IN THE SUPREME COURT OF FLORIDA

SHAWN ROGERS,

Appellant,

v. Case No. **SC18-150**

STATE OF FLORIDA,

Appellee.

On Appeal from the Circuit Court of the First Judicial Circuit in and for Santa Rosa County, Florida

REPLY BRIEF OF APPELLANT

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INTRODUCTION

Rogers' death sentence should be vacated. This case should be remanded for a new second-phase trial. As to **Issue I**, the court failed to instruct the jury to determine beyond a reasonable doubt (1) whether the aggravating factors were sufficient to justify the death penalty, and (2) whether those factors outweighed the mitigating circumstances. The State argues those determinations are sentencing considerations, rather than elements. It also contends only purely factual determinations, as opposed to determinations involving normative judgment, are subject to the constitutional requirement of proof beyond a reasonable doubt. Finally, the State claims Rogers invited any fundamental error related to omitting the instruction at issue.

The State's arguments are unconvincing. First, in *Hurst v. State*, 202 So.3d 40 (Fla. 2016), this Court made clear that, under Florida's capital sentencing scheme, the determinations at issue are elements of capital murder. Second, those determinations have both a purely factual component and an application-of-a-normative-standard-to-facts component. Third, even if those determinations are not susceptible to a quantum of proof, they are susceptible to a subjective state of certitude.

Fourth, instructing the jury to make those determinations beyond a reasonable doubt furthers the interests underlying the constitutional requirement of proof beyond a reasonable doubt. Fifth, Rogers' counsel merely acquiesced to the erroneous

instruction and never affirmatively relied on it. Finally, this Court's recent decision in *Foster v. State*, SC18-860, 2018 WL 6379348 (Fla. Dec. 6, 2018), is inconsistent with the *Apprendi* line of cases and this Court's post-*Hurst v. Florida* jurisprudence.

As to **Issue II**, the court admitted Rogers' letters to an earlier judge and to the elected state attorney in their entirety, including Rogers' reflections on race, politics, and his own character and predispositions. The State argues portions of those letters were relevant. But any lack of remorse on Rogers' part regarding Martin's death was not relevant. Further, the portions of Rogers' letters containing his reflections on race, politics, and his own character and predisposition were not admissible to rebut defense evidence of Rogers' peaceful, well-adapted character while in prison or "to give context to the relevant statements." Finally, even assuming those portions were relevant, their introduction was unduly prejudicial to the point that it rendered the second-phase trial fundamentally unfair.

At a minimum, this case should be remanded for a new *Spencer* hearing followed by the issuance of a revised sentencing order. As to **Issue V**, the court failed to thoughtfully and comprehensively analyze any of the proposed mitigating circumstances. The State argues it is sufficient for a court to simply determine whether each such circumstance was established and assign a weight to those established. It also claims any error should be subjected to harmless error review. But a court must articulate *why* the evidence failed to support some circumstances and

warranted the allocation of certain weight to others. Further, because the court's analysis of the proposed circumstances reflects a perfunctory evaluation on its part, this Court is precluded from meaningfully reviewing the court's sentencing order.[1]

ARGUMENT

I. Reversible Error Occurred When the Court Failed To Instruct the Jury To Determine Beyond a Reasonable Doubt Whether the Aggravating Factors Were Sufficient and Outweighed the Mitigating Circumstances Because Those Determinations Are Elements of Capital Murder, the Court Overlooked *Perry v. State*, and the Error Was Fundamental.

A. Under Florida's capital sentencing scheme, determinations as to (1) whether the aggravating factors are sufficient to justify the death penalty, and (2) whether those factors outweigh the mitigating circumstances are elements of capital murder.

While the State disagrees, it overlooks this Court's explicit declarations and fails to appreciate that, even if the determinations at issue involve normative judgment, they are subject to the requirement of proof beyond a reasonable doubt. The State essentially argues that, under Florida's capital sentencing scheme, a defendant convicted of first-degree murder is eligible for the death penalty solely on the basis of a determination that an aggravating factor exists. [AB 27-30] On that note, it appears to believe the determinations at issue are sentencing considerations, rather than elements. [AB 27-30]

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[1]Additional reasons demand reversal. *See* Initial Brief pp. 70-80, 87-92. But in response to the State's arguments concerning **Issues III**, **IV**, and **VI**, Rogers primarily relies on the arguments raised in his Initial Brief.

Further, the State basically contends that, even if the determinations at issue are elements of capital murder under Florida's scheme, they do not have to be made beyond a reasonable doubt. [AB 30] On that note, it appears to believe only purely factual determinations, as opposed to determinations involving normative judgment, are susceptible to proof beyond a reasonable doubt. [AB 30] And, citing *Tuilaepa v. California*, 512 U.S. 967 (1994), *Kansas v. Marsh*, 548 U.S. 163 (2006), and *Kansas v. Carr*, 136 S. Ct. 633 (2016), the State claims: "The United States Supreme Court has specifically held that the beyond-a-reasonable-doubt standard for finding that the aggravation outweighs mitigation is not required under federal law." [AB 30]

But the determinations at issue are elements of capital murder. And, even if those determinations are not purely factual and involve normative judgment, they are subject to the constitutional requirement of proof beyond a reasonable doubt.

1. *Determinations as to whether the aggravating factors are sufficient and outweigh the mitigating circumstances are not sentencing considerations, but rather elements of capital murder.*

First, this Court indicated in *Hurst v. State* that, under Florida's capital sentencing scheme, those determinations are elements of capital murder. 202 So.3d at 53-54, 57. This Court also rejected the notion that the jury was only required to "find the existence of one aggravating factor and nothing more." *Id.* at 53 n.7. The State ignores that reality.

Second, the determinations at issue increase the penalty for capital murder

beyond the maximum sentence that may be imposed solely on the basis of determinations that (1) the victim is dead, (2) the defendant caused the death, (3) the killing was premeditated or committed during a felony, and (4) aggravating factor(s) exist. Put another way, a defendant is not eligible for the death penalty until those determinations, *plus* determinations as to (5) whether the aggravating factors are sufficient to justify the death penalty; and (6) whether those factors outweigh the mitigating circumstances, are made. *See* Initial Brief pp. 48-51.

