IN THE SUPREME COURT OF FLORIDA

CASE NO. SC15-563
L.T. CASE NO. 2D13-2117

JONATHAN GODWIN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent. /

PETITIONER'S INITIAL BRIEF ON THE MERITS

On Discretionary Review from a
Decision of the District Court of Appeal, Second District

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INTRODUCTION

This petition seeks review of the Second District Court of Appeal's decision affirming the lower court's denial of Defendant Jonathan Godwin's motion for postconviction relief. *Godwin v. State*, 160 So. 3d 497 (Fla. 2d DCA 2015). Godwin's motion alleged, *inter alia*, that appointed counsel provided ineffective assistance by failing to object to imposition of a life sentence for armed robbery with a firearm and a concurrent 15-year sentence for armed false imprisonment, based at least in part on improper sentencing factors.

Specifically, Godwin alleged that the sentencing court violated his constitutional right to a trial by jury by improperly considering his continued assertions of innocence, failure to acknowledge guilt, and failure to show remorse in imposing the maximum sentence for each offense of which he was convicted. Godwin further contended that the sentencing court's consideration of these factors prejudiced him because it resulted in imposition of the maximum sentence for each offense instead of the 10-year minimum mandatory sentence the court had indicated it would impose moments before trial if Godwin admitted guilt.

A different judge ("the postconviction court") concluded based entirely on review of the sentencing hearing transcript that the sentencing court did not consider improper factors because it had already rejected the claim that the sentences were vindictive based entirely on Godwin's rejection of a plea offer; and

that the reference to Godwin's failure to show "one ounce of remorse" was not used against Godwin, but was used to reject unrelated arguments for mitigation. Accordingly, it further concluded that Godwin's appointed counsel had not been ineffective.

The Second District affirmed, noting that continued assertions of innocence, failure to acknowledge guilt, and failure to show remorse may not be considered in arriving at the sentence imposed, but agreeing with the postconviction court that, in context, these factors were considered only to reject unrelated claims for mitigation.

This Court then granted review of the Second District's decision pursuant to article V, section 3(b)(3), of the Florida Constitution. At issue is whether a court may subject a defendant to a harsher sentence, whether by aggravating the sentence or rejecting unrelated claims for mitigation, for refusing to admit guilt and exercising his constitutional right to a trial.

STATEMENT OF THE CASE AND FACTS

A. The Sentencing Court Attempts To Initiate Plea Discussions And Dissuade Godwin From Proceeding *Pro Se*, And Hears Evidence About The Nature And Severity Of The Alleged Crimes At A Motion To Suppress Hearing

Jonathan Godwin, then age 28, was originally charged with armed burglary of a structure in violation of section 810.02(1), Florida Statutes; kidnapping (with possession of firearm) in violation of section 787.01(1)(a), Florida Statutes;

robbery of less than $300 with a firearm in violation of sections 812.131(1), (2)(a), and 775.087(2), Florida Statutes; robbery of more than $300, but less than $20,000, with a firearm, in violation of sections 812.131(1), (2)(a), and 775.087(2), Florida Statutes; and attempted robbery (with a firearm, less than $300) in violation of sections 812.13(1), (2)(a), and 775.087(2), and 777.04, Florida Statutes. (R.1:134; R.2:279-82).[1]

Before trial, Godwin, proceeding *pro se*, filed a motion to suppress evidence supposedly obtained as a result of an illegal stop that took place near a potential robbery in progress at an establishment called Pleasure Time. (R.3:391). During the hearing, the sentencing court asked Godwin whether he was willing to enter a plea, and asked the State if it had made an offer. (R.3:394). Godwin maintained his innocence. (R.3:394). The court then tried to dissuade Godwin from proceeding *pro se*, stating, "You think you know the law . . . . You don't. . . . I'm not going to allow you to make a mockery of the system. . . . And if we get during a trial and you create a problem, there's other things that are going to happen." (R.3:395-96).

The court next heard testimony regarding the nature of the crimes. Officer Gary Felice testified that he spoke with two witnesses, one of whom rushed to his patrol vehicle while still topless, but unharmed; and that the second witness, Ms.

[1] References to the Record will be designated as: (R.[vol.]:[page number]).

Katrina Winkler, was "[e]xcited, panicked, upset," complained of being pistol-whipped with a .357 Smith and Wesson Magnum, and had redness and abrasions on her face. (R.3:404-05, 486, 507, 512). Officer Mark Vazquez stated that Ms. Winkler received on-site medical treatment for her injuries (R.3:468); and that another victim was "distraught, crying, and a little upset" and "afraid for her life." (R.3:504-505).

Godwin then presented argument. The court expressed frustration with Godwin, stating that "I guess you must know more law," "[t]hen you need to get a lawyer in here to advise you," "[y]ou just need to learn to hear what's being said," and, warning Godwin about proceeding *pro se*, "You're looking at a life sentence." (R.3:491, 493, 496). Ultimately, the court appointed standby counsel.

B. Moments Before Trial Commences, Godwin Rejects A Plea Offer Despite Indication From The Court That It Would Impose Concurrent 10-Year Sentences If Godwin Admitted Guilt

Godwin was offered a plea deal by the State moments before voir dire began. (R.3:411, 413). The offer required Godwin to abandon his right to trial on the five then-pending charges. In return, the State would recommend concurrent 10-year mandatory minimum sentences on all counts, with no probation to follow. (R.2:268; 3:414). The following discussion ensued:

> [PROSECUTOR]: I don't think he'll take anything, but I'll make an offer for the record. At least it's on there before we start trial. He's charged now, as I indicated, things are consecutive life

sentences possibly . . . . [B]ut I will offer him the 10-year minimum mandatory.

