IN THE SUPREME COURT OF FLORIDA

ROBERT CRAFT,

Appellant,

v. Case No. **SC19-953**

STATE OF FLORIDA,

Appellee.

On Appeal from the Circuit Court of the Third Judicial Circuit in and for Columbia County, Florida

REPLY BRIEF OF APPELLANT

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I. Reversible Error Occurred When the Court Accepted Craft's Decision To Waive His Right To Present Mitigating Evidence Because the Court Arbitrarily and Unreasonably Accepted That Waiver Without First Ensuring It Was Knowingly, Voluntarily, and Intelligently Made.

A. The court failed to appreciate that Craft's waiver of his right to present mitigating evidence had to be knowingly, voluntarily, and intelligently made.

Craft previously highlighted that reality. In particular, Craft noted the court never articulated such an appreciation. *See* Initial Brief p. 32. Craft also underscored that, in contrast to colloquies concerning his waiver of other rights, the court conducted a cursory colloquy concerning Craft's waiver of his right to present mitigating evidence. *See* Initial Brief p. 32. The State fails to address those facts.

B. Alternatively, the court failed to take reasonable, conscientious steps to make sure Craft understood what he was giving up, and thus, understood the value of his right to present mitigating evidence and the significance of his decision to waive it.

While the State disagrees, it focuses on a brief exchange months prior to Craft's waiver and fails to account for the record as a whole. The State essentially argues the court took reasonable, conscientious steps to make sure Craft understood what he was giving up, and thus, understood the value of his right to present mitigating evidence and the significance of his decision to waive it. [AB 12-14] In support of that argument, the State notes that, approximately four months prior to the May 2019 second-phase bench trial, the court had a brief exchange with Craft

concerning the nature of mitigating evidence. [AB 12-13]

First, Craft waived his right to present mitigating evidence immediately prior to the May 2019 second-phase bench trial. [R3 7-8] And, during that cursory colloquy, the court failed to inform Craft what mitigating evidence was. [R3 7-8] In particular, it failed to explain that mitigating evidence "is not limited to the facts surrounding the crime," Fla. Std. Jury Instrs. (Crim) 7.11. [R3 7-8]

Second, Craft had previously posited that "mitigation" was "anything basically that would prevent me from getting the death penalty." [R1 263] And the court had previously mentioned that "mitigation" could "have to do with all . . . kinds of things," including "something that happened in your childhood" or "psychological . . . problems." [R1 263-64] But that brief exchange occurred approximately four months prior to Craft's waiver of his right to present mitigating evidence. [R1 251; R3 1] It also occurred during a discussion focused, not on Craft's possible waiver of his right to present mitigating evidence, but on his possible waiver of his right to counsel. [R1 252-68]

Third, in contrast to the court in *Durocher v. State*, 604 So.2d 810, 812 (Fla. 1992),the court in the present case never once–much less twice–swore Craft in, had him take the stand, and "closely questioned" him as to his understanding of "what he was giving up." *See* Initial Brief pp. 33-34.

Finally, *Shafer v. Bowersox*, 168 F.Supp.2d 1055 (E.D. Mo. 2001), should

serve as persuasive authority for concluding the court failed to take reasonable, conscientious steps to make sure Craft understood what he was giving up, and thus, understood the value of his right to present mitigating evidence and the significance of his decision to waive it. Craft previously raised that point. *See* Initial Brief pp. 34-36. The State fails to rebut it.

C. Craft fully waived his right to present mitigating evidence, but even assuming otherwise, the court abused its discretion when it accepted any partial waiver without first ensuring it was knowingly, voluntarily, and intelligently made.