The State's contrary argument is conclusory. And it fails to appreciate that "the relevant inquiry is one not of form, but of effect–does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?," *Apprendi v. New Jersey*, 530 U.S. 466, 494 (2000).

Finally, even if the determinations at issue do not increase the penalty for capital murder, they are still necessary to impose the death penalty for that offense. *See* Initial Brief pp. 51-52. The State fails to appreciate the significance of that link.

2. *Even if determinations as to whether the aggravating factors are sufficient and outweigh the mitigating circumstances are not purely factual and involve normative judgment, they are subject to the constitutional requirement of proof beyond a reasonable doubt.*

First, it is necessary to recognize the proper relationship between "elements" and "facts." "'Elements' are the 'constituent parts' of a crime's legal definition–the things the 'prosecution must prove to sustain a conviction.'" *Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016). "Facts, by contrast, are mere real-world

things–extraneous to the crime's legal requirements." *Id.*

That being the case, some elements have both a purely factual component and an application-of-a-standard-to-facts component. For instance, in *United States v. Gauldin*, the Government argued that "materiality" was "a 'legal' question, and that although [the Supreme Court] has sometimes spoken of 'requiring the jury to decide 'all the elements of a criminal offense,' the principle actually applies to *only factual components* of the essential elements.'" 515 U.S. 506, 511 (1995) (internal citations omitted). But the Court rejected that argument, concluding that a jury had to determine beyond a reasonable doubt whether a statement was material. *Id.* at 522-23. The Court reasoned:

> Deciding whether a statement is "material" requires the determination of at least two subsidiary questions of purely historical fact: (a) "what statement was made?" and (b) "what decision was [the entity to which the statement was made] trying to make?" The ultimate question: (c) "whether the statement was material to the decision," requires applying the legal standard of materiality . . . to these historical facts. What the government apparently argues is that the Constitution requires only that (a) and (b) be determined by the jury, and that (c) may be determined by the judge. [But] the application-of-legal-standard-to-fact sort of question posed by (c), commonly called a "mixed question of law and fact," has typically been resolved by juries. Indeed, our cases have recognized in other contexts that the materiality inquiry, *involving as it does "delicate assessments of the inferences a 'reasonable [decisionmaker]' would draw from a given set of facts and the significance of those inferences to him* . . . [is] peculiarly on[e] for the trier of fact."

Id. at 512 (emphasis added) (internal citations omitted).

Further, some elements have both a purely factual component and an

application-of-a-*normative*-standard-to-facts component. For instance, to convict a defendant of obscenity, the jury must determine whether the "material depicts or describes sexual conduct in a patently offensive way" and "taken as whole, lacks serious literary, artistic, political or scientific value." Fla. Std. Jury Instr. (Crim.) 24.5 (2018). Or, to convict a defendant of various crimes, a jury may have to determine whether the defendant committed the crime out of duress or necessity, including whether the "harm that the defendant avoided . . . outweighed the harm caused by committing the" crimes. Fla. Std. Jury Instr. (Crim.) 3.6(k) (2018). On a similar note, even determining whether a defendant acted in self-defense involves more than "binary yes-or-no fact finding"; it requires "balancing of the objective facts with personal and moral judgment." *United States v. Gabrion*, 719 F.3d 511, 548-49 (6th Cir. 2013) (Moore, J., dissenting).

With all that in mind, determinations as to whether the aggravating factors are sufficient and outweigh the mitigating circumstances have both a purely factual component and an application-of-a-normative-standard-to-facts component. In the context of the former component, jurors must determine the historical facts underlying particular aggravating factors and mitigating circumstances.

In the context of the latter, jurors often must initially apply a normative standard to the subsidiary facts to determine the existence of certain aggravating factors and mitigating circumstances. For instance, they may have to determine

whether "the crime was conscienceless or pitiless" or "committed while [the defendant] was under the influence of extreme mental or emotional disturbance." Fla. Std. Jury Instr. (Crim.) 7.11 (2018). After that, jurors have to determine whether the existing aggravating factors are sufficient to justify the death penalty and whether they outweigh the existing mitigating circumstances. That inquiry, similar to the inquiry in *Gauldin*, asks jurors to "'draw [inferences] from a given set of facts,'" conduct "'delicate assessments of'" those inferences, and determine "'the significance of those inferences,'" 515 U.S. at 512.

Second, keeping that in mind, determinations as to whether the aggravating factors are sufficient and outweigh the mitigating circumstances are susceptible to proof beyond a reasonable doubt. As an initial matter, it is necessary to recognize that, in this context, "proof beyond a reasonable doubt" can be interpreted to mean two different things. "[O]ne interpretation focuses on *measuring the balance* between the aggravating factors and the mitigating factors." *State v. Rizzo*, 833 A.2d 363, 377 (Conn. 2003). Under that interpretation, the jury would need to "be persuaded that the aggravating factors outweigh the mitigating circumstances by some quantum . . . measured by the 'beyond a reasonable doubt' standard." *Id.*

The "other interpretation focuses on the *level of certitude* required of the jury in determining that the aggravating factors outweigh the mitigating factors." *Id.* Under that interpretation, the jury would "need only determine that the aggravating

factor[s] [are] greater in some degree . . . than the mitigating factor[s], but, in arriving at that determination, it must be persuaded by a level of certitude beyond a reasonable doubt." *Id.* at 378.

Considering those two interpretations, the "fallacy of the argument [that the determinations at issue are not susceptible to proof beyond a reasonable doubt] lies in the failure to perceive the standard of proof in terms of the level of confidence which the factfinder should have in the accuracy of his finding." *Ford v. Strickland*, 696 F.2d 804, 879 (11th Cir. 1983) (Anderson, J., dissenting). More specifically, assume "'the relative 'weight' of aggravating circumstances and mitigating circumstances is not susceptible to any quantum of proof,'" *Ex parte Bohannon*, 222 So.3d 525, 529-30 (Ala. 2016). Even then, the determinations at issue are susceptible to a "'subjective state of certitude,'" *In re Winship*, 397 U.S. 358, 364 (1970). In short, jurors could reasonably ask themselves if they have an "abiding conviction," Fla. Std. Jury Instr. (Crim.) 3.7 (2018), that the aggravating factors are sufficient and outweigh the mitigating circumstances.

