IN THE SUPREME COURT OF FLORIDA

JONATHAN GODWIN

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC15-563

ON DISCRETIONARY REVIEW OF THE DECISION OF
THE SECOND DISTRICT COURT OF APPEAL, FLORIDA

ANSWER BRIEF OF RESPONDENT

PAMELA JO BONDI
ATTORNEY GENERAL

JOHN KLAWIKOFSKY
Chief Assistant Attorney General
Bureau Chief-Tampa Crim. Appeals
Florida Bar No. 930997

JASON M. MILLER
Assistant Attorney General
Florida Bar No. 624551
Concourse Center 4
3507 E. Frontage Road, Suite 200
Tampa, Florida 33607-7013
CrimAppTPA@myfloridalegal.com
Jason.Miller@myfloridalegal.com
(813)287-7900 Ext. 7135
(813)281-5500 (FAX)
COUNSEL FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES PAGE NO.

STATEMENT OF THE CASE AND FACTS

Appellee accepts Petitioner's Statement of the Case and Facts for purposes limited to the instant review, with the following additions:

A. The First Sentencing Hearing

On December 20, 2006, after the jury returned a verdict of guilty on the charges of robbery with a firearm and false imprisonment, the trial court began Petitioner's first sentencing hearing, ("First Sentencing Hearing"). (R.262-63; 436)[1]. Upon notice of a Faretta error, the sentencing court vacated the sentence and appointed Godwin's standby trial counsel to represent him at a sentencing hearing for a later date, (hereafter the "Second Sentencing Hearing"). (R.262-63; 436).

1 References to the Record are designated as: (R.[page number]; References to the Appendices are designated as: (A.[appendix number]:[page number].

B. The Second Sentencing Hearing

On January 4, 2007, after appointing defense counsel to represent Petitioner, the Sentencing Court hears arguments from either side, (R.446-447). Apparently, the lower court refuses to consider a juvenile history of the Petitioner, as in:

> [DEFENSE COUNSEL] As I understand it is that [Petitioner] was ultimately found guilty for false imprisonment, armed -- excuse me, false imprisonment with a firearm and armed robbery with a firearm. I believe in reviewing his prior history, I believe he has a juvenile matter, and I haven't seen the sentencing guideline scoresheet that I need to look at.
>
> THE COURT I won't consider that.
>
> [DEFENSE COUNSEL] I'm sorry?
>
> THE COURT I will not consider that [juvenile matter].

(R.446).

Defense Counsel then proceeded to make a mitigation argument to the sentencing court, including a characterization of the Petitioner and an argument for the minimum sentence of ten years in prison after which the Petitioner would be sufficiently rehabilitated, as in:

> [DEFENSE COUNSEL] [Petitioner] is now 28 years of age. I would ask the court to seriously consider the imposition of the minimum mandatory of 10 years' Florida state Prison insofar as the minimum term of imprisonment.

> He should not be penalized for electing to proceed to trial. He should not be penalized for electing to proceed to trial pro se which obviously has made it more difficult for all parties involved to conclude the trial. I submit to you that a reasonable sentence under all of the circumstances and a reasonable sentence that was initially offered by the state was 10 years' minimum mandatory, and we would ask the Court to sentence [Petitioner] to the 10-year minimum mandatory sentence, concurrent on both counts.
>
> As I understand it, obviously, the armed robbery with a firearm is a first-degree felony punishable by life and the armed false imprisonment, I believe becomes a second-degree felony, punishable by up to 15 years in Florida state Prison. We would ask the Court to sentence him to the 10-year minimum mandatory on the robbery with a concurrent 10 years on the false imprisonment. He does have a fiancee that has been present, but I don't believe she's present today, and Mr. Godwin does have a minor child by her. And taking everything into consideration, we would ask - ([Petitioner] conferring with [Defense Counsel]). Would you like to make any comment to the court on sentencing, [Petitioner]?

(R.238-239, 447). After Defense Counsel's spoke, the Petitioner was allowed to provide comment; then, Defense Counsel added a rehabilitation argument, as in:

> [PETITIONER]: Yes. I would like to say one thing to this Court. I believe it was Eleanor Roosevelt who said it. **No one can make you feel inferior without your consent.** That's all.
>
> [DEFENSE COUNSEL]: Judge, one other brief comment. I think the Court, in listening to [Petitioner] on numerous occasions has

> realized that [Petitioner] is not dumb. He's bright. I think a 10-year sentence would be appropriate punishment, and I think [Petitioner], at that point in time, would have learned his lesson and can be thereafter a contributing member of, society. So I would ask the court to take that into consideration.

