IN THE SUPREME COURT OF FLORIDA

THOMAS H. FLETCHER,

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

CASE NO. SC20-1862
L.T. No. 572019CF000526CFAXMX

DEATH PENALTY CASE

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

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

This is the appeal of a conviction for first-degree murder and a sentence of death. Citations to the record will be designated as follows: references to the record are referred to by "R," followed by the page number; and, the Initial Brief is referred to by "IB," followed by the page number.

STATEMENT OF THE FACTS

I. Appellant's Childhood in North Carolina

Appellant was born on October 12, 1967. R-2430; *see also* http://www.dc.state.fl.us. He grew up in Hickory, North Carolina. R-1199, 2430, 3000. As children, Appellant and his younger sister had a "rough" childhood marred by nearly all of the Adverse Childhood Experiences (ACEs): (1) physical abuse; (2) emotional abuse; (3) sexual abuse; (4) physical neglect; (5) emotional neglect; (6) domestic violence in the household; (7) parents who are separated or divorced; (8) growing up in a household where someone is incarcerated; (9) growing up in a household where there is someone with a serious alcohol or drug problem; and (10) growing up in a household where there is someone with serious mental illness. *See generally State v. Bright*, 200 So. 3d 710, 726 (Fla. 2016). Appellant described his life as "just fucked up." R-1512.

Physical Abuse

Welfare records cited physical abuse in Appellant's childhood home. R-1257, 3058. Appellant's mother was physically abusive when she drank. R-1205, 3006. Appellant and his younger sister endured physical abuse from their "mom and her boyfriends and her friends that [would] come over. . . ." R-1203, 3004, 3059. The physical abuse included "the point ends of electrical cords, switches, anything they could get their hands on as well as their fists." R-1203, 1258, 3004, 3059. In order to prevent his mother from physically abusing his sister, Appellant "would jump in and say, 'Mom, whoop me instead of her because she don't need anymore of your beating. You've beat her enough. I'm strong, let me take the beatings.'" R-1209, 3010.

Appellant's sister observed Appellant's mother frequently "hit [Appellant] with the ends of belt buckles, electrical cords, [and] switches." R-1204, 3005. According to Appellant's sister, the abuse did not occur "because we were bad because we tried to be good. It was because [our mom] was an alcoholic." R-1204, 3005.

Emotional Abuse

Appellant's mother had "a lot" of boyfriends, and she remarried three times. R-1204, 1211, 1258, 3005, 3012, 3059. All of Appellant's step-fathers were "mean" and had histories of using drugs and alcohol. R-1211, 1258,

3012, 3059. Many of those friends used drugs around Appellant and his younger sister. R-1258, 3059. Appellant described his mother as "a biker whore mother, and all her boyfriends were old bikers, Vietnam vets, whatever, and they taught me as a young kid how to defend myself." R-1350, 3178, 3845-46.

Sexual Abuse

Appellant's sister endured frequent sexual abuse either in her home or in a motel room; Appellant's mother "would get her boyfriends or male friends of hers that would pay her to where she could buy her alcohol [and s]he would sell [Appellant's sister] out sexually to where she could have the money to pay for her [alcohol] problem." R-1207, 1208, 3008, 3008. On one occasion when Appellant was approximately eleven and his sister was eight, Appellant "pulled [a] man off of" his younger sister because the man was sexually abusing her. R-1209, 3010.

Appellant endured sexual abuse when his mother would have women would pay her in exchange for sex with Appellant. R-1208, 3009. Appellant "was always used to being abused by older people." R-1264, 3065.

Physical Neglect

Before moving into a housing project for low income families, Appellant and his younger sister "lived in homes that were dilapidated, without

electricity, without heat." R-1259, 3060. Welfare workers performing visits observed that Appellant and his younger sister "had been unbathed" and lived in a home where "[t]here was very little food." R-1259, 3060. Appellant's mother did not cook or clean very well; Appellant and his younger sister "couldn't eat her cooking so [they] had to learn to cook and clean [for themselves]." R-1211, 3012.

When Appellant was about nine years old, the house "caught on fire." R-1241, 3042. At some point before Appellant turned fourteen years old, another house fire occurred. R-1240-41, 3041-42. When he was thirteen, Appellant lied about his age so that he could work as a busboy and waiter. R-1213, 1267, 3014, 3068. When Appellant was about thirteen and a half or fourteen years old, he left home. R-1212, 3013. He "got tired of the beatings and the abuse. . . ." R-1213, 3014. Appellant tried to take his younger sister with him, but his mother prevented it. R-1213, 1260, 3014.

Emotional Neglect

Appellant's childhood was "[e]xtremely chaotic" and "highly dysfunctional" with "absolutely no structure in the family." R-1261, 1260, 3060, 3062. The only consistency in Appellant's childhood home was "consistency in disorder and disarray." R-1263, 3064. Records include "reports of child neglect that [Appellant and his younger sister] had been left

without anyone, probably caring for themselves." R-3060. Records indicate that, at least on one occasion, Appellant's mother was "too drunk" to take care of Appellant's sister. R-3062.

Appellant's mother did not work much; the family survived "off of welfare . . . food stamps, Medicaid, [and] whatever the system" would provide. R-1205, 3006, 3060. She often traded food stamps for alcohol. R-1258-59, 3059-60. And, she sold her children for sex and used the money to buy alcohol. R-1207-08, 1212, 1257, 3008-09, 3013, 3058.

Domestic Violence in the Household

Around the time of the death of his infant sister, Appellant observed his maternal grandfather when he "came over and attempted to shoot [Appellant's father]." R-3061.

Parents Who Are Separated or Divorced

When Appellant was six years old and his younger sister was three, Appellant's father "walked out" on the family. R-1200, 3001, 3060. This was around the time that Appellant's youngest sister died "when she was two months and twenty-one days old." R-1214, 3015. Appellant's maternal grandfather blamed the infant's death on Appellant's father. R-1260. After he left, Appellant's father did not provide any child support. R-1259, 3060.

Growing up in a Household Where Someone Is Incarcerated

Although the record does not include evidence of incarceration, criminal behavior occurred in Appellant's childhood home. In addition to the sexual abuse, welfare records expressed concerns that Appellant's mother "was running a prostitution ring out of the house." R-1258, 3059.

Growing up in a Household Where There Is Someone with a Serious Alcohol or Drug Problem

Appellant's mother was a "chronic alcoholic" who drank "from the time she woke up until the time she went to bed. . . ." R-1205, 1257, 3006, 3058. Her friends "frequently, daily" would come over drunk. R-1205, 3006. Appellant's maternal grandmother was also an alcoholic. R-3060.

Appellant's mother forced Appellant and his younger sister to consume alcohol at an early age. R-1210, 1258, 3011, 3059. Appellant started using alcohol at age nine. R-1261, 1944, 3062. He started using cocaine and marijuana by the time he was "twelve or fourteen." R-1261, 3062.

Growing up in a Household Where There Is Someone with Serious Mental Illness

Appellant's mother spent some time in a mental hospital. R-1206, 3007. She "had been hospitalized involuntarily for psychiatric problems and welfare as child investigators were just in and out of the house constantly investigating." R-1261, 3062.

Removals

At various times, Appellant and his younger sister were removed from the home and "placed with an aunt or uncle" and also "at the grandmother's house." R-1281, 3080, 3082. For example, child welfare agency records indicate that on August 31, 1984, Appellant (at age 16) and his younger sister were living with an uncle. R-1282, 3083. And at some point, Appellant's younger sister was placed in foster care. R-1210, 1281, 3011, 3082. Eventually, Appellant's grandparents obtained legal custody of Appellant's younger sister. R-1282, 3083.

Education

Although he repeated the ninth grade three times, Appellant scored 106 on a "full scale I.Q." test. R-1262, 3063. As an adult, Appellant's "spelling and reading skills [were determined to be] beyond the twelfth grade and his arithmetic ability [was determined to be] at the end of the tenth grade." R-1263, 1268, 3064. According to his sister, Appellant was "very intelligent in school" and "made A/B Honor Roll." R-1212, 3013.

II. Appellant's Early Adult Years in Florida

Appellant's Move to Fort Lauderdale

At some point in his late teens, Appellant travelled to Fort Lauderdale, Florida, where he first met Milton Grossman. R-1267, 1276-77, 1454, 2434,

3067. Mr. Grossman "was known to the Fort Lauderdale Police Department as someone" who supplied "non-prescription drugs" to members of the community. R-2633. Appellant initially met Mr. Grossman when Appellant bought "dope" from Mr. Grossman at the beach. R-3432-33. Appellant worked as a driver for Mr. Grossman. R-2434, 3898. Arrest records suggest that Appellant was in Broward County from at least March 6, 1987, through January 1, 1990. R-1295-96.