Reflecting that fact, numerous states require determinations beyond a reasonable doubt as to whether the aggravating factors are sufficient and/or outweigh the mitigating circumstances. *See, e.g.*, Ark. Code Ann. § 5-4-603(a) (2018); N.Y. Crim. Proc. Law § 400.27(11)(a) (2018); Ohio Rev. Code Ann. § 2929.03(D)(2) (2018); Tenn. Code Ann. § 39-13-204(g)(1)(B) (2018); Utah Code Ann. § 76-3-

207(5)(b) (2018); *see also Rauf v. State*, 145 A.3d 430, 481-82 (Del. 2016).

Third, and most critically, instructing the jury to determine beyond a reasonable doubt whether the aggravating factors are sufficient and outweigh the mitigating circumstances furthers the interests underlying the constitutional requirement of proof beyond a reasonable doubt. More specifically, such an instruction (1) promotes society's interest in reliable jury verdicts, (2) protects the extraordinary interests at stake for a capital defendant, and (3) increases the wider community's confidence that any defendant condemned to death deserves that punishment. *See* Initial Brief pp. 52-53. The State overlooks that reality.

Fourth, persuasive authority exists to support the State's claim that the determinations at issue do not have to be made beyond a reasonable doubt. *See, e.g.*, *Ex parte Bohannon*, 222 So.3d at 529-33; *Gabrion*, 719 F.3d at 532-33; *Ford*, 696 F.2d at 818. But those cases were wrongly decided. In short, they fail to appreciate that (1) the determinations at issue have a purely factual component and an application-of-a-normative-standard-to-facts component; (2) even if those determinations are not susceptible to a quantum of proof, they are susceptible to a subjective state of certitude; and (3) instructing the jury to make those determinations beyond a reasonable doubt furthers the interests underlying the constitutional requirement of proof beyond a reasonable doubt.

Finally, the Supreme Court has never rejected an argument comparable to

Rogers' argument. As an initial matter, *Tuilaepa* determined that certain factors–considered during the "selection [phase], where the sentencer determines whether a defendant eligible for the death penalty should in fact receive that sentence"–were not vague under the Eighth Amendment. 512 U.S. at 969-80. For its part, *Marsh* determined that Kansas' requirement–that death be imposed if, at the conclusion of the selection phase, the aggravating and mitigating evidence were "in equipoise"–did not violate the Eighth Amendment. 548 U.S. at 169-181. And *Carr* determined that a failure–to instruct the jury, during the "selection phase," that mitigating circumstances "need not be proven beyond a reasonable doubt"–did not violate the Eighth Amendment. 136 S. Ct. at 641-44.

In contrast, the issue here concerns whether a failure–to instruct the jury, during the *eligibility phase*, to determine beyond a reasonable doubt whether the aggravating factors were sufficient and outweighed the mitigating circumstances–violates the *Sixth* and *Fourteenth* Amendments. Further, in both *Marsh* and *Carr*, the Court specifically noted that Kansas law required the State to prove beyond a reasonable doubt that the aggravating circumstances were not outweighed by the mitigating circumstances. 548 U.S. at 178; 136 S. Ct. at 643. But the Court expressed no judgment as to that requirement, much less "specifically held" that it was "not required under federal law" [AB 30].

That said, in *Carr*, the Court reflected on whether, during the "selection phase,"

a standard of proof could be effectively applied "to the mitigating-factor determination." *Id.* at 642. The Court also mused that "the ultimate question whether mitigating circumstances outweigh the aggravating circumstances is mostly a question of mercy," as well as that it "would mean nothing . . . to tell the jury that the defendants must deserve mercy beyond a reasonable doubt." *Id.*

But "[t]he Court's opinion on this point is pure dictum," *United States v. Oakland Cannabis Buyers' Co-op*, 532 U.S. 483, 502 (2001) (Stevens, J., concurring in the judgment). In fact, prior to offering up those thoughts, the Court specifically noted that it was "[a]pproaching the question in the abstract, and without reference to our capital-sentencing case law." *Carr*, 136 S. Ct. 642.

Further, those thoughts concerned selection-phase factors, rather than eligibility-phase elements. In addition, the Supreme Court's dictum conflated a determination as to whether aggravating factors outweigh mitigating circumstances with a determination as to whether a death-eligible defendant deserves mercy from a death sentence. And those two determinations differ in a crucial respect; in contrast to whether a defendant deserves mercy, jurors could reasonably ask themselves if they have an "abiding conviction" that the aggravating factors outweigh the mitigating circumstances.

B. This Court indicated in *Perry v. State* that determinations as to (1) whether the aggravating factors are sufficient to justify the death penalty, and (2) whether those factors outweigh the mitigating circumstances must be made beyond a reasonable doubt.

Rogers previously highlighted that fact. *See* Initial Brief p. 54. The State refuses to directly grapple with it.

C. The court's failure to instruct the jury to determine beyond a reasonable doubt (1) whether the aggravating factors were sufficient to justify the death penalty, and (2) whether those factors outweighed the mitigating circumstances amounted to fundamental error.

The State does not contend any error in this context is not fundamental. [AB 27] Instead, it argues Rogers waived any fundamental error related to omitting an instruction to make the determinations at issue beyond a reasonable doubt. [AB 27] More specifically, it contends Rogers invited any such error "because the defense attorney affirmatively agreed to the jury instructions." [AB 27]

But Rogers did not invite the fundamental error at issue because his counsel merely acquiesced to the erroneous instruction and never affirmatively relied on it. "It is well-settled . . . that 'a party may not make or invite error at trial and then take advantage of the error on appeal.'" *Boyd v. State*, 200 So.3d 685, 702 (Fla. 2015). Thus, fundamental error may be "waived under the invited error doctrine." *Universal Ins. Co. of North America v. Warfel*, 82 So.3d 47, 65 (Fla. 2012).

With that in mind, "[f]undamental error is waived where defense counsel requests an erroneous instruction." *Id.* "Fundamental error is also waived where defense counsel affirmatively agrees to an improper instruction." *Id.*

That said, the First District Court of Appeal has expressed confusion as to the

nature of the action required to qualify as "affirmative agreement." *See Knight v. State*, 1D14-2382, 2018 WL 944663 (Fla. 1st DCA Feb. 19, 2018), *review granted*, SC18-309, 2018 WL 3097727 (Fla. June 25, 2018). But in the foundational case of *Ray v. State*, 403 So.2d 956 (Fla. 1981), this Court made clear "affirmative agreement" to an improper instruction involves reliance on that instruction at trial by the party later raising the fundamental-error claim on appeal.