(R.239-240, 447-448). The Sentencing Court then allowed the Prosecution to make a counter argument to the Petitioner's plea for mitigation, as in:

> THE COURT: Mr. [Prosecutor].
>
> [PROSECUTOR]: Judge, briefly. As I said before, prior to [Petitioner] being sentenced before, before we got back to this situation, this Court sat up on that bench and listened to three days of trial testimony. The State the only reason there's not more counts of the robbery that he was found guilty of is because the State elected not to put on one of those witnesses because of the fear she had for this [Petitioner] and what she went through and has been going through since the day this robbery took place.
>
> [Petitioner] elected to put her on the stand, and you got to see for yourself her reaction to seeing this man and questioning her at that time. She broke down on the stand. This was a traumatic experience for her, to Miss Winkler and to the other -- Miss White, who was in there at the time of this. As I said before, the State believes this was a cold, calculated, thought about, planned out robbery of a business that typically has cash on hand, is open late at night; typically the victims in a case like this do not like to come forward because their pasts are not the best. We heard testimony that it may have been through someone [Petitioner] knows. [Petitioner] knew specifically who to look for in that

> robbery, who might have the keys to the safe. [Petitioner] used a firearm, dragged a girl that was trying to escape for her life at the time, beat her with a handgun.
>
> [Petitioner] was given the opportunity years ago when he was previously charged with attempted murder and armed robbery, given a break at that time, given probation, couldn't complete that and had to go back to finish a prison sentence. He has not learned anything since then. He's done it again, and I believe that he will continue to do so if he is ever let out on the street again. I'm asking the Court impose a life sentence on the armed robbery charge as well as a 15-year concurrent sentence on the armed false imprisonment.

(R.240-242, 449-451). As described in Petitioner's Initial Brief, the lower court pronounced a sentence of life with a concurrent 15 years. (R.451-452).

C. Calling The Additional Victim-Witnesses To The Stand In The Defense's Case For Harassment

In its sentencing consideration of the facts, the lower court recalled "seeing absolute fear in the face of one witness when she broke down in tears" and the lower court noted its belief in the strength of the evidence. (R.451).

D. Direct Appeal And Post-Conviction Proceedings

On or about December 26, 2007, Petitioner cause to be filed with the clerk for the Second District Court of Appeals his Initial Brief on his direct substantive appeal, No. 2D07-0394. (App.2:1). The contents of his single-issue direct substantive appeal claim error in the failure to suppress evidence of his

traffic stop. (App.2:5). Absent from the contents of his Initial Brief, or from his substantive appeal at large, is any claim of error in sentencing by the lower court.

The postconviction proceeding followed. Petitioner alleges, among other things, that the sentencing court imposed a vindictive sentence and used Petitioner's assertion of his constitutional rights against him. (R.10-40). His post-conviction appeal, however, did not include a claim of a vindictive sentence, but claimed only that a sentencing court may not impose a harsher sentence based on a defendant's protestation of innocence, failure to acknowledge responsibility, or lack of remorse. See, Godwin v. State, No. 2D13-2117, 2014 WL 7004868 (Fla. 2d DCA Dec. 12, 2014); Godwin v. State, 160 So. 2d 497 (Fla. 2d DCA 2015).

SUMMARY OF THE ARGUMENT

Petitioner's trial counsel did not commit reversible error in his failure to object to the sentencing court's consideration of Petitioner's failure to admit guilt and failure to show remorse. The record fails to show that the sentencing court relied on any of these assertions in its pronouncement of a sentence; in any event, in the context of this case, these considerations are not unconstitutional.

As a threshold issue, this claim for relief could and

should have been raised on direct appeal, and therefore it is procedurally barred in postconviction. A procedural bar cannot be overcome by simply couching the claim in terms of ineffective assistance. Further, the claim does not represent an express and direct conflict and therefore deprives this Court of jurisdiction. Nonetheless, a sentencing court may consider a defendant's failure to admit guilt and failure to show remorse in its formulation of a sentence that accounts for a defendant's character and potential for rehabilitation. Since these things were precisely requested by Petitioner in his argument for mitigation, there is no error.

Petitioner's request should be rejected because Petitioner asks this Court to create a new standard, applied to Florida criminal defendants, that restricts the type of information that sentencing courts may consider in formulating a sentence. Nothing about the failure to object amounts to deficient performance or prejudice. Instead, it is likely that Petitioner's trial counsel made the strategic decision at sentencing to include an argument for rehabilitation. Certainly, Petitioner requested the sentencing court to consider mitigation and rehabilitation, and, by putting those factors at issue he invited any error in considering remorse which might not otherwise have occurred. This Court should affirm the ruling from the Second District Court of Appeals.

