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STATEMENT OF THE CASE AND FACTS

Respondent Tony Garcia was convicted of arson. At sentencing, the state did not focus on the arson, but rather asked the trial court to sentence Garcia based on uncharged, unsubstantiated allegations of misconduct that occurred after the offense. The trial court adopted the state's sentencing arguments and recommendation. The Fourth District Court of Appeal reversed for resentencing.

A. Evidence at Trial

The evidence of arson was far less compelling than Petitioner suggests.

Garcia's first trial ended in a mistrial because the jury could not agree on a verdict. R341, 606.¹

The cause of the fire was hotly disputed. The defense expert concluded that the cause was undetermined, with the most likely cause as an accidental kitchen fire. T500-01, 521-36. Originally, the state's far less qualified² expert agreed that

¹ In this brief:

- "T" refers to the 816-page trial transcript filed with the Fourth District Court of Appeal on January 29, 2018.
- "R" refers to the 873-page record filed with the Fourth District Court of Appeal on January 29, 2018.
- "IIR" refers to the record of appellate proceedings, sent from the Fourth District Court of Appeal to this Court on June 5, 2020.
- "IB" refers to Petitioner's initial brief, filed with this Court on June 22, 2020.

² The defense expert's qualifications – which include being one of the leading fire investigators and instructors in the country – are outlined on T486-90. The state's expert was more of a law enforcement officer, as opposed to a fire investigator, and he did not have the nationwide experience or expertise of the defense expert.

this case involved an “unattended cooking fire.” T391, 410. He changed his mind only after violating the National Fire Protection Association (NFPA) Code 921 and investigating evidence of motive before determining that arson occurred. T391-93, 535-36, 576-77.³

The state did not collect, preserve, or test anything that would have proven the state’s theory of the case. For instance, the state claimed that the fire was started by lighter fluid and a candle in the kitchen. But the state did not collect or test anything related to the candle; in fact, no state witness could even definitively say that lighter fluid was even present. T377, 402, 425. (The defense’s fire expert said that the state’s claim that it could prove the fire was set this way was “nonsense.” T521.) Furthermore, the state placed a lot of emphasis on a purportedly leaking propane tank found in the living room. But the state did not preserve the tank, so even the state’s propane tank “expert” – presented purportedly to show that the tank had been tampered with – had not examined or tested it. T238, 283. The state admitted that the tank did not contribute to the fire. T412. Also, the state emphasized small gas cans found in the kitchen, but the state

T342-44.

³ The NFPA is “the definitive scientific authority on arson investigation.” Robert Skypala, (*Can’t Get No*) *Jurisdiction: Temporal Impasse in Pennsylvania’s Post-Conviction Relief Process*, 25 Temp. Pol. & Civ. Rts. L. Rev. 243, 245 (2016). Under NFPA 921, an investigator must establish the corpus of the crime – *i.e.*, conclusively determine that the fire was intentionally set – before turning to other investigation techniques. *See* T535, 576-77.

did not present any evidence that those cans or tanks actually contributed to the fire. *See* T426-27. The defense explained that the tanks in the kitchen were not unusual for Garcia, who is a cluttered and unorganized person. T26. (One witness commented that “to say that this house was not neatly kept would be a masterpiece of understatement,” *see* T535, and another described the house as a “hoarding” situation, T293; *see also* R756, 759 (photos showing the messy state of Garcia’s house). Furthermore, the defense pointed out that the propane tanks found in the kitchen were not likely in their original resting place, as the firefighters’ fire suppression techniques (including the use of powerful hoses and destroying Garcia’s ceilings to eliminate hotspots) caused items in the kitchen to move around. T27-28, 111-12, 126, 155-56, 209, 246, 533, 772. Garcia’s kitchen looked like this once the firefighters were done:



R669.

With respect to motive, most of the state’s evidence came from Garcia’s ex-daughter-in-law, who “absolutely hated” Garcia. T207, 209, 292-93. Evidence suggested that Garcia was unaware of the particulars of the foreclosure action (as

his lawyers were handling it), *see* T597-98, and Garcia presented a lawyer familiar with foreclosures who impeached the state's foreclosure witness.⁴

Finally, no one (not even a firefighter) was injured as a result of a fire; even Garcia's pets survived unscathed. T625; R473.

B. Sentencing Proceeding

Throughout the proceedings, the state has made this case about Garcia's purported actions after the offense, rather than about the arson, his actual offense.

At sentencing, Garcia was a 58-year-old man with stomach cancer who had no prior felony convictions. R473, 515, 593. The Legislature's "recommended sentence," *see* § 921.00265, Fla. Stat. (Title), was 2.9 years' imprisonment. R515.

Post-arrest conduct is inadmissible at a sentencing. *Norvil v. State*, 191 So. 3d 406 (Fla. 2016); *Tharp v. State*, 273 So. 3d 269 (Fla. 2d DCA 2019); *Strong v. State*, 254 So. 3d 428 (Fla. 4th DCA 2018). In violation of this rule, the state asked for, and the trial court imposed, a sentence more than 141% more than the Legislature's recommended sentence, based largely on conduct that allegedly happened after the arson. This section details that violation, while also discussing other pertinent aspects of the sentencing hearing.

⁴ Specifically, the state claimed that, once the final judgment of foreclosure was entered, the bank would not have negotiated with Garcia, meaning that Garcia knew his house was going to be taken away. T330-31. The defense's witness explained that banks prefer settlements over foreclosure sales and often would negotiate until the very last minute, even after a judgment was entered. T676-89.

1. The state's reliance on post-arrest misconduct during sentencing

Garcia's purported post-arrest misconduct was a feature of the sentencing.

The state's written sentencing memorandum had a specific section devoted to "DEFENDANT'S RELEVANT CONDUCT SINCE HIS ARREST IN THIS CASE." R478. The state focused on two categories of conduct. First, the state discussed threats Garcia allegedly made toward various individuals, including his neighbors. R479. These allegations had been made at a bond hearing that was held over defense objection. *See* R535-75. Garcia had been rushed to the hospital the morning of this last-minute hearing, so the defense had no way of challenging or rebutting the allegations, as they had not yet talked to Garcia or had any time for investigation. *Id.* Second, the state discussed three jail calls in which, according to the state, Garcia threatened his neighbor and his ex-daughter-in-law. R479-80. Respondent does not agree with the state's view that these comments were threats. The three calls were all sixteen minutes long, but the state cherry-picked two to four sentences from each of the calls. Garcia did not make these phone calls to the purported victims themselves; rather, he called two family members, his ex-wife (with whom he remained close) and his son. R479-80, 627-28. In those calls, Garcia did not ask his family members to take any actions on his behalf; rather, he seemed to be effectively ranting about individuals he believed had wronged him. *Id.* Neither Garcia's son nor his ex-wife took Garcia's statements seriously. To the

contrary, Garcia's son and his ex-daughter-in-law repeatedly stated that Garcia frequently made outlandish and hyperbolic claims that no one believed. T187, 200, 210-11, 293-94; R138. The state attached the jail calls as an exhibit to its written sentencing memo, but the trial court did not listen to the calls. R480, 496, 593-654.

At sentencing, the state once again emphasized Garcia's post-arrest conduct. The state's sentencing argument encompasses about six transcript pages. R619-26. The majority of the argument – about four pages – was devoted to Garcia's post-arrest conduct, rather than the facts of the crime, the (lack of) prior record, or the downward departure motion. R622-25. The defense objected to this argument on the ground that the bond hearing was held over defense objection without Garcia's presence, but the trial court overruled the objection. R623.

2. The downward departure motion

Garcia moved for a downward departure, citing his age and illness. R472-75. It was undisputed that, at some point, Garcia had stomach cancer. *See* R483, 619-21, 628-29, 636-36; T591.

Garcia's illness was on display during this case. As noted, Garcia missed the bond hearing which provided fodder for the *Norvil* violation because he had been rushed by ambulance to the hospital. R539. An officer at the bond hearing testified that Garcia used a cane, had difficulty moving around, needed help getting in and out of a car, and was "a very weak man." R546-58. Garcia attended trial in a

wheelchair. T8, 591. The defense struggled to ensure Garcia received his medications in jail. T337, 615. The trial court frequently recessed because Garcia had no bladder control; at one point, the trial was delayed because Garcia had urinated himself. T336-39, 613-15. At trial, the state successfully excluded evidence of Garcia's illness. T591-92, 610-11, 660.

The state's sole argument in response to Garcia's departure motion was that he failed to meet his evidentiary burden of proving he had cancer. R481-85, 619-20.⁵ The state admitted that Garcia had cancer at some point, but argued there was insufficient evidence he currently suffered from that illness. R619-20. The state never argued that the alleged subsequent misconduct was relevant to the departure motion or to show Garcia's unsuitability for probation. *See* R481-85, 619-26.