More specifically, this Court observed: "If Ray's counsel . . . had affirmatively relied on [the improper instruction] as evidenced by argument to the jury or other affirmative action, we could uphold a finding of waiver absent an objection . . . ." *Id.* at 961. And this Court went on to essentially lay down the following general principle: "it is not fundamental error to convict a defendant under an erroneous . . . charge when he had an opportunity to object to the charge and failed to do so if . . . defense counsel . . . relied on that charge as evidenced by argument to the jury or other affirmative action." *Id.*

With that in mind, fundamental error is not waived "'where defense counsel merely acquiesced to [the incomplete] jury instructions." *Lowe v. State*, No. SC12-263, 2018 WL 5095143, at *15 (Fla. Oct. 19, 2018). Instead, "defense counsel must be aware that an incorrect instruction is being read and must affirmatively agree to, or request, the incomplete instruction." *Black v. State*, 695 So.2d 459, 461 (Fla. 1st DCA 1997), *quoted with approval in Lowe*, 2018 WL 5095143 at *15.

Applying those standards here, Rogers did not invite the fundamental error related to omitting an instruction to determine beyond a reasonable doubt whether the aggravating factors are sufficient and outweigh the mitigating circumstances. As an initial matter, the proposed instructions were prepared by the State. [R 6811] That said, during the charge conference, Rogers' counsel repeatedly indicated he "agreed with" or had "no problem with" those standard instructions. [R 6812-19, 6886-95, 6917-18]

But Rogers' counsel never requested that the court omit an instruction to make the determinations at issue beyond a reasonable doubt. He also never affirmatively agreed to such an omission. In particular, Rogers' counsel never "affirmatively relied on that [omission] as evidenced by argument to the jury or other affirmative action," *Ray*, 403 So.2d at 961. Ultimately, Rogers' counsel "merely acquiesced to [the incomplete] jury instructions," *Lowe*, 2018 WL 5095143 at *15.

The present case is distinct from this Court's decision in *Armstrong v. State*, 579 So.2d 734 (Fla. 1991). There, Armstrong's counsel requested a "limited instruction in order to tailor it to" Armstrong's defense. *Id.* at 735. On appeal, this Court concluded: "By affirmatively requesting the instruction he now challenges, Armstrong has waived any claim of error in the instruction." *Id.* Unlike Armstrong's counsel, Rogers' counsel did not request a "limited instruction." And he certainly did not "tailor" the omission of the beyond-a-reasonable-doubt instruction to Rogers'

defense. Thus, Rogers did not invite the fundamental error at issue here.

On the other hand, two decisions of the First District should serve as persuasive authority for concluding Rogers did not invite that error. First, in *Burns v. State*, the First District concluded Burns did not invite any fundamental error related to omitting the "afterthought" instruction. 170 So.3d 90, 93 n.3 (Fla. 1st DCA 2015). It reasoned Burns' counsel's indication that he had "no problem with" the carjacking instruction "falls far short of an affirmative agreement to omit the 'afterthought' exception, which nobody was even considering, as far as can be told from the transcript." *Id.* Second, in *Williams v. State*, the First District concluded Williams did not invite the fundamental error related to omitting "untruthfully" from the definition of tampering with a witness. 145 So.3d 997, 1003 (Fla. 1st DCA 2014). It reasoned: "the record is devoid of any discussion of whether 'untruthfully' should have been omitted from the jury instructions." *Id.*

Just as Burns' counsel simply indicated he had "no problem with" the instructions proposed there, Rogers' counsel merely stated he "agreed with" or had "no problem with" the instructions proposed here. Further, whereas nobody was considering omitting the "afterthought" instruction in *Burns,* nobody was considering omitting the instruction at issue in the present case. Finally, in similar fashion to the record in *Williams*, the record here was devoid of any discussion of whether the instruction at issue should have been omitted. Thus, if the fundamental errors in

those cases were not invited, the same is true in the present case.

D. This Court should reconsider its recent decision in *Foster v. State* because that decision is inconsistent with the *Apprendi* line of cases, especially *Ring v. Arizona*, as well as this Court's post-*Hurst v. Florida* jurisprudence.

In *Foster v. State*, Foster essentially argued his right to due process had been violated because determinations as to whether the aggravating factors were sufficient and outweighed the mitigating circumstances had not been made beyond a reasonable doubt. SC18-860, 2018 WL 6379348, at *2-3 (Fla. Dec. 6, 2018). In support of that argument, Foster contended those determinations were elements of "capital first-degree murder." *Id.*

In response, this Court acknowledged that "[p]roof beyond a reasonable doubt extends to every element of the crime." *Id.* at *3. And this Court recognized that, to establish first-degree murder, the following elements must be proven: (1) the victim is dead, (2) the death was caused by the defendant, and (3) the killing was premeditated or committed during a felony. *Id.* at *3-4. This Court also noted first-degree murder is a "'capital felony.'" *Id.* (quoting § 782.04(1)(a), Fla. Stat. (2018)).

But this Court rejected Foster's argument. *Id.* at *4. In support of its conclusion, this Court reasoned:

> [U]nder Florida law, there is no crime expressly termed "capital first-degree murder." Florida law prohibits first-degree murder, which is, by definition, a capital crime. This distinction, while subtle, is essential, because contrary to Foster's argument, it is not the *Hurst* [*v. State*] findings that establish first-degree murder as a capital crime for which

> the death penalty may be imposed. Rather, in Florida, first-degree murder is, by its very definition, a capital felony.

Id. at *3.

With that in mind, this Court's rejection of Foster's argument was necessarily premised on the following chain of logic: (1) first-degree murder is a "capital felony"; (2) thus, the death penalty may, by definition, be imposed on any defendant convicted of first-degree murder; (3) further, to convict a defendant of first-degree murder, determinations as to the elements of first-degree murder must be made beyond a reasonable doubt; (4) but determinations as to whether the aggravating factors are sufficient and outweigh the mitigating circumstances are *not* elements of first-degree murder; (5) thus, the death penalty may be imposed on any defendant convicted of first-degree murder without those determinations being made beyond a reasonable doubt.

