

IN THE SUPREME COURT OF FLORIDA

JONATHAN LAWRENCE,

Appellant,

vs.

CASE NO. SC18-2061

STATE OF FLORIDA,

Appellee.

_____ /

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT,
IN AND FOR SANTA ROSA COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

ANDY THOMAS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

BARBARA J. BUSHARIS
Assistant Public Defender
Fla. Bar No. 71780
Leon County Courthouse
301 S. Monroe St., Suite 401
Tallahassee, Florida 32301
(850) 606-8500
barbara.busharis@flpd2.com

ATTORNEY FOR APPELLANT

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STATEMENT OF THE CASE

This is an appeal from a final order of the circuit court for Santa Rosa County, Florida, sentencing Jonathan Lawrence to death for the 1998 killing of Jennifer Robinson. (R. 1380-1400.) The order was entered following a second penalty phase trial, after Mr. Lawrence's original death sentence was vacated pursuant to *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). This Court has jurisdiction pursuant to article V, section 3(b)(1) of the Florida Constitution.

I. Prior Proceedings.¹

Jennifer Robinson was killed on May 7, 1998, and on March 24, 2000, Mr. Lawrence entered a plea of guilty of first-degree murder as a principal. *See Lawrence v. State*, 846 So. 2d 440, 442 (Fla. 2003) ("Lawrence I"). Mr. Lawrence had previously entered a plea of guilty in a separate case in federal court involving the killing of Justin Livingston, Mr. Lawrence's cousin, which happened about a month before Ms. Robinson was killed. *Id.* at 444 n.3. Within a few days of entering his guilty plea involving Ms. Robinson, Mr. Lawrence entered a no contest plea to a charge of attempted first-degree murder as a principal in a separate case involving the non-fatal shooting of Leighton Smitherman, which also

¹ All citations to the record refer to the Corrected Record on Appeal filed with this Court on April 12, 2019.

took place before Ms. Robinson and Mr. Livingston were killed. *Id.* During each of the three episodes Mr. Lawrence was in the company of Jeremiah Rodgers. *See id.*

Following a penalty phase trial, a jury recommended a sentence of death by a vote of eleven to one, and the trial court imposed that penalty. *Id.* at 444. This Court affirmed the conviction and sentence on direct appeal. *Id.* The Court subsequently rejected a post-conviction claim that Mr. Lawrence's plea was not voluntary because of Mr. Lawrence's mental illness. *See Lawrence v. State*, 969 So. 2d 294, 301 (Fla. 2007) ("Lawrence II").

A petition for writ of certiorari was denied on October 14, 2003, in *Lawrence v. Florida*, 124 S. Ct. 394 (2003). Mr. Lawrence's motion for post-conviction relief was denied in 2006, and this court affirmed that denial. *See Lawrence II*, 969 So. 2d at 301. Mr. Lawrence's petition for writ of habeas corpus in federal court was similarly denied, and the Eleventh Circuit Court of Appeals affirmed the denial in 2012. *See Lawrence v. Secretary, Florida Dep't of Corrections*, 700 F. 3d 464 (11th Cir. 2012).

Mr. Lawrence filed a Successive Motion to Vacate Death Sentence, and Alternatively Motion to Correct Illegal Sentence, on January 8, 2017, arguing that he was entitled to relief from his death sentence pursuant to *Hurst v. Florida*, 136 S. Ct. 616 (2016), and Florida cases following that decision. (R. 73-159.) The trial court granted the State's motion to strike the Successive Motion for exceeding the

page limit set by the Florida Rules of Criminal Procedure. (R. 175-76.) Mr. Lawrence then filed an Amended Successive Motion on January 31, 2017. (R. 177-201.)

At a case management conference held on March 23, 2017, the parties stipulated that Mr. Lawrence was entitled to *Hurst* relief. (R. 231-37; Order Granting Defendant’s Amended Successive Motion for Postconviction Relief, R. 239-41.) Shortly afterward the State gave notice that it would again seek the death penalty, and would rely on two statutory aggravators: Mr. Lawrence was previously convicted of another felony involving violence, and the capital felony was a homicide committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. (R. 242.)

II. Proceedings Below.

In April 2018 Mr. Lawrence, through counsel, served a motion to waive his right to a jury trial, to present mitigation, and to challenge the State’s evidence. (R. 1203-12.)² At a case management conference on April 20, 2018, counsel informed the trial court that Mr. Lawrence “doesn’t want us to present mitigation, [...] doesn’t want us to challenge the State’s argument, and he doesn’t want a jury trial.” (R. 1168-69.) The court conducted a colloquy to determine whether Mr.

² The motion was filed with the court on May 15, 2018. (R. 1202.) It was supplemented with a corrected PET Scan after the State presented its case at the penalty phase, but in advance of the presentation of mitigation. (R. 1415-17.)

Lawrence understood the rights he was attempting to waive. (R. 1171-79.) In addition, Dr. Julie Harper testified that she had met with Mr. Lawrence five or six times, had performed a competency evaluation on him, and believed he was competent to waive the rights in question. (R. 1180-85.) She noted she was aware that he had schizophrenia and brain damage, and took that into account in concluding he was competent. (R. 1185.) Following her testimony, the trial court found Mr. Lawrence's waivers were knowing and voluntary. (R. 1187.)

The parties discussed the appointment of special counsel to present mitigation at a case management conference on May 24, 2018.³ (R. 1220-33.) The trial court stated it would keep the trial on the calendar but would also make efforts to locate a qualified attorney to serve as special counsel. (R. 1233.) After that conference, Michelle Hendrix was appointed to serve as special counsel for the purpose of assisting the court in considering mitigation. (R. 1236-40, 1242-45.)

When the penalty phase hearing began on June 4, 2018, the court confirmed Mr. Lawrence's waiver of mitigation. (R. 1272.) Mr. Lawrence answered affirmatively when asked whether he still did not want his attorney to present any evidence on his behalf, whether he had discussed with his attorney the mitigation

³ The discussion focused on the decision in *Marquardt v. State*, 156 So. 3d 464, 490 (Fla. 2015) ("Rather than utilizing standby counsel to present mitigation, the trial court should appoint an independent, special counsel to represent the public interest in bringing forth all available mitigation for the benefit of the jury, the trial court, and this Court, in order to assist the judiciary in performing its statutory and constitutional obligations in death penalty cases.").

evidence that could be presented, and whether he understood the importance of that evidence. (R. 1272-73.) Following that colloquy, the court again found that his waiver of the right to present mitigation was knowing, intelligent, and voluntary. (R. 1274.)

At the close of the State's case in the penalty phase the court informed Mr. Lawrence that he could still change his mind and present mitigation. (R. 1365.) Mr. Lawrence declined. (R. 1365.) The penalty phase trial was adjourned to give special counsel an opportunity to prepare to present mitigating evidence. (R. 1365-66.)

Mitigation was presented by the special counsel at a hearing on August 20, 2018. (R. 1442-1585.) When the hearing resumed the court confirmed with Mr. Lawrence that he understood that mitigating evidence was important, had discussed it with his attorney, and still wanted to waive the presentation of mitigating evidence. (R. 1444-45.) The parties agreed that the remaining portion of the hearing could serve as a *Spencer* hearing. (R. 1445.) The court addressed Mr. Lawrence regarding the presentation of any arguments in mitigation:

Mr. Lawrence, when we conclude here today, I'm going to have the prosecutor submit a sentencing memorandum to me that will outline his reasons why he thinks the death penalty should be imposed. And normally the defense attorney would offer one showing why it should not be imposed. Do you want your attorney to submit a sentencing memorandum on your behalf?

(R. 1447.) After conferring with counsel, Mr. Lawrence replied “No, sir.” (R. 1447.) Special Counsel Hendrix noted for the court that she would be unable to refer directly to testimony provided by Dr. Harper:

Because the defendant was not going to allow presentation of mitigation on his behalf Doctor Harper had advised that she could not testify because her information was gained through the patient/doctor confidentiality. And so without a waiver of that I am unable to present her testimony.

(R. 1449.)