THE COURT: Period?

[PROSECUTOR]: Period for all counts to run concurrently, no probation to follow, just 10 years.

THE COURT: *And I would impose that if you were to accept it today, just so you'll know.*

MR. GODWIN: No, sir.

THE COURT: You reject that offer? You understand what that means?

MR. GODWIN: Yes, sir.

THE COURT: It means you're 28. *You would receive credit for all the time served.* Do you want to talk to Mr. Sinardi for a minute?

MR. GODWIN: The State cannot offer me credit time served right now.

THE COURT: *I'll give it to you.*

MR. GODWIN: I'm not taking the offer.

THE COURT: Do you want to talk to Mr. Sinardi?

MR. GODWIN: I don't need to.

THE COURT: That's fine. I'm just offering you the opportunity.

MR. GODWIN: Thank you. I thank you for offering it.

THE COURT: *You realize if you're convicted, it probably would not be a 10-year minimum mandatory?*

MR. GODWIN: It's clear.

THE COURT: That's a possibility. I don't know if it's probable, but it's a possibility. . . .

(R.3:413-15) (emphases added). Despite the court's assurance that it would

impose the minimum mandatory sentences with no probation to follow if Godwin admitted guilt, Godwin exercised his right to a jury trial. (R.3:415).

C. The Jury Returns A Guilty Verdict And The Court Considers Godwin's Rejection Of A Plea Offer, And Failure To Show Remorse, In Imposing Sentences

On December 20, 2006, after a two-day trial in which Godwin represented himself with the assistance of standby counsel, Godwin was found guilty of armed false imprisonment and armed robbery with a firearm. (R.2:268, 285). The charge of armed burglary of a structure was nolle prossed and Godwin was acquitted of the remaining two charges. (R.2:285).

The sentencing court immediately imposed a life sentence on Godwin without conducting a *Faretta* hearing to determine whether Godwin wished to be represented by counsel at sentencing. (R.2:262-63; R.3:436). Recognizing its error, the court vacated the sentence and appointed Godwin's standby counsel, Nick Sinardi, counsel for sentencing. (R.2:160, 206, 263; 3:446).

At the sentencing hearing, held on January 4, 2007, appointed counsel acknowledged that the court had no discretion to impose a sentence below the statutory minimum of 10 years, but told the court that the sentencing guidelines scoresheet suggested a minimum prison term of 108 months (or nine years). (R.3:446-47). The court declined to consider the scoresheet. (R.3:446).

Appointed counsel then argued that the minimum mandatory sentence was a

reasonable one, reminding the court that the State previously offered concurrent 10-year minimum mandatory sentences, with no probation, on all counts. (R.3:447). He also argued that Godwin "should not be penalized for electing to proceed to trial" or "for electing to proceed to trial *pro se*." (R.3:447).

Appointed counsel then stated that "[Godwin] does have a fiancée . . . and . . . a minor child by her," and then argued that Godwin was bright and "would have learned his lesson" if the court imposed 10-year sentences. (R.3:448, 449). Godwin did not speak other than to quote Eleanor Roosevelt: "No one can make you feel inferior without your consent." (R.3:448-49).

The State sought a life sentence, referring to charges for which Godwin was not convicted and arguing that "the only reason there's not more counts of the robbery . . . is because the State elected not to put on one of those witnesses. . . ." (R.3:449). It then stated that "Godwin elected to put [that witness] on the stand," and it was a traumatic experience for her. (R.3:449). It also discussed the nature of the crimes, and suggested that Godwin could not be rehabilitated because of a prior criminal conviction. (R.3:450).

The court imposed the maximum sentence for each offense, life in prison and a term of 15 years, to run concurrently, explaining its decision as follows:

> THE COURT: I've had an opportunity to hear the argument of counsel, hear the argument of Mr. Godwin. I've heard the testimony of the witnesses from the witness stand. I had no idea what this case was about until I heard the testimony. *I understand why the State*

> *offered the 10 years. It was rejected by you.* After having heard the argument, excuse me, having heard the testimony of the witnesses, seeing the absolute fear in the face of one witness when she broke down in tears during cross-examination or direct examination, I understand exactly why they elected not to call that lady.
>
> I don't have a doubt in my mind that you committed that robbery, sir. Not one doubt. I find those witnesses to be credible. My fear is, sir, if you're let out amongst the community again, the citizens of the State of Florida and citizens of the United States of America, you would be a – put them at risk. *I don't think you've shown one ounce of remorse, not one ounce. I don't think you even acknowledge that you committed this crime. To this day, you don't acknowledge that.* I don't have a doubt that you committed it.
>
> You beat that woman about the head and about the face with a firearm. It could have caused permanent damage to her. It did not.
>
> It is the judgment, sentence and order of the Court, count of robbery, life Florida State prison, the rest of your natural life without parole.
>
> It is a 10-year minimum mandatory as to the sentence of false imprisonment with a firearm. 15 years concurrent.

(R.3:451-52) (emphases added).[2] Godwin appealed, and the Second District, in a *per curiam* decision, affirmed. *Godwin v. State*, 996 So. 2d 221 (Fla. 2d DCA 2008).

[2] All three victims of the robbery testified against codefendant Wesley Taylor at his bond hearing. Keena White testified that Taylor was "the one that hit me with the pistol in the back of my head and I would feel completely uncomfortable if you gave him a bond." (R.1:60). Sabrina Hearns also testified that she was "assaulted by [Taylor]." (R.1:60). Godwin alleged in written arguments after his evidentiary hearing on his postconviction motion that his codefendant ultimately accepted the same plea deal that was offered to Godwin. (R.1:154).