ARGUMENT

ISSUE ONE

IT WAS NOT INEFFECTIVE ASSISTANCE OF COUNSEL TO FAIL TO OBJECT WHEN THERE WAS NO INDICATION THAT THE COURT RELIED UPON A LACK OF REMORSE IN ANY AGGRAVATION OF PETITIONER'S SENTENCE. [RESTATED]

This Court should reject the contention by the Petitioner that the failure to object by his defense counsel created reversible error since there was no requirement for defense counsel to object and the record is devoid of any evidence that the sentencing court relied on any impermissible factors. Lastly, because the Petitioner invited the sentencing court to consider mitigation arguments including rehabilitation, the sentencing court was liberated to consider Petitioner's failure to admit guilt and failure to show remorse.

A. The Burden, Standard Of Review And Threshold Issues

Petitioner bears the burden to show that reversal of the Second District Court of Appeals is necessary by means of a valid ineffective assistance of counsel claim. Jennings v. State, 123 So. 3d 1101, 1127 (Fla. 2013).

1. Petitioner's burden; de novo review

Petitioner is correct that this Court is in the same position to examine the transcript as was the post-conviction court. Almeida v. State, 737 So. 2d 520 (Fla. 1999). However, the court should note that denial of a Rule 3.850 claim

following an evidentiary hearing presents a mixed question of law and fact, qualifying for independent review. Stephens v. State, 748 So. 2d 1028, 1031 (Fla. 2000). The standard of review for a trial court's ruling on a claim of ineffective assistance requires the appellate court to defer to the trial court's superior vantage for factual findings, but to review the court's ultimate conclusions on the deficiency and prejudice prongs de novo. Washington v. State, 835 So. 2d 1083, 1085 (Fla. 2002).

2. Petitioner should not be heard to re-litigate issues which should have been disposed of on direct appeal.

Issues brought on appeal under post-conviction collateral attack which merely revive what should have been brought on direct appeal should not be heard by this Court. Appellant's direct appeal involved a Motion to Dismiss for a search and seizure traffic stop. Certainly, this issue could have and should have been brought to the attention of the District Court on direct appeal and failure to do so limits review. Medina v. State, 573 So. 2d 293, 295 (Fla. 1990).

Defendant's claim included an allegation that the judge imposed a vindictive sentence for not showing remorse. A claim that a sentence was vindictive is procedurally barred, where such claim could have been raised on direct appeal but was not. Smith v. State, 909 So. 2d 972 (Fla. 2d DCA 2005).

It is well established that a defendant may not couch a

claim that could have been raised on direct in terms of ineffective assistance in an attempt to circumvent the rule that postconviction relief may not serve as a second appeal. See Cherry v. State, 659 So. 2d 1069, 1072 (Fla. 1995) (a defendant on postconviction may not "counter the procedural bar" on issues that were or could have been raised on direct appeal by "couch[ing] his claim... in terms of ineffective assistance of counsel in failing to preserve or raise those claims").

3. No conflict in jurisdiction

Petitioner alleges an express and direct conflict of authority with the First, Third, Fourth and Fifth District Court's of Appeal. In his Initial Brief, Petitioner claims the Second District in this case performed an "unexplained and perfunctory about-face from its precedent." Petitioner's Initial Brief, at 17. However, Respondent's position has been cited by this Court in Derrick v. State, 581 So. 2d 31, 36 (Fla. 1991) when it found that a criminal defendant's lack of remorse may be used as evidence at sentencing, specifically when considering a potential for rehabilitation. Id.; See, Tanzi v. State, 964 So. 2d 106, 115 (Fla. 2007) ("this Court has permitted evidence of lack of remorse to rebut proposed mitigation, such as remorse and rehabilitation"); Singleton v. State, 783 So. 2d 970, 978 (Fla. 2001) ("this Court has held that lack of remorse is admissible to rebut evidence of remorse or other mitigation such

as rehabilitation"); Rankin v. State, 174 So. 3d 1092, 1094 (Fla. 4th DCA 2015) ("Consideration of remorse is appropriate if it occurs during a court's consideration of whether or not to mitigate a sentence. This is especially true where a defendant takes the position at his sentencing that he has been rehabilitated since remorse is a part of rehabilitation"); Turner v. State, 902 So. 2d 202 (Fla. 3rd DCA 2005) (confirming that "lack of remorse is admissible to rebut evidence of remorse or other mitigation"). As such, there is no conflict and the Second District's opinion does not violate the principles outlined in this court's relevant cases.

B. It Is Not Ineffective Assistance of Counsel to Fail to Object After Inviting A Sentencing Court To Assess A Defendant's Potential For Rehabilitation.