But that reasoning is inconsistent with the *Apprendi* line of cases. It is also inconsistent with this Court's own jurisprudence.

1. Foster *is inconsistent with the* Apprendi *line of cases, especially* Ring.

A criminal defendant is "indisputably entitle[d] . . . to 'a jury *determination* that [he] is guilty of every *element* of the crime with which he is charged beyond a reasonable doubt.'" *Apprendi*, 530 U.S. at 476-77 (emphasis added). And "[a]ny fact that, by law, increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt." *Alleyne v. United States*, 570 U.S.

99, 102 (2013); *see also Apprendi*, 530 U.S. at 490.

Further, in ascertaining which determinations are elements that "increase the penalty for a crime," the appropriate analysis "looks to the operation and effect of the law as applied and enforced by the state." *Mullaney v. Wilbur*, 421 U.S. 684, 699 (1975). Thus, "the relevant inquiry is one not of form, but of effect–does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" *Apprendi* 530 U.S. at 494. Of note, "the relevant 'statutory maximum' is not the maximum sentence [that may be] impose[d] after finding additional facts, but the maximum [that may be] impose[d] *without* any additional findings." *Blakely v. Washington*, 542 U.S. 296, 303-04 (2004).

Applying those principles here, the death penalty may not be imposed on *any* defendant convicted of first-degree murder. As an initial matter, Florida law does provide that first-degree murder "constitutes a capital felony." § 782.04(1)(a), Fla. Stat. (2018). Thus, in a formal sense, the death penalty may, "by definition," be authorized for any defendant convicted of first-degree murder.

But, again, "the relevant inquiry is one not of form, but of effect–does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" *Apprendi* 530 U.S. at 494. With that in mind, under Florida's capital sentencing scheme, the death penalty may be imposed on a defendant convicted of first-degree murder *only if* (1) at least one aggravating factor

exists; (2) the aggravating factor(s) are sufficient to justify the death penalty; *and* (3) those factor(s) outweigh the mitigating circumstances. Put another way, considering "the operation and effect of" Florida's scheme, *Mullaney*, 421 U.S. at 699, a defendant convicted of first-degree murder is not eligible for the death penalty until *all* of those conditions are met. *See* Initial Brief pp. 48-51.

More specifically, in the absence of determinations that (1) at least one aggravating factor exists; (2) the aggravating factor(s) are sufficient to justify the death penalty; and (3) those factor(s) outweigh the mitigating circumstances, "the 'statutory maximum' for *Apprendi* purposes" is life without parole. That is because life without parole is the maximum sentence that may be imposed solely on the basis of determinations that (1) the victim is dead, (2) the defendant caused the death, and (3) the killing was premeditated or committed during a felony. Conversely, a defendant is eligible for the death penalty *only if* the above-mentioned additional determinations are made.

In *Ring v. Arizona*, 536 U.S. 584 (2002), the Supreme Court rejected the foundational premise of this Court's reasoning in *Foster*–that first-degree murder is a "capital felony," and thus, the death penalty may, by definition, be imposed on any defendant convicted of that offense. In *Ring*, Arizona argued: "Ring was convicted of first-degree murder, for which Arizona law specifies 'death or life imprisonment' as the only sentencing options; Ring was therefore sentenced within the range of

punishment authorized by the jury verdict." *Id.* at 603-04. But the Court rejected that argument. *Id.* It reasoned:

> The Arizona first-degree murder statute "authorizes a maximum penalty of death only in a formal sense," for it explicitly cross-references the statutory provision requiring the finding of an aggravating circumstance before imposition of the death penalty. If Arizona prevailed on its . . . argument, *Apprendi* would be reduced to a "meaningless and formalistic" rule of statutory drafting.

Id. at 604 (internal citations omitted).

Similar to Arizona in *Ring*, this Court in *Foster* essentially reasoned: first-degree murder is a "capital felony"; thus, the death penalty may, by definition, be imposed on any defendant convicted of a first-degree murder. But that reasoning overlooks that, though section 782.04, Florida Statutes, declares first-degree murder a "capital felony," it "authorizes a maximum penalty of death only in a formal sense."

More specifically, section 782.04 explicitly cross-references section 775.082, Florida Statutes. And, in relevant part, the latter provides: "a person who has been convicted of a capital felony shall be punished by death if the proceeding held to determine sentence according to the procedure set forth in s. 921.141 results in a determination that such person shall be punished by death, otherwise such person shall be punished by" life without parole. § 775.082, Fla. Stat. (2018). Further, this Court has concluded that, under the procedure set forth in section 921.141, "*to increase the penalty from a life sentence to a sentence of death*, the jury must unanimously find the existence of any aggravating factor, that the aggravating factors

are sufficient to warrant a sentence of death, [and] that the aggravating factors outweigh the mitigating circumstances." *Perry v. State*, 210 So.3d 630, 640 (Fla. 2016) (emphasis added).[2]

That being the case, if Arizona's reasoning in *Ring* "reduced [*Apprendi*] to a 'meaningless and formalistic' rule of statutory drafting," the same is true of this Court's reasoning in *Foster*.

2. Foster *is inconsistent with this Court's post*-Hurst v. Florida *jurisprudence.*

Most critically, in *Perry*, this Court stated: "in cases in which the penalty phase jury is not waived, the *findings* necessary to increase the penalty from a mandatory life sentence to death must be found beyond a reasonable doubt by a unanimous jury." 210 So.3d at 633 (emphasis added). Immediately thereafter, this Court noted: "Those findings specifically include . . . all aggravating factors to be considered, . . . that sufficient aggravating factors exist for the imposition of the death penalty, [and] that the aggravating factors outweigh the mitigating circumstances." *Id.* And this Court later affirmed: "we construe section 921.141(2)(b)2. to require the penalty phase jury to unanimously find beyond a reasonable doubt that each aggravating factor exists, that sufficient aggravating factors exist to impose death, and that they outweigh the

[2]In relevant part, "the procedure set forth in section 921.141" addressed by this Court in *Perry* was identical to the "the procedure set forth in section 921.141" at the time of this Court's decision in *Foster*. *Compare* § 921.141, Fla. Stat. (2016) *with* § 921.141, Fla. Stat. (2018).

mitigating circumstances found to exist." *Id.* at 639 (original emphasis omitted).