D. The Postconviction Court Denies Godwin's Motion For Relief Based On Its Review Of The Sentencing Transcript

Godwin subsequently filed a motion for postconviction relief pursuant to Florida Rule of Criminal Procedure 3.850(a)(1) and (6), asserting several grounds. (R.1:10-40). Pertinent to this petition, Godwin claimed that appointed counsel was ineffective for failing to object to the sentencing court's consideration of his rejection of a plea offer, failure to acknowledge guilt by maintaining his innocence, and failure to show remorse. (R.1:36). The postconviction court granted an evidentiary hearing on five grounds, including Godwin's claims the trial court violated his right to due process by imposing a vindictive sentence and that appointed counsel was ineffective on that basis, and the sentencing court considered constitutionally improper factors. (R.1:142-44; 2:160). At the hearing, Godwin testified (and the sentencing transcript reflects) that appointed counsel did not object to the sentence on any basis. (R.2:207, 266).

The postconviction court rejected Godwin's claim that the sentencing court considered his refusal to accept a plea in imposing sentence because it had already rejected Godwin's claim that the sentence was vindictive, which requires a court to consider, *inter alia*, whether there were any facts on the record that could explain the reason for the harsher sentence "other than that the defendant exercised his or her right to a trial or hearing." *See Wilson v. State*, 845 So. 2d 142, 156 (Fla. 2003); (R.2:177, 182). Thus, the postconviction court found that the "record

clearly demonstrates that the trial court did not consider [Godwin's] refusal to accept the plea offer when imposing its sentence." (R.2:182).

Turning to Godwin's claim that the sentencing court improperly considered Godwin's failure to show remorse, the postconviction court acknowledged that a trial court cannot impose a harsher sentence because a defendant exercises the right to remain silent, protests his innocence, or fails to show remorse. It concluded from its review of the sentencing transcript, however, that the sentencing court did not use Godwin's lack of remorse against him, but used his lack of remorse only to reject appointed counsel's arguments for mitigation. (R.2:183). The postconviction court's analysis did not mention the sentencing court's statement that Godwin did not "even acknowledge that [he] committed this crime." Thus, the postconviction court further concluded that appointed counsel did not provide ineffective assistance. Godwin then filed an appeal.

E. The Second District Affirms Denial Of Postconviction Relief, And This Court Accepts Jurisdiction

The Second District initially affirmed without opinion. *Godwin v. State*, No. 2D13–2117, 2014 WL 7004868 (Fla. 2d DCA Dec. 12, 2014). Upon consideration of Godwin's motion for rehearing, clarification, and/or certification (which it treated as a motion for written opinion), the court again affirmed the denial of each of Godwin's claims, but wrote a brief opinion explaining its reasoning. *Godwin v. State*, 160 So. 3d 497 (Fla. 2d DCA 2015).

It recognized "that a defendant's assertion of innocence and lack of remorse may not be factors that contribute to a defendant's sentence," but nevertheless affirmed because, "in context, the trial court's comments at sentencing were made in connection with its rejection of the argument for mitigation." *Id.* at 498. Godwin timely filed a notice to invoke this Court's discretionary jurisdiction.

Godwin filed a *pro se* jurisdictional brief in this Court, contending that the Second District's holding is in express and direct conflict with decisions of the First, Third, Fourth, and Fifth District Courts of Appeal. He also claimed that the Second District misapplied *Shelton v. State*, 59 So. 3d 248, 250 (Fla. 4th DCA 2011), where the court held that there was no evidence the trial court used the defendant's lack of remorse against him because the trial court had expressly stated that it was basing its sentence on the defendant's record and conduct which had resulted in his conviction.

This Court granted review.

SUMMARY OF ARGUMENT

A defendant's exercise of the bedrock constitutional right to a trial by an impartial jury cannot contribute to the imposition of a harsher sentence in any context. Allowing courts to consider a defendant's protestation of innocence, failure to acknowledge responsibility, or failure to show remorse in imposing sentence would place defendants in an untenable position -- invoke fundamental

rights and receive an increased sentence, or waive such rights for a less severe sentence. Such a judicially-created dilemma deters the exercise of constitutional rights, and is contrary to Florida law.

Moreover, even if trial courts may properly consider those factors to reject mitigation, the sentencing court did not so limit its consideration. Here, after indicating before trial that it would impose consecutive 10-year minimum mandatory sentences if Godwin admitted guilt, the sentencing court imposed maximum sentences, emphasizing that Godwin had rejected a plea offer, and failed to acknowledge responsibility or show "one ounce of remorse."

Despite the sentencing court's emphasis on these improper factors, sentencing counsel failed to object to the imposition of maximum sentences. Accordingly, sentencing counsel provided ineffective assistance, and this Court should quash the Second District's decision and remand for resentencing before a different judge.

ARGUMENT

I. GODWIN'S COUNSEL PROVIDED INEFFECTIVE ASSISTANCE BY FAILING TO OBJECT TO THE COURT'S CONSIDERATION OF GODWIN'S INSISTENCE ON HIS RIGHT TO TRIAL, FAILURE TO ACKNOWLEDGE GUILT, AND FAILURE TO SHOW REMORSE IN IMPOSING SENTENCE

A. The Standard Of Review Is De Novo

Generally, this Court employs a mixed standard of review of a trial court's ruling on an ineffective assistance of counsel claim after an evidentiary hearing, deferring to the lower court's factual findings, but reviewing the court's legal conclusions de novo. *Jennings v. State*, 123 So. 3d 1101, 1113 (Fla. 2013).

