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 REPLY BRIEF ON THE MERITS

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

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The sentencing court considered Godwin's decision to exercise his right to a trial when it imposed maximum sentences by noting Godwin's rejection of a plea deal, and failure to acknowledge responsibility or show remorse. Florida law prohibits such considerations because they needlessly deter the exercise of fundamental rights. Nevertheless, Godwin's counsel failed to object and the sentencing court imposed maximum sentences despite stating prior to trial that it would impose concurrent 10-year minimum mandatory sentences if Godwin pled guilty. Thus, Godwin's counsel provided ineffective assistance.

The State, however, contends in its Answer Brief for the first time in these proceedings that Godwin's constitutional challenge is procedurally barred. Further, although the State largely fails to address the substantial case law cited by Godwin, it argues that sentencing courts are permitted to consider a defendant's failure to admit guilt or show remorse, particularly where the defendant has "invited" such consideration. Finally, citing no record evidence to provide context and mostly adopting Godwin's statement of facts, the State contends that the sentencing court

limited its consideration of these factors to rejection of mitigation, and that the failure to object was a strategic decision. These arguments lack merit.

As discussed below, the State conceded that Godwin was entitled to an evidentiary hearing on this claim; sentencing courts cannot consider a defendant's exercise of the right to a trial to reject unrelated claims for mitigation; and, even if courts may do so in that limited context, read reasonably, the record reflects that the court improperly relied on Godwin's exercise of his constitutional rights in determining his sentence. Thus, this Court should quash the Second District's decision and remand for resentencing before a different judge.

A. The Court Should Consider Godwin's Claim On The Merits

The State has waived its argument that Godwin's claim is procedurally barred because it failed to raise it at any stage of these proceedings since they began in August 2010. *See* Fla. R. Crim. P. 3.850(f)(6) ("The State's answer shall . . . describe any matters in avoidance. . . ."); s*ee also Cook v. State*, 638 So. 2d 134, 135 (Fla. 1st DCA 1994) (State waived timeliness objection "by responding to all nine claims of ineffective assistance of counsel below"); *Arbelaez v. Crews*, 43 F. Supp. 3d 1271, 1283 (S.D. Fla. 2014) (State waived procedural defect and timeliness argument by failing to "advise any court" over 8 years). Indeed, the State conceded that Godwin was entitled to an evidentiary hearing on this claim; addressed only the merits on appeal; and did not raise this argument in its

jurisdictional brief to this Court. (R.1:143; CR.1:115, 148-155, 169).[1] Further, both the postconviction court and the Second District decided this issue on the merits. Thus, this Court should address this claim on the merits.

B. 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 Florida Constitution, "[t]he right of trial by jury shall be secure to all and remain inviolate." Art. I, § 22, Fla. Const. Although the express language of this constitutional provision guarantees the right to a jury trial, the State contends that an accused's exercise of this right may be considered evidence of bad character. Thus, according to the State, courts may deter the exercise of a fundamental right by concluding that a defendant is incapable of rehabilitation and unworthy of mitigation, regardless of the claimed mitigation, solely because the defendant has protested his innocence and required the State to prove its case. Indeed, the State argues that the exercise of this right "should also be of interest and is constitutional" as a consideration supporting aggravation (AB at 26), a position indisputably contrary to Florida law. The Court should reject this argument.

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[1] References to the Record will be designated as: (R.[vol.]:[page number]). References to the Constructed Records, a separately-paginated record of all filings before the Second District, will be designated as: (CR.[vol.]:[page number]).

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

The State contends that courts are permitted to consider a defendant's assertions of innocence as evidence of a defendant's bad character to reject unrelated grounds for mitigation in imposing a sentence. This argument makes no attempt to address the substantial case law cited in Godwin's Initial Brief, otherwise lacks merit, and rests on an improper reading of this Court's precedent.

Indeed, as established in Godwin's Initial Brief, it is axiomatic that a defendant's exercise of the right to a jury trial should be unfettered by fear that its exercise might be held against him. *See City of Daytona Beach v. Del Percio*, 476 So. 2d 197, 205 (Fla. 1985) ("[A]ny judicially imposed penalty which needlessly . . . deters the exercise of the Sixth Amendment right to demand a jury trial is patently unconstitutional.") (internal quotations omitted); *Galluci v. State*, 371 So. 2d 148, 150 (Fla. 4th DCA 1979) (right to trial by jury "may be exercised freely by an individual, without fear that the choice to go to trial will be held against him"); *cf. 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.").