3. The trial court adopted the state's sentencing recommendation

The trial court wholesale adopted the state's sentencing argument and recommendation. The court stated that it had "read the state's sentencing recommendation" and had "taken into consideration," *inter alia*, "all the evidence"

⁵ Analysis of a downward departure motion is a "two-step process." *Banks v. State*, 732 So. 2d 1065, 1068 (Fla. 1999). "First, the trial court must determine whether it *can* depart, i.e., whether there is a valid legal ground and adequate factual support for that ground in the case pending before it (step 1)." *Kovalsky v. State*, 220 So. 3d 1192, 1194 (Fla. 4th DCA 2017) (cleaned up). There must be competent substantial evidence supporting the requested ground. *Id.* Second, the trial court should decide whether it should depart. *Id.* The state's argument focused on the first step, whether there was sufficient evidence supporting the departure ground, more so than the second step. *See* R481-85, 619-26.

and “the state’s argument.” R610, 646. The court said its sentence was based on “all the evidence, the severity of the crime, the issues that were testified to.” R610, 646. The trial court denied Garcia’s downward departure motion for the reasons proffered by the state. R646. The trial court sentenced Garcia to the exact sentence requested by the state – 84 months’ imprisonment. R615-26, 646.

C. Appellate Proceedings

The Fourth District rejected Garcia’s trial argument on appeal, but did reverse and remand for resentencing. IIR141-44; *Garcia v. State*, 279 So. 3d 148 (Fla. 4th DCA 2019). Citing *Norvil*, the Fourth District explained that the Criminal Punishment Code (CPC) precludes reliance on subsequent misconduct at sentencing. *Garcia*, 279 So. 3d at 150. The state violated this rule by “urg[ing] the trial court to consider an impermissible sentencing factor—namely, incidents of misconduct occurring after the charged offense.” *Id.* The Fourth District placed the burden to the state to show that this impermissible sentencing factor did not influence the sentence. *Id.* It found that the state had not met its burden, where the trial court had stated that it had considered “the evidence, the severity of the crime, [and] the issues that were testified to” – which necessarily included the subsequent misconduct – and then “the trial court imposed the exact sentence requested by the prosecutor.” *Id.* at 151 (alteration in original).

SUMMARY OF ARGUMENT

POINT I: The Fourth District Court of Appeal properly applied *Norvil* to this case. *Norvil* and its progeny preclude reliance on post-arrest or subsequent misconduct at sentencing. Here, the state relied extensively on such misconduct, and the trial court obviously adopted that argument, as it said that it was relying on the state's argument and evidence and then imposed the state's requested sentence.

Petitioner has not shown that the Fourth District erred. The “presumption” that a trial court ignored an impermissible sentencing factor applies only when there is some indication the trial court knew the consideration was improper. Here, the trial court clearly thought the subsequent misconduct was admissible, as it overruled a defense objection and expressly adopted the state's sentencing argument and recommendation that heavily featured the misconduct. Furthermore, it is well-established that impermissible sentencing considerations constitute fundamental error. Finally, Petitioner's the claim that *Norvil* left open the question of whether it applies to “substantiated” allegations of misconduct is untrue.

POINT II: This Court should not overrule *Norvil*. That case was rightly decided as both a statutory and constitutional matter. And Petitioner has failed to identify any good reason for overruling *Norvil*. Neither disagreement with a case nor a change in court personnel is sufficient to justify overturning precedent.

POINT III: If this Court does overrule *Norvil*, it should not permit any and all allegations of misconduct to infiltrate sentencing hearings. Rather, this Court should implement certain procedural protections; for instance, the misconduct should be related to the underlying charges, substantiated, and not a feature of the hearing; furthermore, the defendant must be given an opportunity to explain or present evidence on this issue. Because these factors were not considered or explored in this particular case, if this Court overrules *Norvil*, it should remand for these factors to be considered in the first instance.

POINT IV: Finally, Petitioner did not waive this issue, where he cited *Norvil* in his brief before the Fourth District and asked for resentencing due to impermissible sentencing considerations. Nor did Petitioner open the door to the *Norvil* violation through his departure motion. Petitioner's argument on this point should be deemed waived, as this brief is the first time the state has argued that Garcia's request for probation opened the door to the *Norvil* violation. On the merits, to the extent the concept of "opening the door" even applies at sentencing, it only applies to otherwise inadmissible evidence "directly related" to a departure motion. Any purported misconduct was not related to Garcia's departure motion, which requested leniency on the ground that Garcia had cancer.

ARGUMENT

This brief proceeds in four sections. The first section explains that the Fourth District properly applied *Norvil* in this case and responds to Petitioner’s three arguments otherwise. The second section counters Petitioner’s request to overrule *Norvil*. The third section addresses a possible alternative test to *Norvil*. Finally, the last section addresses Petitioner’s waiver and opening the door arguments.

I. The Fourth District Court of Appeal correctly applied *Norvil*

In *Norvil*, this Court “adopt[ed] the following bright line rule for sentencing purposes: a trial court may not consider a subsequent arrest without conviction during sentencing for the primary offense.” 191 So. 3d at 410. This rule applies not only to subsequent misconduct that resulted in a formal arrest, but also any post-arrest misconduct. *Tharp*, 273 So. 3d at 271; *Strong*, 254 So. 3d at 431; *Love v. State*, 235 So. 3d 1037, 1039 (Fla. 2d DCA 2018); *Williams v. State*, 193 So. 3d 1017, 1018 (Fla. 1st DCA 2016).⁶ Even prior to *Norvil*, Florida appellate courts precluded reliance on allegations of misconduct at sentencing. *Love*, 235 So. 3d at 1039; *see generally infra* n.21 (collecting cases).

This case involved a straightforward application of *Norvil*. In flagrant

⁶ This makes sense. There’s no principled distinction between misconduct that resulted in an arrest and misconduct that did not. If anything, it makes more sense to allow evidence of subsequent arrests at sentencing: subsequent arrests are more reliable than uncharged allegations of misconduct, as arrests must be supported by probable cause and the state’s desire to proceed.

disregard of *Norvil* and its progeny, the state emphasized post-arrest misconduct at Garcia's sentencing, devoting an entire section of a written memorandum to the topic and then again highlighting it the sentencing hearing. R478-80, 622-25. They did so despite a case reversing for a very similar error. *Williams*, 193 So. 3d 1017.⁷ The trial court obviously adopted the improper argument, stating that it had "taken into consideration all the evidence," "the state's argument," and "the issues that were testified to," *see* R646 – which necessarily included the alleged subsequent misconduct – and then "imposed the exact sentence requested by the prosecutor." *Garcia*, 279 So. 3d at 151. The Fourth District correctly held that, by adopting the prosecutor's illegal argument, the trial court violated *Norvil*. *Id.* at 150-51.

Petitioner argues that the Fourth District erred in applying *Norvil* in three ways by: (1) failing to give the trial court appropriate deference; (2) finding fundamental error; and (3) reversing where the allegations were "substantiated." IB17-25, 30-45. None of these arguments have merit.

A. The Fourth District properly applied the standard of review

Petitioner argues the Fourth District erred because it "did not afford the sentencing court any deference" and improperly "presumed" that the trial court

⁷In *Williams*, the First District reversed and remanded for resentencing because the prosecutor implied that the defendant had threatened witnesses and the record suggested that the trial court had "accepted as true . . . the prosecutor's assertions." *Id.* at 1019. Here, too, the state argued that Garcia had threatened witnesses and the trial court accepted that argument.

considered subsequent misconduct. IB20. This argument ignores the record, the holdings of this Court's "presumption" cases, and the standard of review.

Petitioner faults the Fourth District for not providing "any deference" to the trial court, but Petitioner does not explain why this was required. IB20.

Constitutional issues and potential improper sentencing factors are reviewed de novo. *Norvil*, 191 So. 3d at 408; *Cromartie v. State*, 70 So. 3d 559, 563 (Fla. 2011); *Allen v. State*, 211 So. 3d 48, 52 (Fla. 4th DCA 2017). Tellingly, Petitioner does not provide a legal citation either time it makes this argument. IB16, 20.

Even if deference was required, it is not true that the Fourth District did not afford any or that it "presumed" that the trial court considered the misconduct. Petitioner acts as if nothing in the record indicates that the trial court was influenced by the improper sentencing factor. But that's not true. At the sentencing hearing, the state spent more time improperly discussing subsequent misconduct (devoting nearly four transcript pages to this topic) than it did responding to Garcia's request for a downward departure (2 ½ pages) or the nature of the crime (½ page). R619-25. In the written memo, the state spent an equal amount of time on Garcia's subsequent misconduct as it did his primary offense and substantially more time than on his prior record. R476-80. The trial court expressly stated that it *was* considering this information. It said it had read the state's written memorandum, had "taken into consideration all the evidence" and "the state's

argument,” and that it’s sentence was based on “all the evidence, the severity of the crime, the issues that were testified to.” R646. That “evidence,” “argument,” and “issues that were testified to” obviously included the alleged misconduct, as that was a feature of the state’s sentencing argument. And the trial court gave the precise sentence the state requested, and that recommendation had been heavily influenced by the alleged subsequent misconduct.