Petitioner is simply incorrect when he claims that a sentencing court cannot consider a criminal defendant's continued assertion of innocence, failure to acknowledge guilt or failure to show remorse "in any context." See, Petitioner's Initial Brief, p.11. Nor is it accurate to state that a sentencing court may not consider a criminal defendant's protestation of innocence, failure to acknowledge responsibility, or lack of remorse in assessing character for the purpose of rehabilitation.

Instead, depending on the context of the pronouncement, a criminal defendant's failure to acknowledge guilt and failure to

show remorse may be used if they are aligned with the sentencing court's inquiry into the character of a defendant or a defendant's prospects for rehabilitation and restoration to a useful place in society. If, on appeal, a criminal defendant fails to show reliance by a sentencing court on the exercise of any of the defendant's constitutional rights, the sentence and conviction should be affirmed. This Court should affirm the holding of the Second District Court of Appeals on this issue.

Further, in the context of postconviction, counsel cannot be said to be ineffective for failing to object to the court's consideration of remorse in response to the defense arguments for mitigation. Counsel made a strategic decision to open the door to such consideration. Further, given the existence of the cases above, counsel cannot be said to be ineffective for failing to object to considering remorse when this court has said it is appropriate if invited. See Derrick, Singleton, and Tanzi, at 115, supra ("this Court has permitted evidence of lack of remorse to rebut proposed mitigation.") The principles in this authority show that counsel's performance was not constitutionally deficient and further, that no prejudice resulted where the law permitted the judge's consideration.

1. There is no per se bar against the mention of a failure to admit guilt or a lack of remorse.

Petitioner seems to urge this Court to issue an opinion

mandating a per se bar against the mention of a criminal defendant's failure to acknowledge guilt or to show remorse in the pronouncement of a sentence. Petitioner seems to claim that the Constitution prohibits consideration of a defendant's failure to admit guilt or to show remorse in imposing sentence, and seeks an order imposing this per se ban. Petitioner's claim is incorrect. This Court has repeatedly allowed for the consideration of a criminal defendant's lack of remorse in particular contexts. Tanzi, 964 So. 2d at 115.

2. Use of a lack of remorse in § 921.0026(2)(j) as a departure sentence

The failure to acknowledge guilt, and its cousin a failure to show remorse, make a clear and entirely constitutional appearance in Florida statutory downward departure law. See, § 921.0026(2)(j); State v. Chandler, 668 So. 2d 1087, 1088 (Fla. 1st DCA 1996) (Webster, J., concurring).

In Rankin v. State, 174 So. 3d 1092, 1094 (Fla. 4th DCA 2015) a defendant sought a mitigated downward departure sentence based on remorse and a potential for rehabilitation, but the sentencing court refused for a failure to show remorse. Id. The appellate court affirmed the use of failure to show remorse finding that the lower court had, in fact, used the defendant's lack of remorse in rebuttal to defendant's request under § 921.0026(2)(j), and reasoned:

> Consideration of remorse is appropriate if it occurs during a court's consideration of whether or not to mitigate a sentence. This is especially true where a defendant takes the position at his sentencing that he has been rehabilitated since **remorse is a part of rehabilitation.** Thus, where a defendant **injects the issue of his rehabilitation** into his case, we have held **the trial court permissibly could have considered all factors relevant to his rehabilitation and fitness to rejoin society, including his remorse or lack of it.**

Id. (citations and punctuation omitted); See also State v. Ayers, 901 So. 2d 942, 945 (Fla. 2d DCA 2005) (record did not support departure factor of remorse because it is impossible for a defendant who refuses to accept responsibility for an offense to show remorse for that offense, for purposes of entitlement to a downward departure); State v. Chestnut, 718 So. 2d 312 (Fla. 5th DCA 1998) ("We are certain that [defendant's] denial of doing 'what [he] was accused of' is not the kind of remorse contemplated by the legislature;" Chestnut denied the crime but "expressed concern for the victim and [was] remorseful that the incident occurred," so the downward departure was reversed).

Therefore, since the consideration of a showing of remorse and therein an acknowledgement of guilt may be considered by Florida sentencing courts, a construct of which has been enacted by statute, the reverse must be true; specifically, that a lack of remorse may be used to rebut a plea for mitigation involving remorse or propensity toward rehabilitation. If not, then a

criminal defendant need only make a remorseful claim and the sentencing court would be powerless to rebuke it.