While the State disagrees, it glosses over the circumstances under which Craft's family members and Craft himself offered statements, and ignores the court's failure to discuss the consequences of any partial waiver with Craft. The State argues Craft "did not fully waive his mitigation presentation." [AB 14] And it appears to contend the court did not abuse its discretion in accepting any partial waiver of Craft's right to present mitigating evidence. [AB 11-12, 14] In fact, the State appears to believe that, if the court had ensured any partial waiver was knowingly, voluntarily, and intelligently made, it would have violated Craft's "right to control his own destiny." [AB 11-12, 14]

First, Craft fully waived his right to present mitigating evidence. From the beginning, Craft made such an intention clear. Months prior to trial, in a letter to the court, Craft stressed: there "is nothing to mitigate in my case." [R1 41] In court, he subsequently reemphasized: "I do not want mitigation." [R1 255]

Further, immediately prior to trial, he explicitly waived his right to present mitigating evidence. [R3 7-8] Most importantly, at the *Spencer* hearing, the court declared: "the defendant did not present any mitigating evidence." [R4 9]

Second, after the State rested at the second-phase bench trial, Craft's family members and Craft himself did offer statements. [R3 83-100, 110-16] But those statements were not the equivalent of Craft presenting mitigating evidence. In particular, Craft did not present those statements for the purpose of supporting a sentence of life without parole or indicating a death sentence was not appropriate.

As an initial matter, the State itself recognizes that Craft's "family decided, of their own accord, to participate." [AB 14] On that note, at trial, Craft made clear he simply wished for his family members "to be allowed to speak" for "their conscience purpose." [R3 82] And the State had no objection to the family members, in the court's words, "one by one coming up here to the witness stand." [R3 83]

Further, each family member subsequently gave a narrative statement without being questioned by either party. [R3 83-100, 110-16] And Craft's statement was simply an attempt "to clear everything up" for his family, especially as to why he was asking to be sentenced to death. [R3 98-100]

Consistent with the above, in its sentencing order, the court observed: Craft "indicated that he did not want to present anything but that he wanted to give his family, who were in attendance, an opportunity to address this Court. Four members

of [Craft]'s family testified . . . . [Craft] also gave a brief statement." [R1 144] Finally, in terms of substance, the statements by Craft and his family members at the second-phase bench trial added little, if any, to the statements by Craft and his family members contained in the competency reports and the PSI. [R1 289-92, 297-99, 318-29; R3 83-100, 110-16]

Third, assume Craft only partially waived his right to present mitigating evidence. Even then, the court abused its discretion when it accepted any partial waiver without first ensuring it was knowingly, voluntarily, and intelligently made. In short, the court never "interviewed [Craft] on the issue of what mitigation was to be presented and determined that he understood the potential consequences of his decision, that his decision was deliberate, and that he made the decision freely and voluntarily," *Boyd v. State*, 910 So.2d 167, 188 (Fla. 2005).

Fourth, the present case is distinct from *Boyd*. There, Boyd was represented by counsel. 910 So.2d at 187-88. Prior to the second-phase trial, Boyd "refused to present any mitigation." *Id.* at 187. But later, "after discussing matters with his friends and family, Boyd elected to testify during the penalty phase and allowed his pastor to testify." *Id* at 188.

And "the trial judge inquired about the mitigation issue several times and concluded that the mitigation presented was all Boyd wished to present." *Id.* In fact, "the trial judge interviewed Boyd on the issue of what mitigation was to be presented

and determined that he understood the potential consequences of his decision, that his decision was deliberate, and that he made the decision freely and voluntarily." *Id.*

On appeal, this Court concluded the trial court did not err by failing to require (1) Boyd's counsel to "indicate on the record whether there [was] mitigating evidence that could be presented and what the evidence would be"; and (2) Boyd to "confirm that he ha[d] discussed these matters with his attorney and . . . still wishe[d] to waive mitigation." *Id.* In support of that conclusion, this Court reasoned that Boyd did not fully waive his right to present mitigating evidence. *Id.* Alternatively, this Court essentially reasoned that Boyd's partial waiver was knowingly, voluntarily, and intelligently made. *Id.*

Unlike in *Boyd*, in the present case, Craft fully waived his right to present mitigating evidence. In particular, in contrast to the situation there, Craft's family members decided on their own to testify, and Craft's subsequent statement was simply an attempt "to clear everything up" for his family. *See* discussion *supra* pp. 4-5.

In addition, unlike Boyd's partial waiver, any partial waiver by Craft was not knowingly, voluntarily, and intelligently made. More specifically, unlike the court there, the court here never "interviewed [Craft] on the issue of what mitigation was to be presented and determined that he understood the potential consequences of his decision, that his decision was deliberate, and that he made the decision freely and

voluntarily."