Here, however, the postconviction court's conclusion was based on its determination that the sentencing court did not consider improper factors in imposing sentence, which is a question of law subject to de novo review. *See Cromartie v. State*, 70 So. 3d 559, 563 (Fla. 2011); *Mosley v. State*, --- So. 3d ---, No. 2D14-2910, 2015 WL 6777209, at *1 (Fla. 2d DCA Nov. 6, 2015); *Imbert v. State*, 154 So. 3d 1174, 1175 (Fla. 4th DCA 2015).

Further, to the extent the postconviction court made a factual finding regarding the sentencing court's intent in considering Godwin's refusal to accept a plea, and failure to show remorse and acknowledge guilt, such findings were based on its review of a transcript of the sentencing hearing. As a result, this Court is in the same position to examine the transcript as was the postconviction court and may reexamine its findings. *See Walton v. Estate of Walton*, 601 So. 2d 1266,

1268 (Fla. 3d DCA 1992); *see also Almeida v. State*, 737 So. 2d 520, 524 n.9 (Fla. 1999); *W. Shore Rest. Corp. v. Turk*, 101 So. 2d 123, 126 (Fla. 1958); *Holmes v. Bridgestone/Firestone, Inc.*, 891 So. 2d 1188, 1191 (Fla. 4th DCA 2005). Thus, this Court's review of the postconviction court's ruling is de novo.

This Court "must examine the record to determine whether the transcript 'may reasonably be read to suggest' that a defendant's sentence was the result, at least in part, of the consideration of impermissible factors." *Mosley*, 2015 WL 6777209, at *1 (citing *Moorer v. State*, 926 So. 2d 475, 477 (Fla. 1st DCA 2006)). Indeed, "for justice to be done, it must also *appear* to be done." *Nawaz v. State*, 28 So. 3d 122, 125 (Fla. 1st DCA 2010) (emphasis in original).

B. Counsel's Failure To Object To A Sentencing Court's Consideration Of Constitutionally Improper Factors In Imposing Sentence Constitutes Ineffective Assistance

It is Godwin's burden to meet both requirements of *Strickland v. Washington*, 466 U.S. 668, 687 (1984), with respect to his ineffective assistance of counsel claim. First, Godwin must show that counsel's performance was deficient, which requires a showing that sentencing counsel's errors were so serious that counsel was not functioning as the "counsel" guaranteed under the Sixth Amendment. *Rodriguez v. State*, 39 So. 3d 275, 284 (Fla. 2010). "Strategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable. . . ."

Occhicone v. State, 768 So. 2d 1037, 1048 (Fla. 2000).

Counsel's performance is deficient where he or she fails to object to a court's consideration of improper sentencing factors because there can be no tactical reason to "stand[] mute when the trial judge impose[s] the harshest sentence available based on improper sentencing factors." *Johnson v. State*, 120 So. 3d 629, 630-32 (Fla. 2d DCA 2013) (concluding that trial counsel was ineffective in failing to object to court's comments that defendant had "shown absolutely no remorse" and denied involvement in crimes, which were intertwined with commentary on the severity of the offense).

Second, Godwin must show that he suffered prejudice as a result of the deficient performance. *Rodriguez*, 39 So. 3d at 284-85. Prejudice is met "if 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Id.* at 285 (quoting *Strickland*, 466 U.S. at 694); *see also Porter v. McCollum*, 558 U.S. 30, 44 (2009) (emphasizing that defendants must establish a probability sufficient to undermine confidence in the outcome).

Where a trial court imposes a life sentence after emphasizing a defendant's refusal to admit guilt, continued assertions of innocence, and lack of remorse -- or where a defendant is denied due process -- the court's confidence in the outcome

of the proceedings is undermined. *Johnson*, 120 So. 3d at 632; *cf. Williams v. State*, 164 So. 3d 739, 740 (Fla. 2d DCA 2015) (consideration of defendant's assertion of innocence, refusal to admit guilt, and failure to show remorse is fundamental error); *Davis v. State*, 149 So. 3d 1158, 1160 (Fla. 4th DCA 2014) (same).

Here, counsel failed to object to the sentencing court's consideration of Godwin's refusal to admit guilt and failure to show remorse. As argued below, consideration of these factors is improper, and counsel provided ineffective assistance.

C. The Sentencing Court Violated Godwin's Constitutional Rights By Considering Godwin's Insistence On His Right To Trial, Failure to Acknowledge Guilt, and Failure to Show Remorse In Imposing The Maximum Sentences

Under the United States and Florida Constitutions, every criminal defendant is entitled to a speedy and public trial by an impartial jury. Amend. VI, U.S. Const.; art. I, § 22, Fla. Const. ("The right of trial by jury shall be secure to all and remain inviolate."). These constitutional rights are held in high esteem by the judiciary. Indeed, maintaining the sanctity of the jury trial is critical to the integrity of our judicial system. *See*, *e.g.*, *Galluci v. State*, 371 So. 2d 148, 150 (Fla. 4th DCA 1979) ("Our system presumes innocence and rightfully holds in high esteem an individual's right to trial by jury. And such right may be exercised freely by an individual, without fear that the choice to go to trial will be held

against him.").

Moreover, this Court and the United States Supreme Court have held that "'any judicially imposed penalty which needlessly discourages assertion of the Fifth Amendment right not to plead guilty and deters the exercise of the Sixth Amendment right to demand a jury trial is patently unconstitutional.'" *City of Daytona Beach v. Del Percio*, 476 So. 2d 197, 205 (Fla. 1985) (quoting *Gillman v. State*, 373 So. 2d 935, 938 (Fla. 2d DCA 1979) (citing *United States v. Jackson*, 390 U.S. 570, 580 (1968)); *cf. Mitchell v. United States*, 526 U.S. 314, 329-330 (1999) (prohibiting negative inferences from the exercise of a constitutional right during sentencing because the stakes are necessarily high and doing so may result in "decades of added imprisonment"). Such decisions are an acknowledgement that these constitutional rights would mean little if a judge could punish a defendant for invoking them. *See Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978) ("To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort").