Petitioner’s reliance on “presumption” cases gets it nowhere. According to Petitioner, appellate courts have “consistently applied a presumption that sentencing courts ignore improper sentencing factors made known to them.” IB17-18 (citing *Harvard v. State*, 414 So. 2d 1032 (Fla. 1982) & *Alford v. State*, 355 So. 2d 108 (Fla. 1977)). Petitioner overstates the legal principle from those cases. Those cases actually stand for the proposition that appellate courts presume sentencing courts ignored improper sentencing factors *when there is an indication that the court realized the impropriety*. Both *Alford* and *Havard* were death penalty cases that dealt with specific improper sentencing material, confidential information undisclosed to the defense. *Harvard*, 414 So. 2d at 1033-34; *Alford*, 355 So. 2d at 108. In both cases, affirmative evidence existed on the face of the record indicating that the trial court did not consider this impermissible material. In *Alford*, the trial court disclosed that it had improperly been made aware of such information and assured the defense that it had not considered it. 355 So. 2d at

108-09. And, in *Harvard*, the case had been reversed specifically because the trial court erred in relying on this information. 414 So. 2d at 1033-34, 1036. Here, in contrast, nothing suggests that the trial court knew the misconduct relied upon by the state was improper; for instance, the court never said it was not considering it. To the contrary, the fact that the trial court overruled a defense objection to that evidence and explicitly said it was considering it demonstrates that the trial court did think evidence of Garcia’s subsequent misconduct was relevant and admissible at sentencing. *See Petion v. State*, 48 So. 3d 726, 735 (Fla. 2010); *id.* at 738 (Canady, J., concurring) (“it is nonsensical to presume that the trial court did not consider the evidence it had previously determined to be admissible”).

Finally, the Fourth District’s opinion in this case accords with the standard of review. All five district court of appeals use the same standard for reviewing improper sentencing considerations: reversal is required when “the record . . . ‘may reasonably be read to suggest’ that a defendant’s sentence was the result, at least in part, of the consideration of impermissible factors.”⁸ This standard was crafted by, and agreed to, *by the state*. *Epprecht v. State*, 488 So. 2d 129, 130 (Fla. 3d DCA 1986) (“the state and the defendant propose[d this] test”). It has existed for

⁸ *Strong*, 254 So. 3d at 432 (quoting *Mosley v. State*, 198 So. 3d 58, 60 (Fla. 2d DCA 2015)); *see also Torres v. State*, 124 So. 3d 439, 441 (Fla. 1st DCA 2013); *Kimbrough v. State*, No. 3D19-1173, 2020 WL 1445409, at *1 (Fla. 3d DCA Mar. 25, 2020); *Kenner v. State*, 208 So. 3d 271, 278 (Fla. 5th DCA 2016).

decades.⁹ At base, it's just an application of the familiar harmless error standard.

“The harmless error test . . . places the burden on the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the [sentence] or, alternatively stated, that there is no reasonable possibility that the error contributed to the [sentence].” *State v. DiGuilio*, 491 So. 2d 1129, 1135 (Fla. 1986). When a defendant proffers evidence that the trial court relied on an improper sentencing factor (*i.e.*, demonstrates an error), then the burden shifts to the state to “prove beyond a reasonable doubt that the error complained of did not contribute to the” sentence. *Id.*; *see also Chapman v. California*, 386 U.S. 18, 23-24 (1967). Here, Garcia showed that an error occurred, as the state extensively relied on an improper sentencing factor. The Fourth District then shifted the burden to the state to prove that the factor did not actually influence the trial court (*i.e.*, that the error was harmless). The Fourth District properly held that the state did not meet that burden, where the trial court appears to have wholesale adopted the state’s reasoning and proposed sentence.

B. Impermissible sentencing considerations constitute fundamental error

Next, Petitioner argues that the Fourth District erred because, according to

⁹ *See Johnson v. State*, 679 So. 2d 831, 832-33 (Fla. 1st DCA 1996); *Reese v. State*, 639 So. 2d 1067, 1068 (Fla. 4th DCA 1994); *Cook v. State*, 647 So. 2d 1066, 1067 (Fla. 3d DCA 1994); *Epprecht*, 488 So. 2d at 130.

Petitioner, “merely establishing that the sentencing court considered an improper sentencing factor is insufficient” to demonstrate fundamental error. IB21.

According to Petitioner, a defendant must also meet some additional undefined and nebulous standard before a court can find fundamental error in this context. IB21-22. Petitioner’s argument is not the current state of the law, nor should it be.

The district court of appeals have unanimously held, for decades, that improper sentencing considerations constitute fundamental error.¹⁰ This Court approved one of those decisions in *Norvil*. 191 So. 3d at 407, 410 (approving of *Yisrael v. State*, 65 So. 3d 1177 (Fla. 1st DCA 2011)).

This is consistent with this Court’s test for fundamental error in sentencing. A sentencing error is fundamental if two things are true: (1) the error was “patent,” meaning that “the error must be apparent from the record,” and (2) the error could affect the length of the sentence. *Maddox v. State*, 760 So. 2d 89, 100 (Fla. 2000).

¹⁰See, e.g., *Kimbrough*, 2020 WL 1445409, at *1; *Price v. State*, 278 So. 3d 697, 701 (Fla. 4th DCA 2019); *Ortiz v. State*, 264 So. 3d 1032, 1034 (Fla. 4th DCA 2019); *Berben v. State*, 268 So. 3d 235, 237-38 (Fla. 5th DCA 2019); *Lundquist v. State*, 254 So. 3d 1159, 1160 (Fla. 2d DCA 2018); *Hillary v. State*, 232 So. 3d 3, 4 (Fla. 4th DCA 2017); *Williams*, 193 So. 3d at 1018; *Williams v. State*, 164 So. 3d 739, 740 (Fla. 2d DCA 2015); *Challis v. State*, 157 So. 3d 393, 395-96 (Fla. 2d DCA 2015); *Gage v. State*, 147 So. 3d 1020, 1022 (Fla. 2d DCA 2014); *Smith v. State*, 62 So. 3d 698, 700 (Fla. 2d DCA 2011); *Nawaz v. State*, 28 So. 3d 122, 124 (Fla. 1st DCA 2010); *Hannum v. State*, 13 So. 3d 132, 136 (Fla. 2d DCA June 2009); *Jiles v. State*, 18 So. 3d 1216, 1216 (Fla. 5th DCA 2009); *McDonald v. State*, 751 So. 2d 56, 58 (Fla. 2d DCA 1999); *Mitchell v. State*, 521 So. 2d 185, 187 (Fla. 4th DCA 1988).

If the patent error “could significantly impact a defendant’s length of incarceration,” then it is fundamental. *Id.* at 103; *see also Rosado v. State*, 129 So. 3d 1104, 1109 (Fla. 5th DCA 2013) (a claim of a vindictive sentence “constitutes fundamental error because it extends the defendant’s length of incarceration”).

Impermissible sentencing factors satisfy both prongs. First, appellate courts only reverse when the record reasonably suggests that an improper factor influenced the sentence. *See supra* n.8. That is another way of saying the error is “patent” or apparent on the face of the record. Second, the premise underlying improper sentencing consideration jurisprudence is that a court has extended a sentence due to an impermissible factor. Here, the record suggests that the state and the trial court thought 84-months’ imprisonment was warranted largely because of alleged subsequent misconduct. R478-80, 610, 622-24, 646. But-for that misconduct, that number was not justified. Thus, the reliance on uncharged misconduct appears to have “significantly impact[ed Garcia’s] length of incarceration” and therefore was fundamental error. *Maddox*, 760 So. 2d at 103.

Concluding that an allegation of improper sentencing considerations constitutes fundamental error is not only legally correct, but also practically sound. The remedy in this case – resentencing – is not burdensome. *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1348 (2016); *State v. Rhoden*, 448 So. 2d 1013, 1016 (Fla. 1984) (“The purpose for the contemporaneous objection rule is not

present in the sentencing process because any error can be corrected by a simple remand to the sentencing judge.”). As this Court has recognized, allowing defendants to raise these issues as fundamental error achieves judicial economy. *Maddox*, 760 So. 2d at 98-99. “Although it is preferable for the trial courts to correct their own sentencing errors, little is gained if the appellate courts require prisoners to file, and trial courts to process, more postconviction motions to correct errors that can be safely identified on direct appeal.” *Id.* at 98 (citation omitted).

Petitioner’s proposed rule would create a lot more work for courts. Rather than having appellate courts simply analyze whether the record suggests that an improper factor influenced the sentence, Petitioner wants appellate courts to have to do an additional step of analysis, determining whether that consideration was particularly bad or unjust. Much more ink will be spilled on these issues, both by the parties briefing the issue and the courts deciding the issue. Furthermore, as *Maddox* recognized, Petitioner’s proposal funnels more issues and cases to the postconviction process; if this Court declines to review an improper sentencing consideration as fundamental error, then defendants will file Rule 3.850 motions alleging ineffective assistance of counsel for failing to object. *Maddox*, 760 So. 2d at 98-99. And addressing sentencing errors in the postconviction process requires more work than in the direct appeal process because defendants are pro se in the postconviction process, and pro se pleadings are rarely models of clarity. *See id.*

Finally, Petitioner cites the dissent in *Cromartie* to argue that an error that has “a minor impact on the sentence does not constitute fundamental error.” IB21 (citing *Cromartie*, 70 So. 3d at 565 (Canady, C.J., dissenting)). This argument was properly rejected by the *Cromartie* majority. “To a prisoner, this prospect of additional time behind bars is not some theoretical or mathematical concept. Any amount of actual jail time is significant, and has exceptionally severe consequences for the incarcerated individual and for society which bears the direct and indirect costs of incarceration.” *Rosales-Mireles*, 138 S.Ct. 1897, 1907 (2018) (cleaned up). People should not spend any additional time in prison, even a “minor” amount of time, because of the trial court’s unconstitutional reasoning. And this is consistent with *Maddox*, which held that any error that extends the length of incarceration is “serious” and thus fundamental error. 760 So. 2d 89. Furthermore, Petitioner’s proposed rule once again creates more work for courts and undermines the benefit of bright-line rules. What does “minor” even mean? What sort of test would apply in cases unlike *Cromartie*, where the error is not arithmetical? Adopting Petitioner’s proffered rule will mean every case involving fundamental error will involve briefing and analysis about whether the error was “minor.”