Later in that hearing defense counsel confirmed that Mr. Lawrence still wanted to waive his right to present any argument. (R. 1581.) Defense counsel also reminded the court that it could conduct its own independent review of the mitigation evidence the special counsel had summarized. (R. 1584-85.)

The State filed a Sentencing Memorandum urging the court to find that two statutory aggravators had been proven beyond a reasonable doubt: a previous conviction of a violent felony, and that the capital felony was committed in a cold, calculated, and premeditated manner. (R. 1668-83.) The State’s memorandum conceded that the record established both statutory and nonstatutory mitigating circumstances, but argued that the mitigation was insignificant in comparison to the aggravating factors. (R. 1682.)

The court pronounced sentence on September 12, 2018, and sentenced Mr. Lawrence to death. (R. 1725-29.) The court entered a contemporaneous written order setting out its findings and explaining its ruling. (R. 1701-24.)

After recounting the prior proceedings, the sentencing order noted that Mr. Lawrence had sent the court a handwritten letter dated August 14, 2017, stating “I’m guilty of all my charges and deserve my death sentence.” (R. 1708-09.) Next, the court reiterated its earlier finding that Mr. Lawrence’s waiver of mitigation was knowing, intelligent, and voluntary. (R. 1709-10.) The court then found that the State had proven beyond a reasonable doubt the existence of two aggravating circumstances: that the defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person; and that the murder was committed in a cold, calculated, and premeditated manner. (R. 1714-17.) The court also found that each of the aggravating circumstances should be given “great weight.” (R. 1716, 1717.)

Regarding mitigation, the court noted that special counsel had presented evidence of two statutory mitigating factors: that the capital felony was committed while Mr. Lawrence was under the influence of extreme mental or emotional disturbance, and that Mr. Lawrence’s capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of the law was substantially impaired. (R. 1718.) As to the first, based on “uncontroverted” reports indicating

that Mr. Lawrence had suffered organic brain damage and mental illness, the court found that Mr. Lawrence was influenced by mental or emotional disturbance during the commission of the crime, but rejected the opinion that his mental or emotional disturbances “deprived him of sufficient self-control or were a predominant cause or influence upon his criminal behavior.” (R. 1719.) The court nevertheless found both statutory mitigating factors were established and assigned them moderate weight. (R. 1720.)

The court also found four additional nonstatutory mitigating factors: that Mr. Lawrence told the probation officer he feels he deserves to die; that he was raised in an abusive and dysfunctional home; that he cooperated with police in locating the scene of the crime and Ms. Robinson’s body; and his history of mental problems. The court assigned “slight weight” to the first three mitigators, and “moderate weight” to Mr. Lawrence’s mental health history. (R. 1721-22.) The court then concluded:

The State has proven beyond and to the exclusion of every reasonable doubt the existence of two serious aggravators. The prior violent felony aggravator was given great weight due to the fact that both prior offenses were committed prior to the murder of Jennifer Robinson, were committed with the co-defendant, Rodgers, and involved murder and attempted murder. Both of these prior crimes were senselessly violent and without any moral or legal justification. They are indicative of the same total disregard for human life evidenced in this case. In each case, Lawrence and Rodgers killed or attempted to kill another human being.

In addition, the cold, calculated, and premeditated aggravator was given great weight due to Lawrence's significant involvement in the planning, preparation, and execution of the murder.

The Court finds that these two aggravators greatly outweigh all of the statutory and non-statutory mitigating circumstances, inclusive of the significant mental mitigation.

(R. 1722-23.)

STATEMENT OF THE FACTS

Summary of Penalty Phase Testimony

Major Joe McCurdy, Santa Rosa Sheriff's Office. Major Joe McCurdy was a detective in Santa Rosa County in May 1998. (R. 1287.) He identified maps showing the location of the Robinson and Livingston crime scenes and characterized them as "remote." (R. 1288-89.) Mr. Lawrence led law enforcement to both locations. (R. 1290.) During his interactions with Mr. Lawrence, Mr. Lawrence was cooperative and did not seem to be delusional or suffering from mental illness. (R. 1291.) Major McCurdy also interviewed both Mr. Lawrence and his co-defendant, and identified recordings of those conversations. (R. 1291-93.)

Leighton Smitherman. The prior testimony of Leighton Smitherman, as transcribed during the original penalty phase trial in March 2000, was presented to the trial court by agreement as "Court Exhibit A." (R. 1248.) In that testimony Mr. Smitherman stated he was retired and living in Pace, Florida in March 1998. (R. 1249.) He did not know Jeremiah Rodgers or Jonathan Lawrence. (R. 1250.) During the evening hours of March 29, 1998, he was watching a movie in his living room with his wife and daughter. (R. 1251-52.) He was sitting in a chair backed up to a window. (R. 1252.) He heard a gun go off outside the house, and felt a pain in his back and left arm. (R. 1252.) A bullet had entered his body at the base of his neck, just an inch to the left of his spine. (R. 1252-53.) Doctors were

unable to remove the bullet because of its location. (R. 1253.) Mr. Smitherman stated he was aware that Mr. Lawrence later entered a plea of guilty as a principal in the shooting. (R. 1253-54, 1256-57.)

Todd Hand, former deputy sheriff, Santa Rosa County. Todd Hand was a deputy in 1998 and was assigned to investigate the disappearance of Justin Livingston. (R. 1297-98.) He was aware of the shooting at Mr. Smitherman's residence, and said there were no leads in that case at the time. (R. 1299.) He interviewed Mr. Lawrence about Justin Livingston's disappearance, and Mr. Lawrence told him he had last seen Mr. Livingston on the Lawrence property, walking towards State Road 90. (R. 1300-01.)

After the disappearance of Jennifer Robinson, Mr. Hand learned Elijah Waldrop had seen some photographs in Jeremiah Rodgers' possession, and that Mr. Rodgers was saying Mr. Lawrence was involved in "some kind of foul play." (R. 1311-12.) Mr. Hand went to the Lawrence residence and met Mr. Lawrence there. (R. 1312.) He informed Mr. Lawrence that people were implicating Mr. Lawrence in Ms. Robinson's disappearance; Mr. Lawrence initially denied knowing Ms. Robinson. (R. 1313-14.) Mr. Hand drove with Mr. Lawrence to the Waldrop residence and said Mr. Lawrence was "very, very nervous," so they returned to Mr. Lawrence's house. (R. 1319.) Mr. Lawrence consented to a search of his truck, his residence, and another vehicle on the property. (R. 1315.) Based

on evidence found in the search, including handwritten notes, an empty Polaroid cartridge, some photos that had been cut into pieces, and the manufacturer's box for a Lorcin .380 caliber handgun, he arrested Mr. Lawrence. (R. 1316-20.)

Officers also put out a BOLO for Jeremiah Rodgers. (R. 1320.)

Mr. Lawrence assisted Mr. Hand in locating the bodies of both Justin Livingston and Jennifer Robinson. (R. 1350.) Mr. Hand stated that, while Mr. Lawrence was assisting in that recovery, he did not see any evidence of hallucinations or other mental illness. (R. 1350-51.) At the Lawrence property Mr. Hand also found a Polaroid camera and a number of books, including several books about snipers and a book about serial killers. (R. 1351-54.) In a book titled *Body: The Incredible Machine*, a page depicting the lower leg had several markings on it. (R. 1354-55.) Officers also found a scrapbook containing clippings about various serial killers. (R. 1355-57.)

Elizabeth Skinner. Ms. Skinner, the mother of victim Jennifer Robinson, stated her daughter was a senior in high school in May 1998. (R. 1302.) On May 7, 1998, Jeremiah Rodgers came to the house to take Jennifer on a date. (R. 1303.) Ms. Skinner met him and told him her rules for Jennifer, which included no drinking and observing a curfew. (R. 1302-03.) Mr. Lawrence was not there. (R. 1303.) The next morning, Ms. Skinner realized her daughter had not come home. (R. 1304.) She did not immediately call law enforcement, but first tried calling the

numbers from which Mr. Rodgers had previously called. (R. 1304.) After that she called the police, and Officer Leonard Thomas took a missing person report from her. (R. 1304.)

Later, after the State had established the existence of an aggravator, Ms. Skinner made a victim impact statement asking for justice for her daughter. (R. 1362-64.)