Certainly a defendant seeking a departure under § 921.0026(2)(j) puts the credibility of his request at issue when he claims remorse. In doing so, it is the job of the sentencing court to gauge the veracity and truthfulness of that claim by whatever means are lawfully available. A sentencing court shirks this fundamental responsibility by failing to appraise such a claim. Additionally, a defendant who seeks a downward departure based upon remorse, yet cries "unconstitutional" when it does not receive it, wants his cake and wants to eat it, too, and has invited the error. Sheffield v. Superior Ins. Co., 800 So. 2d 197 (Fla. 2001) ("Under the invited-error doctrine, a party may not make or invite error at trial and then take advantage of the error on appeal"). It cannot be said with any credibility or support in favor of an outright per se ban on the use of such concepts by a judge.

3. Courts may use of a lack of remorse in response to claims for mitigation, such as considering a defendant's character or potential for rehabilitation

Florida courts have also utilized these concepts outside of the statutory downward departure structure when they are used to respond to a defendant's mitigation claim. In the following cases, the defendant stated an affirmative plea for mitigation,

and the sentencing courts evaluated the requests, in part, based on a lack of remorse or a lack of potential for rehabilitation.

This Court has made very clear: "this Court has held that lack of remorse is admissible to rebut evidence of remorse or other mitigation such as rehabilitation." Singleton, 783 So. 2d at 978 (Fla. 2001) (emphasis added); see also, Tanzi, 964 So. 2d at 115 (trial court did not abuse its discretion during penalty phase of capital murder by allowing State to cross-examine mental health expert regarding lack of remorse, where defense opened the door to such questioning, and the State used lack of remorse to rebut proposed mitigator).

In Shelton v. State, 59 So. 3d 248, 249-250 (Fla. 4th DCA 2011), the defendant requested a mitigated sentence based, in part, on remorse and rehabilitation. Id. The Fourth District reviewed the entire sentencing transcript to analyze the context of the lower court's pronouncement of sentence. Id. It determined that any of the court's comments regarding the defendant's lack of remorse "lacked any grounds to mitigate his sentence." Id. Specifically, the appellate court considered the following pronouncement and reasoning:

> I think the testimony left no question that this crime occurred and it occurred the way that she ... described it.... I tend to agree with [the prosecutor], I think those masks came off because ... I don't think [the victim] was supposed to survive this incident. I'm not sentencing on that basis

> ... I think it's an appropriate ... conclusion to reach ... but I'm not sentencing on that basis.
>
> I am, however, considering the testimony as it was presented and this lady, quite frankly, for lack of a better way to characterize it, was terrorized in that household and these men ran after her when she tried to escape and brought her back at gunpoint to terrorize her some more.
>
> I'm looking at a prior record here and at the ripe old age of 19, let's see, I have one, two, three, four, five, six prior convictions...
>
> I've heard absolutely no 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.
>
> I remember her testimony, I have notes of it, in which she broke down what each of the individuals did and quite frankly I do think that she's lucky to be alive and to have lived ... And based on that sir, I ... think based on your record and based on this conduct, you have forfeited your right to remain out with us and I will sentence you on Count 1 to life imprisonment with a ten-year mandatory minimum, on Count 2 to 15 years in the Department of Corrections, both counts concurrent.

Id. The Fourth District went on to consider remorse, by viewing:

> the [lower] court's comments regarding the defendant's lack of remorse as the court's recognition that it lacked any grounds to mitigate his sentence. [The Fourth District] found no evidence that the [lower] court used the defendant's lack of remorse against him.

Id.; See also Lincoln v. State, 978 So.2d 246, 246 (Fla. 5th DCA

2008) (sentencing court considered a lack of remorse as a factor in rejecting defendant's claim of contrition).

In St. Val. v. State, 958 So. 2d 1146, 1147 (Fla. 4th DCA 2007) the appellate court rejected appellant's contention of a per se rule against utilization of lack of remorse in sentencing by stating:

> We reject appellant's contention that a sentencing judge may never take a defendant's lack of remorse into consideration when imposing sentence. If a defendant is remorseful, it means that he is sorry he committed the crime for which he is to be sentenced. One who so regrets his acts may not commit such acts in the future. This is the type of factor that judges have historically taken into consideration in imposing sentence.
>
> In 1930, Roscoe Pound described the received ideal of a judge imposing sentence, given shape by the dominant moral, social, and economic conceptions of the time:
>
> > [A] judge imposing sentence must go thoroughly into the details of the conditions, internal and external, under which an act was done. He must look into the motive of the act and its consequences. The legal ideal is one of exact adjustment of the penalty to the particular case by way of compensation for the generality of the legal precept which was applied mechanically in determining conviction.