Appellant returned to North Carolina for a period of time. R-1267, 1277-78, 3068, 3078. Arrest records suggest Appellant was in North Carolina from at least February 5, 1993, through August 9, 1993. R-1296.

At some point, Mr. Grossman sent Appellant a bus ticket and "some cash" so that Appellant could return to Fort Lauderdale. R-1277, 2435, 3078. After receiving the bus ticket, Appellant returned to Fort Lauderdale and settled there permanently. R-1215, 1267, 1277, 3016. He worked at a café on the beach and took part-time classes at the Fort Lauderdale Art Institute. R-1267. Appellant still kept in touch with his younger sister. R-1215, 3016.

Appellant's Relationship with Milton Grossman

While in Florida, Appellant developed a relationship with Mr. Grossman "where Mr. Grossman had supplied over the years large amounts of cocaine and marijuana and other substances to [Appellant]. They had a very close

relationship. They had been sexually intimate and the victim had given [Appellant] the keys of several of his homes and cars." R-1250, 2545-46, 3051. "In some ways," Appellant viewed Mr. Grossman as a father or grandfather figure. R-1250-51, 1288, 1952, 3051-52, 3089. Although Mr. Grossman was a father figure, "he was also an abuser." R-1264, 3065.

In the summer of 1994, Mr. Grossman was 65 years old, stood five feet eight inches tall, and weighed approximately 171 pounds. R-2544, 2600, 3900, 3908. Appellant was 26 years old, stood at least six feet tall, and weighed 180 pounds. R-2544-45, 3900.

1994 Murder of Milton Grossman

On the evening of Friday, July 1, 1994, Mr. Grossman gave Appellant some cocaine as well as some marijuana and vodka. R-1254, 1940-41, 2436-37, 2535, 3055. Mr. Grossman told Appellant: "I don't believe you quit [cocaine]." R-2436. Mr. Grossman and Appellant both used cocaine that night. R-2436, 2561, 2624, 2636.

On or about the night of Sunday, July 3, 1994, or the early morning hours of Monday, July 4, 1994, Appellant "had been on a run for days using cocaine excessively" with little to any sleep; Mr. Grossman and Appellant were in an argument because Mr. Grossman "cut off" Appellant's supply of drugs. R-1526, 1289, 1253, 1254, 1470, 1938, 1945, 2450-51, 2536, 3054,

3055, 3900. When Appellant demanded more, Mr. Grossman said: "[F]uck you, I ain't giving you shit. . . ." R-2439. During the argument that ensued, Mr. Grossman was "verbally and physically abusive" to Appellant. R-1251, 1254-55, 1950-51, 3052, 3055-56; *see also* R-1261 ("[Mr. Grossman] had become both verbally and physically abusive toward [Appellant] while [Appellant] was under the influence of cocaine and marijuana.").

Mr. Grossman swung at Appellant and Appellant swung back. Appellant then grabbed a knife from the kitchen, held it behind Mr. Grossman's head, led Mr. Grossman to a bedroom, and demanded that Mr. Grossman open a safe. R-2439-40, 2466-67, 3900-01. Mr. Grossman said to Appellant: "I ain't opening the fucking safe, fuck you. . . . I'll have you killed boy, I'll have you killed." R-2440.

Mr. Grossman started "fighting" and "swinging" at Appellant. R-2440. Appellant killed Mr. Grossman by stabbing him. R-1489, 1498, 1500, 1927, 1931, 1971, 2440, 2468, 3901-02; *see also Fletcher v. State*, 53 So. 3d 1249, 1250 (Fla. 4th DCA 2011). Appellant "got angry and stabbed [Mr. Grossman] in the stomach [and] then stabbed him in the neck because he was screaming." R-1388, 3874, 3908. Appellant was "as high as hell"; he was "out of it"; he "flipped out"; he "was tripping high on coke"; and he "wouldn't have done it if he wasn't on drugs." R-1512, 1936-37, 1943, 1947, 2476.

Because of the effects of cocaine, Appellant was "completely uninhibited" during the attack. R-2540. Mr. Grossman suffered the "vicious" injuries that "showed a great deal of violence":

> He had a large 12 inch gash in the back of the neck. He had a stabbing through the thyroid cartilage. He had a large wound in the abdomen where the bowel fell out. He had a cut around the mandible, multiple injuries, really intense cuts into the neck to the points where [Appellant] had separated the vertebrae.

R-2540, 2453-54, 3897. The injury to Mr. Grossman's abdomen was "about three by four inches" and extended into area "where the stomach and intestines are located." R-2602. On his back, Mr. Grossman sustained a cut "which was approximately a foot long and gaping to be three and a half inches wide." R-2603. One of the cuts to Mr. Grossman's neck "passed all the way through the tissue, the skin, the subcutaneous fat and tissue and muscle and again was continuous with that wound on the back." R-2613, 3897. The knife blow to the neck "incised" Mr. Grossman's jugular vein. R-3909. The injuries to the neck and abdomen were "life threatening" and were determined to be the "cause of death" with the manner of death a homicide. R-2621, 2624-25, 3909-10.

According to a defense medical expert, the injuries sustained by Mr. Grossman could be consistent with the "vicious and violent type of homicides [that] have been known to occur between homosexual lovers." R-2547,

2583. Given the evidence in the case, however, the expert opined that obtaining more cocaine was the primary driver. R-2583, 2585.

Shortly after the murder, Appellant described himself as "fucked up in the head" because "[e]verything around me looks fucked up to me." R-2477-78. For the death of Mr. Grossman, a jury found Appellant guilty of first-degree murder and armed robbery. R-2921, 3904; *see also Fletcher*, 53 So. 3d at 1250. After the penalty phase of his capital murder trial, Appellant received a sentence of life imprisonment without the possibility of parole. R-1406, 3904; *see also Fletcher*, 53 So. 3d at 1250.

III. Appellant's Adult Life in Prison

Appellant Grows Tired of His Life Sentence

Appellant was "tired of doing [his] life sentence" for the 1994 murder of Mr. Grossman. R-1340, 1353, 3167, 3181, 3848. Appellant wished "back in '94 they would have given me the death penalty." R-1353, 3181, 3848. Appellant was "tired of living on an open compound full of gang members, homosexuals, and drug-addicted whites who scam their mothers out of money just to give to the gang members and fags." R-1388, 3874-75. Appellant described his state of mind in prison as "tired." *See* R-3194, 3860:

> I'm sick and tired of being around these scumbag — I mean, I know I probably look like one of [them] my damn self, because of what I'm in here for and for what I just done, but these scumbag people that I'm surrounded by, child molesters, fucking

> niggers, and these Chicos, and I'm sick of it. I'm sick of it. I'm sick of being on a day-to-day rat race with these people. I'm tired.

After losing an appeal, Appellant decided to "plan [his] final retirement from living on open compound." R-1388-89, 3875. Appellant described his thought process as: "It's either going to be me killing one of these fuck boys in here or me killing myself." R-1355, 3183, 3850.

Appellant admitted to a suicide attempt on "May 23rd . . . [that] didn't work." R-1340, 3167, 3184, 3836, 3851. After the failed attempt at self-strangulation with a sheet, Appellant realized: "Suicide ain't going to do it. I can't do it." R-1357, 3184, 3185, 3852. Appellant concluded that "the only thing that would help me out is maybe getting the death penalty, let the State kill me." R-3167, 3835.

Appellant Murders Kenny Davis on 9/22/18

Appellant's cellmate at Blackwater River Correctional Facility was Kenny Davis, who had occasional thoughts of suicide because he "don't want to live out the next 20 years in this shit that we're living in." R-1340, 3167, 3836, 3871. Appellant viewed Mr. Davis as "a good candidate" for Appellant's plan: "Not only would I help him EOS his sentence, and he ain't got to trudge 20 more years throughout this prison sentence, it will also, hopefully, help me out and help me get an EOS date sooner than however

life kills me." R-1341, 2168, 3836. Additionally, Appellant did not want to get caught "at the moment" or "jumped by other inmates," as that might prevent him from completing the murder. R-1343, 3170, 3838.