Even if this Court were inclined to overrule *Cromartie* and adopt the dissent, it would be inapplicable here because it’s not clear the error was “minor.” In *Cromartie*, this Court reviewed a trial court’s policy of rounding up lowest

permissible sentences. 70 So. 3d at 562-63. It was easy to determine how much additional time was being added; there, the trial court added 0.17 years (or 2 months) and 0.84 years (or 10 months) based on its unconstitutional policy. *Id.* at 560. Here, in contrast, it is unclear how much additional prison was imposed on Garcia because of the misconduct. It does not appear to be a “minor” amount. Given the state’s emphasis on the misconduct at both the hearing and in their memo, a significantly lower sentence would have been recommended (and then ultimately imposed) had the state not considered Garcia’s alleged misconduct an appropriate consideration. Because the extent of the harm cannot be calculated as in *Cromartie*, this Court cannot say the impact on the sentence was “minor.”

Garcia is entitled to resentencing without the influence of subsequent misconduct tainting the process. “Even though the defendant has no substantive right to a particular sentence within the range authorized by statute, the sentencing is a critical stage of the criminal proceeding [and t]he defendant has a legitimate interest in the character of the procedure which leads to the imposition of sentence even if he may have no right to object to a particular result of the sentencing process.” *Gardner v. Florida*, 430 U.S. 349, 358 (1977) (plurality opinion) (citations omitted). While Garcia does not necessarily have a right to a particular sentence below 84-months’ imprisonment, he does have a right to a sentencing process in which the trial court only considers permissible sentencing factors.

Overall, “it is not the legality of [Garcia’s] sentence that is at issue; rather, it is due process.” *Hodierne v. State*, 141 So. 3d 1254, 1255 (Fla. 2d DCA 2014).

C. *Norvil* makes no distinction between “substantiated” and “unsubstantiated” allegations; in any event, the allegations in this case were not clearly “substantiated”

Petitioner claims that *Norvil* left open the question of whether its applies to “substantiated” allegations of misconduct, and Petitioner claims that district courts of appeal have struggled with this open question. IB23-25, 30-31. Neither of these claims is true; *Norvil* did not leave open that question because *Norvil* involved substantiated misconduct, and no discord among the appellate courts exists.

1. *Norvil* applies to both substantiated and unsubstantiated allegations

Contrary to Petitioner’s assertion, *Norvil* does apply to “substantiated” allegations of misconduct because the allegations in *Norvil* were substantiated. *Norvil* involved a post-arrest burglary. 191 So. 3d at 407-08. The Fourth District expressly found – and this Court did not disagree with that finding – that the allegations were substantiated, concluding that “the allegations of criminal conduct were supported by evidence in the record” and “the information about the burglary before the court went beyond ‘unsubstantiated allegations of misconduct.’” *Norvil v. State*, 162 So. 3d 3, 9-10 (Fla. 4th DCA 2014), *quashed by* 191 So. 3d 406 (Fla. 2016). In fact, the allegations in *Norvil* were far more substantiated then they were in this case. The state in *Norvil* substantiated the burglary with objective scientific

evidence (fingerprints), the victim’s statement, and by actually charging *Norvil* with burglary. *Id* at 5, 10. In this case, the allegations against Garcia were based solely on untested testimony¹¹ (not objective evidence like fingerprints), and the state had not charged Garcia. Because *Norvil* involved substantiated allegations, it is not true that *Norvil* left open the question of whether it applied to substantiated allegations.

Additionally, it’s clear this Court intended for the *Norvil* rule to apply to both types of allegations because *Norvil* adopted a “bright line rule for sentencing.” 191 So. 3d at 410. The purpose of a “bright line rule” is “to provide certainty and reduce litigation.” *Gilbride, Heller & Brown, P.A. v. Watkins*, 783 So. 2d 224, 226 (Fla. 2001). Petitioner’s proffered rule – that *Norvil* applies only to “unsubstantiated” allegations of subsequent misconduct – would mean that *Norvil* is no longer a bright line rule, and it would cause uncertainty and increased litigation. Every sentencing hearing involving allegations of subsequent misconduct could devolve into mini-trials over whether the allegations are “substantiated.” It’s unclear what rules of evidence or procedure (if any) would apply. And then appeals would turn into litigation over whether the state sufficiently substantiated the allegations. This Court’s decision in *Norvil* avoids

¹¹ Because the trial court held the bond hearing without Garcia’s presence and without giving the defense any time to investigate the issue, the defense was unable to cross-examine, confront, or undermine the testimony. *See* R535-75.

this unnecessary waste of judicial resources by banning all reliance on subsequent misconduct, substantiated or not.

Finally, to the extent *Norvil* is a case of statutory interpretation – which Garcia contends it is, *see infra* Part II.A – then this Court cannot distinguish between substantiated and unsubstantiated allegations. The premise of *Norvil* was that the Florida legislature has wholesale excluded consideration of subsequent misconduct, substantiated or not.

2. There is no discord among the appellate courts over whether *Norvil* applies to substantiated misconduct

In addition to incorrectly representing that *Norvil* involved unsubstantiated misconduct, Petitioner also contrived a “substantiated versus unsubstantiated” conflict among the district court of appeals in order to obtain review in this Court. Petitioner claims that *Norvil* “has caused an immense rift between the districts as to whether it prohibits a sentencing court from considering post-offense misconduct even when the misconduct is substantiated.” IB27.

A quick glance at the cases Petitioner cites quickly reveals that conflict does not exist.¹² Two of the cases– *Walker* and *Love* – were cited for the proposition that Garcia advances here, that *Norvil* applies to all misconduct, substantiated or

¹² For this reason, this Court should discharge this case for lack of jurisdiction. *See Woodward v. State*, 286 So. 3d 140 (Fla. 2019) (discharging jurisdiction after this Court had already accepted the case on due to conflict).

not. IB27-28 (citing *Walker v. State*, 253 So. 3d 1, 2 (Fla. 4th DCA 2018) & *Love*, 235 So. 3d at 1040). Petitioner then cites two cases – *Fox* and *Paul* – in an attempt to show “conflict” or a “rift.” IB27 (citing *Fox v. State*, 281 So. 3d 498 (Fla. 4th DCA 2019) & *Paul v. State*, 277 So. 3d 232 (Fla. 1st DCA 2019)). But neither of those cases actually supports the proposition that *Norvil* does not apply to substantiated allegations. *Fox* dealt with a novel question: whether *Norvil* applies to misconduct that was committed before the primary offense at sentencing, but for which the defendant was not convicted until after the primary offense. 281 So. 3d 498. That case never even uses the words “substantiated” or “unsubstantiated.” *Id.* Next, *Paul* does not even cite or acknowledge *Norvil*. 277 So. 3d 232. And *Paul* relied primarily on *Williams*, 193 So. 3d 1017, a case briefed before *Norvil* and one that ordered resentencing. *Paul*, 277 So. 3d at 239-40. It cannot be said that *Paul* interpreted *Norvil* as permitting reliance on substantiated allegations of misconduct when it is unclear if the First District was even aware of that opinion. Petitioner has not cited a single case that recognizes or grapples with the “rift” that Petitioner claims exists.

3. The allegations in this case were not clearly “substantiated”

Even if there is a distinction between substantiated and unsubstantiated allegations, that does not mean Garcia’s is not entitled to resentencing. Petitioner assumes that the allegations in this case were substantiated, such that (under

Petitioner's view) *Norvil* would not apply. But neither the trial court nor the Fourth District ever made such a finding, and this Court cannot make such a finding in the first instance. *See Featured Properties, LLC v. BLKY, LLC*, 65 So. 3d 135, 137 (Fla. 1st DCA 2011) ("A fundamental principle of appellate procedure is that an appellate court is not empowered to make findings of fact." (citation omitted)).

Garcia disputes that the allegations were substantiated. Because the trial court held the bond revocation hearing over defense objection without Garcia's presence and without giving the defense an opportunity to talk to Garcia or do any investigation, the testimony at the bond revocation hearing cannot be considered substantiated. R540-42, 570. Furthermore, Petitioner assumes that the alleged threats made in the CDs were substantiated, but the trial court did not listen to the CDs. *See* R593-654. Furthermore, the purported misconduct was arguably just Garcia venting. Garcia was known for making outlandish claims that he did not mean. T187, 200, 210-11, 293-94; R138. The state cherrypicked 2-4 sentences out of *16-minute-long* conversations. And Garcia made these purported "threats" not to the victims themselves, but to his family, and he did not ask his family to carry out any actions. If expressing hyperbolic frustration to friends and family warrants prison time, then many should be in prison.

II. This Court should decline the state’s invitation to overrule *Norvil*

In addition to arguing that the Fourth District misapplied *Norvil*, Petitioner also asks this Court to recede from *Norvil*. IB25-29. This Court should decline to do so because *Norvil* was correctly decided as a matter of both statutory and constitutional law and because of stare decisis principles.