Finally, if the court had ensured any partial waiver by Craft of his right to present mitigating evidence was knowingly, voluntarily, and intelligently made, it would not have violated Craft's "right to control his own destiny." As an initial matter, a defendant's right to control their own destiny "is not absolute," *Martinez v. Court of Appeal of California, Fourth Appellate District*, 528 U.S. 152, 161 (2000).

Regardless, assume the court had "interviewed [Craft] on the issue of what mitigation was to be presented and determined that he understood the potential consequences of his decision, that his decision was deliberate, and that he made the decision freely and voluntarily," *Boyd*, 910 So.2d at 188. In that event, Craft still could have presented the mitigating evidence that he saw fit to present. The court would not have violated–in any form or fashion–Craft's "right to control his own destiny."

II. Reversible Error Occurred When the Court Assigned Slight Weight to the "Childhood Trauma" Mitigating Circumstance Because the Court Arbitrarily and Unreasonably Assigned the Same Weight to That Circumstance That It Assigned to the "Good Behavior During Trial" Mitigating Circumstance.

While the State disagrees, it fails to appreciate that, even assuming the court did not act arbitrarily, it acted unreasonably when it assigned the same weight to the "childhood trauma" circumstance that it assigned to the "good behavior during trial" circumstance. The State essentially argues the court did not abuse its discretion in

assigning the same weight to those circumstances. [AB 15-18]

In support of its argument, the State asserts the court did not "arbitrarily assign weight to the mitigating factors." [AB 15-16] Instead, according to the State, the court considered "the evidence presented" and offered some analysis in support of its assignments of weight to the respective mitigating circumstances. [AB 15-16]

In addition, the State claims "it is perfectly reasonable that one might assign the same weight to both [the "childhood trauma" circumstance and the "good behavior during trial" circumstance] based on the facts of this case." [AB 17-18] In that context, the State maintains that the "'childhood trauma' circumstance was not supported by direct evidence." [AB 17] And the State stresses Craft's "good behavior during the trial process was directly observed by the trial court"; that behavior was "closer in time to the murder"; and Hunsicker's murder was "temporally removed from [Craft's] childhood." [AB 17]

Finally, the State attempts to distinguish the present case from *Ramirez v. State*, 739 So.2d 568 (Fla. 1999). [AB 16-17] More specifically, the State appears to acknowledge it was unreasonable for the trial court in *Ramirez* to assign less weight to the "no significant criminal history" mitigating circumstance because "[r]ational individuals would not consider stealing $10 a significant criminal history." [AB 16-17] But the State then argues that, unlike the court there, the court here did not make "an objectively unreasonable finding." [AB 17]

First, even if the court did not "arbitrarily assign weight to the mitigating factors," it abused its discretion when it assigned the same weight to the "childhood trauma" mitigating circumstance that it assigned to the "good behavior during trial" mitigating circumstance. As an initial matter, a court can abuse its discretion even if its ruling is not arbitrary. That is, "'under the abuse of discretion standard of review, a ruling will be upheld unless the ruling is arbitrary, fanciful, *or* unreasonable.'" *Guzman v. State*, 214 So.3d 625, 632 (Fla. 2017) (emphasis added). Thus, a court abuses its discretion if its ruling, though not arbitrary, is unreasonable.

With that in mind, the court here did generally consider the evidence and, at least to a degree, offer some analysis in support of its assignments of weight to the respective mitigating circumstances. [R1 153-55] That being the case, assume the court did not *arbitrarily* assign the same weight to the "childhood trauma" circumstance that it assigned to the "good behavior during trial" circumstance. Even then, the court abused its discretion because it *unreasonably* assigned the same weight to those circumstances. *See* discussion *infra* pp. 9-11.

Second, on that note, it was not "perfectly reasonable" for the court to assign the same weight to those circumstances "based on the facts of the present case." That is, "discretion is abused only where no reasonable person would take the view adopted by the trial court.'" *Guzman*, 214 So.3d at 632. And, here, no reasonable person would take the view adopted by the court.