Appellant "waited until Kenny got himself some ICE [(methamphetamine)] so I could manipulate him to stay awake and out of his bunk." R-1389, 3875. Appellant and Mr. Davis starting using the methamphetamine around 8:30 at night. R-1342, 3169, 3837. Around midnight, Appellant "realized that this is the perfect opportunity for me to do what I've got to do." R-1342, 3169, 3838. Appellant thought out the murder "clearly." R-1344, 3171, 3839.

Appellant waited until after the 3:30 a.m. cell count. R-1389, 1344, 3171, 3839, 3875. Appellant knew that the lights would come on thirty minutes later at 4:00 a.m. R-1364, 3192, 3839, 3858. Appellant "walked up behind a sitting Kenny and snatched him up in a choke hold." R-1389, 3839, 3875-76. Appellant "had to really wrap [his arm] on [Kenny's little 'ole neck] and turn his head sideways and twist him and hold him, because he was bucking." R-1360, 3188, 3855. Mr. Davis "panicked and went to stabbing [Appellant] in the leg with a pencil." R-1344, 3171, 3839. Mr. Davis bucked for what "seemed like 5 or 10 minutes. . . ." R-1360, 3188, 3855.

Next, Appellant dragged the victim "over to a locker and sat down while [he] continued to choke [Mr. Davis] for about 3-5 minutes until [Mr. Davis] died." R-1389, 3876. While he was choking Mr. Davis, Appellant said: "[G]o to the light, take it easy, relax, if you go to the light you're EOSing, don't worry about it, take it easy." R-1344, 3171, 3839. Mr. Davis was 33 years old. R-3883. He died of "manual asphyxiation," meaning he was "strangled by somebody else." R-3885. The manner of death was "homicide." R-3887.

Appellant murdered his cellmate "out of pure selfishness." R-1388, 3874. According to Appellant, "it wouldn't have mattered who my roommate was [because] that individual was going to die." R-1389, 3875. Appellant "planned his death for more than a week leading up to it." R-1388, 3874.

After Mr. Davis died, Appellant tied a sheet around the victim's neck and lifted the victim into the victim's bunk. R-1389, 1361, 3189, 3840, 3876. Appellant covered up the victim and waited for the cell doors to open at 4:00 a.m. R-1389, 3839-40, 3858, 3876. Appellant then "went to breakfast." R-1345, 3172, 3840.

IV. Multiple Admissions of Guilt

Sworn Interview with Florida Department of Law Enforcement (FDLE)

On September 23, 2018, Appellant participated in an interview with two FDLE agents. R-1337, 3161, 3833. During the interview, Appellant

confessed to killing his cellmate, Kenny Davis. R-1339-40, 3166-67, 3835. Appellant described his state of mind as: "If I could kill myself right now with a handful of pills, I'd appreciate it, but as far as manually killing myself, no, I ain't going to do that." R-1366, 3194, 3860. Appellant also stated that, if he did not receive the death penalty, he would "do it again. I'll find me another inmate and kill him again, straight up." R-1366, 3194, 3860. Appellant indicated that he was "pushing for a fast and speedy trial immediately." R-1368, 3196, 3862. When asked if he wanted to receive the death penalty, Appellant responded: "Yes, sir. That's what I'd like." R-3848.

Letter to Clerk of Court

On December 10, 2018, Appellant wrote a letter to the Clerk of Court, Santa Rosa County Courthouse. R-1315, 3870, 4098-99. In the letter, Appellant wrote: "I am wanting a fast and speedy trial and would like this to move along faster. Please tell a judge — a judge or <u>any</u> judge — that I want a plea deal of the death penalty. With that, I can forgo all of the trial nonsense." R-1382, 3871.

Letter to Chief Judge

On February 27, 2019, Appellant wrote a letter to the "Chief Justice," Santa Rosa County Courthouse. R-1384, 3872, 4099. In the letter, Appellant wrote: "I am wondering why I have not been brought to court, yet?

I gave a full statement admitting my guilt to two F.D.L.E. members on 9-23-18. I am willing to forgo my trial and accept the plea of the death penalty for my crime." R-1384, 3872.

STATEMENT OF THE CASE

I. Pretrial

Indictment and Notice of Intent to Seek Death Penalty

On March 19, 2019, a grand jury indicted Appellant for the "First Degree Premeditated Murder" of Kenneth Jeff Davis. R-21-22, 4001-02. That same day, the State filed a "Notice of Intent to Seek Death Penalty and Motion for Appointment of Expert Pursuant to Rule 3.202." R-23-24.

Amended Motion to Waive Right to Jury Trial on Penalty Phase and Presentation of Mitigation

On June 11, 2019, counsel for Appellant filed the "Amended Motion to Waive Right to Jury Trial on Penalty Phase and Presentation of Mitigation." R-47-49. In the motion, counsel wrote that:

- "Defendant has adamantly informed counsel and the court that he wishes to plead guilty and receive the death penalty." R-47.
- "Defendant has adamantly informed counsel on more than one occasion that he does not wish his attorneys to investigate mitigation, despite the possibility of its existence." R-47.

- "[D]espite his desire to keep counsel on his case, he does not want his attorneys to investigate mitigation, present mitigation or challenge the State's evidence of aggravation." R-47-48.
- "Defendant wishes to waive both his right to a penalty phase jury and the presentation of any mitigating evidence." R-48.

Appellant requested "that the court order that a jury trial be waived in this case as to both the guilty [sic] and penalty phases and that counsel be ordered to conduct no further mitigation investigation or to present argument or evidence of mitigation during the penalty phase of proceedings." R-50.

II. Trial

Guilty Plea, Waiver of Penalty Phase Jury, and Order for Comprehensive Presentence Investigation

On August 29, 2019, Appellant "pled guilty to first-degree murder in open court, which the Court accepted." R-4020, 3970. During the plea colloquy, Appellant asked the trial court "Is there such a thing as a plea deal for the death penalty?" R-4071. Appellant referenced a case titled "*Wall v. State*." R-4071; *see also Wall v. State*, 238 So. 3d 127, 134 (Fla. 2018):

> The trial court explained to Wall that his goal of receiving the death penalty was inconsistent with trial counsel's responsibility to mount a defense and the concept of pleading no contest to C.J.'s death was discussed. Then Wall raised case law from Indiana where a court had allowed a defendant to plead guilty in exchange for the death penalty. That offer was presented by Wall to the State but was rejected.

Appellant expressed a desire to proceed *pro se*, but withdrew any request when he learned that a *Faretta*[1] inquiry would "take time." R-4071; *see also* R-4075 ("If having an attorney or attorneys is going to aid me in getting this done quicker for me and everybody else, then I'll keep the attorneys."). At the end of the colloquy, the trial court found that Appellant's plea of guilty was "knowingly, voluntarily, and freely given. . . ." R-4088, 4103.

Additionally, Appellant filed a "Waiver of Penalty Phase Jury." R-64, 3970. The waiver contains the following language:

> I understand that before I would be eligible to receive the death penalty, the jury would be required to unanimously find that the State has proven at least one aggravating factor beyond a reasonable doubt, that the aggravating factor(s) proven is/are sufficient to impose the death penalty *beyond a reasonable doubt*, and that the death penalty should be imposed."

R-64 (emphasis added with the emphasized text handwritten in the original). After a colloquy, the trial court found that Appellant knowingly and voluntarily waived "the penalty phase for the jury." R-4102, 4104.

Also, Appellant waived his right to present mitigation and directed trial counsel not to conduct any mitigation investigation. R-4020, 4093-94, 4096-97. After a colloquy, the trial court found that Appellant waived "his right to the presentation of mitigation evidence." R-4103.

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[1] *Faretta v. California*, 422 U.S. 806 (1975).

Finally, the trial court entered an "Order for Comprehensive Presentence Investigation [(PSI)]." R-70-71, 3970. Among other items, the Order directed the Florida Department of Corrections (DOC) to "seek to determine if evidence of the statutory mitigators are present and detail the evidence accordingly." R-70. The trial court described the desired PSI as "comprehensive." R-4105.

10/24/19 Status Conference

Prior to the hearing, the State filed "various information" about Appellant's previous murder case. R-1305. The trial court received "additional mitigation that was used in the previous penalty phase." R-1305. Additionally, counsel for Appellant "filed [Appellant's] Department of Corrections records." R-1306. Also, DOC prepared a PSI, for which Appellant "did not cooperate." R-1306.