A. The Criminal Punishment Code precludes reliance on subsequent misconduct

Although *Norvil* does briefly mention “due process,” that opinion appears to be, at base, a case of statutory interpretation. This Court correctly held that the CPC precludes reliance on subsequent misconduct.

The Legislature can preclude reliance on certain factors. *See* § 921.002(1), Fla. Stat. (“The provision of criminal penalties *and of limitations upon the application of such penalties* . . . is a matter properly addressed by the Legislature.” (emphasis added)). While sentencing does “call for the [trial] court to exercise discretion[,] . . . to ensure certainty and fairness in sentencing, [trial] courts must operate within the framework established by” the legislature. *Rosales-Mireles*, 138 S.Ct. at 1903 (cleaned up); *see also Hall v. State*, 823 So. 2d 757, 763 (Fla. 2002).

Norvil correctly interpreted the CPC as precluding reliance on subsequent misconduct at sentencing because, under the CPC, the primary offense and prior conduct – not subsequent misconduct – are the important factors at sentencing.

The CPC mentions the importance of the primary offense many times. For instance, the sentence must be “commensurate with the severity of the primary offense and the circumstances surrounding the primary offense.” § 921.002(1)(c), Fla. Stat. Similarly, the very first relevant sentencing factor listed in the PSI statute is “a complete description of the situation surrounding the criminal activity with which the offender has been charged.” § 921.231(1)(a), Fla. Stat. Uncharged subsequent misconduct is not a circumstance surrounding the primary offense.

Additionally, the CPC repeatedly emphasizes the importance of *prior* record at sentencing. For instance, it states that “the severity of the sentence increases with the length and nature of the offender’s prior record” and “use of incarcerative sanctions is prioritized toward offenders convicted of serious offenses and certain offenders who have long prior records.” § 921.002(1)(d), (i), Fla. Stat. The PSI statute similarly requires detail about “the offender’s prior record of arrests and convictions.” § 921.231(1)(c), Fla. Stat.

Norvil correctly applied the statutory interpretation principle of “expressio unius est exclusio alterius” to determine that the CPC precludes a trial court’s consideration of subsequent misconduct. Under this principle, “the mention of one thing implies the exclusion of another.” *Moonlit Waters Apartments, Inc. v. Cauley*, 666 So. 2d 898, 900 (Fla. 1996). Here, the Florida legislature has repeatedly “mentioned one thing” – that an offender’s primary offense and prior

record is what is relevant at sentencing. *Id.* The specific mention of contemporary (the primary offense) and prior (the prior record) conduct “implies the exclusion of” subsequent conduct. *Id.* This is not a situation where the Florida legislature was completely silent on what factors are relevant at sentencing. *See Norvil*, 191 So. 3d at 409 (“the CPC is unambiguous concerning the factors a trial court may consider in sentencing a defendant.”). Rather, the legislature has informed this Court what factors are relevant, and it excluded subsequent misconduct.

The fact that the legislature has not amended the CPC in the wake of *Norvil* supports Garcia’s point. Appellate courts assume that the Florida legislature is aware of its statutory interpretation decisions, and the legislature’s failure to amend a statute in response to an opinion is considered an endorsement of that interpretation. *Zommer v. State*, 31 So. 3d 733, 754 (Fla. 2010); *Gammage v. State*, 277 So. 3d 735, 741 (Fla. 2d DCA 2019). *Norvil* has been on the books for six years, and, in that time, the Florida legislature amended the CPC. But the Legislature has not amended the CPC to add subsequent misconduct as a pertinent sentencing factor – indicating that the Legislature agreed with *Norvil*’s statutory interpretation. In fact, the legislature did not amend the CPC despite a sitting appellate judge urging them to do so. *Brown v. State*, 225 So. 3d 947, 948 (Fla. 5th DCA 2017) (Berger, J., concurring specially) (“I would urge the Legislature to

amend section 921.231(1), to include subsequent arrests and their related charges as permissible sentencing factors.”).

Two judges dissented in *Norvil*, but none of their arguments justify overruling the majority opinion. First, the two dissenters in *Norvil* appear to believe that the majority opinion was wrong as a policy matter. 191 So. 3d at 411 (Canady, J., dissenting). But the legislature “has primary responsibility for making the difficult policy choices that underlie any criminal sentencing scheme,” and this Court “do[es] not sit as a ‘superlegislature’ to second-guess these policy choices.” *Ewing v. California*, 538 U.S. 11, 28 (2003). A court “may not ignore the criminal sentencing policy established by the legislature simply because that policy offends the trial court’s sensibilities.” *State v. Ayers*, 901 So. 2d 942, 946 (Fla. 2d DCA 2005) (citing *Hall*, 823 So. 2d at 763). This Court must respect the Florida legislature’s policy decision to exclude subsequent conduct from sentencing, even if this Court disagrees with it.

Next, the dissenters took umbrage with the majority’s reliance on the PSI statute, claiming that “nothing in the CPC either expressly or implicitly limits a sentencing judge to considering facts presented in a PSI.” *Norvil*, 191 So. 3d at 410 (Canady, J., dissenting). But the majority’s reasoning was not limited to just the PSI statute; the majority relied on other provisions as well. *Id.* at 408-09. Furthermore, even if the PSI statute is not an exhaustive list of all possible

sentencing factors, it still provides insight into what factors the Legislature thought are relevant. And the fact that the Legislature specifically mentioned prior and contemporaneous conduct as relevant factors, but not subsequent conduct, implies the exclusion of that latter category.

Finally, the dissent makes a mistake of law. The dissent claims that Florida requires only the preparation of a PSI and “does not require any sentencing judge to make use of a PSI.” *Id.* at 410 (Canady, J., dissenting). But in those cases where a PSI has been ordered, the judge must “make use” of the PSI, as “rule 3.710 expressly provides that the trial court must also *consider* the PSI before imposing a sentence.” *Slinger v. State*, 268 So. 3d 922, 924 (Fla. 5th DCA 2019) (emphasis in original); *see also Johnson v. State*, 355 So. 2d 857, 858 (Fla. 3d DCA 1979).

B. Permitting reliance on uncharged subsequent misconduct at sentencing would violate the state and federal constitutions

While *Norvil* was primarily a case of statutory interpretation, the case does have a constitutional dimension. As *Norvil* recognized through its brief mention of due process, allowing trial courts to consider subsequent misconduct at sentencing raises serious constitutional concerns. This Court should outright conclude that reliance on subsequent misconduct at sentencing is unconstitutional. At the very least, this Court should continue to interpret the CPC as precluding reliance on subsequent misconduct in order to avoid the constitutional concerns. *See Cashatt v. State*, 873 So. 2d 430, 436 (Fla. 1st DCA 2004) (“a statute is to be construed where

fairly possible so as to avoid substantial constitutional questions.”) (citing *U.S. v. X-Citement Video, Inc.*, 513 U.S. 64 (1994) & *Giorgetti v. State*, 821 So. 2d 417 (Fla. 4th DCA 2002)).

1. Allowing reliance on uncharged subsequent misconduct at sentencing incentivizes the state to circumvent the constitution

Norvil also has a constitutional dimension because, without it, the state has little incentive to comply with the constitutional protections for the accused.

Due process applies to sentencing. *Townsend v. Burke*, 334 U.S. 736 (1948); *Griffin v. State*, 517 So. 2d 669, 670 (Fla. 1987). “A convicted defendant has a due process right to ‘a fair sentencing process—one in which the court goes through a rational procedure of selecting a sentence based on relevant considerations and accurate information.’” *Thorne v. United States*, 46 A.3d 1085, 1088 (D.C. 2012) (quoting *Welch v. Lane*, 738 F.2d 863, 865 (7th Cir. 1984)). As a part of this due process protection, “courts have held that consideration of certain types of information at sentencing violates due process.”¹³ *Norvil* is an application of this basic rule, that some factors cannot constitutionally be considered at sentencing.

Norvil exists in order to ensure that the state complies with the state and federal constitution before punishing a defendant for criminal behavior. “Allowing

¹³ Carissa Byrne Hessick & F. Andrew Hessick, *Recognizing Constitutional Rights at Sentencing*, 99 Calif. L. Rev. 47, 54 (2011); *see also Norvil*, 191 So. 3d 406; *Ortiz*, 264 So. 3d at 1034 (“a court violates a defendant’s due process rights by relying on impermissible factors in sentencing.”)

judges to consider conduct for which a defendant has never been charged when determining an appropriate sentence essentially provides prosecutors with the incentive to withhold formal charges against a defendant for certain criminal conduct.”¹⁴ The state has little incentive to formally charge Garcia with assault, tampering, resisting law enforcement, or any other potential crime available if they can obtain the same level of punishment by emphasizing that behavior at Garcia’s sentencing for arson. The state should not be permitted to “backdoor” its way to a desired sentencing outcome; if it wants to punish Garcia for his actions after the arson, then it needs to charge and convict him of those crimes.¹⁵

Allowing the state to rely on subsequent conduct is especially problematic because, had the state formally charged Garcia with a crime due to his post-arrest conduct, the CPC would have precluded the inclusion of that crime on Garcia’s scoresheet. *See* § 921.0021(5), Fla. Stat. The state should not be permitted to do informally what it could not do formally. Overall, the trial court “may also have imposed the sentence” it did “because [it] believed” Garcia committed crimes

¹⁴ Kathryn M. Zainey, *The Constitutional Infirmary of the Current Federal Sentencing System: How the Use of Uncharged and Acquitted Conduct to Enhance a Defendant’s Sentence Violates Due Process*, 56 Loy. L. Rev. 375, 403 (2010); *see also* Robert Alan Semones, *A Parade of Horribles: Uncharged Relevant Conduct, The Federal Prosecutorial Loophole, Tails Wagging Dogs in Federal Sentencing Law, and United States v. Fitch*, 46 U.C. Davis L. Rev. 313, 337-44 (2012) (advancing effectively this same argument).