Leonard Thomas, former deputy, Santa Rosa County. Mr. Thomas took a missing person report from Ms. Robinson on the afternoon of May 8, 1998. (R. 1305-06.) Ms. Robinson told him she had last seen Jennifer with Mr. Rodgers. (R. 1307.) Mr. Thomas located Mr. Rodgers, who told him he had left Jennifer in Pensacola. (R. 1307.) Later Mr. Thomas learned that a half-brother of Mr. Rodgers, Elijah Waldrop, had seen some pictures of Jennifer and she was deceased. (R. 1308-09.) Mr. Thomas gave that information to the major crimes unit. (R. 1309.)

Larry Shane Thornburg. Larry Thornburg testified he had known Mr. Lawrence since the 6th grade. (R. 1321.) Sometime before 1998 he purchased an automatic Lorcin .380 caliber pistol and sold it to Mr. Lawrence. (R. 1322-23.) He identified a State exhibit as the kind of box the pistol came in. (R. 1322.) Mr. Thornburg did not recall the date of the transaction. (R. 1323.)

Captain Todd Luce, Lake County Sheriff's Office. In 1998 Captain Luce was a sergeant in the narcotics division of the Lake County Sheriff's Office. (R. 1324.) He participated in apprehending Jeremiah Rodgers in Lake County. (R. 1325-26.) When officers stopped Mr. Rodgers and surrounded his vehicle Mr. Rodgers pointed a gun at his own head. (R. 1326.) Captain Luce asked him "what is this all about," and Mr. Rodgers in reply flung a handful of Polaroid pictures out of the window. (R. 1327.) He was ultimately taken into custody. (R. 1327.) In addition to the photographs, officers recovered a gun from his car. (R. 1328-29.) Captain Luce never had any contact with Mr. Lawrence. (R. 1329.)

Laura Reed. In 1998, Laura Reed was a crime scene technician with the Florida Department of Law Enforcement (FDLE). (R. 1331.) She was involved in the recovery of Jennifer Robinson's body as well as evidence from the location where the body was found, including a shell casing. (R. 1332-34.) The body was in a remote location, covered with leaves, debris, and soil. (R. 1338-39.) Ms. Reed attended Ms. Robinson's autopsy and received a bullet recovered from Ms. Robinson's brain. (R. 1342.) Ms. Reed also collected evidence from a residence and a truck that had been brought to the lab; the evidence included an ice chest, an empty bag for ice, a plastic bag containing disposable gloves, a shovel, and a spotlight. (R. 1343-47.) In the residence she found a piece of tissue inside a plastic bag in the freezer. (R. 1347-48.)

Dr. Gary Dean Cumberland. Dr. Cumberland's testimony from the penalty phase trial in 2000 was also presented to the trial court by stipulation as "Court Exhibit B." (R. 1218, 1259.) Dr. Cumberland was a medical examiner in the First District Medical Examiner's Office and conducted the autopsy. (R. 1260-61.) He testified that Ms. Robinson died as a result of a gunshot wound to the back left side of her head, which traveled through her brain and caused her death. (R. 1262-63.) He opined that she would have been unconscious instantly, and would have died within minutes. (R. 1266.) A bullet was recovered during the autopsy and turned over to the FDLE. (R. 1265.) Ms. Robinson also had wounds made by a sharp instrument on her forehead, above her eyebrows, and on her right calf. (R. 1263.) Two calf muscles had been removed. (R. 1263.) Later Dr. Cumberland examined the tissue found in a freezer at the Lawrence residence, and determined that it was "consistent with" having been removed from Ms. Robinson's leg. (R. 1264.) he could not say definitively that it was human tissue, but said it had "the characteristics of human muscle." (R. 1264.) A toxicology screen revealed Ms. Robinson had a blood alcohol level of 0.138 grams per deciliter. (R. 1265.)

Stipulation: Donald Pribbenow. Mr. Lawrence stipulated that "Donald Pribbenow was employed as a document handwriting expert with the Florida Department of Law Enforcement in 1998. Donald Pribbenow examined known writings of Jonathan Lawrence and handwritten notes found in his trailer and

subsequently issued a report dated September 8, 1998. In his opinion, Jonathan Lawrence wrote State Exhibits 7A and 7B.”⁴ (R. 1268, 1359.)

Stipulation: Magda Clanton. Mr. Lawrence stipulated that “Magda Clanton was employed as a DNA/Serology expert with the Florida Department of Law Enforcement in 2000. Magda Clanton examined the section of calf muscle found in the freezer by the Florida Department of Law Enforcement crime scene technicians, and subsequently issued a report dated March 8, 2000. Testing of the section revealed human blood on the tissue.” (R. 1217, 1359-60.)

Stipulation: Joseph Michael Hall. Mr. Hall was originally scheduled to testify on a second day of the penalty phase, but Mr. Lawrence instead stipulated to the following facts: “Joseph Michael Hall was a firearms expert with the Florida Department of Law Enforcement. He examined the Lorcin that is already in evidence [State’s Exhibit 10]. In his opinion the bullet that was recovered from Jennifer Robinson was fired by that particular gun. He also opined in another report that the cartridge in the Smitherman case...was also fired by the Lorcin .380.” (R. 1361.)

Mitigation

Special Counsel Hendrix reviewed information contained in the exhibits to the defense motion to waive mitigation. (R. 1449.) This included a history of

⁴ State’s Exhibits 7A and 7B were handwritten notes found when Todd Hand and other officers searched Mr. Lawrence’s residence. (R. 1315-17.)

depression and attention deficit disorder beginning in elementary school. (R. 1450.) An evaluation performed when Mr. Lawrence was 16 noted depression and a low average IQ. (R. 1451-54.) His mother described him as a “follower.” (R. 1455.) This observation was consistent with the conclusion of the doctor who performed the evaluation. (R. 1456-57.) Mr. Lawrence’s history also included numerous suicide attempts and multiple hospitalizations for mental health treatment. (R. 1458-68.) Psychiatric evaluations after he was incarcerated on an earlier offense resulted in diagnoses of “depressive disorder with psychotic features and schizo-typical personality disorder” (R. 1463), as well as “personality disorder, nonspecific with schizoid features, and depressive disorder and delayed bereavement” (R. 1467). Prison records noted that he was injured in a car accident at the age of five. (R. 1464.)

A psychological evaluation from 1996 noted that Mr. Lawrence’s IQ scores at that time were consistent with “learning disabilities, attention deficit disorders, or other deficits of organic [etiology].” (R. 1471-72.) Another evaluation that year, performed in connection with an application for Social Security disability income, concluded with diagnoses of schizo-affective disorder and schizoid personality disorder (R. 1474-75.) At the time Mr. Lawrence had been released from custody and was living in a small trailed behind his mother’s home. (R. 1475.)

Evaluations performed in 1998, after Mr. Lawrence was arrested for the instant offense, noted his dysfunctional and abusive family environment, alcohol use, depression, a low average IQ, a pattern of being withdrawn and isolated, and suicidal thoughts. (R. 1476-79.) Hallucinations were also noted, both in those evaluations and subsequent evaluations. (R. 1480, 1483-85.) He was diagnosed in 1998 with major depressive disorder and personality disorder with schizoid and antisocial features. (R. 1480.) An evaluation performed in 2005 questioned his competency to assist counsel, noted significant neuropsychological impairment, and also noted emerging behaviors consistent with Asperger's syndrome. (R. 1481-83.) A competency evaluation performed in 2005 concluded he was competent but noted his history of a childhood brain injury and long-term depression. (R. 1488-91.)

In addition, the special counsel noted letters written to Mr. Lawrence by Mr. Rodgers after Mr. Lawrence had been released, but Mr. Rodgers was still in prison. (R. 1559-64.) She suggested the tone of the letters was manipulative. (R. 1560.) She noted an evaluation of Mr. Rodgers in which he admitted that he would fake various mental health issues in order to be sent to the state hospital, and also admitted that he “‘played crazy’ in prison in an effort to manipulate and either get something he wanted or get out of something that was adverse to him.” (R. 1565.) Additional evaluations of Mr. Rodgers confirmed that he was being

manipulative when he claimed various psychological issues, and that Mr. Rodgers did not have mental health issues. (R. 1566.)