Through counsel, Appellant informed the court that he "wants to get this done as quickly as possible." R-1307. Nevertheless, the trial court appointed special counsel to develop additional mitigation. R-1307. The trial court expressed a concern that it might overlook mitigation without an appointment. *See* R-1308:

> The Court's concern is the Court might leave one [of the statutory or non-statutory mitigating factors] out that should have been made. And then this entire matter might get reversed because the Florida Supreme Court may decide there may be somebody

> up there that has a different opinion of what potential non-statutory and statutory mitigating factors may have been present. And if that's the case, then it's going to get sent back down.

Appellant indicated that he understood the trial court's desire to get it right the first time in order to avoid reversal on appeal. *See* R-1310:

> I understand what you're doing, Judge. And I appreciate that, because in the future I'm hoping that I get the death penalty. And if I do get it, then I'm going to waive every appeal that I can possible. And if we can get it correct now to where I won't have to worry about too many problems down the road, too many hurdles to try to have to climb and help me waive these problems, then yeah. We can do what we've got to do now.

The trial court expressed some concerns about its role in developing mitigation for Appellant. R-1309 ("And I also think that it could be possible frankly at some point that the Florida Supreme Court may decide that a judge simply can't be — can't pick out the mitigators and then make a ruling on the mitigators. And so I've just got — I've got some legal concerns about that.").

Appellant's counsel suggested that the appointment of a mental health expert would not be necessary in this case because Appellant would not cooperate with one. R-1314 ("There's no need for [appointed special counsel] to seek to have experts appointed, because the defendant simply will not cooperate."). The trial court responded by saying: "Well, I understand the defendant won't cooperate, but really special counsel is really for the benefit of the public." R-1314.

Counsel for Appellant suggested that, "at each hearing," the trial court should re-inquire whether Appellant still wanted to waive the presentation of mitigation. R-1316. The trial court agreed. R-1316. Appellant then confirmed that he did not want his counsel "to present any mitigating circumstances or mitigation evidence" and that he did not want his counsel "to challenge any of the aggravating circumstances that the State is going to present. . . ." R-1316-17. Then, after counsel for Appellant reminded Appellant that he could still change his mind, Appellant stated that "It ain't going to happen" and "It's not going to happen." R-1317.

Appointment of Special Counsel

On November 1, 2019, the trial court issued an "Order Appointing Special Counsel." R-1301-02:

> After reviewing the PSI and other mitigating evidence submitted by the State and defense counsel, the Court has determined that significant mitigation might exist because of Defendant's drug usage leading up to the incident. Although the Court is cognizant of Defendant's desire to expedite this case, the Court concludes that, based on the potential mitigation, special counsel should be appointed in this case.

Letter to Trial Court

On December 22, 2019, Appellant wrote a three-page letter to the trial court judge presiding over the case. R-1388-90, 3873. In the letter, Appellant complained about the slow progress of his case. R-1388, 3874.

Highlighting the fact that he pleaded guilty, waived a jury trial, and waived the presentation of mitigation, Appellant asked: "How come it takes over 4 months for you to settle this open-and-shut case?" R-1388, 3874. Appellant criticized the court for "hiring an outside individual to do mitigation for [the court's] curiosity." R-1388, 3874. Appellant noted that the trial court already had a transcript of the mitigation presented at Appellant's previous capital murder trial from the 1990s. R-1388, 3874. Appellant stated that he killed the victim in this case because Appellant had "lost all hope." R-1388, 3874. Appellant informed the court that "I don't want to have to kill again in the future, but I have no problem with it if I have to." R-1390, 3876. Appellant described the death penalty as "part of my career path and my retirement." R-1390, 3876-77. Appellant closed the letter by saying that he wanted to "follow Kenny toward a, hopefully, better life." R-1390, 3877.

Motion to Continue

On March 23, 2020, counsel for Appellant filed a "Motion to Continue." R-1329-30. The motion requested a continuance due to a scheduling conflict for counsel. R-1329.

On April 13, 2020, the trial court granted the motion to continue and reset the case for June 18, 2020. R-1331.

Penalty Phase

On June 18, 2020, the trial court conducted the penalty phase proceedings. R-3812. Appellant reaffirmed his desire to waive a penalty phase jury. R-3814. Appellant confirmed his understanding that waiving a penalty phase jury means "waiving the right to have 12 people unanimously decide that your sentence should be death." R-3817-18. Appellant also waived his right to confront witnesses and consented to video testimony. R-3815.

After the State presented its evidence during the penalty phase, Appellant "consent[ed] to [his] attorney not to present any evidence … in the sentencing hearing." R-3912. After a colloquy between the trial court and Appellant, Appellant's counsel stated:

> I just wanted to add to the record just to reiterate what was said during the [plea]-colloquy, when you accepted his plea and the representation made to the Court then that he did not want us to conduct [any] mitigation investigation, did not want to present any mitigation evidence at these proceedings, or for us to object unless something was considered a lie. As far as I know, he doesn't think anybody has lied about anything today; so, I've made no objections on those grounds. But he did not want to contest it, so accordingly we see any further preparation for this proceeding have nothing — nothing to present today.

R-3914-15.

Special counsel appointed by the trial court then presented: mitigation evidence from the penalty phase of Appellant's 1994 murder trial; Appellant's

incarceration history while serving the life sentence he received for the 1994 murder; and information from Appellant's confessions to the 2018 murder. R-3916-41.

Appellant's counsel expressed his view that, because Appellant waived a jury trial for the penalty phase, the penalty proceedings before the trial court also served as a *Spencer*[2] hearing. R-3951, 3971.

Sentencing Order

The trial court originally set July 7, 2020, as the date "for the Court to make its decision" regarding the sentence. R-4019. Because of COVID-19 concerns, however, "transportation of inmates was ceased." R-4019. The trial court eventually set a date for November 24, 2020. R-4020.

On November 24, 2020, the trial court issued a sentencing order. R-3970-81. The trial court found four aggravators and assigned weight accordingly. *See* R-3972-76:

> The capital felony was committed by a person previously convicted of a felony and under a sentence of imprisonment – great weight.
>
> The defendant was previously convicted of another capital felony or a felony involving the use or threat of violence to the person – great weight.
>
> The capital felony was especially heinous, atrocious, or cruel – great weight.

[2] *Spencer v. State*, 615 So. 2d 688 (Fla. 1993).

> The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification – great weight.

The trial court found the following ten mitigating circumstances and assigned weight accordingly. *See* R-3976-80:

> Defendant was physically and sexually abused as a child – some weight.
>
> Defendant was raised by an alcoholic mother – slight weight.
>
> Defendant had an unstable home life – slight weight.
>
> Defendant was protective of his sister who was being abused – some weight.
>
> Defendant provided for his sister – slight weight.
>
> Defendant was exposed to alcohol and illegal drugs at a young age and became an addict – some weight.
>
> Defendant has an artistic talent and has demonstrated a desire to develop this ability in the past – very slight weight.
>
> Defendant has "lost all hope" – very slight weight.
>
> Defendant was cooperative with law enforcement – very slight weight.
>
> Defendant was respectful and courteous in court – very slight weight.

With regard to the relative weight of the aggravating factors and mitigating circumstances, the trial court concluded:

> The Court finds that sufficient aggravating factors exist to warrant the death penalty. Still mindful that a human life is at stake, the Court, nonetheless, finds that the aggravating factors far outweigh the mitigating circumstances and that a sentence of death, rather than life, is appropriate in this case.

R-3980-91, 4038.

Even though Appellant clearly and unequivocally expressed his desire to waive all appeals, the trial court nevertheless ordered Appellant's counsel to file a notice of appeal. *See* R-3981, 4038-39:

> Defendant's sentence of death is subject to automatic review by the Florida Supreme Court. The Court acknowledges that Defendant has already indicated his desire to waive all appeals and postconviction relief related to this case; however, the Court orders his attorney to file all appropriate pleadings within 30 days of this Order.

After the trial court concluded his announcement of the sentence, an exchange took place outlining the process that occurred. *See* R-4039-41:

> THE COURT: Okay. All right. Okay. With that, the Court had I think previously adjudicated him guilty. The Court sentences him to death. He has 30 days in which he can appeal. If you cannot afford an attorney, one will be appointed for him, but I guess in this case, the public defender's office — I guess, do I need to re-appoint the public defender's office for the purposes of appeal, Mr. Kypreos?
>
> MR. KYPREOS: Your Honor, typically, as — as far as filing the notice of appeal, which you want me to do, which I've explained to him what happens automatically anyway, whether I file the notice of appeal, I'm obligated as trial counsel —
>
> THE COURT: Sure.