More specifically, no reasonable person would take the view that the "childhood trauma" circumstance was entitled to the same weight as the "good behavior during trial" circumstance. On the one hand, Craft acted appropriately in court. In particular, he did not have to be asked "to be quiet or to abide by courtroom decorum or rules," and he "treated [the court] and opposing counsel with dignity and respect." [R1 155]

On the other, Craft experienced substantial early childhood adversity. *See* Initial Brief pp. 7-8, 10-12, 38-39. In particular, *as the court itself found*, Craft experienced the following:

- childhood physical abuse;
- childhood sexual abuse;
- childhood physical neglect;
- childhood emotional neglect;
- parents who are separated;
- growing up in a household where someone is incarcerated; and
- growing up in a household where there is someone with a serious drug problem.

[R1 153-54]

Further, those adverse childhood experiences had an ill effect on Craft's ability to function. In particular, those experiences affected Craft's brain development,

including his ability to regulate his emotions and control his impulses. *See* Initial Brief pp. 39-40.

In those circumstances, no reasonable person would take the view that the "childhood trauma" circumstance was entitled to the same weight as the "good behavior during trial" circumstance. Simply put, such a view would be unreasonable; it would not be "[f]air, proper, or moderate under the circumstances," Black's Law Dictionary 584 (2d pocket ed. 2001).

Third, the "childhood trauma" mitigating circumstance was supported by direct evidence. More specifically, the circumstance was supported by Craft's statements in the competency reports, as well as Craft's and his family's statements in the PSI. [R1 289-92, 297-99, 318-29]

Further, those statements were direct evidence. "'Direct evidence is evidence which requires only the inference that what the witness said is true to prove a material fact.'" *Wright v. State*, 221 So.3d 512, 523 (Fla. 2017). Applying that standard here, whether Craft experienced childhood trauma was a material fact. And the statements at issue required only the inference that they were true to prove that Craft experienced childhood trauma.

Fourth, the court did observe Craft's "good behavior during the trial process"; that behavior was "closer in time to the murder"; and Hunsicker's murder was "temporally removed from [Craft's] childhood." Even so, no reasonable person

would take the view that the "childhood trauma" circumstance was entitled to the same weight as the "good behavior during trial" circumstance.

More specifically, assume a reasonable person would (1) increase the weight assigned to the "good behavior during trial" circumstance because they observed the behavior and the behavior occurred within approximately a year of Hunsicker's murder; and (2) decrease the weight assigned to the "childhood trauma" circumstance because the childhood trauma occurred a number of years prior to that murder. Even then, no reasonable person would take the view that those mitigating circumstances were entitled to the same weight. *See* discussion *supra* pp. 9-11.

Finally, this Court's decision in *Ramirez*, 739 So.2d at 568, should serve as persuasive authority for concluding the court abused its discretion when it assigned the same weight to the "childhood trauma" circumstance that it assigned to the "good behavior during trial" circumstance. As an initial matter, the State appears to acknowledge it was unreasonable for the court in *Ramirez* to assign less weight to the "no significant criminal history" mitigating circumstance because "[r]ational individuals would not consider stealing $10 a significant criminal history." [AB 16-17]

But, by the same token, rational individuals would not consider substantial early childhood adversity, such as that experienced by Craft, to have no effect on an individual's ability to function. With that in mind, if it was "objectively

unreasonable" for the court there to assign less weight based on a judgment that stealing ten dollars out of a vehicle was a significant crime, it was "objectively unreasonable" for the court here to assign less weight based on a judgment that Craft's adverse childhood experiences had no ill effect on his ability to function. *See* Initial Brief pp. 40-41.

III. Reversible Error Occurred When the Court Sentenced Craft to Death Because It Arbitrarily and Unreasonably Imposed Death Without First Affirmatively Showing All Believable, Uncontroverted Mitigating Evidence Had Been Considered and Weighed.