Dr. Joseph Wu. Dr. Wu is a professor of cardiology and radiology at Stanford Medical School. (R. 1589.) He testified that he performed a PET scan and an MRI of Mr. Lawrence's brain in 2018. (R. 1493-95.) The tests revealed "significant abnormalities consistent with traumatic brain injury and also consistent with a high risk of C.T.E. called chronic traumatic encephalopathy." (R. 1495.) Among other things, Dr. Wu detected changes in Mr. Lawrence's brain consistent with autism spectrum disorder, but even more so with having an old traumatic brain injury. (R. 1501-04.) Dr. Wu noted that Mr. Lawrence had a history of a brain injury at the age of four, and that Mr. Lawrence's aunt had said he showed "a significant change in personality" after that injury. (R. 1504.) The PET scan also showed damage to the right side of Mr. Lawrence's brain consistent with the MRI results. (R. 1513-15.) The right amygdala volume was smaller than the left, which Dr. Wu said was associated with "greater impairment in ability to regulate aggression." (R. 1516-17.) This smaller volume could be "associated with posttraumatic stress disorder following childhood stress." (R. 1518.) Dr. Wu reviewed a number of life events that could have contributed to that condition, including the deaths of two of Mr. Lawrence's brothers, his parents' divorce, his

father's incarceration because of a sex offense, and the loss of two close friends in accidents. (R. 1518-19.)

Dr. Wu also reviewed Mr. Lawrence's past evaluations and related them to his clinical observations. (R. 1521-23.) When asked on cross-examination whether two previous evaluations had suggested Mr. Lawrence might be malingering, he replied that his conclusion, based on the consistency of IQ scores, was that there had been no malingering. (R. 1530-33.) Dr. Wu also said malingering could not explain the physical changes in Mr. Lawrence's brain that were revealed in the MRI and PET scans. (R. 1533-34.)

Lori Carter. Lori Carter, Mr. Lawrence's older sister, testified about the accident that affected Mr. Lawrence when he was four. (R. 1548.) Her father had been out drinking and her mother was driving them home. Ms. Carter was in the car along with Mr. Lawrence and a third sibling, Wesley, who later killed himself accidentally. Their mother fell asleep and ran into a ditch. (R. 1548-49.) Mr. Lawrence suffered a concussion and stayed overnight in the hospital. (R. 1549.) Their mother spent several months in the hospital with a spinal cord injury; their father broke his pelvis and was also hospitalized. (R. 1550.) The children lived with their aunt for about three months while their parents recovered. (R. 1550.) Mr. Carter said her brother was "slow" and did not interact with other children. (R.

1551.) As an adult he tried working for the septic tank business she ran with her husband, but wasn't able to remember what to do. (R. 1553-54.)

Kim Coleman. Kim Coleman, Mr. Lawrence's younger sister, was not born when the accident occurred that gave Mr. Lawrence a concussion and injured their parents. (R. 1557-58.) She said she spoke with her brother frequently and visited him when she could. (R. 1558-59.)⁵

Presentence Investigation

A PSI report (R. 1369-78) was filed with the following recommendation: "Before the court stands a 43 year old man, who has been incarcerated since he was 23 years old. He has been in the criminal justice system since the age of 13 and was first sentenced to prison at the age of 18, for criminal mischief on a church. The defendant has several mental health diagnoses and received Social Security Supplementary Income for his disability. Since this is a capital offense it is recommended the Court consider the jury's recommendation and sentenced [sic] the defendant as deemed appropriate by the Court." (R. 1378.)

⁵ Mr. Lawrence's mother was deceased at the time of his second penalty phase trial, but the special counsel recounted her testimony from the earlier proceeding. (R. 1544-46.) The special counsel also noted testimony of other family members. (R. 1546-47.)

SUMMARY OF THE ARGUMENT

Florida’s capital sentencing scheme requires multiple determinations before the death penalty can be imposed. These determinations include a finding that one or more aggravating factors are present, a finding that the aggravating factor or factors are sufficient to impose death as a penalty, and a finding that the aggravating factor or factors outweigh any mitigating evidence presented. *See* § 921.141(2), Flat. Stat. (2018). In a jury trial, if the jury does not make each of these determinations unanimously, the jury must recommend a sentence of life in prison without possibility of parole, and the trial court must impose that sentence. *See id.* at (2)-(3). The trial court does not exercise its discretion to choose the appropriate sentence until each of these findings has been made *and* the jury, in addition, has unanimously recommended death. *Id.* at (3)(a)2. In a bench trial, although the step of obtaining a jury recommendation is necessarily absent, the remaining findings are still required. *Id.* at (3)(b), (4).

These determinations are functional “elements” of the capital offense and, therefore, must be proven beyond a reasonable doubt. They are functional elements, although not elements of the underlying offense, because they increase the available penalty for the charged crime. The trial court did not make these findings based on proof beyond a reasonable doubt.

In addition, a death sentence is disproportionate in the case, given the extensive mental health evidence (including the results of 2018 tests presented at the second penalty phase hearing) and Mr. Lawrence's role in the charged crime.

ARGUMENT

I. Fundamental Error Occurred When the Court Failed to Determine Beyond a Reasonable Doubt that the Aggravating Factors Were Sufficient to Justify Death and that the Aggravating Factors Outweighed the Mitigating Circumstances.

Fundamental error “goes to the foundation of the case...and is equivalent to a denial of due process.” *F.B. v. State*, 852 So. 2d 226, 229 (Fla. 2003) (citation omitted). The trial court’s failure to make required findings beyond a reasonable doubt before considering a death sentence denied Mr. Lawrence due process of law.

Any determination increasing the penalty for a crime must be found beyond a reasonable doubt by the fact-finder. *Alleyne v. United States*, 570 U.S. 99, 104 (2013) (citing *Apprendi v. New Jersey*, 530 U.S. 466, 483 n.10, 490 (2000)). Under Florida’s capital sentencing scheme, before a jury can consider 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 610, 640 (2016). These findings must be made beyond a reasonable doubt. *Id.* at 633 (citing *Hurst v. State*, 202 So. 3d 40, 44-45, 53-54, 59-60 (Fla. 2016)). The State’s burden of proof is not lessened when the trial court sits as the finder of fact following a waiver of the defendant’s right to a jury trial. As explained below,

these are required findings that precede the “selection” of the death penalty for a particular defendant, and therefore must be proved beyond a reasonable doubt.

A. Under the United States Constitution, required findings increasing the penalty for a crime, including findings required to authorize the death penalty after a guilty verdict on the underlying offense, require the same degree of proof as the elements of the underlying offense.

The “elements” of a crime for purposes of conviction and the “functional elements” of a crime for purposes of sentencing are not always identical. *See Apprendi v. New Jersey*, 530 U.S. 466, 495-96 (2000). However, as discussed below, that distinction is not what determines the burden of proof in a criminal trial. The legally significant distinction is whether a particular determination increases the available penalty for a crime. *Id.* For example, in *Apprendi*, the placement of a hate crime sentence “enhancer” within the sentencing provisions of a criminal statute did not prevent the enhancer from functioning as an element. *Id.* In the context of capital sentencing, any factor that must be found before the death penalty can be selected for a particular defendant is the “functional equivalent” of an element of the charged offense, at least for sentencing purposes. *See Ring v. Arizona*, 536 U.S. 584, 609 (2002) (citing *Apprendi*, 530 U. S. at 494 n. 19). This does not prevent legislatures from creating sentencing “factors” or “considerations” to guide the exercise of a trial court’s discretion in sentencing within an available range. *Alleyne*, 570 U.S. at 116.

Apprendi established that the due process clauses of the Fifth and Fourteenth Amendments, coupled with the right to a jury trial under the Sixth Amendment, require any fact increasing the maximum penalty for a crime to be proved beyond a reasonable doubt. 530 U.S. at 476. At issue in *Apprendi* was a state statute allowing a trial judge to apply a “hate crime” sentence enhancement. *Id.* at 469. The defendant had entered a plea exposing him to as much as ten years in prison. *Id.* at 470. In a separate hearing, as provided by state law, the trial court heard evidence relating to an alleged racial bias on the defendant’s part, and found by a preponderance of the evidence that the defendant had acted with a biased purpose. *Id.* at 470-71. The court then sentenced the defendant to an enhanced term of 12 years in prison. *Id.* at 471.