MR. KYPREOS: — to then complete the record as — as you ordered. The defendant, as you advised me, wishes to waive his right of counsel on appeal. Typically, in an appeal, I move to, on behalf of my client, for defense counsel to be appointed — on appeal. I'm not certain whether or not the supreme court requires that when the defendant wishes to waive his right — right to counsel, but you ordered me to prepare the appropriate motions, so I'll prepare them. It seems to me that he can then object to the supreme court as to whether he makes the objection that which is to proceed.

THE COURT: So at this point counsel is still appointed. Counsel is still appointed for the purposes of filing whatever needs to be filed —

MR. KYPREOS: Right.

THE COURT: — with the Florida Supreme Court since this is going to be subject to an automatic review.

Notice of Appeal

On December 17, 2020, trial counsel filed a notice of appeal. R-4047.

SUMMARY OF THE ARGUMENT

Issue I

During the proceedings below, Appellant knowingly, intelligently, and voluntarily waived his right to present evidence during the penalty phase of his capital trial. Nevertheless, Appellant claims on appeal that the trial court did not do enough to uncover all available mitigation. In other words, Appellant criticizes the trial court for not doing enough of what Appellant said he never wanted done in the first place. Additionally, Appellant sought the imposition of a death sentence. Granting relief in this appeal would turn the concept of waiver on its head.

To the extent any error occurred during the penalty phase, the trial court did not err as Appellant claims on appeal — i.e., the lower tribunal failed to uncover and consider a sufficient amount of mitigation. Rather, if any error did occur, then it happened when the trial court forced a mitigation presentation upon an unwilling, competent defendant. During the proceedings below, Appellant clearly communicated to trial counsel the objective of the defense during the penalty phase: do not present any mitigation; and, do not object to the State's aggravation unless that evidence is false. And, trial counsel articulated that defense to the trial court. Nonetheless, following this Court's caselaw (albeit, with misgivings), the trial

court appointed special counsel to do the exact opposite of what Appellant wanted — i.e., uncover and present mitigation during the penalty phase. In doing so, the trial court interfered with Appellant's Sixth Amendment right to autonomy and possibly ran afoul of the Eighth Amendment Conformity Clause in the Florida Constitution.

Finally, no fundamental error occurred because the lower tribunal ordered the Department of Corrections (DOC) to prepare a Presentence Investigation (PSI), appointed special counsel to develop mitigation, and considered a sufficient amount of mitigation prior to imposing a death sentence. In this case, the aggravation was just too overwhelming: while serving a life sentence for a prior first-degree murder conviction, Appellant murdered his cellmate so that Appellant could "retire" to death row.

Issue II

A capital defendant in Florida is eligible to receive a death sentence once the existence of at least one aggravating factor is found beyond a reasonable doubt. In this case, Appellant has a prior violent felony conviction. Therefore, Appellant was Constitutionally eligible to receive a death sentence immediately upon the trial court's acceptance of his guilty plea. Any fact-finding necessary to establish death eligibility in this case (i.e.,

the finding of at least one aggravating factor) was satisfied by the jury verdict in the prior case. Therefore, no Sixth Amendment violation occurred.

Furthermore, this Court has repeatedly held that the weighing of aggravating factors and mitigating circumstances is not a factual determination subject to the beyond a reasonable doubt standard. Nevertheless, Appellant claims that the jury's recommendation — not the finding of an aggravating factor — increases the maximum authorized sentence from life imprisonment to death. Even if true under Florida's statutory framework, that does not transform the subjective weighing of aggravating factors and mitigating circumstances into objective facts. Rather, weighing involves a question of mercy — i.e., whether, based on the circumstances of the crime as well as the character and background of the accused, the defendant should receive the greater (death) or lesser (life without parole) of the two available sentencing options authorized by the verdict and any aggravating factor found during the eligibility phase.

Finally, to the extent any Sixth Amendment error did occur, it was not fundamental as the evidence of aggravation was overwhelming in this case: while serving a life sentence for a prior first-degree murder conviction, Appellant murdered his cellmate so that Appellant could "retire" to death row.

ARGUMENT

ISSUE I: DID THE TRIAL COURT COMMIT FUNDAMENTAL ERROR BY NEGLIGENTLY PERFORMING ITS DUTY TO UNCOVER MITIGATION FOR A DEFENDANT WHO DID NOT WANT ANY MITIGATION PRESENTED? (Restated)

I. Summary

When he knowingly and voluntarily waived his right to present evidence during the penalty phase, Appellant waived any claim that the trial court failed to develop sufficient mitigation. *Cf. Allen v. State*, Case No. SC19-1313, 2021 WL 2232499, at *6 (Fla. June 3, 2021), quoting *Major League Baseball v. Morsani*, 790 So. 2d 1071, 1077 n.12 (Fla. 2001); *cf. also McKenzie v. State*, 153 So. 3d 867, 883-84 (Fla. 2014).

Forcing a mitigation presentation upon an unwilling, competent defendant interferes with the Sixth Amendment right to autonomy and may run afoul of the Eighth Amendment Conformity Clause in the Florida Constitution. *See McCoy v. Louisiana*, 138 S. Ct. 1500, 1508 (2018); *see also Allen*, 2021 WL 2232499, at *10 n.5.

No fundamental error occurred below. The trial court ordered DOC to prepare a PSI, appointed counsel to develop mitigation, and considered all available mitigation prior to imposing a sentence. And, the aggravation was overwhelming: while serving a life sentence for first-degree murder, Appellant murdered his cellmate so that he could “retire” to death row.

II. Standard of Review

Appellant Incorrectly Claims Abuse of Discretion

Appellant incorrectly asserts that the abuse of discretion standard of review applies to his claim of error. *See* IB-25, citing *Spann v. State*, 857 So. 2d 845, 854 (Fla. 2003). In *Spann*, this Court used the abuse of discretion standard to review a trial court's decision to accept a defendant's waiver of mitigation. *See Spann*, 857 So. 2d at 854. In this appeal, however, Appellant does not challenge the trial court's decision to accept his waiver; rather, Appellant challenges how well the trial court developed mitigation.

What is the Judicial Decision Under Review?

Appellant does not challenge any decision by the lower tribunal. Instead, Appellant challenges the trial court's performance of a "duty." *See, e.g.*, IB-22 ("Although Florida law respects a defendant's choice to waive mitigation, the sentencing court has an independent duty to ensure that available mitigation is brought forth and considered."). Because Appellant focuses on the performance of a duty instead of an actual decision, the nature of the adjudication under review remains unclear. *See generally* Phillip J. Padovano, 2 Fla. Prac., Appellate Practice § 19:1 (2021 ed.) ("The applicable standard for a particular *decision* depends on the nature of the adjudication. Early identification of the correct standard of review is

important because it is the measurement by which the *decision* of the lower tribunal will be tested on appeal.") (emphases added).

Ineffective Assistance of Trial Court?

Appellant alleges that special counsel (hereinafter, "mitigation counsel"), the trial court, and DOC failed to perform their mitigation duties to the level required by this Court's caselaw. *See, e.g.*, IB-25 ("[T]he Court has imposed certain duties on both counsel and the trier of fact to ensure that available mitigation is brough forth. . . ."); *see also* IB-28, quoting *Muhammad v. State*, 782 So. 2d 343, 363-64 (Fla. 2001) ("We have repeatedly emphasized the duty of the trial court to consider all mitigating evidence. . . . This requirement 'applies with no less force when a defendant argues in favor of the death penalty, and even if the defendant asks the court not to consider mitigating evidence.'").

Rather than argue that the trial court erred by failing to appoint mitigation counsel, Appellant argues that counsel who was appointed failed to discover and present sufficient mitigation to the court. *See, e.g.*, IB-30 ("[T]he mitigation presented by special counsel did not address the effect of Mr. Fletcher's drug use on the night in question.").

Likewise, instead of arguing that the trial court reversibly erred by failing to consider a specific piece of evidence within the existing record,

Appellant claims that the lower tribunal did not do enough to uncover "available" mitigation outside the record. *See* IB-22 ("The trial court failed to guarantee that all available mitigation evidence was presented and considered. . . . [T]he court relied on 25-year-old evidence in mitigation and took no steps to bring forth or consider current mitigating evidence."); *see also* IB-30, quoting *Tisdale v. State*, 257 So. 3d 357, 362 (Fla. 2018) (Pariente, J., concurring) ("[T]he trial court should have been alerted to the possibility of significant mitigation in the form of 'substantial early childhood adversity.'. . .").