¹⁵Semones, 46 U.C. Davis L. Rev. at 345.

subsequent to the charged arson, but “the proper method of imposing punishment for [these offenses] would be through a separate prosecution.” *City of Daytona Beach v. Del Percio*, 476 So. 2d 197, 205 (Fla. 1985).

Consider, also, the possibility that the defendant is acquitted of the alleged subsequent misconduct. Due process precludes reliance on conduct for which the defendant has been acquitted at sentencing.¹⁶ Theoretically, the state could rely on post-arrest misconduct at a sentencing hearing, but later the defendant is acquitted of those precise allegations. But, at that point, it would be too late go back and redo the original sentencing hearing. Requiring the state to charge and prove a crime before sentencing a defendant for it avoids this problem.

This constitutional analysis also responds to one of the concerns proffered by the *Norvil* dissent. According to that dissent, it is a “remarkable proposition that a defendant who has committed an additional crime while out on bond should not have that subsequent crime held against him when being sentenced for the earlier offense.” *Norvil*, 191 So. 3d at 411 (Canady, J., dissenting). But Respondent is not saying that the state can never punish an individual for committing a crime while out on bond. All Respondent is saying is that, before the state can seek to further deprive a defendant’s physical liberty on that ground, basic constitutional

¹⁶ *Burr v. State*, 576 So. 2d 278 (Fla. 1991); *Doty v. State*, 884 So. 2d 547, 549 (Fla. 4th DCA 2004).

protections, such as the burden of proof, the reasonable doubt standard, and confrontation rights, should apply. If the state charged and convicted Garcia of assaulting Martin or Darnell then, at the sentencing for those crimes, the state could emphasize that Garcia was out on bond for the arson during the offenses, and the state at the sentencing could also permissibly emphasize the arson, since it was a prior offense. If anything, the “remarkable proposition” is Petitioner and the *Norvil* dissent’s view that this Court should do away with constitutional protections and permit trial courts to sentence individuals based on any factors that it so chooses, even those unrelated to the primary offense, without any guiding standards, without constitutional protections, and in violation of the CPC.

2. Without rules like *Norvil*, Florida has a standardless sentencing scheme that violates due process

The two dissenters in *Norvil* appear to believe that judges should have broad, possibly unfettered, discretion to consider everything and anything it wants at sentencing. 191 So. 3d at 410-11 (Canady, J., dissenting) (citing *Williams v. New York*, 337 U.S. 241 (1949)).¹⁷ But such a world, and a sentencing scheme without *Norvil* and cases like it, violates due process.

A sentencing scheme violates due process if it is “so standardless that it

¹⁷ “Although courts continue to rely on it, *Williams* itself is no longer good law.” Hessick & Hessick, 99 Calif. L. Rev. at 85. It has been overruled in part by the United States Supreme Court and superseded by statute. *Id.*

invites arbitrary enforcement.” *Johnson v. United States*, 135 S.Ct. 2551, 2556 (2015); *cf. Exxon Shipping Co. v. Baker*, 554 U.S. 471, 499 (2008) (excessive punitive damages violative of due process due to “the stark unpredictability” of the awards). A trial court’s sentencing discretion is not unlimited; “like any other exercise of judicial discretion, the trial court’s sentencing decision must be supported by logic and reason and must not be based upon the whim or caprice of the judge.” *McKinney v. State*, 27 So. 3d 160, 161 (Fla. 1st DCA 2010); *see also Canakaris v. Canakaris*, 382 So. 2d 1197, 1203 (Fla. 1980) (“The discretionary power that is exercised by a trial judge is not . . . without limitation.”).

As it currently stands, Florida’s sentencing regime borders on a constitutional violation. This Court has upheld the CPC against a due process challenge, but only because the CPC utilizes “objective criteria, such as the severity and nature of the offense and the offender’s criminal history.” *Hall*, 823 So. 2d at 759-60. That “objective criteria” is the information that goes into the CPC score. *See id.* But in actuality, that “objective criteria” matters very little; courts treat the CPC score as a “sentencing floor” rather than as “objective criteria” that guides a sentencing decision.¹⁸ Unsurprisingly, this has resulted in well-

¹⁸ *See, e.g., Moore v. State*, 286 So. 3d 887, 887 (Fla. 2d DCA 2019) (trial court opined that the “bottom of the guidelines are pretty much reserved for people who accept responsibility”); *Gallo v. State*, 272 So. 3d 418, 423 (Fla. 4th DCA 2019) (suggesting the CPC score was irrelevant to the appropriate sentence); *Torres v. State*, 879 So. 2d 1254, 1255 (Fla. 3d DCA 2004) (noting that, under the CPC, the

documented disparity, both racial and geographic, in Florida sentencing.¹⁹ To overrule *Norvil* would be to remove one of the few limitations Florida has on sentencing and move this state toward an even more standardless regime.

In conclusion, this Court may not entirely agree with all of the constitutional analysis just proffered. But these concerns at least suggest that a world without *Norvil* poses “substantial constitutional questions.” *Cashatt*, 873 So. 2d at 436. This principle should permeate this Court’s statutory analysis and, in order to avoid a constitutional problem, this Court should interpret the CPC as prohibiting

“score provides a sentencing floor, but the court can impose any sentence up to the legal maximum”); Pamala L. Griset, *New sentencing laws follow old patterns: A Florida case study*, 30 *Journal of Criminal Justice* 287, 288 (2002) (noting that the purpose of the prosecutor-created CPC was to establish “a bottom but no top”).

¹⁹*Delancy v. State*, 256 So. 3d 940, 947 (Fla. 4th DCA 2018) (“the DOC statistics showing a disparity between average sentences for white defendants and minority defendants are disturbing.”); Lisa Margulies, Sam Packard, and Len Engel, *An Analysis of Florida’s Criminal Punishment Code*, Crime and Justice Institute, (June 2019), at 18-19, available at <http://www.crj.org/assets/2019/06/An-Analysis-of-Florida-CPC-June-2019.pdf>; Cyrus O’Brien et al., *Florida Criminal Justice Reform: Understanding the Challenges and Opportunities*, Florida State University Project on Accountable Justice (2017), available at <https://accountablejustice.github.io/report/>; Josh Salman, Emily Le Coz, and Elizabeth Johnson, *Bias on the Bench*, Sarasota Herald-Tribune, Dec. 8, 2016, available at <http://projects.heraldtribune.com/bias/>; Josh Salman, Emily Le Coz and Elizabeth Johnson, *Florida’s Broken Sentencing System: Designed for Fairness, It Fails to Account for Prejudice*, Sarasota Herald-Tribune, Dec. 8, 2016, available at <http://projects.heraldtribune.com/bias/sentencing/>; Josh Salman, Emily Le Coz and Elizabeth Johnson, *Tough on Crime: Black Defendants Get Longer Sentences in Treasure Coast System*, Sarasota Herald-Tribune, Dec. 8, 2016, available at <http://projects.heraldtribune.com/bias/bauer/>.

reliance on subsequent misconduct.

C. A world without *Norvil* is impractical and unadministrable

One of *Norvil*'s benefits is that lays out a "bright line rule." 191 So. 3d at 410. It's easy to spot and rectify a *Norvil* error; if the trial court appears to have relied on subsequent conduct, then resentencing is required. And bright-line rules are easy to follow and thus violations are easily avoided by attorneys and courts versed in the law. *Cf. Dickerson v. United States*, 530 U.S. 428, 443 (2000) (declining to overrule *Miranda v. Arizona*, in part because "the meaning of *Miranda* has become reasonably clear and law enforcement practices have adjusted to its strictures" (citation omitted)).

Petitioner advances an alternative rule that is more difficult to apply and will create more work for courts. Instead of a "bright line rule," Petitioner wants this Court to hold that a trial court can rely on uncharged subsequent misconduct sometimes, when the claims are "substantiated." IB23-25, 27, 30. But are courts supposed to have mini-trials in the middle of sentencing to determine whether allegations of subsequent misconduct are substantiated? If so, what rules, if any, apply? Is misconduct substantiated if the only evidence of it is hearsay? Does the defendant have a constitutional right to confrontation or cross-examination? Can a defendant's silence in response to the allegations be used against him? And then appellate courts will have to review whether the trial court erred in finding

misconduct substantiated. If the appellate court reverses for failure to substantiate, can the state try again to substantiate it at resentencing? Requiring the state to formally charge and prove subsequent misconduct if it wants to punish a person for such behavior avoids all of these complications.

