" of the aggravators as "opposed simply to finding that an aggravator exists." *Id.* at 502 (emphasis added). There is no standard of proof associated with such a determination; it is a simple question

of whether a single aggravator was found by the jury or by the judge, if a jury is waived, as in this case. Here, the trial court found three aggravating factors. (Res. DAR 1300-1302). The trial court was only required to find one aggravator for sufficiency to be established, not to make a determination or “qualitative assessment” of the aggravators for purposes of Florida’s death penalty statute.¹⁵

Moreover, this Court has repeatedly rejected this same claim of fundamental error in dozens of capital cases. *Rogers v. State*, 285 So.3d 872, 885-86 (Fla. 2019), *cert. denied*, *Rogers v. Florida*, 141

¹⁵ Constitutionally, neither the jury or the judge was required to find any aggravator in this particular case based on the exception for prior convictions established in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). The trial court found as one of the three aggravating factors that Caylor was on felony probation for a prior Georgia conviction for felony child molestation. (Res. DAR 1300-1301). Caylor, due to his prior conviction for molesting another young girl, was eligible constitutionally for the death penalty upon conviction for first-degree murder before any penalty phase started. Any of the criticism of the *Almendarez-Torres* exception would not apply to Caylor because he entered a guilty plea to the prior conviction. *Sessions v. Dimaya*, 138 S.Ct. 1204, 1253 (2018) (Thomas, J., dissenting) (characterizing the *Almendarez-Torres* exception as an “aberration” that should be “reconsidered.”). Those criticisms do not apply when the prior conviction is the result of a guilty plea. Caylor waived all his jury trial rights by entering a plea to the prior offense and may not resurrect those rights by later committing a murder. There is no such concept as unwaiver-by-subsequent-criminal-conduct.

S.Ct. 284 (2020); *Newberry v. State*, 288 So.3d 1040, 1047 (Fla. 2019) (holding sufficiency and weighing determinations “are not subject to the beyond a reasonable doubt standard of proof”), *cert. denied*, *Newberry v. Florida*, 141 S.Ct. 625 (2020); *Bright v. State*, 299 So.3d 985, 998 (Fla. 2020), *cert. denied*, *Bright v. Florida*, 141 S.Ct. 1697 (2021); *Santiago-Gonzalez v. State*, 301 So.3d 157, 177 (Fla. 2020), *cert. denied*, *Santiago-Gonzalez v. Florida*, 141 S.Ct. 2828 (2021); *Lawrence v. State*, 308 So.3d 544, 552 n.8 (Fla. 2020), *cert. denied*, *Lawrence v. Florida*, 142 S.Ct. 188 (2021); *Craven v. State*, 310 So.3d 891, 902 (Fla. 2020), *cert. denied*, *Craven v. Florida*, 142 S.Ct. 199 (2021); *Craft v. State*, 312 So.3d 45, 57 (Fla. 2020), *cert. denied*, *Craft v. Florida*, 142 S.Ct. 490 (2021); *Doty v. State*, 313 So.3d 573, 577 (Fla. 2020), *cert. denied*, *Doty v. Florida*, 142 S.Ct. 449 (2021); *Woodbury v. State*, 320 So.3d 631, 656 (Fla. 2021), *cert. denied*, *Woodbury v. Florida*, 142 S.Ct. 1135 (2022); *Deviney v. State*, 322 So.3d 563, 572-73 (Fla. 2021), *cert. denied*, *Deviney v. Florida*, 142 S.Ct. 908 (2022); *Allen v. State*, 322 So.3d 589, 603 (Fla. 2021), *cert. denied*, *Allen v. Florida*, 142 S.Ct. 904 (2022); *Davidson v. State*, 323