The Supreme Court held the defendant “had a constitutional right to have a jury find such bias on the basis of proof beyond a reasonable doubt.” *Id.* at 475-76. The court’s conclusion was grounded in both the historical right to a trial by jury and “the companion right to have the jury verdict based on proof beyond a reasonable doubt.” *Id.* at 477-78.

The Court rejected the argument that the finding of bias was merely a sentencing factor rather than an element of a more serious offense, stating “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?” *Id.* at 494. The court added that “when the term ‘sentence enhancement’ is used to describe an increase beyond the maximum authorized statutory sentence, it is the functional equivalent of an element of a greater offense than the one covered by the jury’s guilty verdict.” *Id.* n.19.

The *Apprendi* decision rested on the foundation of an earlier case interpreting a federal carjacking statute, *Jones v. United States*, 526 U.S. 227 (1999). In *Jones*, the Court considered whether the federal statute created three separate offenses or one offense with three possible maximum penalties. The statute described the offense, followed by three subsections: the first provided that carjacking was subject to a maximum of 15 years in prison; the second provided that if serious bodily injury resulted, the maximum prison term was 25 years; and the third provided that if death resulted, the defendant could be subject to life in prison. *Id.* at 230 (citing 18 U.S.C. § 2119 (1988)). The defendant was charged with carjacking and told he faced 15 years in prison; a jury convicted him as charged. *Id.* at 231. At sentencing, however, the court imposed a 25-year prison term because a victim had suffered permanent hearing loss as a result of being struck with a gun during the carjacking. *Id.*

The main issue before the Court was whether the second subsection of the statute created an independent offense or merely a sentencing consideration to be applied once the underlying offense was proved. The Court explained that

resolving the issue required looking beyond the superficial organization of the statute:

Much turns on the determination that a fact is an element of an offense rather than a sentencing consideration, given that elements must be charged in the indictment, submitted to a jury, and proven by the Government beyond a reasonable doubt. [...] Accordingly, some statutes come with the benefit of provisions straightforwardly addressing the distinction between elements and sentencing factors. [...] Even without any such help, however, § 2119 at first glance has a look to it suggesting that the numbered subsections are only sentencing provisions. It begins with a principal paragraph listing a series of obvious elements (possession of a firearm, taking a motor vehicle, connection with interstate commerce, and so on). That paragraph comes close to standing on its own, followed by sentencing provisions, the first of which, subsection (1), certainly adds no further element. But the superficial impression loses clarity when one looks at the penalty subsections (2) and (3). These not only provide for steeply higher penalties, but condition them on further facts (injury, death) that seem quite as important as the elements in the principal paragraph (e. g., force and violence, intimidation). It is at best questionable whether the specification of facts sufficient to increase a penalty range by two-thirds, let alone from 15 years to life, was meant to carry none of the process safeguards that elements of an offense bring with them for a defendant's benefit. The “look” of the statute, then, is not a reliable guide to congressional intentions[...].

Id. at 232-33 (citations omitted). Based on the language of the statute, the way the provisions related to each other, and the wording of similar statutes, the Court

concluded that the second and third subsections set out aggravated forms of the crime that had to be proved beyond a reasonable doubt. *Id.* at 236.

Two years after *Apprendi* was decided, the Court held in *Ring v. Arizona* that the principles set out in *Apprendi* required invalidating a state statute allowing a trial judge to determine the existence of aggravating factors so as to justify imposition of the death penalty. 536 U.S. at 589 (overruling *Walton v. Arizona*, 497 U. S. 639 (1990)). The defendant in *Ring* had been convicted of first-degree murder in a jury trial and was then sentenced to death in a separate proceeding in which the trial court found that aggravating factors were present. *Id.* at 592-93.

Under the statute at issue in *Ring*, the maximum punishment the defendant could have received based on the jury's verdict was life in prison. *Id.* at 597. The Supreme Court considered, but rejected, an argument that "death or life imprisonment" were both sentencing options for first-degree murder under Arizona law, and that the defendant "was therefore sentenced within the range of punishment authorized by the jury verdict." *Id.* at 603-04. Because an aggravating circumstance had to be found before death could be imposed, the death penalty was authorized "only in a formal sense." *Id.* at 604 (citations omitted). The Court reiterated *Apprendi*'s reasoning that the additional finding was the "functional equivalent" of an element of the offense. *Ring*, 536 U.S. at 609.

The central holding of *Apprendi* was reaffirmed in *Blakely v. Washington*, 542 U.S. 296 (2004), which held a state statute allowing a trial court to impose an “exceptional” sentence in excess of a defined statutory range violated the defendant’s right to a trial by jury. The defendant in *Blakely* entered into a plea agreement subjecting him to a sentencing range of 49 to 53 months, but state law allowed the trial judge to impose a longer sentence based on “substantial and compelling reasons justifying an exceptional sentence.” *Id.* at 299. At sentencing, the court determined the defendant had acted with “deliberate cruelty” and imposed an exceptional sentence of 90 months. *Id.* at 300. The Supreme Court held this increase could not be upheld in light of *Apprendi* and the Sixth Amendment right to trial by jury, and reversed. *Id.* at 305.

As it had in *Ring*, the Court rejected an argument that additional fact-finding did not expose the defendant to a higher penalty because the resulting sentence was theoretically within legal limits for that class of felony. *See Blakely*, 542 U.S. at 303-04. The Court explained that “the ‘statutory maximum’ for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.” *Id.* at 303 (citation omitted). It did not matter that the exceptional sentence was under the statutory maximum; what mattered was that the trial court could not have imposed that sentence based on the defendant’s plea alone. *Id.* at 303-04.

Similarly, in *Alleyne*, the Court held unconstitutional a statute imposing a mandatory minimum sentence on the basis of judicial fact-finding. 570 U.S. at 103. Although the Court had previously drawn a distinction between facts increasing a statutory maximum and those increasing a mandatory minimum sentence, the Court concluded the distinction was inconsistent with *Apprendi*:

Any 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. Mandatory minimum sentences increase the penalty for a crime. It follows, then, that any fact that increases the mandatory minimum is an “element” that must be submitted to the jury.

Id. (overruling *Harris v. United States*, 536 U.S. 545 (2002)).

As it had in earlier cases, the Court recognized the continued vitality of sentencing discretion within statutory limits. *Id.* at 116. And, as in earlier cases, the Court firmly rejected the argument that the sentence actually imposed in that case could have been imposed even without additional fact-finding. *Id.* at 112-15.

The Court reiterated its adherence to these principles most recently in *Haymond*, a plurality opinion involving a federal statute that mandated an additional prison term for certain defendants who violated their conditions of supervised release, without requiring a trial, and without regard to the term authorized for the original conviction. *See United States v. Haymond*, -- S. Ct. --, 2019 WL 2605552 (June 26, 2019). The defendant in *Haymond* was on supervised release following a conviction for possessing child pornography. *Id.* at *2. An

unannounced search of his computer found images that appeared to be child pornography; in a hearing conducted without a jury, using a preponderance of the evidence standard, a trial judge found it “more likely than not” that the defendant knowingly possessed some of those images. *Id.* at *3. Normally, this finding would have subjected the defendant to as much as two additional years in prison, based on his original conviction. *Id.* However, a separate provision created a mandatory term of at least five years and as much as life in prison for the possession of child pornography, without regard to how much time had been authorized for the initial conviction. *Id.*

The Court held that subjecting the defendant to an increased sentencing range based on the trial court’s fact-finding violated the Fifth and Sixth Amendments. *Id.* at *7. The plurality rejected an argument that the Sixth Amendment does not apply to post-judgment sentencing proceedings, saying “any ‘increase in a defendant’s authorized punishment contingent on the finding of a fact’ requires a jury and proof beyond a reasonable doubt ‘no matter’ what the government chooses to call the exercise.” *Id.* (citing *Ring*, 536 U.S. at 602).