St. Val, 958 So. 2d at 1147 (citations omitted). These holdings mirror the reasoning detailed in Rankin where the court's consideration of failure to accept guilt and failure to show

remorse respond to a request by the defendant for such mitigation; "where a defendant injects the issue of his rehabilitation into his case, we have held the trial court permissibly could have considered all factors relevant to his rehabilitation and fitness to rejoin society." Rankin, 174 So. 3d at 1094.

Also, most other states go even further and provide for increased sentences for those defendants who fail to express remorse for their crimes. See State v. Coleman, 984 A.2d 650, 655 (R.I. 2009); Hersick v. State, 904 So. 2d 116, 128 (Miss. 2004); State v. Hammond, 742 A.2d 532, 538-39 (N.H. 1999); Phelps v. State, 914 N.E.2d 283, 293 (Ind. Ct. App. 2009); State v. Collins, 290 S.W.3d 736, 747 (Mo. Ct. App. 2009); People v. Stewart, 68 A.D.3d 1438, 1438 (N.Y. App. Div. 2009).

Since the district courts are allowing sentencing court's to consider lack of remorse in character assessments and in rehabilitation estimates, and other states do the same, this Court should strongly consider it. This use of privileged silence constitutes a limited exception or "invited error."

It is worth noting that not only do all the above Florida cases support the State's position that the defense can open the door to considering lack of remorse, but all of these cases appear to be in a direct appeal posture. They do not support a conclusion that this alleged sentencing error can overcome the

procedural bar discussed above and be raised in postconviction.

4. Federal courts may use lack of remorse as a measurement of character or rehabilitation potential in aggravation.

Although the Constitution prohibits a judge from drawing a negative inference from the silence of a criminal defendant at trial or at sentencing, it does not equate to a per se prohibition against considering a defendant's lack of remorse. See United States v. Johnson, 903 F.2d 1084 (7th Cir. 1990) ("There is a distinction, however, between punishing a defendant for exercising his right to remain silent and considering the defendant's character in determining an appropriate sentence"); Burr v. Pollard, 546 F.3d 828, 832 (7th Cir. 2008) (Remorse is properly considered at sentencing because it speaks to traditional penological interests such as rehabilitation and deterrence).

It is well established that a sentencing judge may consider lack of remorse when imposing a sentence. See Johnson at 1090 (citing numerous federal cases in support); Burr, supra. These cases suggest that one's propensity for rehabilitation is always an issue in sentencing, regardless of whether the defense brings it up or not. While the defense can open the door on an improper consideration, the State would suggest that propensity for rehabilitation is always proper; and therfore the door is always "open" to consider one's remorse or lack thereof--as long as

this is done within the context of gauging rehabilitation and not as punishment for exercising silence. Some cases explain that a lack of remorse is fair game whenever the court is evaluating the rehabilitation factor, even on its own initiative.

As the Burr court explained:

> [S]ilence can be consistent not only with exercising one's constitutional right, but also with a lack of remorse. The latter is properly considered at sentencing because it speaks to traditional penological interests such as rehabilitation (an indifferent criminal is not ready to reform) and deterrence (a remorseful criminal is less likely to return to his old ways)... The line between the legitimate and the illegitimate, however, is a fine one. As we have recognized, "sometimes it is difficult to distinguish between punishing a defendant for remaining silent and properly considering a defendant's failure to show remorse in setting a sentence." ... But this is not one of those difficult cases.

Burr, supra, at 832 (citations omitted).

This Court should order a construct that allows for the consideration of lack of remorse in the course of considering arguments in favor of mitigation or rehabilitation; however, use in aggravation should also be of interest and is constitutional.

C. In This Case, There Exists No Evidence In The Record That The Sentencing Court Relied Upon The Petitioner's Apparent Lack Of Remorse In Aggravation Of The Sentence Imposed

No evidence in the record points to reliance by the

sentencing court on the Petitioner's assertion of innocence, failure to admit guilt, or failure to show remorse. Reliance is required. Petitioner bears the burden of proving the sentencing court relied upon the statement using the record from the district court.

1. Burden on the Petitioner to show reliance

In the cases presented by the Petitioner for the proposition that an impermissible constitutional prohibition was used against a defendant, the respective defendant was successful in proving the sentencing court improperly relied upon the statement. German v. State, 27 So. 3d 130, 131 (Fla. 4th DCA 2010) (The question then is whether the trial court relied on the defendant's silence or lack of remorse in fashioning the sentence).