While the State disagrees, its position is irreconcilable with binding precedent. The State basically argues that, if a capital defendant invites the possibility of a death sentence and refuses to present mitigating evidence, the trial court should not be required to consider and weigh all believable, uncontroverted mitigating evidence. [AB 23-24]

Alternatively, the State appears to contend that a trial court is not required to affirmatively show all believable, uncontroverted mitigating evidence has been considered and weighed. [AB 24-25] Instead, according to the State, a trial court is allowed to "lay[] out some of the facts and circumstances that were part of the trial court's consideration in determining the weight of the mitigating circumstances," and implicitly consider the rest. [AB 24-25]

On a related note, the State claims that, in the present case, it is "reasonable to assume" the court considered and weighed all believable, uncontroverted mitigating

evidence. [AB 25-26] In that context, the State asserts: "Most, if not all, factors that [Craft] claims were not specifically discussed in the sentencing order would fall into one of the categories which were considered." [AB 26]

Finally, the State attempts to distinguish the present case from *Robinson v. State*, 684 So.2d 175 (Fla. 1996). [AB 25-26] More specifically, the State essentially argues that, unlike the court there, the court here did not completely fail to consider the mitigating evidence. [AB 25]

First, the following evidence was before the court:

- Craft "was born with [the umbilical] cord around his neck," and was blue and not breathing, [R1 326];
- His mother failed to obtain proper mental health treatment for Craft, and "felt that she could 'beat it out of him,'" [R1 319];
- By age four, all of Craft's baby teeth were rotten because of malnutrition, and at times, Craft's mother "would starve the kids," [R1 319, 323, 326-28];
- Craft was designated "emotionally handicapped" and a "slow learner"; classified as "mentally retarded"; and was enrolled in special education classes, [R1 290, 297, 320, 326];
- He began drinking beer and smoking marijuana around age ten or twelve, and later began using crystal methamphetamine, [R1 291, 298,

321];

- Craft had previously worked, including repairing vehicles, welding, tree service, carpentry, and painting/remodeling, [R1 290, 298, 317];
- As an adult, he saved a fellow inmate's life while they were both in the local county jail, [R1 319];
- Craft immediately, and repeatedly, confessed to killing Shira, [R1 309-10; R3 18, 28-37, 40-42, 50-52]; and
- Craft later plead guilty to first-degree murder, [R2 45, 53-54, 60-70].

And that evidence was believable and uncontroverted. It was also mitigating. Craft previously highlighted those facts. *See* Initial Brief pp. 49-50. The State does not dispute them.

Second, considering and giving effect to mitigating evidence is critical to satisfying the demands of the Eighth Amendment. "Only then can we be sure that the sentencer has treated the defendant as a 'uniquely individual human bein[g]' and has made a reliable determination that death is the appropriate sentence." *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989), *abrogated on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002).

Third, with that in mind, even if a capital defendant invites the possibility of a death sentence and refuses to present mitigating evidence, the trial court is required to consider and weigh all believable, uncontroverted mitigating evidence. As an

initial matter, the "rights, responsibilities and procedures set forth in our constitution and statutes have not been suspended simply because the accused invites the possibility of a death sentence." *Hamblen v. State*, 527 So.2d 800, 804 (Fla. 1988); *see also Goode v. State*, 365 So.2d 381, 384 (Fla. 1978).

On that note, this Court has "'repeatedly emphasized the duty of the trial court to consider *all* mitigating evidence 'contained anywhere in the record, to the extent it is believable and uncontroverted.'" *Muhammad v. State*, 782 So.2d 343, 363 (Fla. 2001). And that "requirement 'applies with no less force when a defendant argues in favor of the death penalty, and even if the defendant asks the court to not consider mitigating evidence.'" *Fitzpatrick v. State*, 900 So.2d 495, 523 (Fla. 2005).

Fourth, assume that, as a general matter, a trial court is *not* required to consider and weigh all believable, uncontroverted mitigating evidence if a capital defendant invites the possibility of a death sentence and refuses to present mitigating evidence. Even then, the court here would have been required to do so. That is because Craft's plea agreement, which was accepted by the court, provided that the "court will consider all evidence presented [at the second-phase trial] as well as that contained within the record if the right to a [second-phase] jury is waived." [R1 67; R2 69-70]

Fifth, *expressly* considering mitigating evidence is also critical to satisfying the demands of the Eight Amendment. In short, the United States Supreme Court has

"emphasized repeatedly the crucial role of meaningful appellate review in ensuring that the death penalty is not imposed arbitrarily or irrationally." *Parker v. Dugger*, 498 U.S. 308, 321 (1992). And the Court has pointed out that "meaningful appellate review is available" where "the sentencing authority is required to *specify the factors it relied upon* in reaching its decision." *Gregg v. Georgia*, 428 U.S. 153, 195 (1976) (emphasis added).