B. Due process requires proof beyond a reasonable doubt of any determination that must be made before the death penalty is available for a particular defendant.

To satisfy the Due Process clause of the federal constitution, convicting an individual of a crime requires proof of the crime beyond a reasonable doubt. *E.g.*,

In re Winship, 397 U.S. 358, 362 (1970). This means “proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.” *Id.* at 364. The reasonable doubt standard “reflects a profound judgment about the way in which law should be enforced and justice administered.” *Id.* at 361-62 (citation omitted). The requirement of proof beyond a reasonable doubt stands between the accused and a conviction based on factual error. *See id.* at 363. It “provides concrete substance for the presumption of innocence.” *Id.* (citation omitted). In addition, the reasonable doubt standard has a vital role in maintaining public confidence in the court system:

Moreover, use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty.

Id. at 364.

Society’s interest in the reliability of the verdict is even stronger in capital cases than in other criminal cases because of the “qualitative difference between death and other penalties.” *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion); see also *Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993) (reversing a

conviction where the jury was improperly instructed on the meaning of “reasonable doubt”). The burden of proof on the State to prove all elements allowing a court to impose a death sentence, including any required findings that expose the defendant to a greater punishment than that authorized by the conviction on the underlying offense, must be proof beyond a reasonable doubt.

C. In addition to requiring a finding that aggravating circumstances exist, Florida’s capital sentencing scheme requires findings that aggravating factors are sufficient to justify the death penalty, and that those factors outweigh mitigating circumstances, before the fact-finder reaches the ultimate decision of whether a death sentence can be imposed.

Under Florida’s capital sentencing scheme, the determinations that at least one aggravating factor is present, that the aggravating factors are sufficient to justify imposing death, and that aggravating factors outweigh any mitigating evidence presented, are functional “elements” that must be proved beyond a reasonable doubt because they increase the maximum sentence from life in prison to death.

The current statute was enacted in response to *Hurst v. Florida*, 136 S. Ct. 616 (2016), and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). In *Hurst v. Florida*, the United States Supreme Court held that Florida’s then-existing capital sentencing scheme violated the Sixth Amendment because it allowed the death penalty to be imposed based on judicial fact-finding after receiving an advisory verdict from the

jury. 136 S. Ct. at 620 (citing § 921.141(2)-(3), Fla. Stat. (2010)). In *Hurst v. State*, this Court struck down an interim revision to the statute that did not require jury unanimity. 202 So. 3d at 44. *Hurst v. State* focused on the requirement of jury unanimity, not the “companion right” of proof beyond a reasonable doubt.

However, this Court explicitly recognized in *Hurst v. State* that three findings must be made, and then a unanimous jury recommendation obtained, before the judge can consider imposing a death sentence:

we reiterate our holding that before the trial judge may consider imposing a sentence of death, the jury in a capital case must unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt, unanimously find that the aggravating factors are sufficient to impose death, unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death.

Id. at 57. The Court also recognized that those findings were “elements” for sentencing purposes. *Id.* The only possible conclusion is that the findings, or sentencing elements, are subject to proof beyond a reasonable doubt. This conclusion is supported by the terms of the statute itself.

First-degree murder is a “capital felony” under section 782.04(1)(a), Florida Statutes (2018). Obtaining a conviction for first-degree murder based on premeditation requires the State to establish the following elements: (1) a victim is dead; (2) the death was caused by the defendant; and (3) the killing was

premeditated. *See* Fla. Std. Jury Instr. (Crim.) 7.2 (2017). Despite the statutory “capital felony” label, under Florida’s capital sentencing scheme, the findings necessary to convict a defendant of first-degree premeditated murder are insufficient to sentence the defendant to death. *See* § 782.04(1)(b).⁶ A separate proceeding must be held, as provided in sections 775.082 and 921.141, Florida Statutes.

The provisions of section 921.141 create a system in which the jury makes findings allowing the death penalty to be imposed and then, only after making those findings, makes a recommendation about the sentence. After the jury makes its recommendation, the trial court exercises its discretion to choose between a life sentence and a death sentence. *See* § 921.141(2)-(3). Section 921.141(2)(b) sets out the specific findings required before a death sentence can be considered:

If the jury:

[...] 2. Unanimously finds at least one aggravating factor, the defendant is eligible for a sentence of death and the jury shall make a recommendation to the court as to whether the defendant shall be sentenced to life imprisonment without the possibility of parole or to

⁶ This is why the Court’s decision in *Foster*, discussed below, does not change Defendant’s argument. The defendant in *Foster* argued that he had not been found guilty of all of the elements of “capital first-degree murder.” 258 So. 2d 1248, 1251 (Fla. 2018). However, the statute in effect when that defendant was originally sentenced, like the current statute, required additional findings before a death sentence could be considered for first-degree murder. What has changed since that defendant was sentenced was the law governing the additional findings, not the law governing the underlying conviction.

death. The recommendation shall be based on a weighing of all the following:

- a. Whether sufficient aggravating factors exist.
- b. Whether aggravating factors exist which outweigh the mitigating circumstances found to exist.
- c. Based on the considerations in sub-subparagraphs a. and b., whether the defendant should be sentenced to life imprisonment without parole or to death.

§ 921.141(2)(b).

The “eligibility” referred to in section 921.141(2)(b) is not dispositive of the available sentencing range, because section 921.141(2) must be read in its entirety, as well as together with section 921.141(3). Under the remaining language in section 921.141(2)(b), the court must make a recommendation based on two additional findings: whether sufficient aggravating factors exist, and whether aggravating factors outweigh the mitigating factors.

Under section 921.141(2)(c), even if a jury finds the existence of an aggravating factor beyond a reasonable doubt, but does not separately and unanimously recommend death, the jury’s sentencing recommendation must be for a term of life in prison. When the jury recommends life, in turn, “the court *shall* impose the recommended sentence.” § 921.141(3)(a)1. (emphasis added).

In other words, under Florida law, a defendant cannot be “exposed to a penalty exceeding the maximum he would receive if punished according to the

facts reflected in the jury verdict alone,” *see Apprendi*, 530 U.S. at 483, merely because the fact-finder has determined beyond a reasonable doubt that at least one aggravating factor exists, even though that aggravating factor makes the defendant “eligible” for death. Without additional findings, the jury cannot make its recommendation, and the court has no discretion to impose the death penalty.

In this case, because Mr. Lawrence waived his right to a jury determination of the facts allowing a death sentence to be imposed, the Court must also apply section 921.141(3)(b) and (4). Section 921.141(3)(b) says that, when a defendant has waived his right to a jury in the penalty phase,

the court, after considering all aggravating factors and mitigating circumstances, may impose a sentence of life imprisonment without the possibility of parole or a sentence of death. The court may impose a sentence of death only if the court finds that at least one aggravating factor has been proven to exist beyond a reasonable doubt.

This provision must be read together with the section that follows it:

In each case in which the court imposes a sentence of death, the court shall, considering the records of the trial and the sentencing proceedings, enter a written order addressing the aggravating factors set forth in subsection (b) found to exist, the mitigating circumstances in subsection (7) reasonably established by the evidence, whether there are sufficient aggravating factors to warrant the death penalty, and whether the aggravating factors outweigh the mitigating circumstances reasonably established by the evidence.

§ 921.141(4).

The findings that must be included in the written order are required whether the penalty phase trial is a jury trial or a bench trial. Although it is logical that the court in a bench trial does not have to go through the step of making a recommendation to itself before deciding whether to impose a sentence of life without the possibility of parole or death, the remaining statutory findings are functional elements requiring proof beyond a reasonable doubt.

In summary, absent the further proceedings and findings defined in section 921.141, the maximum available sentence for first-degree murder is life in prison. *See* § 775.082(1)(a); § 921.141(3)(a); *Hurst v. State*, 202 So. 3d 40, 53 (Fla. 2016). Without additional findings, a defendant cannot be sentenced to death. *See Hurst v. State*, 202 So. 3d at 53; *see also* Fla. Std. Jury Instr. (Crim) 7.11 (2017) (“If your vote on the appropriate sentence is less than unanimous, the defendant will be sentenced to life in prison without the possibility of parole.”). Therefore, for purposes of ascribing a burden of proof, these additional findings are treated as elements of the crime, whether they are called “elements” or something else, and require proof beyond a reasonable doubt.