In Yesbick v. State, 408 So.2d 1083, 1085 (Fla. 4th DCA 1982) the defendant was unable to carry her burden of reliance and the appellate court affirmed the sentence since there were "any number of reasons the trial judge may have found to justify a more severe sentence" but that defendant failed to show reliance. Similarly, in Gallucci v. State, 371 So.2d 148 (Fla. 4th DCA 1979) the defendant's burden was met since the trial court's pronouncement, on its face, implied that a demand for trial will be treated differently from a plea. Likewise in Gillman v. State, 373 So.2d 935 (Fla. 2d DCA 1979) the

defendant's burden was met since evidence in the record affirmatively showed that the sentencing judge's view that a defendant's choice of plea shows whether he recognizes and repents his crime; thus a defendant who enters a plea would receive a different sentence than a defendant who elects to go to trial. In our case, Petitioner has presented no such reliance and therefore has not carried that burden.

2. No such evidence in the record

Petitioner points to no evidence in his Initial Brief that could be characterized as reliance by the sentencing court on the Petitioner's assertion of innocence, failure to acknowledge guilt and failure to show remorse.

i. No reliance on Petitioner's assertion of innocence

Petitioner appears to takes great care in his detail of the pre-trial plea discussions between the parties and the Petitioner's rejection of each and every negotiation, indicating that Petitioner asserted his innocence throughout the proceedings. On pages 7-8 of Petitioner's Initial Brief, Petitioner italicized the following five words by the sentencing court meant to carry the entire burden of Petitioner's claim that the sentencing court relied upon Petitioner's assertion of innocence in its consideration of a sentence: It was rejected by you. (R.451-452).

With those five words, Petitioner urges this Court to institute a new standard of law that implies reliance by the sentencing court. Petitioner urges this Court to ignore the real and overshadowing liklihood that the sentencing court was simply reciting for the record the history of plea negotiations prior to trial. Petitioner urges this Court to read into those five words an implication that the sentencing court was recognizing Petitioner's assertion of his innocence, and, using the same five words, retaliating against Petitioner for such an assertion. The judge was simply stating a fact. The judge did not get involved in plea negotiations and only verified Defendant was rejecting the State's offer. As this Court is aware, it is common to preserve the rejection of plea offers on the record to refute future postconviction claims that an offer was not properly conveyed. This was not punishment for electing a trial, and the Court should not follow Petitioner's urging.

ii. No reliance on Petitioner's failure to acknowledge guilt or failure to show remorse

On the same pages of Petitioner's Initial Brief, Petitioner recites several lines to support his claim that the sentencing court relied upon his failure to acknowledge guilt and failure to show remorse in his sentencing consideration. After a full trial and two sentencing hearings, all of which provide an avalanche of context into the sentencing court's reasoning and

considerations, Petitioner hints at a few lines at the end to support his claim. Near the end of his pronouncement, the sentencing court states:

> 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.

(R.451-452). Even if this Court were to consider these few lines, nothing in these lines indicate reliance. Absent from these lines are the implications or facial assertions that were sufficient for reversal in other cases. Instead, as argued below, these lines are surrounded by an avalanche of context that reveals their true use, to refute Petitioner's request for mitigation.

D. In This Case, Evidence In The Record Exists That The Sentencing Court Refuted Petitioner's Request For Mitigation, Specifically His Argument For Rehabilitation

This Court should hold that the pronouncements by the sentencing court are constitutional since, in context, they are utilized by the sentencing court in response to Petitioner's request for mitigation and argument for rehabilitation.

1. Second Sentencing Hearing

At the Second Sentencing Hearing, Petitioner's defense counsel made a mitigation argument similar to the argument at the previous hearing. Petitioner's defense counsel makes an impassioned request for mitigation and a lengthy argument for

rehabilitation which ends with:

> I think the Court, in listening to [Petitioner] on numerous occasions has realized that [Petitioner] is not dumb. He's bright. I think a 10-year sentence would be appropriate punishment, and I think [Petitioner], **at that point in time, would have learned his lesson and can be thereafter a contributing member of, society. So I would ask the court to take that into consideration.**

(R.239-240, 447-448).

The sentencing court would be remiss if it did not consider mitigation in accordance with Petitioner's request. Additionally, the sentencing court would miss its mark if it did not consider the Petitioner's character in its pronouncement of sentence. Because of the invitation afforded to it by the Petitioner, the sentencing court was constitutionally authorized, if not required, to consider the facts and circumstances pled before it.

Petitioner seems to want his Constitutional cake and to eat it, too. Petitioner put forth a series of facts in support of a mitigation argument and a rehabilitation argument; but, when the sentencing court fails to accord Petitioner justification for mitigation or rehabilitation, Petitioner claims constitutional offense.