Despite this well-settled law (and in an unexplained and perfunctory about-face from its precedent), here, while recognizing that rejection of a plea offer and failure to acknowledge guilt and show remorse "may not be factors that contribute to a defendant's sentence," the Second District nevertheless held that constitutional rights are not violated where, "in context," these factors are used to reject other,

unrelated, claimed bases for mitigation of a sentence. *See Godwin*, 160 So. 3d at 498. Thus, according to the Second District, a defendant's exercise of bedrock constitutional rights *can contribute* to the imposition of a harsher sentence, due to rejection of mitigation, under federal and Florida law.

Such a conclusion, however, improperly discourages the exercise of constitutional rights. Indeed, such an approach would create the ultimate prisoner's dilemma for both defendants faced with overwhelming evidence of guilt and defendants who are actually innocent -- to invoke fundamental rights and receive an increased sentence, or to waive those rights for a less severe sentence. Such a judicially-created dilemma is incompatible with decisions of this Court and of other district courts of appeal. Accordingly, this Court should quash *Godwin*, and remand for resentencing before a different judge.

1. Florida courts prohibit consideration of a defendant's rejection of a plea offer, continued assertions of innocence and failure to acknowledge guilt or to show remorse in imposing sentence

This Court has previously held that it is constitutionally impermissible to consider a defendant's exercise of his or her right to trial in determining the defendant's sentence. *See Del Percio*, 476 So. 2d at 205. In *Del Percio*, one defendant was fined $500 for violation of an ordinance after exercising her right to trial, whereas others who pled *nolo contendere* received no fines or penalties for the same conduct. *Id.* In imposing the fine, the court discussed the facts of the

case and the credibility of the witnesses, but also noted that the defendant had maintained the ordinance was unconstitutional and that, nevertheless, she was innocent. *Id.* Remaining faithful to the principle that any judicial discouragement of the exercise of constitutional rights is patently unconstitutional, this Court quashed the defendant's fine, broadly holding that a defendant's exercise of the right to trial "cannot be a factor in the sentencing decision." *Id.* Subsequently, in *Holton v. State*, 573 So. 2d 284, 292 (Fla. 1990), the Court reiterated that a defendant's exercise of the right to trial cannot be used against him or her during sentencing because "due process guarantees an individual the right to maintain innocence even when faced with evidence of overwhelming guilt."

Other Florida courts have extended this prohibition to a court's consideration of the failure to show remorse or acknowledge guilt. *See, e.g.*, *Jiles v. State*, 18 So. 3d 1216, 1216 (Fla. 5th DCA 2009) (holding that trial court considered improper sentencing factors where it noted that defendant did not "accept responsibility" but "denied [his] involvement" while crediting codefendant for "accept[ing] responsibility for what he did and . . . [being] willing to take the hit for what he did without going through the process"); *Donaldson v. State*, 16 So. 3d 314, 314 (Fla. 4th DCA 2009) (reversing and remanding where trial court considered defendant's protestations of innocence and failure to show remorse in determining what sentence to impose); *Ritter v. State*, 885 So. 2d 413, 414 (Fla. 1st

DCA 2004) (holding that, "[a]lthough remorse and an admission of guilt may be grounds for mitigation of sentence, the opposite is not true") (quoting *K.N.M. v. State*, 793 So. 2d 1195, 1198 (Fla. 5th DCA 2001)); *A.S. v. State*, 667 So. 2d 994, 995-96 & n.4 (Fla. 3d DCA 1996) (holding that a defendant's not guilty plea, continued protestation of innocence, and failure to show remorse "should never have been a factor" or an influence on trial court's disposition); *Gallucci*, 371 So. 2d at 150 (holding it is proper for a court to "consider the plea itself as a step toward rehabilitation," but it is constitutionally impermissible to "conclude that a request for a trial is an indication that a defendant cannot be rehabilitated").

In *Johnson v. State*, 948 So. 2d 1014, 1015-16 & n.1 (Fla. 3d DCA 2007), the defendant was convicted of robbery with a firearm of an elderly couple, a crime the court described as "highly violent." The defendant's sentencing scoresheet indicated a minimum sentence of 48 months in prison to a maximum of life in prison, with a 10-year minimum mandatory for possession of a firearm. *Id.* at 1015. The defendant requested a downward departure sentence as a youthful offender, a mitigating circumstance pursuant to section 921.0026(2)(*l*), Florida Statutes. *Id.* The trial court declined the request because it saw "no reason for cutting [the defendant] any break whatsoever" where the defendant "failed to acknowledge his culpability for the charged offense." *Id.* at 1016 & n.1. The Third District held that such a consideration was improper, even if it was only one

of several factors considered, and directed the judge on remand to "consider [the defendant's] request for a mitigated sentence." *Id.* at 1017.

In *Gilchrist v. State*, 938 So. 2d 654 (Fla. 4th DCA 2006), the Fourth District reached the same result, based on similar circumstances. There, the trial court stated: "'He's yet to admit or concede his guilt. He had the opportunity to speak today and you had to drag the words out of his mouth. I don't see the least bit of remorse. I don't even know that he realizes what he's done is wrong.'" *Id.* at 656. The Fourth District held that these were improper considerations because, although the trial court did not impose a maximum sentence or upwardly depart from the sentencing guidelines, "the record indicate[ed] that the court considered [defendant's] failure to confess and lack of remorse in determining his sentence . . . because the trial court indicated that lack of remorse and failure to confess were considered in not mitigating the sentence." *Id.* at 658.