Finally, rather than argue that the trial court reversibly erred by failing to order a PSI from DOC, Appellant alleges that the PSI prepared by a DOC employee did not uncover enough mitigation. *See* IB-33 ("[T]he order directed [DOC] to address the potential existence of any statutory mitigators. . . . Despite the trial court's detailed order, the PSI filed in this case was not comprehensive. . . ."). Of note, however, Appellant acknowledges that a PSI "was filed but most sections simply noted 'unable to verify due to offender refusal to participate in PSI.'"). IB-4, quoting R-1293-1300.

Thus, Appellant raises three novel claims of ineffective assistance: (1) ineffective assistance of mitigation counsel; (2) ineffective assistance of trial court; and (3) ineffective assistance of DOC. Placing ultimate responsibility

for the performance of mitigation counsel and DOC on the trial court, Appellant argues that the trial court failed to perform its own duties and failed to ensure that mitigation counsel and DOC performed their respective duties to the level required by this Court. *See* IB-29 ("[A]lthough the formalities of a presentence investigation report and the appointment of special counsel were observed, the court did not ensure that all available mitigation was considered."); *see also* IB-32 ("Since the defense was prevented from presenting this mitigation, the court should have ensured it was brought forth, either through specific instructions to special counsel or through calling its own witnesses."). Hence, the crux of Appellant's argument appears to be a claim of ineffective assistance of trial court.

Of note, the lower court expressed a concern that this Court would fault for it failing to uncover a sufficient amount of mitigation. *See* R-1308:

> The Court's concern is the Court might leave one [of the statutory or non-statutory mitigating factors] out that should have been made. And then this entire matter might get reversed because the Florida Supreme Court may decide there may be somebody up there that has a different opinion of what potential non-statutory and statutory mitigating factors may have been present. And if that's the case, then it's going to get sent back down.

And, the trial court expressed concerns about its role in developing mitigation for Appellant. R-1309 ("And I also think that it could be possible frankly at some point that the Florida Supreme Court may decide that a judge simply

can't be — can't pick out the mitigators and then make a ruling on the mitigators. And so I've just got — I've got some legal concerns about that.").

Judicial Negligence?

Appellant fails to articulate whether his claim of ineffective assistance of trial court involves conclusions of law, discretionary decisions, or findings of fact. *See* Padovano, 2 Fla. Prac., Appellate Practice § 19:3 (2021 ed.) ("Although there are certain exceptions, *nearly all trial level decisions* can be classified within the following three general types: (1) conclusions of law; (2) discretionary decisions; and (3) findings of fact.") (emphasis added).

Without a clear answer to the above question, it remains unclear how much deference this Court should afford the judicial performance Appellant now challenges. *See* Padovano, 2 Fla. Prac., Appellate Practice § 19:3 (2021 ed.) ("As a practical matter, standards of review describe levels of deference for different kinds of decisions."); *see also id.* at § 19:5 ("Appellate judges have traditionally deferred to the discretion of trial judges on matters relating to the course and conduct of the trial, apparently in recognition of the fact that a trial judge is in a superior position to resolve matters relating to the manner in which a trial or hearing is conducted.").

Returning to the standard of review claimed by Appellant, the test for an abuse of discretion is reasonableness. *See* Padovano, 2 Fla. Prac.,

Appellate Practice § 19:3 (2021 ed.) ("This standard is essentially a test of reasonableness. If reasonable people could differ as to the action taken at the trial level, then the action is not unreasonable and there can be no finding of an abuse of discretion."); *see also id*. at § 19:5 ("[A]n alleged abuse of discretion is judged by the use of a general standard of reasonableness.").

Applying the standard of review asserted by Appellant to his claim of ineffective assistance of trial court, it appears that Appellant argues that the lower court unreasonably discharged its mitigation duties. If this is correct, then Appellant appears to argue that the lower tribunal committed something akin to judicial negligence,[3] to wit: (1) the court had a duty to uncover mitigation; (2) the court unreasonably breached that duty; (3) the breach of that duty caused Appellant to receive a death sentence; and (4) even though Appellant expressed a desire to receive the death penalty, he was damaged by the imposition of a death sentence. *See generally Barnett v. Dep't of Fin. Servs.*, 303 So. 3d 508, 513-14 (Fla. 2020).

Thus, Appellant asserts that the abuse of discretion standard of review applies to his judicial negligence claim alleging that the lower tribunal failed

[3] *See generally* Michael H. Cassel, *Coulda, Woulda, Shoulda: The Relationship Between Ineffective Assistance of Counsel, Due Diligence, and the "Could Have Been Raised Earlier" Bar in Postconviction Litigation*, 49 Colum. J.L. & Soc. Probs. 45, 58 (2015) ("In this 'criminal malpractice' litigation, federal courts sitting in diversity, and many state courts, have held that the *Strickland* standard for attorney performance is largely equivalent to state law negligence standards.").

to discharge its "independent duty to ensure that all available mitigation is brought forth and considered." IB-22; *cf. In re Doe*, 204 So. 3d 175, 176-77 (Fla. 1st DCA 2016).

Fundamental Error

Unacknowledged by Appellant, however, his claims were unpreserved below. Therefore, if any standard of review applies to the performance of the trial court, then it is the fundamental error standard. *See Craft v. State*, 312 So. 3d 45, 56 n.6 (Fla. 2020); *see also Woodbury v. State*, 320 So. 3d 631, 655 (Fla. 2021).

III. Law

Mitigation Waiver Not Necessary

If a competent defendant decides to forgo the presentation of mitigation, then no waiver colloquy is required by the United States Constitution. *See Schriro v. Landrigan*, 550 U.S. 465, 479 (2007) ("And as Landrigan's counsel conceded at oral argument before this Court, we have never required a specific colloquy to ensure that a defendant knowingly and intelligently refused to present mitigating evidence.").

In *Landrigan*, trial counsel wanted to present mitigation, but the defendant "would have none of it." *Landrigan*, 550 U.S. at 470. For example, the defendant persuaded his ex-wife and birth mother not to testify. *Id*. at

469. And when defense counsel "tried to proffer anything that could have been considered mitigating," the defendant "interrupted repeatedly." *Id*. at 476. During a waiver colloquy, the trial court asked the defendant "if he had instructed his lawyer not to present mitigating evidence"; the defendant "responded affirmatively." *Id*. And when the trial court asked the defendant "if there was any relevant mitigating evidence," the defendant answered "Not as far as I'm concerned." *Id*. Finally, the defendant appeared to invite the imposition of a death sentence. *See id*. at 470 ("I think if you want to give me the death penalty, just bring it right on. I'm ready for it.").

In reaching its decision regarding the denial of defendant's Federal habeas claim, the Court noted that a waiver colloquy is not required by the Eighth Amendment when a competent defendant decides to forgo the presentation of mitigation evidence during the penalty phase of a capital trial. *Compare Landrigan*, 550 U.S. at 479:

> We have never imposed an "informed and knowing" requirement upon a defendant's decision not to introduce evidence. . . .
>
> And as Landrigan's counsel conceded at oral argument before this Court, we have never required a specific colloquy to ensure that a defendant knowingly and intelligently refused to present mitigating evidence.

Florida Requires a Mitigation Waiver Anyway

In contrast with *Landrigan*, this Court's decisions view the strategic

choice by a competent defendant to forgo the presentation of mitigation evidence as the "waiver" of a substantive right. *See, e.g.*, *Koon v. Dugger*, 619 So. 2d 246, 249 (Fla. 1993) ("We have repeatedly recognized the right of a competent defendant to waive presentation of mitigating evidence.").

Consequently, this Court's decisions require a waiver colloquy when a competent defendant expressed a desire to forgo the presentation of mitigation. *See Koon*, 619 So. 2d at 250:

> When a defendant, against his counsel's advice, refuses to permit the presentation of mitigating evidence in the penalty phase, counsel must inform the court on the record of the defendant's decision. Counsel must indicate whether, based on his investigation, he reasonably believes there to be mitigating evidence that could be presented and what that evidence would be. The court should then require the defendant to confirm on the record that his counsel has discussed these matters with him, and despite counsel's recommendation, he wishes to waive presentation of penalty phase evidence.

See also Mora v. State, 814 So. 2d 322, 332-33 (Fla. 2002) ("[W]e established the *Koon* procedure so that the record would adequately reflect a defendant's knowing waiver of his or her right to present mitigating evidence.") (emphasis omitted); *State v. Lewis*, 838 So. 2d 1102, 1113 (Fla. 2002) ("Although a defendant may waive mitigation, he cannot do so blindly.").