These facts fall into the reasoning detailed in Rankin where the court's consideration of failure to accept guilt and

failure to show remorse respond to a defense request for such mitigation; "where a defendant injects the issue of his rehabilitation into his case, we have held the trial court permissibly could have considered all factors relevant to his rehabilitation and fitness to rejoin society." Rankin, 174 So. 3d at 1094.

2. An avalanche of context supports a life sentence independent of any assertion of innocence, failure to acknowledge guilt, or failure to show remorse

In its first and its second pronouncement, the sentencing court lays out a host of facts supporting the decision for a life sentence. The sentencing court repeats themes of terrorized victims, danger to the public, and overwhelming strength of the evidence at trial, as in:

> After having heard the ... testimony of the witness, seeing the absolute fear in the face of one witness when she broke down in tears during ... direct examination, I understand why [the State] 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 have a doubt that you committed it. You beat a woman about the head and about the face with a firearm. It could have caused permanent damage to her.

(R.239-240, 447-448).

Additionally, the sentencing court was able to consider the Petitioner's insistence on calling the additional victim-witnesses to the stand in his case-in-chief. Comparing the Petitioner's questioning of the victim-witnesses to the minimal defensive facts garnered from them, it is plain to see the trauma the trial court witnessed. The damaging testimony of these victims, in addition to the bullying, intimidating manner in which the Defendant examined them at trial, was rightfully considered by the sentencing court as reflecting the character traits of the Petitioner.

Further, consider Petitioner's statement, "I believe it was Eleanor Roosevelt who said it. No one can make you feel inferior without your consent. That's all." (R.447-448). This certainly seems inconsistent with feeling remorse or regret. The trial judge would have been in the best position to evaluate Defendant's demeanor and fully interpret the statement, but it is an affirmative statement and not mere silence, so it is clearly permissible to hold it against him. The statement puts Defendant above the law and implies he will not allow this proceeding get his spirits down, or feel bad about it, and will keep his head high. This is a statement of rebellion, not contrition, and it alone justified the sentencing court's comments in response to such sentiment.

This Court should also reject the argument that the judge

punished Defendant for rejecting the 10-year offer and proceeding to trial. Appellant seems to think he should have been entitled to the State's 10-year offer despite rejecting it. Consider Bucknor v. State, 965 So. 2d 1200 (Fla. 4th DCA 2007), in which the court held that the record did not support a finding that defendant's thirty-year sentence for robbery was vindictive, even though defendant claimed that sentence was greater than the sentence offered by the State in a pre-trial deal. Nothing in the record showed the trial court was in involved with making the State's offer.

Like in Bucknor, the sentencing court in this case did not make the plea offer, it was made by the prosecution presumably to spare the victims the risk and stress of a trial. The sentencing court merely had the parties put their positions on the record for 3.850 purposes, verified that no agreement could be reached, and then he made sure that Petitioner was knowingly electing a trial.

This avalanche of context proves two things clearly. First, that the sentencing court did not rely on the Petitioner's assertion of innocence, failure to accept guilt, or failure to show remorse; nor any vindictive sentencing. Second, that the real reason justifying the Petitioner's life sentence was firmly based in a theme of terrorized victims, danger to the public, and an overwhelming strength of the evidence at trial.

While Petitioner claims that defendants should not be forced to choose between seeking mitigation and exercising a right to silence, there is no other coherent option; a criminal defendant must choose a strategy. By omitting a showing of remorse, a defendant may necessarily limit the evidence that could support any argument relating to rehabilitation. But this is by strategic choice, not some failing of the constitution.

This Court should enter an order confirming that District Courts may consider lack of remorse to rebut potential mitigation issues, consistent with Rankin and Singleton.

CONCLUSION

Respondent respectfully requests that this Court enter an order affirming the opinion of the Second District Court of Appeals.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished electronically to Jorge A. Perez-Santiago and Peter D. Webster of Carlton Fields Jorden Burt P.A., Suite 4200, Miami Tower, 100 Southeast 2nd St., Miami, FL 33131, via the Florida Courts eFiling Portal (respectively) to:

pwebster@cfjblaw.com, jperezsantiago@cfjblaw.com

on this January 19, 2016.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

PAMELA JO BONDI
ATTORNEY GENERAL

JOHN KLAWIKOFSKY
Chief Assistant Attorney General
Bureau Chief-Tampa Crim. Appeals
Florida Bar No. 930997

JASON M. MILLER
Assistant Attorney General
Florida Bar No. 624551
Concourse Center 4
3507 E. Frontage Road, Suite 200
Tampa, Florida 33607-7013
CrimAppTPA@myfloridalegal.com
Jason.Miller@myfloridalegal.com
(813)287-7900 Ext. 7135
(813)281-5500 (FAX)
COUNSEL FOR RESPONDENT