Likewise, in *Moorer v. State*, 926 So. 2d 475, 476 (Fla. 1st DCA 2006), the court reviewed a sentence in a case where the trial court responded to character testimony and requests for leniency during sentencing by noting that the defendant "'didn't have enough integrity to step up and accept responsibility, . . . we tried a case that should have been resolved on docket day' 'without a trial.'" The trial court later explained that "his comments at sentencing did 'not demonstrate that the Court was punishing the Defendant for exercising his right to trial, but instead

highlight, for the benefit of those calling for leniency, the Defendant's failure to take responsibility for his actions.'" *Id.* at 477. Noting that, "[i]n context, the distinction drawn [by the trial court] is a subtle one, indeed," the First District said that a defendant's "'failure to take responsibility' by pleading guilty is an impermissible consideration in sentencing," and reversed because "[t]he trial judge's comments 'may reasonably be read to suggest that appellant's sentence was the result, at least in part, of his decision to exercise his constitutional right to insist on a jury trial.'" *Id.* (quotations omitted).

In *Cavallaro v. State*, 647 So. 2d 1006, 1006 (Fla. 3d DCA 1994), the Third District also reversed a sentence where the trial court engaged in a colloquy with the defendant's character witness, referring to the defendant's failure to accept responsibility and to show remorse, as evidenced by his decision to proceed to trial rather than enter a plea. The court said that a harsher sentence cannot be imposed because a defendant chose to go trial rather than accept a plea bargain. *Id.* at 1006-07. The court also said that "a party's decision to exercise his or her right to jury trial cannot be viewed as a showing of lack of remorse." *Id.* at 1007. Thus, in context, what the Third District was saying was that it was error for the trial court to reject mitigating circumstances because the defendant had failed to accept responsibility and show remorse.

If courts are allowed to consider a defendant's exercise of constitutional

rights as evidence of a "failure to show remorse," defendants will be faced with a Hobson's choice -- a defendant who has steadfastly maintained his or her innocence will be required to choose between expressing remorse at the eleventh hour, hoping for a reduced sentence; or continuing to maintain innocence, risking a harsher sentence for exercising a fundamental constitutional right. *Cf. Green v. State*, 84 So. 3d 1169, 1172 (Fla. 3d DCA 2012) (recognizing Hobson's choice where a defendant must choose between exercising right to remain silent and right to allocution at sentencing). Clearly, this is no choice at all.

In *Gillman v. State*, quoted favorably in *Cavallaro*, 647 So. 2d at 1007, the Second District explained the inherent flaw in allowing a court to infer a lack of remorse from a defendant's exercise of his or her right to trial:

> Repentance has a role in penology. But . . . [t]he adversary process is a fact-finding engine, not a drama of contrition in which a prejudged defendant is expected to knit up his lacerated bonds to society.
>
> There is a tension between the right of the accused to assert his innocence and the interest of society in his repentance. But in favor of the latter interest only if the trial offered an unparalleled opportunity to test the repentance of the accused. It does not. . . .
>
> If the defendant were unaware that a proper display of remorse might affect his sentence, his willingness to admit the crime might offer the sentencing judge some guidance. But with the inducement of a lighter sentence dangled before him, the sincerity of any cries of mea culpa becomes questionable. Moreover, the refusal of a defendant to plead guilty is not necessarily indicative of a lack of repentance. A man may regret his crime but wish desperately to avoid the stigma of a criminal conviction.

373 So. 2d 935, 938-39 (Fla. 2d DCA 1979) (quoting *Scott v. United States*, 419 F.2d 264, 270-271 (D.C. Cir. 1969)), *quashed on other grounds*, 390 So. 2d 62 (Fla. 1980). The Second District then said that, "[e]ven if we assume that the right to a fair trial may in some circumstances be made costly, the required justification here also must be a paramount goal achievable in no other way. The supposed value of a guilty plea in demonstrating repentance does not meet this test." *Gillman*, 373 So. 2d at 939. *See also Galluci*, 371 So. 2d at 939 (rejecting the argument that courts may "conclude that a request for trial is an indication that a defendant cannot be rehabilitated," because our judicial system presumes innocence and "holds in high esteem an individual's right to trial by jury").

In *Beasley v. State*, 774 So. 2d 649, 673 (Fla. 2000), this Court noted the obvious concern with drawing a negative inference from a defendant's exercise of the right to trial. Observing that "remorse" "is defined in Webster's Third New International Dictionary 1921 (1993), as 'a gnawing distress arising from a sense of guilt for past wrongs (as injuries done to others),'" the Court asked, rhetorically, how a defendant could both show remorse and maintain innocence. *Id.*

There is, moreover, no principled justification for allowing a court to reject arguments for mitigation because a defendant has chosen to exercise fundamental constitutional rights while forbidding aggravation of a sentence based on the identical conduct. First, this supposed distinction is meaningless from the practical

perspective of the defendant weighing the decision to exercise such rights. From a defendant's perspective, taking such considerations into account to reject arguments for mitigation or to aggravate a sentence has the same effect -- the prospect of a longer sentence.

Second, in practice, it appears that courts themselves have difficulty drawing this distinction. For instance, in *Davis v. State*, 149 So. 3d 1158 (Fla. 4th DCA 2014), the trial court had said:

> I heard the evidence and I heard the jury speak. I also heard the recommendation of your lawyer. I've heard the recommendation by the state. *I am going to give you as much of a break as I can.* What I didn't hear was your responsibility. What I didn't hear was an apology to the family of the victims and to the victims. What I didn't hear was you taking ownership of your actions and that bothers me.