Not surprisingly then, this Court itself has long recognized that, "[t]o ensure meaningful review in capital cases, trial courts must provide this Court with a thoughtful and comprehensive analysis of the mitigating evidence in the record." *Jackson v. State*, 704 So.2d 500, 507 (Fla. 1997).

Sixth, with that in mind, a trial court is required to affirmatively show all believable, uncontroverted mitigating evidence has been considered and weighed. In short, this Court has declared: "It is clearly the responsibility of the trial court to affirmatively show that all possible mitigation has been considered and weighed, and it is error to fail to do so." *Robinson*, 684 So.2d at 179; *see also Farr v. State*, 621 So.2d 1368, 1371 (Fla. 1993). Thus, a trial court is not allowed to explicitly consider only a portion of the mitigating evidence and implicitly consider the rest.

Seventh, the mitigating evidence at issue here would not "fall into one of the categories which were considered," but regardless, this Court cannot simply assume the court considered and weighed all believable, uncontroverted mitigating evidence.

As an initial matter, the court considered the following categories of mitigating evidence: (1) childhood trauma; (2) close family ties; (3) general mental health mitigation; and (4) Craft "exhibited good behavior during the trial." [R1 153-55] However, by its very nature, the mitigating evidence at issue would not "fall into" one of those categories. *See* discussion *supra* pp. 14-15.

But suppose otherwise. Even then, this Court cannot simply assume the court considered and weighed all believable, uncontroverted mitigating evidence. Again, it "is clearly the responsibility of the trial court to *affirmatively show* that all possible mitigation has been considered and weighed." *Robinson*, 684 So.2d at 179 (emphasis added).

Finally, this Court's decision in *Robinson*, 684 So.2d at 175, dictates a conclusion that the court abused its discretion when it failed to affirmatively show all believable, uncontroverted mitigating evidence had been considered and weighed. Contrary to the State's apparent belief, the court in *Robinson* did not completely fail to consider the mitigating evidence. In fact, that court considered a number of mitigating circumstances, including Robinson's head injuries, possible mental illness, and cocaine problem. *Id.* at 178-79.

Even so, this Court concluded "the trial court failed to consider and weigh *all* of the available mitigating evidence in the record." *Id.* at 180 (emphasis added). And this Court emphasized: "most importantly, our review of the PSI and appellant's two

psychiatric and clinical evaluations discloses evidence of mitigation that received little or no discussion in the sentencing order." *Id.*

Similar to the court in *Robinson*, the court in the present case considered a number of mitigating circumstances. But, also like the court there, the court here failed to consider and weigh all of the available mitigating evidence in the record. Stated differently, like the record in *Robinson*, the record in the present case discloses evidence of mitigation that received little or no discussion in the sentencing order.

IV. At Least Considered Cumulatively, the Court's Errors–in Assigning Slight Weight to the "Childhood Trauma" Mitigating Circumstance and Failing to Affirmatively Show All Believable, Uncontroverted Mitigating Evidence Had Been Considered and Weighed–Were Not Harmless.

The State argues any errors–in assigning slight weight to the "childhood trauma" mitigating circumstance and failing to affirmatively show all believable, uncontroverted mitigating evidence had been considered and weighed–were harmless. [AB 18-19, 26-27] But reversible error occurred.

The "harmless error test . . . places the burden on the state, as the beneficiary of the error, to prove . . . that there is no reasonable possibility that the error contributed to the conviction." *State v. DiGuilio*, 491 So.2d 1129, 1138 (Fla. 1986). "Thus, if there is error, it requires reversal *unless* the state can prove beyond a reasonable doubt that the error was harmless." *Ciccarelli v. State*, 531 So.2d 129, 131 (Fla. 1988). Ultimately, the "'question is whether there is a reasonable possibility that the error *affected* the verdict,'" *not* whether the error *substantially*

influenced the jury's verdict." *Knowles v. State*, 848 So.2d 1055, 1059 (Fla. 2003) (emphasis added).