Further, in *Hurst v. State*, this Court stressed that, before the death penalty could be considered, the jury had to determine (1) whether at least one aggravating factor existed, (2) whether the aggravating factors are sufficient, and (3) whether those factors outweigh the mitigating circumstances. 202 So.3d at 53. Immediately thereafter, this Court stated: "all these findings necessary for the jury to essentially convict a defendant of *capital murder*–thus allowing imposition of the death penalty–are also elements." *Id.* at 53-54 (emphasis added). And this Court subsequently reiterated: "these findings occupy a position on par with elements of a greater offense." *Id.* at 57.

Finally, in *Asay v. State*, this Court indicated that, in determining whether *Hurst v. Florida* should apply retroactively, this Court would "treat the aggravators, the sufficiency of the aggravating circumstances, [and] the weighing of the aggravating circumstances against the mitigating circumstances as elements of the crime that needed to be found by the jury to the same extent as other elements of the crime." 210 So.3d 1, 15-16 (Fla. 2016).

II. Reversible Error Occurred When the Court Admitted Rogers' Letters in Their Entirety Because Rogers' Written Reflections on Race, Politics, and His Own Character and Predispositions "So Infected the Sentencing Proceeding With Unfairness as To Render the Jury's Imposition of the Death Penalty a Denial of Due Process," and the Error Was Fundamental.

A. Rogers' written reflections on race, politics, and his own character and predispositions "so infected the sentencing proceeding with

unfairness as to render the jury's imposition of the death penalty a denial of due process."

While the State disagrees, it misunderstands various evidentiary principles and overlooks that even relevant evidence can render a trial fundamentally unfair if that evidence gives rise to sufficient undue prejudice. The State essentially argues the admission of Rogers' letters in their entirety was not fundamentally unfair because portions of those letters were relevant. [AB 31-34] More specifically, it contends they had a logical tendency to prove (1) Martin's killing was premeditated; (2) Rogers had a motive to kill Martin; (3) Rogers, in fact, killed Martin; (4) in doing so, Rogers exhibited heightened premeditation; and (5) Rogers lacked remorse regarding Martin's death. [AB 31-34]

The State also appears to assert portions of the letters were admissible to rebut defense evidence of Rogers' peaceful, well-adapted character while in prison. [AB 34] And it claims that, even if portions of Rogers' letters were not relevant, they were admissible "to give context to the relevant statements." [AB 33]

Further, the State appears to argue the admission of Rogers' letters in their entirety could not have been fundamentally unfair in the second-phase trial because they "were admitted during the guilt phase of the trial, not during sentencing." [AB 33] Finally, the State appears to reason that, if evidence is relevant, its admission can never be fundamentally unfair. [AB 33-34]

First, as an initial matter, the State may misapprehend Rogers' argument. As

the State appears to recognize, portions of Rogers' letters addressed the events of March 30, Rogers' involvement in those events, and his motives for being involved, [R2840-41, 2843, 2850]. And those portions were relevant.[3] Rogers previously acknowledged that reality. *See* Initial Brief p. 63.

But portions of Rogers' letters also contained his reflections on race, politics, and his own character and predisposition. [R2840-43, 2845, 2849-50] And those reflections "so infected the sentencing proceeding with unfairness as to render the jury's imposition of the death penalty a denial of due process." *See* Initial Brief pp. 65-69. As a result, the court erred by admitting Rogers' letters *in their entirety*.

Second, any lack of remorse on Rogers' part regarding Martin's death was not relevant. "'For evidence to be relevant, it must have a logical tendency to prove or disprove a fact which is of consequence to the outcome of the action.'" *Amoros v. State*, 531 So.2d 1256, 1259-60 (Fla. 1988); see also § 90.401, Fla. Stat. (2018). Further, "aggravating considerations must be limited to those provided for by [section 921.141, Florida Statutes], and information must relate to one of the statutory aggravating [factors] in order to be considered aggravation." *Odom v. State*, 403 So.2d 936, 942 (Fla. 1981).

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[3]The relevant portions included Rogers' statement: "when I heard about the brutal, unjustified, racist shooting of that young brother Trayvon Martin I decided that I was going to kill the next white man that came across my path. Unfortunately it happened to be Ricky Dean Martin," [R2841].

Applying those principles here, lack of remorse had no logical tendency to prove or disprove a fact of consequence to the outcome of the action. In particular, lack of remorse bears no relation to the four factors needed to establish the cold, calculated, and premeditated aggravating factor. *See* Initial Brief pp. 71-72. Thus, despite the State's contrary claim, [AB 34], lack of remorse had no logical tendency to prove or disprove any fact of consequence to establishing that aggravating factor.

Third, the portions of Rogers' letters containing his reflections on race, politics, and his own character and predisposition were not admissible to rebut defense evidence of Rogers' peaceful, well-adapted character while in prison. "'[D]uring the penalty phase of a capital case, the state may rebut defense evidence of the defendant's nonviolent nature by means of direct evidence of specific acts of violence committed by the defendant.'" *Gore v. State*, 784 So.2d 418, 433 (Fla. 2001) (quoting *Hildwin v. State*, 531 So.2d 124, 128 (Fla. 1988)); *see also Braddy v. State*, 111 So.3d 810, 852 (Fla. 2012). For instance, in *Valle v. State*, Valle introduced evidence that he had adapted well to prison life. 581 So.2d 40, 45-46 (Fla. 1991). The State later introduced evidence "about specific incidents in prison for which [Valle] had not been convicted." *Id.* at 46. On appeal, this Court concluded: "Under the rational of *Hildwin*, it is clear that the state could introduce rebuttal evidence of specific acts of prison misconduct and violence." *Id.*

Applying the relevant principle here, Rogers introduced evidence regarding his

peaceful, well-adapted character while in prison. [R6241-345] And, as a result, the State was permitted to rebut that evidence by introducing direct evidence of specific acts of violence committed by Rogers. But the portions of Rogers' letters containing his reflections on race, politics, and his own character and predisposition did not contain direct evidence of specific acts of violence committed by Rogers in prison. [R2840-43, 2845, 2849-50]

Fourth, the portions of Rogers' letters containing his reflections on race, politics, and his own character and predisposition were not admissible "to give context to the relevant statements." Although the State fails to identify a ground for its contrary claim, [AB 33], this Court has recognized that "a police officer's statements during an interrogation are admissible if they provoke a relevant response or provide context to the interview." *Jackson v. State*, 107 So.3d 328, 340 (Fla. 2012); *see also McMillian v. State*, 214 So.3d 1274, 1286 (Fla. 2017). But that general principle has no applicability here.