So.3d 1241, 1247-48 (Fla. 2021) (“Since *Rogers*, we have consistently held the reasonable-doubt standard inapplicable to either the sufficiency or weighing determination”), *cert. denied*, *Davidson v. Florida*, 142 S.Ct. 1152 (2022); *McKenzie v. State*, 333 So.3d 1098, 1105 (Fla. 2022), *cert. denied*, *McKenzie v. Florida*, 143 S.Ct. 230 (2022); *Bell v. State*, 336 So.3d 211, 217 (Fla. 2022), *cert. denied*, *Bell v. Florida*, 143 S.Ct. 184 (2022); *Joseph v. State*, 336 So.3d 218, 227, n.5 (Fla. 2022), *cert. denied*, *Joseph v. Florida*, 143 S.Ct. 183 (2022); *Fletcher v. State*, 343 So.3d 55, 59 (Fla. 2022) (noting this Court has “repeatedly rejected” the claim that the sufficiency and weighing determinations are subject to the beyond a reasonable doubt standard of proof); *Mosley v. State*, 349 So.3d 861, 870 (Fla. 2022) (stating, yet again, that the “sufficiency and weight of aggravating factors in a capital case are not elements that must be determined by the jury beyond a reasonable doubt”), *cert. denied*, *Mosley v. Florida*, 143 S.Ct. 1028 (2023); *Orme v. State*, 361 So.3d 842, 845-46 (Fla. 2023) (noting the death penalty statute does not impose any “beyond a reasonable doubt” requirement on the sufficiency and weighing determinations;

rather, the only statutory requirement is that the aggravating factors are subject to that standard of proof, citing *Lawrence*, 308 So.3d at 552 n.8, and also noting this Court’s recent caselaw “consistently holds that the sufficiency and weighing determinations are not subject to the beyond a reasonable doubt standard of proof.”); *Wells v. State*, 364 So.3d 1005, 1014 (Fla. 2023) (explaining the claim that the trial court committed fundamental error in failing to expressly find beyond a reasonable doubt that sufficient aggravating circumstances warranted the death penalty and that such circumstances outweighed the mitigating circumstances depends on the premise that the sufficiency and weighing are elements of the crime of capital murder and, as a result, require proof beyond a reasonable doubt but noting that this Court has “rejected that premise time and again, consistently holding instead that neither the sufficiency nor weighing determination is subject to the reasonable-doubt standard.”), *cert. denied*, *Wells v. Florida*, 2023 WL 7287192 (U.S. Nov. 6, 2023) (No. 23-5565).

This Court has also rejected this argument in capital cases involving a waiver of the penalty phase jury. *Craft v. State*, 312 So.3d 45, 576 (Fla. 2020), *cert. denied*, *Craft v. Florida*, 142 S.Ct. 490 (2021); *Orme*, 361 So.3d at 845. As opposing counsel acknowledges, her office has repeatedly raised this same claim of fundamental error supported by these exact same arguments before this Court in numerous other capital cases, including in *Craft*, to no avail. IB at 33, n.1.

The trial court properly did not determine sufficiency of the aggravating factors or perform the weighing at any standard of proof, much less at the beyond-a-reasonable-doubt standard of proof required by *In re Winship*.¹⁶

Accordingly, this Court should affirm the death sentence following the resentencing.

¹⁶ Fundamental error is not subject to harmless error analysis. *Figueroa-Sanabria v. State*, 366 So.3d 1035, 1056, n.22 (Fla. 2023) (citing *Reed v. State*, 837 So.2d 366, 369-70 (Fla. 2002)).

CONCLUSION

The State respectfully requests that this Honorable Court affirm the sentence.

Respectfully submitted,

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/s/ Charmaine Millsaps

Charmaine M. Millsaps
Attorney for the State of Florida

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF has been furnished via the e-portal to **BARBARA J. BUSHARIS**, Assistant Public Defender of the Second Judicial Circuit, 301 S. Monroe St., Suite 401, Tallahassee, FL 32301; phone: (850) 606-8500; email: barbara.busharis@flpd2.com this 20th day of November, 2023.

/s/ Charmaine Millsaps

Charmaine M. Millsaps
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