And "the harmless error test is to be rigorously applied." *DiGuilio*, 491 So.2d at 1138. On that note, this Court has repeatedly stressed:

> The test is not a sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test. Harmless error is not a device for the appellate court to substitute itself for the trier-of-fact by simply weighing the evidence. The focus is on the effect of the error on the trier-of-fact.

Id. at 1139.

Further, these general principles have been applied to errors in failing to properly consider mitigating evidence. *See, e.g., Ault v. State*, 53 So.3d 175, 195 (Fla. 2010). In that context, this Court has declared:

> The question is whether there is a reasonable possibility that the error contributed to the sentence. Reversal is permitted only if the excluded mitigating [circumstances] reasonably could have resulted in a lesser sentence. If there is no likelihood of a different sentence, then the error must be deemed harmless.

Kaczmar v. State, 228 So.3d 1, 14 (Fla. 2017). And, in applying that standard, this Court has considered whether (1) the trial court "recognized and gave weight to numerous other mitigating circumstances"; (2) the case involved "substantial aggravation"; and (3) the "excluded" mitigating circumstances were "minor and tangential." *Covington v. State*, 228 So.3d 49, 67 (Fla. 2017).

Finally, the harmless error rule "'preserves the accused's constitutional right

to a fair trial by requiring the state to show beyond a reasonable doubt that the specific [errors] did not contribute to the verdict.'" *Johnson v. State*, 53 So.3d 1003, 1007 (Fla. 2010). In short, a defendant "has a constitutional right to a fair trial free of harmful error." *Id.* With that in mind, it is appropriate to review the cumulative effect of multiple errors.

> Where multiple errors are discovered in the jury trial, a review of the cumulative effect of those errors is appropriate because "even though there was competent substantial evidence to support a verdict . . . and even though each of the alleged errors, standing alone, could be considered harmless, the cumulative effect of such errors [may be] such as to deny to defendant the fair and impartial trial that is the inalienable right of all litigants in this state and this nation."

McDuffie v. State, 970 So.2d 312, 328 (Fla. 2007); *see also Hurst v. State*, 18 So.3d 975, 1015 (Fla. 2009).

In the present case, assume the court's errors–in assigning slight weight to the "childhood trauma" circumstance and failing to affirmatively show all believable, uncontroverted mitigating evidence had been considered and weighed–did not *substantially influence* the court's decision to sentence Craft to death. Even then, the State cannot prove there is no reasonable possibility that those errors *contributed to* that decision.

On the one hand, the present case involves four aggravating circumstances. [R1 145-51] On the other, the court recognized and gave weight to only four "non-statutory" mitigating circumstances. [R1 153-55] Moreover, among even those

limited circumstances, the court erred in assigning the "childhood trauma" circumstance only slight weight.

In addition, the "excluded" mitigating circumstances were not minor and tangential. Again, those circumstances included the following:

- Craft "was born with [the umbilical] cord around his neck," and was blue and not breathing, [R1 326];
- His mother failed to obtain proper mental health treatment for Craft, and "felt that she could 'beat it out of him,'" [R1 319];
- By age four, all of Craft's baby teeth were rotten because of malnutrition, and at times, Craft's mother "would starve the kids," [R1 319, 323, 326-28];
- Craft was designated "emotionally handicapped" and a "slow learner"; classified as "mentally retarded"; and was enrolled in special education classes, [R1 290, 297, 320, 326];
- He began drinking beer and smoking marijuana around age ten or twelve, and later began using crystal methamphetamine, [R1 291, 298, 321];
- Craft had previously worked, including repairing vehicles, welding, tree service, carpentry, and painting/remodeling, [R1 290, 298, 317];
- As an adult, he saved a fellow inmate's life while they were both in the

local county jail, [R1 319];

- Craft immediately, and repeatedly, confessed to killing Shira, [R1 309-10; R3 18, 28-37, 40-42, 50-52]; and
- Craft later plead guilty to first-degree murder, [R2 45, 53-54, 60-70].