Fifth, the admission of Rogers' letters during the first-phase trial does not preclude that admission from being fundamentally unfair in the context of the second-phase trial. The jury was repeatedly told that, in reaching its decision in the second-phase trial, it could–and even should–consider evidence admitted during the first-phase trial. [R 3080, 3083, 6196-97, 6932-33, 6936, 6947-48, 6950, 6956-67]

Finally, assume the portions of the letters containing Roger's reflections on

race, politics, and his own character and predisposition had some logical tendency to prove (1) Martin's killing was premeditated; (2) Rogers had a motive to kill Martin; (3) Rogers, in fact, killed Martin; and (4) in doing so, Rogers exhibited heightened premeditation. Even then, "the Due Process Clause . . . wards off the introduction of 'unduly prejudicial' evidence that would 'rende[r] the trial fundamentally unfair.'" *Carr*, 136 S.Ct. at 644; *see also McLean v. State*, 934 So.2d 1248, 1261 (Fla. 2006).

With that in mind, here, the introduction of Roger's reflections on race, politics, and his own character and predisposition was unduly prejudicial to the point that it rendered the second-phase trial fundamentally unfair. In short, on one hand, the State had little need for Rogers' reflections because of his testimony below, his earlier testimony introduced below, and the portions of Rogers' letters addressing his involvement in the events of March 30. *See* Initial Brief pp. 11-17, 30-31. On the other hand, Rogers' reflections provided the State with an unfair advantage by appealing improperly to the jury's emotions. *See* Initial Brief pp. 65-67.

In that context, *Spears v. Mullin*, 343 F.3d 1215 (10th Cir. 2003), should persuade this Court to conclude that the portions of Rogers' letters containing his reflections "so infected the sentencing proceeding with unfairness as to render the jury's imposition of the death penalty a denial of due process." *See* Initial Brief pp. 67-69. The State makes no attempt to distinguish that well-reasoned decision.

B. The court's admission of Rogers' letters in their entirety amounted to fundamental error.

The State's position here appears to rest primarily on its assertion that the admission of Rogers' letters in their entirety was not error in the first place. [AB 31-34] That said, the State also appears to offer a conclusory argument that any error in admitting those letters did not amount to fundamental error. [AB 31-33] But such an argument overlooks that an error is fundamental when it "'is equivalent to a denial of due process.'" *F.B. v. State*, 852 So.2d 226, 229 (Fla. 2003); *see also Wheeler v. State*, 4 So.3d 599, 607 (Fla. 2009). And here, the court's admission of Rogers' reflections on race, politics, and his own character actually was more than "equivalent to a denial of due process"; it actually denied Rogers due process. *See* Initial Brief pp. 69-70; *see also* discussion *infra* pp. 24-28.

III. Reversible Error Occurred When the Court Considered the Proposed Mitigating Circumstances Because, Rather Than Thoughtfully and Comprehensively Analyzing Those Circumstances, the Court Summarily Addressed and Disposed of Them.

A. Rather than thoughtfully and comprehensively analyzing the proposed mitigating circumstances, the court summarily addressed and disposed of them.

While the State disagrees, it ignores that, in analyzing proposed mitigating circumstances, a trial court has to provide reasons for its decisions. The State essentially argues the court satisfied the requirements of *Campbell v. State*, 571 So.2d 415 (Fla. 1990), and its progeny because, in its sentencing order, the court determined whether each proposed mitigating circumstance was established and assigned a weight to those established. [AB 40-42] In that context, the State notes fifteen pages

of the court's sentencing order addressed proposed mitigating circumstances. [AB 41]

Further, the State acknowledges "the judge did not give explanation as to why he felt the weight he assigned was warranted." [AB 42] But it then claims a trial court does not have to explain why the evidence warrants the allocation of certain weight to proposed mitigating circumstances. [AB 42]

First, to satisfy the requirements of *Campbell* and its progeny, a trial court must do more than simply determine whether each proposed mitigating circumstance was established and assign a weight to those established. In short, the "sentencing order must reflect 'reasoned judgment' by the trial court." *Oyola v. State*, 99 So.3d 431, 446 (Fla. 2012). Among other things, that means the court must "expressly and specifically articulate why the evidence presented failed to support" certain proposed mitigating circumstances, "and why that same evidence warranted the allocation of [certain] weight to" other proposed circumstances. *Id.* at 447.

With that in mind, the court here did determine whether each proposed mitigating circumstance was established and assigned a weight to those established. But the court's order still failed to reflect "reasoned judgment." More specifically, the court failed to expressly and specifically articulate (1) *why* nineteen circumstances were not proven, and (2) *why* the other forty-nine circumstances, though proven, were given relatively limited weight. Instead, the court summarily addressed and disposed of all sixty-eight mitigating circumstances. *See* Initial Brief pp. 82-87.

Second, the length of the court's sentencing order does not weigh in the State's favor here. As an initial matter, fifteen pages of the court's sentencing order did address proposed mitigating circumstances. [R3595-3610] Further, as previously acknowledged, the court determined whether each proposed mitigating circumstance was established and assigned a weight to those established. But there were sixty-eight proposed circumstances. [R3595-3610] And the court failed to expressly and specifically articulate (1) *why* nineteen circumstances were not proven, and (2) *why* the other forty-nine circumstances, though proven, were given relatively limited weight. Thus, although it may have taken fifteen pages to do so, the court still summarily addressed and disposed of all sixty-eight mitigating circumstances. *See* Initial Brief pp. 82-87.