Moreover, Florida courts have held that the exercise of constitutional rights cannot factor into the sentencing decision, and lack of remorse cannot be inferred

from the exercise of those rights. *See, e.g.*, *Johnson v. State*, 948 So. 2d 1014, 1017 (Fla. 3d DCA 2007) (cannot consider defendant's failure "to acknowledge his culpability for the charged offense" in rejecting mitigation); *Moorer v. State*, 926 So. 2d 475, 476 (Fla. 1st DCA 2006) (consideration of defendant's "'failure to take responsibility' by pleading guilty is an impermissible consideration in sentencing"); *Ritter v. State*, 885 So. 2d 413, 414 (Fla. 1st DCA 2004) ("Although remorse and an admission of guilt may be grounds for mitigation of sentence, the opposite is not true."); *Cavallaro v. State*, 647 So. 2d 1006, 1006 (Fla. 3d DCA 1994) ("[A] party's decision to exercise his or her right to jury trial cannot be viewed as a showing of lack of remorse."); *Gillman v. State*, 373 So. 2d 935, 938-39 (Fla. 2d DCA 1979) (impermissible to place a burden on right to trial by inferring a lack of remorse from a defendant's exercise of that right); *Gallucci*, 371 So. 2d at 150 (constitutionally impermissible to "conclude that a request for a trial is an indication that a defendant cannot be rehabilitated").

Further, this Court held in *Del Percio*, 476 So. 2d at 205, *Holton v. State*, 573 So. 2d 284, 292 (Fla. 1990), and *Pope v. State*, 441 So. 2d 1073, 1078 (Fla. 1983), respectively, that a defendant's exercise of the right to trial "cannot be a factor in the sentencing decision"; cannot be used against him during sentencing because "due process guarantees an individual the right to maintain innocence even when faced with evidence of overwhelming guilt"; and that it is a *mistake* to infer

"lack of remorse from the exercise of constitutional rights." The State, however, makes no attempt to reconcile its position with any of these aforementioned authorities.

Rather, despite the impressive body of Florida law contradicting the State's argument, the State contends that this Court has already rejected Godwin's position, citing *Derrick v. State*, 581 So. 2d 31, 36 (Fla. 1991), *Tanzi v. State*, 964 So. 2d 106, 115 (Fla. 2007), and *Singleton v. State*, 783 So. 2d 970, 978 (Fla. 2001). These decisions, however, do not address the issue on review here.

Anticipating the State's misplaced reliance on these cases, Godwin discussed *Pope*, from which these decisions originate, and *Derrick* on pages 25 and 26 of his Initial Brief. In *Pope*, this Court expressly stated that "inferring lack of remorse from the exercise of constitutional rights" is a mistake, and prohibited its use in aggravation of a sentence. *Pope*, 441 So. 2d at 1078. Although the Court held that "[a]ny convincing evidence of remorse may properly be considered in mitigation of the sentence," *Pope* cannot be read to prohibit such consideration in aggravation of a sentence, but to sanction the commission of the same error in a corollary context, rejection of any proposed mitigation. *Id.* at 1078. None of the other decisions cited by the State touch upon the same considerations addressed in *Pope*, and given the distinguishable factual context of each case, do not control.

In *Derrick*, 581 So. 2d at 36, the State elicited testimony that he had admitted killing the victim, and "would kill again" before the defendant introduced evidence of remorse or rehabilitation. This Court held that "[w]hile the statement[s] would be admissible to rebut evidence of remorse or rehabilitation, it was introduced before the defense presented any evidence." *Id.* Thus, the particular statements at issue, an admission of guilt and a statement of intention to kill again, were admissible only to rebut evidence presented by the defense of remorse or rehabilitation. The Court did not address whether lack of remorse may be inferred from the exercise of constitutional rights to reject unrelated proposed mitigation.

This Court's decision in *Tanzi* likewise did not address this issue. Indeed, in *Tanzi*, the defendant never asserted his innocence. He confessed to all of the charges, and pled guilty to first-degree murder. *Tanzi*, 964 So. 2d at 111. Further, evidence of lack of remorse was admissible because Tanzi's own mental health expert testified that he had antisocial personality disorder, a symptom of which is a lack of remorse, and "[t]he State did not present any testimony regarding Tanzi's remorse or lack thereof for [the victim's] murder." *Id.* at 115. Thus, Tanzi's sentence could not have been based on his assertions of innocence.

In *Singleton*, the defendant argued it was improper for the State to ask the defendant's parole officer on cross-examination to clarify his testimony regarding the defendant's behavior and demeanor while on parole for a *prior* violent crime.