D. Requiring the critical findings required by section 921.141, Florida Statutes, to be based on proof beyond a reasonable doubt is consistent with this Court’s precedent.

This Court stated in *Perry v. State* that “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. The decision in *Perry* also explicitly recognized a distinction between the findings that sufficient aggravating factors exist to impose death and that the aggravating factors outweigh any mitigating circumstances, on one hand, and the sentencing recommendation that flows from those findings, on the other:

[W]e determine that the sentencing recommendation is a separate conclusion distinct from the jury’s findings of whether sufficient aggravating factors exist and whether the aggravating factors outweigh the mitigation. It has long been true that a juror is not required to recommend the death sentence even if the jury concludes that the aggravating factors outweigh the mitigating circumstances.

Id. at 639-40 (citation omitted).

The Court’s recent decision in *Foster v. State*, 258 So. 3d 1248 (Fla. 2018), *reh’g denied* Jan. 1, 2019, and *petition for cert. filed* May 10, 2019, does not undermine *Perry*, nor does it support a conclusion that the findings required under section 921.141 are mere sentencing considerations as opposed to functional elements. *Foster* rejected an argument that the defendant was entitled to a life sentence because a jury had not unanimously found beyond a reasonable doubt all elements of “capital first-degree murder.” 258 So. 3d at 1251. The Court stated “the *Hurst* penalty phase findings are not elements of the capital felony of first-degree murder. Rather, they are findings required of a jury (1) *before* the court can impose the death penalty for first-degree murder, and (2) *only after* a conviction or

adjudication of guilt for first-degree murder has occurred.” *Id.* at 1252 (emphasis in original). The findings are, as *Foster* acknowledges, essential to the level of punishment that can be imposed. Thus, they are functional elements under the line of cases beginning with *Jones* and *Apprendi*, even if they are not elements of the statutorily defined crime of first-degree murder.

Similarly, the Court’s statement in *Foster* that “it is not the *Hurst* findings that establish first-degree murder as a capital crime for which the death penalty may be imposed” must be understood in light of *Apprendi* and the other cases cited above. It is true that first-degree murder is a crime for which the death penalty *may* be imposed. However, the Supreme Court has repeatedly rejected arguments that a particular sentence could be upheld because it was within a theoretically acceptable range of punishment. *Alleyne*, 570 U.S. at 112-15; *Blakely*, 542 U.S. at 303-04; *Ring*, 536 U.S. at 603-04. The fact that death is theoretically an available penalty in any first-degree murder case does not change the State’s burden of proof beyond a reasonable doubt in the sentencing phase.

Even more recently than *Foster*, this Court reiterated its adherence to *Apprendi* and *Blakely* in *Brown v. State*, 260 So. 3d 147 (Fla. 2018), *reh’g denied* Jan. 23, 2019. At issue in *Brown* was the statute providing that a defendant whose score on the Criminal Punishment Code scoresheet is 22 points or fewer must be sentenced to a non-state prison sanction, unless the court makes written findings

that such a sanction could present a danger to the public. *See id.* at 148-49 (citing § 775.082(10), Fla. Stat.). The Court agreed that “subsection (10) unambiguously sets the statutory maximum penalty, for *Apprendi* purposes as defined by *Blakely*, as a ‘nonstate prison sanction,’ ...for her and similarly situated offenders.” *Id.* at 150. Absent the factual finding of dangerousness to the public, which was not reflected in the defendant’s underlying verdict, the court did not have discretion to sentence the defendant to a prison sentence. *Id.* Therefore, the Court held, subsection (10) violated the defendant’s Sixth Amendment right to a jury trial. *Id.* at 151.

Similarly, in any sentencing proceeding where the State is seeking the death penalty, the statutory maximum penalty, for *Apprendi* and *Blakely* purposes, is life in prison, absent certain critical findings.

The *Hurst* findings — the existence of one or more aggravating factors, the finding that the aggravating factors are sufficient to justify imposing the death penalty, and the finding that the aggravating factors outweigh any mitigating evidence —are critical findings that must be submitted to a jury and proved beyond a reasonable doubt before the jury can recommend, or the court can consider, a death sentence. The burden of proof beyond a reasonable doubt is a due process safeguard standing between a capital defendant and the risk of unfounded or arbitrary imposition of the law’s most severe penalty.

E. As a general rule, critical findings that require proof beyond a reasonable doubt are not limited to historical or objective facts.

In *Kansas v. Carr*, -- U.S. --, 136 S. Ct. 633 (2016), Justice Scalia questioned whether mitigation could be subjected to any burden of proof at all, writing “the ultimate question whether mitigating circumstances outweigh aggravating circumstances is mostly a question of mercy.” *Id.* at 642. Justice Scalia described findings regarding aggravating circumstances as “purely factual,” distinguishing them from the “judgment call” involved in evaluating mitigating circumstances. *Id.* He added that “[i]f we were to hold that the Constitution requires the mitigating-factor determination to be divided into its factual component and its judgmental component, and the former to be accorded a burden-of-proof instruction, we doubt whether that would produce anything but jury confusion.” *Id.*

In a dissenting opinion in *Hurst v. State*, Justice Canady cited this language with approval to explain why aggravating circumstances should be the only “facts that the government must prove to the jury.” 202 So. 3d at 82 (Canady, J., dissenting). The dissent referred to the other required findings as “determinations that require subjective judgment,” suggesting that the Sixth Amendment did not require that judgment to be exercised according to a particular standard of proof. *See id.*

Mr. Lawrence respectfully offers the following in response to these concerns.

First, several of the statutory aggravating circumstances listed in section 921.141(6), Florida Statutes, require the exercise of individual judgment, and are not purely historical facts. For example, subsection (6)(c) refers to the defendant knowingly creating a great risk of death to many persons. Subsection (6)(h) applies to a felony that was “especially heinous, atrocious, or cruel.” Subsection (6)(i) applies to a felony committed “in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.” Although these aggravators require the exercise of judgment on the part of the factfinder, they are subject to the requirement of proof beyond a reasonable doubt under any reading of the statute.

Second, Justice Scalia’s concern about jury confusion may not give juries enough credit. A jury can be instructed to determine the facts relating to mitigation separately from its ultimate conclusion about whether to extend mercy. In fact, this is what section 921.141 does, as do the statutes of several other jurisdictions. For example, in Arkansas, the capital sentencing statute explicitly states that the following findings must be proved beyond a reasonable doubt:

The jury shall impose a sentence of death if the jury unanimously returns written findings that:

- (1) An aggravating circumstance exists beyond a reasonable doubt;
 - (2) Aggravating circumstances outweigh beyond a reasonable doubt all mitigating circumstances found to exist; and
 - (3) Aggravating circumstances justify a sentence of death beyond a reasonable doubt.
- (b) The jury shall impose a sentence of life imprisonment without parole if the jury finds that:
- (1) Aggravating circumstances do not exist beyond a reasonable doubt;
 - (2) Aggravating circumstances do not outweigh beyond a reasonable doubt all mitigating circumstances found to exist; or
 - (3) Aggravating circumstances do not justify a sentence of death beyond a reasonable doubt.

Arkansas Code § 5-4-603(a) (2017).

Similarly, the Tennessee capital sentencing statute provides that “The sentence shall be death, if the jury unanimously determines that: (A) At least one (1) statutory aggravating circumstance or several statutory aggravating circumstances have been proven by the state beyond a reasonable doubt; and (B) Such circumstance or circumstances have been proven by the state to outweigh any mitigating circumstances beyond a reasonable doubt.” Tennessee Code Ann. § 39-13-204(g)(1) (2017). And in Texas, the sentencing jury in a capital case must determine beyond a reasonable doubt “whether there is a probability that the

defendant would commit criminal acts of violence that would constitute a continuing threat to society.” Texas Code. Crim. Proc. Ann. Art. 37.071, Sec. 2(2)(b). Although these statutory schemes have significant differences from Florida’s sentencing provisions, they illustrate some of the determinations juries are asked to make in the context of capital sentencing.