Finally, a trial court is required to provide some reason or explanation why the evidence warrants the allocation of certain weight to proposed mitigating circumstances. *Oyola* makes that crystal clear. There, this Court concluded the trial court's "sentencing order violated the requirements articulated in *Campbell*." 99 So.3d at 447. And, in support of that conclusion, this Court reasoned the court "did not expressly and specifically articulate why the evidence presented failed to support the proposed statutory mitigators, and why that same evidence warranted the allocation of slight weight to the nonstatutory mitigation evidence presented." *Id.*

B. The court's error in summarily addressing and disposing of the proposed mitigating circumstances should not be subjected to

harmless error review because that error precludes this Court from meaningfully reviewing the court's sentencing order.

While the State disagrees, it fails to appreciate that the court's analysis of the proposed circumstances reflects a perfunctory evaluation on the part of the court. The State essentially argues any error related to the court's consideration of those circumstances should be subjected to harmless error review because that error was minor. [AB 42-43] On that note, the State attempts to analogize the court's error here to the court's error in *Lowe*, 2018 WL 5095143. [AB 42-43]

First, summarily addressing and disposing of proposed mitigating circumstances precludes meaningful review of a court's sentencing order.

> Clearly then, the [sentencing order] can only satisfy Campbell and its progeny if it truly comprises a thoughtful and comprehensive analysis of any evidence that mitigates against the imposition of the death penalty. . . . If the trial court does not conduct such a deliberate inquiry and then document its findings and conclusions, this Court cannot be assured that it properly considered all mitigating evidence. In such a situation, we are precluded from meaningfully reviewing the sentencing order.

Walker v. State, 707 So.2d 300, 319 (Fla. 1997). In other words, "[t]o ensure meaningful review in capital cases, trial courts must provide this Court with a thoughtful and comprehensive analysis of the mitigating evidence in the record." *Jackson v. State*, 704 So.2d 500, 507 (Fla. 1997).

Second, that being the case, this Court has drawn a critical distinction when determining whether an error related to the court's consideration of proposed mitigating circumstances should be subjected to harmless error review. More

specifically, this Court has distinguished between minimally defective sentencing orders and orders reflecting a perfunctory evaluation.

> [We] reiterate the importance of *Campbell* and its requirement of a thorough written evaluation of the proposed mitigating circumstances. Certainly, we will not remand where the trial court's order is minimally defective. But where the order is made up of conclusory statements or otherwise reflects a perfunctory evaluation on the part of the trial court, harmless error analysis will not save that order.

Griffin v. State, 820 So.2d 906, 914 n.10 (Fla. 2002).

In short, where "a trial court failed to detail its findings in a sentencing order, this Court has vacated a death sentence and remanded with instructions to issue a new sentencing order." *Martin v. State*, 107 So.3d 281, 319 (Fla. 2012). On the other hand, where "a trial court details its findings on mitigation, those findings are subject to harmless-error review." *Id.*

Third, with all that in mind, the court's error here should not be subjected to harmless error review. As an initial matter, the court summarily addressed and disposed of all sixty-eight mitigating circumstances. *See* Initial Brief pp. 82-87. And at least some of the court's findings were made in haste and without care. *See* Initial Brief pp. 82-83.

In those circumstances, the court's sentencing order was more than minimally defective. Instead, the court's analysis of the proposed mitigating circumstances reflects a perfunctory evaluation on the part of the court. Simply put, the court failed to detail its findings on mitigation. As a result, this Court is precluded from

meaningfully reviewing the sentencing order.

Two prior decisions of this Court dictate a conclusion that the court's error here should not be subjected to harmless error review. In *Oyola*, this Court concluded the court's sentencing order violated the requirements of *Campbell* and remanded without subjecting the error to harmless error review. 99 So.3d at 447. In *Jackson*, this Court did the same. 704 So.2d at 506-07. Further, the errors in those cases are analogous to the error here. *See* Initial Brief pp. 84-87. As a result, if the errors there were not subjected to harmless error review, the error here should not be either.

Finally, the court's error here is not analogous to the court's error in *Lowe*. There, the sentencing order simply "contain[ed] some inconsistencies and may [have been] 'less than a model of clarity.'" *Lowe*, 2018 WL 5095143, at *26. In contrast, here, the court summarily addressed and disposed of all sixty-eight mitigating circumstances. *See* Initial Brief pp. 82-87. Thus, although this Court was able to meaningfully review the court's order in *Lowe*, the same is not true here.

CONCLUSION

A few points bear repeating. Instructing the jury to determine beyond a reasonable doubt whether the aggravating factors are sufficient and outweigh the mitigating circumstances furthers the interests underlying the constitutional requirement of proof beyond a reasonable doubt. Due process prevents the fundamentally unfair use of evidence, whether true or false. And deliberate

consideration by the trial judge is particularly important in a death penalty case.

With that in mind, various errors demand reversal here. First, the court failed to instruct the jury to determine multiple elements of capital murder beyond a reasonable doubt. Second, the court's admission of Rogers' letters in their entirety "so infected the sentencing proceeding with unfairness as to render the jury's imposition of the death penalty a denial of due process." Third, the decision by the court to instruct the jury on, and the decisions by the jury and court to later find (and weigh), the cold, calculated, and premeditated aggravating factor were not supported by the evidence.

Fourth, in finding and assigning great weight to the prior violent felony conviction aggravating factor, the court improperly considered Rogers' indeterminate use of violence. Fifth, rather than thoughtfully and comprehensively analyzing the mitigating circumstances, the court summarily addressed and disposed of them. Finally, Rogers' death sentence is a disproportionate punishment for first-degree murder.

Rogers' death sentence should be vacated. This case should be remanded for imposition of a life-without-parole sentence. Alternatively, this case should be remanded for a new second-phase trial. At a minimum, this case should be remanded for a new *Spencer* hearing followed by the issuance of a revised sentencing order.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished electronically via the Florida Courts E-filing portal to Jennifer A. Donahue, Assistant Attorney General, Capital Appeals Division, The Capitol, PL-01, Tallahassee, FL, 32399-1050, and by U.S. Mail to Appellant, Shawn Rogers, #166626, Florida State Prison, P.O. Box 800, Raiford, FL 32083, on this 18th day of December, 2018.

CERTIFICATE OF FONT AND TYPE SIZE

I hereby certify that this brief was typed using Times New Roman, 14 point.

Respectfully submitted,

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