All that being the case, assume the present case involves "substantial aggravation." Even then, a reasonable possibility exists that, in the absence of the court's errors, a greater aggregate amount of weight could have been assigned to the mitigating circumstances reasonably established by the evidence, and as a result, those circumstances could have outweighed the aggravating factors. In short, if the trial court had properly considered the mitigating circumstances at issue, the result reasonably could have been a sentence of life without parole.

Crook v. State, 813 So.2d 68 (Fla. 2002), should persuade this Court to reach such a conclusion. There, Crook raped, robbed, and murdered a fifty-nine-year-old woman, who "suffered multiple stab wounds and significant head injuries." *Id.* at 69. The trial court found three aggravating factors: (1) committed while engaged in sexual battery; (2) pecuniary gain; and (3) especially heinous, atrocious, or cruel. *Id.* at 73. It also found three "statutory" mitigating circumstances, as well as seventeen "nonstatutory" mitigating circumstance. *Id.*

On appeal, this Court determined the court erred in failing to find and weigh evidence that Crook suffered from brain damage and had been diagnosed as

borderline intellectually disabled. *Id.* at 74-77. And this Court noted: "we do not discount the statutory aggravators." *Id.* at 77. But this Court proceeded to conclude: "We are not certain whether, if the trial court had properly considered the brain damage and borderline [intellectual disability] and the effect of those mental mitigators on the crime in question, the trial court would have found that the aggravation outweighed the mitigation . . . ." *Id.* at 77-78.

On the one hand, both *Crook* and the present case involved multiple aggravating factors. On the other, in both cases, the "excluded" mitigating circumstances–if properly considered–were entitled to significant weight. In addition, whereas the court there recognized and gave weight to three "statutory" mitigating circumstances and seventeen "nonstatutory" mitigating circumstances, the court here recognized and gave weight to only four "nonstatutory" circumstances. Further, among even those limited circumstances here, the court erred in assigning one only slight weight.

All that being the case, if there was a reasonable possibility the court's errors contributed to the decision to impose death in *Crook*, the same is even more true in the present case.

V. In Response to the State's Additional Arguments, Craft Relies on the Arguments Raised in His Initial Brief.

CONCLUSION

A few points bear repeating. A court abuses its discretion if its ruling, though

not arbitrary, is unreasonable. Even if a capital defendant invites the possibility of a death sentence and refuses to present mitigating evidence, the trial court is required to consider and weigh all believable, uncontroverted mitigating evidence. And even if errors did not substantially influence an outcome, they are not harmless if there is a reasonable possibility that they affected the outcome.

With that in mind, multiple errors demand reversal here. First, the court accepted Craft's decision to waive his right to present mitigating evidence without first ensuring that waiver was knowingly, voluntarily, and intelligently made. Second, without justification, the court assigned the same weight to the "childhood trauma" mitigating circumstance that it assigned to the "good behavior during trial" circumstance. Third, the court accepted Craft's decision to not present mitigating evidence, but then imposed death without first ensuring that all available mitigating evidence was brought forth.

Fourth, the court imposed death without first affirmatively showing all believable, uncontroverted mitigating evidence had been considered and weighed. Fifth, even though Craft invited the possibility of a death sentence, the court imposed death without first ensuring the propriety of that sentence could be established according to the law. Sixth, the court failed to determine beyond a reasonable doubt whether the aggravating factors were sufficient to justify the death penalty. Finally, the court failed to enter a written order of competency.

Craft's death sentence should be vacated. And this case should be remanded for a new second-phase trial. Alternatively, this case should be remanded for a reevaluation of the mitigating evidence and the sentence. At a minimum, this case should be remanded for entry of a nunc pro tunc written order of competency.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished electronically via the Florida Courts E-filing portal to Michael T. Kennett, Assistant Attorney General, Capital Appeals Division, and by U.S. Mail to Appellant, Robert Craft, #C00181, Union Correctional Institution, P.O. Box 1000, Raiford, FL 32083, on this 17th day of March, 2020.

CERTIFICATE OF FONT AND TYPE SIZE

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

Respectfully submitted,

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