Id. at 1159 (emphasis added). Although the trial court had said that it would give the defendant as much of a "break" as it could (suggesting the trial court was considering potential bases for mitigation), the Fourth District reversed, concluding that the trial court "improperly considered his lack of remorse as an aggravating factor in the sentencing decision." *Id.*

To the extent decisions of this Court have suggested that the prohibition on consideration of such factors is limited to their use to aggravate a sentence, and that "lack of remorse" inferred from the assertion of constitutional rights may properly be considered to deny mitigation, such decisions are erroneous extensions of *Pope v. State*, 441 So. 2d 1073 (Fla. 1983).

In *Pope*, this Court stated:

> Unfortunately, remorse is an active emotion and its absence, therefore, can be measured or inferred only from negative evidence. *This invites the sort of mistake which occurred in the case now before us-inferring lack of remorse from the exercise of constitutional rights*. This sort of mistake may, in an extreme case, raise a question as to whether the defendant has been denied some measure of due process, thus mandating a remand for reconsideration of the sentence. For these reasons, we hold that henceforth lack of remorse should have no place in the consideration of aggravating factors. *Any convincing evidence of remorse may properly be considered in mitigation of the sentence, but absence of remorse should not be weighed either as an aggravating factor nor as an enhancement of an aggravating factor.*

Id. at 1078 (emphasis added). Thus, this Court held in *Pope* that convincing evidence *of remorse* is a permissible mitigating consideration; it did not, however, suggest that *lack of remorse* could be used to reject grounds for mitigation. *See State v. Sachs*, 526 So. 2d 48, 51, 51 n.* (Fla. 1988) (holding that "lack of remorse cannot constitute a valid reason for an upward departure," particularly where it is inferred from the exercise of constitutional rights, but that clear and convincing evidence of actual remorse may constitute a valid reason for a downward departure).

In *Derrick v. State*, 581 So. 2d 31, 36 (Fla. 1991), the State had elicited testimony during the penalty phase that the defendant had admitted killing the victim, and "would kill again." The defendant argued that this testimony was irrelevant and impermissibly showed both lack of remorse and the possibility that he would kill again, which suggested he could not be rehabilitated. The State

contended that the testimony had not been used to show lack of remorse. This Court held that the testimony was erroneously admitted, and constituted reversible error. *Id.* It said that, "[w]hile the statement would be admissible to rebut evidence of remorse or rehabilitation, it was introduced before the defense presented any evidence." *Id.* Moreover, the Court focused on the statement's highly prejudicial suggestion that the defendant would kill again, which is relevant to a defendant's rehabilitative potential. *Id.* Thus, the Court held that the particular statement at issue was admissible *only to rebut evidence presented by the defense of remorse or rehabilitation*.

Even if this Court concludes that it is constitutionally permissible to consider such factors to reject any requests for mitigation, the sentencing court here did not clearly so limit its consideration.

2. Even if courts may consider a defendant's rejection of a plea offer, continued assertions of innocence and failure to acknowledge guilt or to show remorse to reject requests for mitigation of sentence, the sentencing court did not clearly so limit its consideration

Any doubt regarding whether a court's remarks during sentencing demonstrate consideration of a defendant's exercise of constitutional rights in imposing sentence should be resolved in favor of the defendant. Indeed, Florida courts faced with such arguments review the record to determine whether it may reasonably be read to suggest that a trial court considered improper factors. *See*,

e.g., *Mosley*, 2015 WL 6777209, at *1 (citing *Moorer*, 926 So. 2d at 477); *see also Macan v. State*, --- So. 3d ---, No. 1D13-5496, 2015 WL 7770643, at *1 (Fla. 1st DCA Dec. 1, 2015) (impermissible to refer to failure to take responsibility or show remorse where defendant protested innocence throughout proceedings). Thus, courts have reversed sentences where the record does not affirmatively exclude the possibility that the trial court considered improper factors. *See Johnson*, 679 So. 2d at 832-33 (vacating sentence where court's comments "may reasonably be read to suggest" it was the result, at least in part, of defendant's exercise of constitutional right to trial); *see also Fraley v. State*, 426 So. 2d 983 (Fla. 3d DCA 1983) (reversing because court could not affirmatively conclude from record what factors trial court took into account to impose a harsher sentence).

In *Shelton v. State*, 59 So. 3d 248, 249 (Fla. 4th DCA 2011) (relied upon in *Godwin*), the Fourth District reviewed whether a defendant's sentence for home invasion with a firearm was improperly based on the defendant's failure to show remorse or recognize his improper conduct. In imposing a life sentence, although the trial court observed that it had not heard "'recognition whatsoever on [the defendant's] behalf that he's done anything wrong, that he feels any remorse in the least for what was done to this lady,'" it expressly said that it was basing its decision on the defendant's record and conduct. *Id.* at 249-50. The Fourth District affirmed because the trial court expressly stated it was basing its sentence on the

defendant's record and conduct, noting that "'remorse and an admission of guilt may be grounds for mitigation of a sentence or a disposition'" and perceiving the trial court's comments merely "as the court's recognition that it lacked any grounds to mitigate" the sentence. *Id.* at 250 (quoting *K.N.M.*, 793 So. 2d at 1198).[3]

Unlike *Shelton*, here the sentencing court did not expressly state that it was basing the length of the sentences on any specific proper factors. Moreover, the sentencing court's inappropriate comments were not confined to a stray remark, clearly made in rejection of requests for mitigation, or an observation that it had no grounds to mitigate the sentences. Rather, the sentencing court's remarks were rife with constitutionally impermissible considerations. Indeed, the court's reasoning for imposing the harshest possible sentences after having indicated prior to trial that it would impose concurrent 10-year sentences reasonably suggests that its decision was rooted in the consideration of improper factors:

> THE COURT: I've had an opportunity to hear the argument of counsel, hear the argument of Mr. Godwin. I've heard the testimony of the witnesses from the witness stand. I had no idea what this case was about until I heard the testimony. *I understand why the State offered the 10 years. It was rejected by you.* After having heard the argument, excuse me, having heard the testimony of the witnesses,

[3] The full quote in *K.N.M.* is "[a]lthough remorse and an admission of guilt may be grounds for mitigation of a sentence or a disposition, *the opposite is not true*." *K.N.M.*, 793 So. 2d at 1198 (emphasis added).