In Florida, the mitigation waiver colloquy is known as a *Koon* inquiry or a *Koon* hearing. *See, e.g.*, *Sparre v. State*, 164 So. 3d 1183, 1190 (Fla.

2015) ("The trial court conducted a *Koon* inquiry with Sparre to confirm whether his waiver of putting on the mitigation evidence proffered by his defense team was knowing and voluntary.").

The Sixth Amendment Right to Autonomy

The Sixth Amendment right to autonomy is a personal right that every competent defendant enjoys. *See McCoy*, 138 S. Ct. at 1507, quoting *Faretta*, 422 U.S. at 834 ("As this Court explained, '[t]he right to defend is personal,' and a defendant's choice in exercising that right 'must be honored out of 'that respect for the individual which is the lifeblood of the law.''); *see generally Commonwealth v. Miranda*, 146 N.E.3d 435, 458 (Mass. 2020) ("In *McCoy*, the Court held that defense counsel improperly intruded on rights reserved personally to the defendant. . . .").

The dignity of the individual provides the basis for the right. *See McCoy*, 138 S. Ct. at 1508, quoting *McKaskle v. Wiggins*, 465 U.S. 168, 176-77 (1984) ("The right to appear *pro se* exists to affirm the dignity and autonomy of the accused."); *see also Indiana v. Edwards*, 554 U.S. 164, 186-87 (2008) (Scalia, J., dissenting) ("[T]he dignity at issue is the supreme human dignity of being master of one's fate rather than a ward of the State—the dignity of individual choice."); *Robertson v. State*, 143 So. 3d 907, 914-15 (Fla. 2014) (Canady, J., dissenting) ("Respect for the individual dignity of

the defendant requires respect for his decision of whether to pursue an appeal and for his right to a lawyer who will not work against him."); *Bowers v. Hardwick*, 478 U.S. 186, 217 (1986) (Stevens, J., dissenting), overruled by *Lawrence v. Texas*, 539 U.S. 558 (2003), quoting *Fitzgerald v. Porter Mem'l Hosp.*, 523 F.2d 716, 719-20 (7th Cir. 1975):

> The character of the Court's language in these cases brings to mind the origins of the American heritage of freedom—the abiding interest in individual liberty that makes certain state intrusions on the citizen's right to decide how he will live his own life intolerable. Guided by history, our tradition of respect for the dignity of individual choice in matters of conscience and the restraints implicit in the federal system, federal judges have accepted the responsibility for recognition and protection of these rights in appropriate cases.

The Supreme Court relied upon a nautical analogy to explain the nature of the right — describing it as the ability of a competent defendant to serve as the captain of the ship for certain, fundamental decisions. *See McCoy*, 138 S. Ct. at at 1509 ("Presented with express statements of the client's will to maintain innocence, however, counsel may not steer the ship the other way."); *see also Nixon v. Singletary*, 758 So. 2d 618, 625 (Fla. 2000), overruled on other grounds by *Florida v. Nixon*, 543 U.S. 175 (2004) ("[T]he Supreme Court has made it clear that the defendant, not the attorney, is the captain of the ship.").

Those fundamental decisions include whether to: (1) plead guilty; (2) waive a jury trial; (3) testify on one's own behalf; and (4) take an appeal. *See Jones v. Barnes*, 463 U.S. 745, 751 (1983), citing *Wainwright v. Sykes*, 433 U.S. 72, 93 n.1 (1977) (Burger, C.J., concurring); ABA Standards for Criminal Justice 4–5.2, 21–2.2 (2d ed. 1980); *see also McCoy*, 138 S. Ct. at 1508, citing *Jones v. Barnes*, 463 U.S. at 751 ("Some decisions, however, are reserved for the client—notably, whether to plead guilty, waive the right to a jury trial, testify in one's own behalf, and forgo an appeal.").

Arguably, *McCoy* articulated a fifth fundamental decision: the right to decide the objective of the defense. However, *McCoy* suggests that the right to decide the objective of the defense is already included within the four fundamental decisions announced in *Jones v. Barnes*. *See McCoy*, 138 S. Ct. at 1508 ("Autonomy to decide that the objective of the defense is to assert innocence belongs in this latter category [of decisions].").

Because the Sixth Amendment right to autonomy is personal, the consequences of a defendant's fundamental decisions are irrelevant — even in a capital case. *See McCoy*, 138 S. Ct. at 1508:

> Just as a defendant may steadfastly refuse to plead guilty in the face of overwhelming evidence against her, or reject the assistance of legal counsel despite the defendant's own inexperience and lack of professional qualifications, so may she insist on maintaining her innocence at the guilt phase of a capital trial.

Accordingly, how well or how poorly a fundamental decision impacted the trial does not matter so long as the defendant enjoyed the opportunity to make that decision. *See McCoy*, 138 S. Ct. at 1508 ("These are not strategic choices about how best to *achieve* a client's objectives; they are choices about what the client's objectives in fact *are*.") (emphases in original); *cf. Faretta*, 422 U.S. at 834, quoting *Illinois v. Allen*, 397 U.S. 337, 350-51 (1970) (Brennan, J., concurring) ("And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of 'that respect for the individual which is the lifeblood of the law.'").

Hence, if a usurpation of the right occurs, then the outcome of the trial remains irrelevant when examining for error. *See McCoy*, 138 S. Ct. at 1511:

> [T]he violation of McCoy's protected autonomy right was complete when the court allowed counsel to usurp control of an issue within McCoy's sole prerogative. . . . Violation of a defendant's Sixth Amendment-secured autonomy ranks as error of the kind our decisions have called "structural"; when present, such an error is not subject to harmless-error review.

Furthermore, the fact that the outcome of the trial may involve a death sentence does not implicate abstract Eighth Amendment concerns sufficient to outweigh a competent defendant's Sixth Amendment personal right to make decisions regarding his defense. *Cf. Robertson v. State*, 143 So. 3d 907, 914-15 (Fla. 2014) (Canady, J., dissenting):

> Indeed, the Supreme Court's death penalty jurisprudence rests on the recognition that "the Eighth Amendment *guarantees individuals* the right not to be subjected to excessive sanctions." *Roper v. Simmons*, 543 U.S. 551, 560 (2005) (emphasis added). It is not based on some abstract right of the state to ensure appropriate sentences but on the concrete right of individuals to be free of cruel and unusual punishments. In this case, it is Mr. Robertson's right that is at issue, and his decision concerning whether to pursue an appeal to vindicate that right—as well as his right to a lawyer who will support that decision—should not be annulled. Respect for the individual dignity of the defendant requires respect for his decision of whether to pursue an appeal and for his right to a lawyer who will not work against him.

Thus, Eighth Amendment "heightened reliability"[4] concerns do not trump a competent defendant's Sixth Amendment right to autonomy. *Cf. People v. Bloom*, 774 P.2d 698, 718 (Cal. 1989) ("[A] judgment of death may not be regarded as unreliable in a constitutional sense merely because a self-represented defendant chose not to present mitigating evidence at the penalty phase."); *cf. also State v. Riley*, 459 P.3d 66 (Ariz. 2020) ("[B]oth the Supreme Court and this Court have repeatedly held that the Eighth Amendment requires only that a jury be allowed to consider mitigating evidence; it does not require a jury to be presented with that evidence over a defendant's objections."); *State v. Hugueley*, No. W2004-00057-CCA-R3-CD, 2005 WL 645179, at *5 n.2 (Tenn. Crim. App. Mar. 17, 2005), *aff'd*, 185

[4] *See generally Sumner v. Shuman*, 483 U.S. 66, 72 (1987) ("the unique nature of the death penalty and the heightened reliability demanded by the Eighth Amendment in the determination whether the death penalty is appropriate in a particular case").

S.W.3d 356 (Tenn. 2006) ("[T]he decision of a competent capital defendant not to present mitigating evidence does not deprive the State of its interests in seeing that his sentence was imposed in a constitutionally acceptable manner.") (emphasis omitted); *People v. Coleman*, 660 N.E.2d 919, 937 (Ill. 1995) ("We are not persuaded by defendant's argument that the heightened need for reliability in capital cases justifies forcing the accused to accept representation by counsel.").