Specifically, the parole officer testified on direct examination that the defendant was generally well-behaved, but that he had to ask the defendant to refrain from certain areas of conversation. On cross-examination, he clarified that those areas of conversation included the defendant's attempts to "discuss how [the minor victim of his prior crime] offered him sex for money and that his conviction was improper." *Singleton*, 783 So. 2d at 978-79. Thus, the admissible evidence of lack of remorse was not based on the defendant's exercise of the right to trial in the matter before the court.

The State also cited *Rankin v. State*, 174 So. 3d 1092 (Fla. 4th DCA 2015), and *Turner v. State*, 902 So. 2d 202 (Fla. 3rd DCA 2005), to support its contention that there is no conflict for this Court to address. *Turner*, however, held that the defendant had waived the argument, and also provided no factual context supporting its holding that the court properly considered assertions of innocence to reject mitigation. *Id.* at 203. Moreover, *Johnson*, 948 So. 2d at 1017, in which the Third District held that courts cannot consider the failure to acknowledge culpability in rejecting a request for mitigation, was decided after *Turner*.

Finally, *Rankin* is distinguishable and is poorly reasoned. In *Rankin*, unlike here, the defendant sought a downward departure sentence pursuant to section 921.0026(2)(j), Florida Statutes, which provides that a court may impose a sentence below the mandatory minimum if "[t]he offense was committed in an

unsophisticated manner and was an isolated incident for which the defendant has shown remorse." Also, the trial court observed that the "[Conte] facility" noted that the defendant had no remorse. *Rankin*, 174 So. 3d at 1095. Thus, evidence of lack of remorse, including evidence from a third-party, "went directly to the heart of this statutory basis for a downward departure." *Id.* at 1098.

Moreover, the court incorrectly relied on *Peters v. State*, 128 So. 3d 832 (Fla. 4th DCA 2013), to distinguish its decision in *Davis v. State*, 149 So. 3d 1158, 1160 (Fla. 4th DCA 2014), where the court held that consideration of a defendant's "failure to take ownership of [the defendant's] actions or apologize to the victims' families" was fundamental error. In *Peters*, the defendant had entered pleas of guilty and taken the position at resentencing that he had been rehabilitated. 128 So. 3d at 847. On that basis, the court distinguished cases prohibiting consideration of lack of remorse by noting the defendants in those cases "consistently maintained [their] innocence." Thus, the court held that remorse is appropriately considered when a defendant does not dispute his guilt, but claims he has been completely rehabilitated. *Id.* at 848. Thus, *Rankin* is not on point.

Continuing to rely on inapposite Florida law, the State argues that a court's consideration of a defendant's failure to acknowledge guilt and "its cousin," lack of remorse, is constitutionally appropriate because remorse is relevant to support a request for a downward departure pursuant to section 921.0026(2)(j), Florida

Statutes. Godwin, however, did not request a downward departure sentence, and does not argue that courts cannot consider a defendant's lack of remorse when a downward departure sentence is sought. *See Beasley v. State*, 774 So. 2d 649, 672 (Fla. 2000) (defining remorse, and querying how a defendant could show remorse while at the same time maintaining innocence). Moreover, Godwin does not contend that "convincing evidence of remorse" cannot be considered to mitigate a sentence because under those circumstances the defendant has chosen to admit guilt. *See Pope*, 441 So. 2d at 1078. Instead, Godwin argues that courts cannot consider a defendant's protestations of innocence or lack of remorse based on the exercise of the right to trial to reject any unrelated arguments for mitigation.

Finally, the State relies on cases from the Seventh Circuit Court of Appeals discussing the Fifth Amendment. Although these cases support the State's position by analogy, even the Seventh Circuit acknowledges that it is "difficult to distinguish between punishing a defendant for remaining silent and considering a defendant's failure to show remorse." *U.S. v. Johnson*, 903 F.2d 1084, 1090 (7th Cir. 1990); *Burr v. Pollard*, 546 F.3d 828, 832 (7th Cir. 2008).

Moreover, many courts reject the approach of the Seventh Circuit. *See, e.g.*, *Roberts v. U.S.*, 445 U.S. 552, 557 n.4 (1980) ("We doubt that a principled distinction may be drawn between 'enhancing' the punishment imposed upon the petitioner and denying him the 'leniency' he claims would be appropriate if he had

cooperated."); *U.S. v. Frierson*, 945 F.2d 650, 658, 659 (3d Cir. 1991) (stating denial of leniency because of exercise of Fifth Amendment right is unconstitutional penalty) (collecting cases and citing *U.S. v. Perez-Franco*, 873 F.2d 455, 463 (1st Cir. 1989); *Thomas v. U.S.*, 368 F.2d 941, 945 (5th Cir. 1966) (cannot place defendant "between the devil and the deep blue sea" at sentencing by suggesting a reduced sentence if defendant waives right to silence); *State v. Burgess*, 943 A.2d 727, 734 (N.H. 2008) (collecting numerous cases and holding that lack of remorse cannot be inferred from silence and maintenance of innocence).