D. Stare decisis demands respect for *Norvil*

Finally, the doctrine of stare decisis counsels against overruling *Norvil*. Under this Court’s newly articulated analysis for determining whether a case can be overruled, this Court can recede from *Norvil* only if it was “clearly erroneous” and if there was some binding “higher legal authority—whether it be a constitutional provision, a statute, or a decision of the Supreme Court” requiring a change in course. *State v. Poole*, SC18-245, 2020 WL 3116597, at *15 (Fla. Jan. 23, 2020). This Court must also consider reasons for not receding, such as reliance interests. *Id.* “The question today . . . is not whether [*Norvil*] was right or wrong, but whether to adhere to it in deciding the present case.” *June Medical Services LLC v. Russo*, 2020 WL 3492640, at *21 (2020) (Roberts, J., concurring); *see also Dickerson*, 530 U.S. at 443 (noting that there must be “some special justification” for overruling precedent beyond mere disagreement with the case (cleaned up)).

Norvil does not meet the standards for overruling a case. Garcia believes that *Norvil* was correctly decided. But even if this Court thinks the opinion was questionable, that opinion was not “clearly erroneous.” *Poole*, 2020 WL 3116597,

at *15 (emphasis added). This is a “deferential” standard of review, requiring a “definite and firm conviction that a mistake has been committed.” *Concrete Pipe and Products of Cal., Inc. v. Construction Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 623 (1993); *see also June Medical Services*, 2020 WL 3492640, at *22 (Roberts, J., concurring) (“for precedent to mean anything, the doctrine must give way only to a rationale that goes beyond whether the case was decided correctly.”). For all of the reasons provided in the previous sections, this court cannot definitively and firmly say that the majority made a mistake in *Norvil*.

Furthermore, there has been no “higher legal authority” counseling reversal on this matter. *Poole*, 2020 WL 3116597, at *15. For instance, this Court overruled its juvenile resentencing precedent because it interpreted “a more recent United States Supreme Court decision, *Virginia v. LeBlanc*,” as requiring that outcome. *Franklin v. State*, 258 So. 3d 1239, 1241 (Fla. 2018). Here, there has been no intervening rule of constitutional procedure or statutory amendment that requires this Court to overturn *Norvil*. To the contrary, the Legislature has acquiesced to *Norvil*’s interpretation of the CPC.

Finally, reliance interests weigh against overruling *Norvil*. Contrary to Petitioner’s claim, this is not a case “involving procedural and evidentiary rules.” IB29. Rather, this is a case of statutory and constitutional interpretation. The

district court of appeals have faithfully applied *Norvil* in the aftermath,²⁰ and the Florida legislature has likely relied upon it when amending the CPC. Furthermore, if this Court overrules *Norvil*, it will be overruling or at least calling into question decades of Florida appellate precedent. *Norvil* did not arise out of nowhere in 2016; it was the culmination of decades of Florida appellate courts limiting a trial court's ability to consider misconduct at sentencing.²¹ Petitioner effectively admits as much when discussing Second District precedent. IB31-35.

Petitioner doesn't really give a good reason for overruling *Norvil*. The only rationale Petitioner proffers is that the opinion is "confusing," *see* IB27, but *Norvil* was not confusing. *Norvil* established an easy-to-apply bright line rule. 191 So. 3d at 410. Appellate courts have successfully applied this rule.²² And, as noted, Petitioner's claim that "the opinion has caused an immense rift between the districts" is untrue. IB27. If anything, it's Petitioner's proffered rule – that only

²⁰ *See, e.g., Love*, 235 So. 3d at 1040; *Walker*, 253 So. 3d at 2; *Brown*, 225 So. 3d at 948; *Williams*, 193 So. 3d at 1019.

²¹ *See, e.g., Petit-Homme v. State*, 284 So. 3d 1126 (Fla. 5th DCA 2019); *Nichols v. State*, 283 So. 3d 947 (Fla. 2d DCA 2019); *Tharp*, 273 So. 3d 269; *Love*, 235 So. 3d 1037; *Lundquist*, 254 So. 3d 1159; *Strong*, 254 So. 3d 428; *N.D.W. v. State*, 235 So. 3d 1001 (Fla. 2d DCA 2017); *Imbert v. State*, 154 So. 3d 1174 (Fla. 4th DCA 2015); *Mosley*, 198 So. 3d 58; *Challis*, 157 So. 3d 393; *Hernandez v. State*, 145 So. 3d 902 (Fla. 2d DCA 2014); *Yisrael*, 65 So. 3d 1177; *Mirutil v. State*, 30 So. 3d 588 (Fla. 3d DCA 2010); *Gray v. State*, 964 So. 2d 884 (Fla. 2d DCA 2007); *Seays v. State*, 789 So. 2d 1209 (Fla. 4th DCA 2001); *Reese v. State*, 639 So. 2d 1067 (Fla. 4th DCA 1994); *Epprecht*, 488 So. 2d 129.

²² *See supra* n.20.

bad, non-minor, and substantiated conduct be barred – that is confusing.

Petitioner also asks this Court to overrule *Norvil* because there was a dissent. AB26-29. “The fact that the composition of the court has changed is not a sufficient reason to change established precedent.”²³ To overrule a case because the former dissent is now in the majority fosters distrust and instability in the law.²⁴

²³ Michael Sears, *Abrogation of the Traditional Common Law of Premises Liability*, 44 U. Kan. L. Rev. 175, 190 (1995); see also Bryan A. Garner et al., *The Law of Judicial Precedent* 416 (2016); Margaret A. Sewell, *Adarand Constructors, Inc. v. Peña: The Armageddon of Affirmative Action*, 46 DePaul L. Rev. 611, 644 n.256 (1997) (“the change of one Justice’s vote in a short period of time is not in itself sufficient reason to abandon a precedent. A reversal fueled by a mere change in the Court’s personnel is particularly damaging to the Court’s image as a neutral decisionmaker.” (cleaned up) (quoting Amy L. Padden, *Note, Overruling Decisions in the Supreme Court: The Role of a Decision’s Vote, Age, and Subject Matter in the Application of Stare Decisis After Payne v. Tennessee*, 82 Geo. L.J. 1689, 1719 (1994))).

²⁴ Stewart F. Hancock, Jr., *Constancy Through Turbulent Times*, 47 Syracuse L. Rev. 291, 297 (1997) (noting that “stare decisis is accepted” as a principle because it “enhances stability in the law because the failure of a court to settle on a rule invites perpetual attack and reexamination, with the real possibility that governing rules will change whenever the composition of the Court changes” and that it “is a rule of legitimacy” (citation omitted)).

This Court in particular has been criticized for fostering such instability. Mark Joseph Stern, *Florida Supreme Court Destroys Precedent Protecting Mentally Disabled People From Execution*, Slate, (May 22, 2020), available at <https://slate.com/news-and-politics/2020/05/florida-supreme-court-precedent-death-penalty-disability.html>; American Bar Association, *Florida Supreme Court “Recedes” from Major Death Penalty Decision Creating Uncertainty About Status of Dozens of Cases*, (Mar. 11, 2020), available at https://www.americanbar.org/groups/committees/death_penalty_representation/project_press/2020/spring/florida-supreme-court-state-v-poole/; Mark Joseph Stern, *Florida Supreme Court Gives Itself the Power to Shred Liberal Precedent, Starting With Death Penalty Limits*, Slate, (Jan. 23, 2020), available at <https://slate.com/news-and-politics/2020/01/florida-supreme-court-precedent->

See also June Medical Services, 2020 WL 3492640, at *22 (Roberts, J., concurring) (stare decisis is “an established rule to abide by former precedents, where the same points come again in litigation; as well to keep the scale of justice even and steady, and not liable to waver with every new judge’s opinion” (quoting 1 W. Blackstone, *Commentaries on the Laws of England* 69 (1765))).

This Court should affirm that *Norvil* remains good law, and it should thus affirm the Fourth District’s opinion in this case faithfully applying that precedent.

III. Even if this Court overrules *Norvil*, Appellant is entitled to resentencing

If this Court overrules *Norvil*, then it should require certain prerequisites before subsequent misconduct can influence a sentence. Such protections are required in to ensure the sentence is based primarily on the primary offense and prior record, to avoid due process concerns, and to comply with precedent.

This Court could hold that only subsequent *charged* misconduct can be considered at sentencing. Such a holding would ensure that the misconduct was “substantiated” (as it had to be supported by probable cause), while also ensuring that the state believed the conduct was criminal and serious enough to pursue.

Alternatively, this Court could adopt the standards outlined in the Fourth District’s opinion in *Norvil*, 162 So. 3d 3, *quashed by* 191 So. 3d 406 (Fla. 2016).

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Under that opinion, subsequent misconduct could be considered if: “(1) the new charge [or other misconduct] was relevant; (2) the allegations of criminal conduct were supported by evidence in the record; (3) the defendant had not been acquitted of the charge that arose from the subsequent arrest; (4) the record does not show that the trial court placed undue emphasis on the subsequent arrest and charge in imposing sentence; and (5) the defendant had an opportunity to explain or present evidence on the issue of his prior and subsequent arrests.” *Id.* at 9.²⁵

With respect to the first prong, this Court should define “relevance.” In theory, all misconduct could be justified as relevant on the ground that it provides some insight into the type of person the offender is. For this limitation to have any meaning, this Court should require the subsequent misconduct to have some connection to the crime; for instance, the subsequent offense was a failure to appear on the primary offense or related to jury tampering during the trial for the primary offense. But if the defendant committed a crime wholly unrelated to the underlying offense – for instance, if someone charged with drug possession committed a violent crime – then it should be barred as unrelated.