Third, albeit in a different context, the Supreme Court has long recognized that juries are capable of deciding mixed questions of law and fact that may involve both “purely historical fact” and the application of a legal standard to those facts. *See United States v. Gaudin*, 515 U.S. 506, 511-13 (1995). If an adequately instructed jury can determine mixed questions of law and fact, surely it can determine the existence or sufficiency of sentencing factors and apply a legal standard to those factors.

Finally, Mr. Lawrence would point to this Court’s reasoning in *Perry*, cited above on page 40. Under section 921.141, the ultimate recommendation about whether to impose death or a sentence of life in prison is not subject to a burden of proof. The findings upon which that recommendation is based, however, require proof beyond a reasonable doubt.

F. The trial court’s sentencing order was deficient in that it failed to make required findings before re-imposing the death penalty.

The court’s sentencing order in this case specifically found that the State had proved the existence of two aggravating circumstances beyond a reasonable doubt. (R. 1715.) It held both circumstances were entitled to “great weight.” (R. 1716, 1717.) The court found that two statutory mitigators had been established by the “greater weight of the evidence.” (R. 1720.) The court also considered four non-statutory mitigating factors based on the PSI, assigning slight weight to Mr. Lawrence’s feeling of remorse, his dysfunctional and abusive childhood, and his cooperation with police, and moderate weight to his history of mental problems. (R. 1721-22.) However, the court did not make additional required findings beyond a reasonable doubt, namely that the aggravating circumstances were sufficient to justify death and that the aggravating circumstances outweighed the mitigating circumstances. The order concluded the aggravators “greatly” outweighed the mitigating circumstances without mentioning reasonable doubt, and did not expressly rule on the issue of whether the aggravating circumstances were sufficient to justify death. These are not technicalities; under current Florida law they are findings requiring proof beyond a reasonable doubt and, without that, the death sentence in this case is constitutionally deficient.

II. The Death Penalty Is Disproportionate in This Case Given Mr. Lawrence’s Medical History and Degree of Participation in the Capital Offense.

The death penalty is “reserved for only the most aggravated and least mitigated of first-degree murders.” *Urbin v. State*, 714 So. 2d 411, 416 (Fla. 1998) (citing *State v. Dixon*, 283 So. 2d 1, 7 (Fla. 1973) and *Jones v. State*, 705 So. 2d 1364, 1366 (Fla. 1998)). Whenever a sentence of death is imposed, this Court must perform a qualitative review of the aggravating and mitigating circumstances to ensure that the sentence is consistent with the sentence imposed in similar cases. *See id.* at 416-17.

This Court conducted a proportionality review of Mr. Lawrence’s original death sentence in Lawrence I, and concluded that it was not disproportionate. 846 So. 2d at 455. The Court’s analysis at that time was based on the trial court’s finding of “extensive aggravating circumstances and substantial mitigating circumstances.” *Id.* at 453. The aggravating circumstances proved at Mr. Lawrence’s first penalty phase trial were identical to those proved in his post-Hurst penalty phase trial. *See id.* Because Mr. Lawrence expressly waived the right to present mitigation, the defense did not specifically argue grounds for mitigation. However, numerous potential grounds were identified in Mr. Lawrence’s waiver motion (R. 1203-12) and its exhibits. These exhibits were reviewed by special counsel and should be considered now in reevaluating whether the death penalty is

proportionate in this case. Moreover, the Court in 2006 did not have the benefit of Dr. Wu's extensive analysis of MRI images and PET scans, taken in 2018, or his testimony regarding the nature and likely consequences of the organic brain damage revealed in those tests.

In *Johnson v. State*, 720 So. 2d 232, 237-38 (Fla. 1998), this Court vacated a death sentence where the aggravating circumstances were that the defendant had committed prior violent felonies and that the capital offense happened during a burglary. The Court noted that the prior felonies, although properly found for purposes of aggravation, involved crimes in which the defendant was a principal. *Id.* The Court then balanced the aggravators against the mitigating factors that the defendant was 22 at the time of the capital offense; he voluntarily surrendered to police; he had a troubled childhood, he was previously employed, he was respectful to his parents and neighbors; he had a young daughter; and he had earned a GED after being a high school athlete. *Id.* The Court concluded the offense was "a horrible, senseless and indefensible first-degree murder," but that it was "not among those for which the death penalty is specifically reserved." *Id.*

The Court vacated the death sentences of co-defendants in *Sager v. State*, 699 So. 2d 619 (Fla. 1997) and *Voorhees v. State*, 699 So. 2d 602 (Fla. 1997), where the defendants had acted together to rob the victim after a night of drinking together. The victim was initially tied to a chair, then beaten, then dragged into

another room and stabbed. 699 So. 2d at 620. The two defendants were apprehended after leaving with the victim's car, telephone calling card, and debit card. *Id.* at 620-21. Defendant Sager confessed to slitting the victim's throat. *Id.* at 621.

In Sager's case, the court found that the murder was committed during a robbery, and that it was especially heinous, atrocious, or cruel. The trial court gave these aggravating factors great weight. *Id.* n.1. The trial court also found four mitigating circumstances: "(1) Sager was under the influence of extreme mental or emotional disturbance at the time of the murder, little weight; (2) Sager's capacity to appreciate the criminality of his conduct and to conform his behavior to the requirements of law was substantially impaired, very little weight; (3) Sager was 22 years old at the time of the murder, very little weight; and (4) Sager was an accomplice whose participation was relatively minor, very little, if any, weight." *Id.* n.2. In its proportionality review, this Court also noted that the defendants had been drinking before the offense; that Sager suffered from mental illness and, in fact, had recently been released from a mental health facility; and that evidence suggested Voorhees was the leader of the two. *Id.* at 623. Based on this mitigation and the totality of the circumstances, the Court concluded death was not an appropriate penalty. *Id.* The Court reached the same conclusion with respect to Voorhees, despite his role as leader, citing the evidence of alcohol consumption as

well as evidence that Voorhees “began drinking at an early age, suffered from alcoholism, and had an abnormal reaction to alcohol.” 699 So. 2d at 615.

Here, the totality of circumstances supports a conclusion that this was not “the most aggravated and least mitigated” of cases. The record contains extensive evidence that, beginning in early childhood, Mr. Lawrence suffered from depression, schizophrenia or schizo-affective disorder, suicidal tendencies, low self esteem, and a tendency to be a follower. The prior violent felonies presented as aggravating circumstances were both committed with Mr. Rodgers, like Ms. Robinson’s murder; and Mr. Rodgers took a lead role in all three crimes, including shooting Ms. Robinson. *See* Lawrence I, 846 So. 2d at 444 n.3. Although there was evidence of planning here that was not present in *Sager* and *Voorhees*, there was also evidence that Mr. Lawrence had relatively recently been hospitalized for mental health issues and that he grew up in a severely dysfunctional environment. Finally, the trial court heard extensive testimony at the second penalty phase trial from Dr. Wu about long-term, permanent changes in Defendant’s brain as a result of early trauma. Based on this substantial evidence, and taking the aggravating circumstances into account, Mr. Lawrence’s death sentence is disproportionate and should be reversed.

CONCLUSION

Mr. Lawrence requests a new penalty phase trial at which the trial court will be required both to apply the correct burden of proof and to make all the findings required by section 921.141, Florida Statutes. In the alternative, he requests that his sentence be vacated.

CERTIFICATES OF SERVICE AND FONT SIZE

I certify that a copy of the foregoing has been furnished electronically via the Florida Courts e-filing portal to Charmaine M. Millsaps, Assistant Attorney General, Capital Appeals Division, on June 28, 2019. I certify that this brief has been prepared using Times New Roman 14-point font.

Respectfully submitted,

ANDY THOMAS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

/s/ Barbara J. Busharis
BARBARA J. BUSHARIS
Assistant Public Defender
Fla. Bar No. 71780
Leon County Courthouse
301 S. Monroe St., Suite 401
Tallahassee, Florida 32301
(850) 606-8500
barbara.busharis@flpd2.com

ATTORNEY FOR APPELLANT