This Court should follow these more well-reasoned decisions. Like the U.S. Supreme Court suggested in *Roberts*, there is simply no principled distinction between aggravating a sentence and rejecting any mitigating circumstances based on the exercise of constitutional rights. The heavy burden placed on a defendant's free exercise of inviolable rights is the same -- the prospect of a longer sentence.

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

To determine whether Godwin's counsel should have objected to the court's commission of fundamental error, courts review the record to see whether it 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 v. State*, No. 2D14–2910, 2015 WL 6777209, at *1 (Fla. 2d DCA Nov. 6, 2015).

The State refers to what it calls "an avalanche of context"[2] to support its argument that the court did not rely on impressible factors. This "avalanche" is either not in the record or is simply unsupported speculation. Further, the State largely adopts Godwin's statement of facts and characterization of the context that framed the court's sentencing remarks. For instance, the State concedes that the court expressed frustration with Godwin prior to trial during a hearing on Godwin's motion to suppress evidence, warning him twice of potential consequences for proceeding to trial *pro se*: "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," and "I guess you must know more law," "[t]hen you need to get a lawyer in here to advise you," and "[y]ou're looking at a life sentence." (R.3:395-96, 491, 493, 496).

[2] The State improperly refers to extraneous evidence in its brief without citation. For instance, it refers to witness "harassment" by Godwin in a heading on page 9, and supports its "context" argument by asking this Court to "[c]ompar[e] [Godwin's] questioning of the victim-witnesses to the minimal defensive facts garnered from them . . . to see the trauma the trial court witnessed." AB at 34. The State then characterizes the examination as "bullying" and "intimidating," and the testimony as "damaging." The State offers no record support for these characterizations. Thus, they should be stricken. *See* Fla. R. App. P. 9.210(b)(3) ("References to the appropriate pages of the record or transcript shall be made.").

Moreover, the State mischaracterizes Godwin's argument by suggesting that he relies only on the following five words to prove his claim: "It was rejected by you." (R.3:451; AB at 28). Godwin, however, argues that the record evidence shows that constitutionally impermissible considerations predominated the sentencing court's remarks:

> 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.

(R.3:451-52) (emphases added). The State contends that these remarks show the court properly relied on victim impact, danger to the public, and strength of the evidence. (AB at 32). In context, however, the focus of the court's remarks is on Godwin's decision to exercise his right to trial.

Indeed, the court referenced having observed the witness cry immediately after it stated that it understood why the State "offered the 10 years" instead of trying the case to a jury, and that Godwin had rejected that offer. The court then repeated that it understood the State's preference not to try the case and call witnesses to testify, and stated that it had "[n]ot one doubt" that Godwin committed the crime. Thus, the court's discussion regarding the witness, preceded by commentary that the court understood the State's preference to avoid a trial and that Godwin had thwarted that possibility, and followed by the court's expression of strong conviction in Godwin's guilt, may reasonably be read as a rebuke for Godwin's decision to exercise his right to trial.

Moreover, that the court emphasized that Godwin had not "shown one ounce of remorse," or acknowledged guilt, and repeated it had no doubts concerning Godwin's guilt also shows that the court was vexed by Godwin's exercise of the right to trial despite what the court considered overwhelming evidence of guilt.

At minimum, the record reasonably suggests that the sentencing court violated Godwin's right to trial by basing his sentence at least in part on his decision to exercise his right to trial. Thus, Godwin's counsel's performance was deficient because there was no tactical reason to "stand[] mute when the trial judge impose[s] the harshest sentence available based on improper sentencing factors,"

and there is otherwise no support for the State's conjectural theory as to counsel's strategy. *See Johnson v. State*, 120 So. 3d 629, 630-32 (Fla. 2d DCA 2013).

Because counsel failed to object, Godwin's exercise of constitutional rights contributed to his sentence to life in prison without the possibility of parole. This Court's confidence in the sentence should be undermined because Godwin will be imprisoned for the remainder of his 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.

CONCLUSION

Based on the foregoing, this Court should quash the Second District's decision and remand for resentencing before a different judge.

Respectfully submitted,

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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 15th day of February, 2016 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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