Adopting the second requirement – that the allegations are supported by evidence– is a no brainer. Petitioner concedes this much is required. IB23-25, 30-

²⁵ The Alaska Supreme Court has adopted strikingly similar limitations on the consideration of a defendant’s previous police contacts during sentencing. *Layland v. State*, 549 P.2d 1182, 1183 n.5 (Alaska 1976).

31. Furthermore, this protection is required by the federal constitution.²⁶

Florida statutory and constitutional law also mandates that a court avoid placing undue emphasis on the subsequent misconduct. As noted in Point II.A, the Florida legislature has made it abundantly clear the sentence should be based primarily (arguably exclusively) on the primary offense and prior record. Thus, to maintain compliance with legislative policy, trial courts cannot overemphasize subsequent misconduct, which fits into neither of these categories. In fact, Florida courts have long required as much. *See State v. Potts*, 526 So. 2d 63 (Fla. 1988); *Reese v. State*, 639 So. 2d 1067 (Fla. 4th DCA 1994); *Jansson v. State*, 399 So. 2d 1061, 1064 (Fla. 4th DCA 1981). Other jurisdictions similarly limit the weight a sentencing court can give tangential considerations at sentencing.²⁷

Finally, the defendant must be given an opportunity to respond and explain.

²⁶ It violates due process for a defendant to be sentenced on a mistake of fact. *Townsend*, 334 U.S. at 741; *see also Gall v. United States*, 552 U.S. 38, 51 (2007) (sentence under federal guidelines procedurally erroneous if “based on clearly erroneous facts”); *Craun v. State*, 124 So. 3d 1027 (Fla. 2d DCA 2013) (reversing because trial court mistakenly attributed to defendant the misconduct of his codefendant during sentencing); *Lowery v. State*, 22 So. 3d 745 (Fla. 2d DCA 2009) (reversing because trial court misremembered its prior conversation with a defendant); *McCray v. State*, 851 So. 2d 221, 222 (Fla. 3d DCA 2003) (reversing because the sentence imposed “resulted from a misapprehension of fact”).

²⁷ *See, e.g., United States v. Wardlaw*, 576 F.2d 932, 938-39 (1st Cir. 1978) (trial court cannot overemphasize general deterrence at sentencing); *State v. Grove*, 821 P.2d 1005, 1007 (Idaho 1991) (trial court cannot “give undue weight to the statement [of the victim’s family] whereby the emphasis shifts from the crime to consideration of the ‘worth’ of the victim”).

The United States Supreme Court has “recognize[d] the importance of giving counsel an opportunity to comment on facts which may influence the sentencing decision.” *Gardner*, 430 U.S. at 360 (plurality opinion); *cf. State v. House*, 476 So. 2d 908, 910 (La. Ct. App. 1985) (trial court cannot consider arrests during sentencing unless “the defendant is given notice of the derogatory information and is given the chance to speak in mitigation”). Florida has recognized similar principles. *See Potts*, 526 So. 2d 63; *Jansson*, 399 So. 2d at 1064 (trial court may rely on prior arrests only if “the court recognizes that these arrests are not convictions or findings of guilt, and the defendant is given an opportunity to explain or offer evidence on the issue of his prior arrests”). Furthermore, Rule 3.720 requires the trial court to “entertain submissions and evidence by the parties that are relevant to the sentence.” Fla. R. Crim. P. 3.720(b). If this Court permits evidence of subsequent misconduct at sentencing, then evidence and argument rebutting those allegations would be “relevant to the sentence.” *Id.*

Overall, if this Court overrules *Norvil*, it should not affirm Garcia’s sentence. It should remand for a resentencing at which the trial court makes the findings necessary before the admission of subsequent misconduct.

IV. Petitioner’s last “catch-all” arguments are unmeritorious

Finally, Petitioner advances two last-ditch attempts to quash the Fourth District’s opinion. IB35-39. Both arguments were considered and rejected during

the rehearing process and should also be rejected by this Court.

A. Waiver

Garcia did not waive the issue of impermissible sentencing factors. As Petitioner admits, *see* IB35-36, Garcia’s initial brief before the Fourth District cited *Norvil* and argued that the trial court was “influenced by impermissible sentencing factors” and the sentence “was based on impermissible factors under *Norvil*.” IIR85, 95, 99-101. The brief also noted that the state “heavily weighed [Garcia’s] behavior pending trial to support its final [sentencing] recommendation.” IIR101. While the initial brief could have been more loquacious, it is not true that the argument was not raised. Furthermore, Petitioner already raised this waiver argument, and the Fourth District rejected it. IIR145-57, 174.²⁸

B. Downward Departure Motion

Petitioner argues Garcia “opened the door” to a *Norvil* violation through his downward departure motion. IB36-39.

²⁸ If Garcia had somehow waived this issue, an appellate court can still reverse for fundamental errors that are not briefed. *Berben*, 268 So. 3d at 238; *J.V. v. State*, 221 So. 3d 689, 691 (Fla. 4th DCA 2017); *Honaker v. State*, 199 So. 3d 1068, 1070 (Fla. 5th DCA 2016) (“[W]e may sua sponte address fundamental error apparent on the face of the record.”); *Williams v. State*, 280 So. 2d 518, 519 (Fla. 3d DCA 1973). And this rule is ultimately more efficient for the courts; without this rule, Garcia would be forced to continue litigation by filing a habeas petition alleging ineffective assistance of appellate counsel for failing to raise the *Norvil* issue. *See Maddox*, 760 So. 2d at 98-99 (discussing the efficiencies inherent in addressing issues in the first instance, rather than pushing them to the post-conviction process).

This argument should be deemed waived. “Contemporaneous objection and procedural default rules apply not only to defendants, but also to the State.”

Cannady v. State, 620 So. 2d 165, 170 (Fla. 1993); *see also, e.g., State v. Fleming*, 61 So. 3d 399, 401 n.3 (Fla. 2011). Petitioner never advanced this argument during the initial briefing process. *See* IIR104-28, 145-62. Furthermore, the argument made now differs from the rehearing and jurisdictional brief arguments. Originally, Petitioner argued that the simple fact of filing a downward departure motion opened the door to a constitutional violation. IIR157-59. But now, Petitioner advances a more nuanced argument, that Garcia’s request for probation in particular opened the door. IB37-38.

Even if this Court reaches the merits of this argument, it should reject it. It’s unclear if the “opening the door” concept even applies to sentencing; it originated in the trial context. *See Brown v. State*, 294 So. 3d 367, 372 (Fla. 4th DCA 2020).

In any event, that concept is limited. The principle of opening the door “does not *automatically* trigger” the consideration of otherwise impermissible factors. *Id.* Rather, a trial court may consider otherwise impermissible factors only if they are “directly relate[d] to the proposed basis for the downward departure.” *Hayes v. State*, 272 So. 3d 815, 817 (Fla. 1st DCA 2019). For instance, in *Hayes*, the defendant asked for a departure on the ground that his relationship with a minor was consensual. *Id.* at 817. It was not improper for the trial court to find the

relationship was not consensual, where the defendant raised that issue first. *Id.*

Garcia's downward departure motion did not "directly relate" to his purported misconduct. He moved for departure on the ground that he required specialized treatment for stomach cancer. R472-75. His allegedly threatening actions towards individuals after the primary offense has no bearing on whether Garcia actually had cancer and whether that cancer warranted a departure.

For the first time ever, Petitioner now argues, based on a single line in Garcia's departure motion, that reliance on subsequent misconduct was permitted because Garcia requested probation. IB37. But the defense's argument was that probation was appropriate so Garcia could seek medical treatment, not that it was appropriate because he had behaved on probation. R472-74, 615-16. Furthermore, this was not the state's argument below. At sentencing, the state did not use Garcia's subsequent misconduct to rebut the downward departure motion or Garcia's request for probation. Rather, the state's sole response to the downward departure motion was that Garcia presented insufficient evidence to show he had cancer, and that was the reasoning adopted by the trial court when denying the departure motion. R481-83, 619-21, 646. The purported subsequent misconduct was set forth as an independent basis for a harsher sentence – precisely what *Norvil* prohibits – rather than as a response to the departure motion.

CONCLUSION

Petitioner has not persuasively explained how the Fourth District erred ordering the minimally burdensome remedy of a resentencing in this case, nor has Petitioner provided any persuasive reason for overruling *Norvil*. This Court should not overrule *Norvil* and reverse the Fourth District's decision simply because it the composition of the Court has changed. For these reasons, and for the rest of the reasons provided in this brief, this Court should affirm.

CERTIFICATE OF SERVICE

I certify that this brief was served to Assistant Attorneys General Celia Terenzio & Paul Patti, III, 1515 N. Flagler Drive, West Palm Beach, Florida 33401, by email at CrimAppWPB@MyFloridaLegal.com this 21st day of August, 2020.

/s/ CLAIRE VICTORIA MADILL
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CERTIFICATE OF FONT

I certify that this brief was prepared with Times New Roman 14-point font in compliance with Florida Rule of Appellate Procedure 9.210(a)(2).

/s/ CLAIRE VICTORIA MADILL
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