> seeing the absolute fear in the face of one witness when she broke down in tears during cross-examination or direct examination, *I understand exactly why they elected not to call that lady*.
>
> *I don't have a doubt in my mind that you committed that robbery, sir. Not one doubt.* I find those witnesses to be credible. My fear is, sir, if you're let out amongst the community again, the citizens of the State of Florida and citizens of the United States of America, you would be a – put them at risk. *I don't think you've shown one ounce of remorse, not one ounce. I don't think you even acknowledge that you committed this crime. To this day, you don't acknowledge that. I don't have a doubt that you committed it.*
>
> You beat that woman about the head and about the face with a firearm. It could have caused permanent damage to her. It did not.
>
> It is the judgment, sentence and order of the Court, count of robbery, life Florida State prison, the rest of your natural life without parole.
>
> It is a 10-year minimum mandatory as to the sentence of false imprisonment with a firearm. 15 years concurrent.

(R.3:451-52) (emphases added).

The sentencing court's first remark was that it understood why the State had offered Godwin a plea deal, but that Godwin rejected it. The court further emphasized it understood why the State had not wanted to take this case to trial and put a particular witness on the stand after observing the witness cry in court, and that it did not "have a doubt . . . [n]ot one doubt" that Godwin committed the robbery. Thus, the court's discussion regarding victim impact, Godwin's rejection of a plea offer, and its lack of doubt regarding Godwin's guilt may reasonably be read as a rebuke for Godwin's decision to exercise his right to trial when faced with what the court believed to be overwhelming evidence of guilt.

The sentencing court continued, stating "I don't think you've shown one ounce of remorse, not one ounce. I don't think you even acknowledge that you committed this crime. To this day, you don't acknowledge that. I don't have a doubt that you committed it." These comments also indicate the court was frustrated that Godwin chose to exercise his right to trial rather than admit guilt because it was convinced beyond doubt that Godwin committed the crimes.

Notably, however, Godwin's counsel did not argue at sentencing that Godwin was remorseful. He argued only that Godwin had a family and would have learned his lesson upon completion of the 10-year minimum mandatory sentences. (R.3:448-49). Thus, contrary to the facts in *Shelton*, the court's comments here cannot reasonably be perceived merely as recognition that it had searched, unsuccessfully, for a basis to mitigate the sentence.

Moreover, the sentencing court's only comment on the severity of the crimes came at the end of its remarks: "You beat that woman about the head and about the face with a firearm. It could have caused permanent damage to her. It did not." Thus, the transcript clearly reflects that the sentencing court improperly considered Godwin's decision to exercise his right to trial and confront the witnesses against him in arriving at its sentences.

In addition, despite having heard evidence regarding victim impact and the use of violence during the robbery at the hearing on Godwin's motion to suppress,

the sentencing court stated before trial that it would impose the State's offered 10-year minimum mandatory sentences for all counts to run concurrently, with no probation to follow, if Godwin would admit guilt and waive his right to trial. (R.3:413-15). It is unclear what circumstances changed regarding the severity of the crimes and Godwin's rehabilitative potential between the sentencing court's pre-trial proposal and the sentencing hearing, requiring imposition of the harshest possible sentences -- other than Godwin's insistence on exercising his right to trial. Accordingly, the record reasonably suggests that the sentencing court denied Godwin due process and violated his constitutional right to trial by basing the length of his sentences at least in part on his decision to reject the plea offer and exercise his right to trial, failure to acknowledge guilt, and failure to show remorse.

As a result, appointed counsel's performance at sentencing was deficient because he inexplicably failed to object to the sentencing court's considerations of these factors while imposing the harshest possible sentences. *See Johnson*, 120 So. 3d at 631-32. Further, as a result of counsel's failure to object, Godwin's exercise of constitutional rights contributed to his sentence to life in prison without the possibility of parole. Accordingly, this Court's confidence in the outcome of sentencing should be undermined because Godwin will be imprisoned for the remainder of his natural life in part because he did "what the law plainly allows him to do," which "is a due process violation of the most basic sort." *See*

Bordenkircher, 434 U.S. at 363; *see also Johnson*, 120 So. 3d at 632; *cf. Williams*, 164 So. 3d at 740; *Davis*, 149 So. 3d at 1160.

This Court should quash the Second District's decision, and remand for resentencing before a different judge. *See Gallucci*, 371 So. 2d at 150; *Moorer*, 926 So. 2d at 476; *Cavallaro*, 647 So. 2d at 1006.

CONCLUSION

Based on the foregoing, this Court should hold that appointed counsel's failure to object to the sentencing court's consideration of Godwin's rejection of a plea offer, continued assertions of innocence and failure to acknowledge guilt, and failure to show remorse constitutes ineffective assistance of counsel; and quash the Second District's decision and remand for resentencing before a different judge.

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was electronically filed with the Clerk of Court through the Florida Courts eFiling Portal and served via e-mail on counsel of record listed below, on this 28th day of December, 2015 to:

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The undersigned hereby certifies that this brief complies with the font requirements set forth in Florida Rule of Appellate Procedure 9.210 by using Times New Roman 14-point font.

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