The Conformity Clause

Article I, § 17, of the Florida Constitution, known as the Eighth Amendment Conformity Clause, requires courts "to construe the state cruel and unusual punishment provision in conformity with decisions of the Supreme Court interpreting the Eighth Amendment." *Poole*, 297 So. 3d at 505. Similar to pre-emption, the Conformity Clause[5] requires that United States Supreme Court caselaw provides both the floor[6] and the ceiling for cruel and/or unusual punishment protections under state constitutional law.

[5] The Florida Constitution also contains a Conformity Clause for the Fourth Amendment. *See* art. I, § 12, Fla. Const. By adopting these provisions, the people of Florida rejected, at least with respect to the Fourth and Eighth Amendments, the view expressed by former Justice Brennan that a state constitution could provide greater protections than those afforded by the United States Constitution. *See generally* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 491 (1977).

[6] Incorporation through the Fourteenth Amendment previously provided the floor. *See Robinson v. California*, 370 U.S. 660, 667 (1962).

See generally Wyeth v. Levine, 555 U.S. 555, 575 (2009), quoting 71 Fed. Reg. 3922, 3934-35 (2006) ("In that preamble, the FDA declared that the FDCA establishes 'both a "floor" and a "ceiling,"' so that 'FDA approval of labeling . . . preempts conflicting or contrary State law.'"); *see, e.g.*, *Lawrence*, 308 So. 3d at 551 ("In light of the Supreme Court's decision in *Pulley*[*v. Harris*, 465 U.S. 37 (1984)], the conformity clause expressly forecloses this Court's imposition of a comparative proportionality review requirement that is predicated on the Eighth Amendment.").

With pre-emption, a superior sovereign restrains an inferior one; with a conformity clause, an inferior sovereign constrains itself. Under either framework, however, the inferior cannot provide greater protections than the superior. *See Bernie v. State*, 524 So. 2d 988, 990-91 (Fla. 1988) ("With this amendment, however, we are bound to follow the interpretations of the United States Supreme Court with relation to the fourth amendment, and provide *no greater protection* than those interpretations.") (emphasis added).

IV. Analysis

No "Waiver" of Mitigation

Instead of the waiver of a substantive right under the Eighth Amendment, forgoing the presentation of mitigation represents nothing more than the exercise of a personal right under the Sixth Amendment to

determine the objective of one's own defense. *See Landrigan*, 550 U.S. at 479 ("We have never imposed an 'informed and knowing' requirement upon a defendant's decision not to introduce evidence."); *see generally McCoy v. Louisiana*, 138 S. Ct. 1500, 1508 (2018).

In other words, the "right" to present mitigation is a permissive right, not a substantive one. *Cf. State v. Arguelles*, 63 P.3d 731, 753 n.19 (Utah 2003) ("When considering the role of mitigating evidence in capital cases, the Court has phrased the presentation of mitigating evidence as a permissive right.") (citations omitted); *cf. also Wallace v. State*, 893 P.2d 504, 510 n.4 (Okla. Crim. App. 1995) ("Of course, the Supreme Court has not required a defendant to present mitigating evidence. Rather, a survey of relevant cases reveals statements concerning the ability of a defendant to present such evidence are phrased permissively.").

Appellant Waived His Ability to Raise a Mitigation Claim on Appeal

Regardless of whether one was required, the trial court conducted a waiver colloquy in this case and found that Appellant knowingly, intelligently, and voluntarily waived his right to present mitigation during the penalty phase of his capital trial. R-4103. Nevertheless, Appellant raises an unpreserved claim on appeal that the lower court abused its discretion when it failed to "ensure" that all available mitigation was "brought forth and considered." IB-

22, 29. Specifically, Appellant argues that this Court's caselaw imposes a "duty" upon the trial court to develop mitigation in capital cases where the defendant waives its presentation. *See* IB-25. Asserting the record in his case does not include enough available mitigation, Appellant faults the lower tribunal for not performing its duty to the required level.

Given the mitigation wavier, it would defy logic to allow Appellant to complain that the trial court did not do enough to uncover the very type of evidence that Appellant clearly indicated he did not want introduced in the first place. *See, e.g.*, R-4093-97; *cf. Landrigan*, 550 U.S. at 475 ("If Landrigan issued such an instruction [to counsel not to offer any mitigating evidence, then] counsel's failure to investigate further could not have been prejudicial under *Strickland* [*v. Washington*, 466 U.S. 668 (1984).").

Essentially, Appellant criticizes the trial court for not doing enough to protect him from the consequences of his decision. *See generally Allen v. Sec'y, Fla. Dep't of Corr.*, 611 F.3d 740, 765 (11th Cir. 2010):

> Allen, a mentally competent, intelligent defendant, having been convicted of a brutal murder, faced life imprisonment or death. Insisting on doing things his way, he chose death and prevented his counsel from attempting to secure a life sentence through the development and presentation of mitigating circumstances evidence. That is not a choice that most people would have made, but it is one that he had the right to make, and he made it voluntarily and with full awareness of the consequences. *Cf. Sanchez-Velasco v. Sec'y, Dep't of Corr.*, 287 F.3d 1015, 1033 (11th Cir. 2002) ("As a death row inmate, Sanchez-Velasco does

> not have many choices left. One choice the law does give him is whether to fight the death sentence he is under or accede to it. Sanchez-Velasco, who is mentally competent to make that choice, has decided not to contest his death sentence any further. He has the right to make that choice."). What Allen does not have is the right to escape the consequences of his own decision not to present any mitigating circumstances evidence by shifting the blame for it to someone else.

In doing so, Appellant challenges on appeal the very outcome he pursued at trial: the imposition of a death sentence. *See, e.g.*, R-4071 ("Is there such a thing as a plea deal for the death penalty?"); *see also* R-3848 (interview with FDLE) ("You want the death penalty? Yes, sir. That's what I'd like."); *id*. ("I wished back in '94 they would've gave me the death penalty."); *cf. Earl v. State*, 314 So. 3d 1253, 1255 (Fla. 2021).

In the past, this Court entertained such claims — relying in part on proportionality review to justify the mandatory appeal. *See, e.g.*, *Ocha v. State*, 826 So. 2d 956, 964 (Fla. 2002) ("[O]n appeal, this Court must examine Ocha's death sentence to ensure the uniform application of law, evidentiary support, and proportionality. . . . Therefore, it is not inconsistent for Ocha to waive his right to present mitigating evidence at the trial level, yet have appellate counsel appointed against his wishes."); *see also Marquardt*, 156 So. 3d at 491 ("This procedure will continue to help ensure that every death sentence in this state is reliable, proportionate, and imposed in accordance with all constitutional and statutory directives. . . ."). However,

this Court no longer conducts proportionality review in death penalty cases. *See Lawrence*, 308 So. 3d at 552 (eliminating comparative proportionality review from the scope of this Court's appellate review).

Ultimately, Appellant waived the right to present mitigation during the penalty phase; therefore, Appellant waived any mitigation claim on appeal. R-4103; *see also Allen*, 2021 WL 2232499, at *6, quoting *Major League Baseball v. Morsani*, 790 So. 2d at 1077 n.12 ("[T]he voluntary and intentional relinquishment of a known right" is "necessary to establish a 'waiver.'"); *cf. also McKenzie*, 153 So. 3d at 883-84 (Defendant waived any deficiencies with the PSI when he failed to inform the trial court that information was missing from the report.).

A *Koon* Inquiry Interferes with a Defendant's Sixth Amendment Right to Autonomy

The Eighth Amendment does not require a mitigation waiver in capital cases. *See Landrigan*, 550 U.S. at 479. Conformity Clause concerns aside, it does not proscribe one either. *Cf. Villanueva v. Stephens*, 619 F. App'x 269, 274 (5th Cir. 2015) ("Assuming *arguendo* that such a requirement existed, the Court concluded that Landrigan's waiver would have been valid.") (emphasis in original).

However, the way in which Florida courts conduct mitigation waiver colloquies raises significant Constitutional concerns. By forcing counsel to

usurp control over a fundamental decision that belongs to a competent defendant, a *Koon* inquiry interferes with the Sixth Amendment right to autonomy. *Cf. McCoy*, 138 S. Ct. at 1505:

> We hold that a defendant has the right to insist that counsel refrain from admitting guilt, even when counsel's experienced-based view is that confessing guilt offers the defendant the best chance to avoid the death penalty. Guaranteeing a defendant the right "to have the *Assistance* of Counsel for *his* defence," the Sixth Amendment so demands. With individual liberty—and, in capital cases, life—at stake, it is the defendant's prerogative, not counsel's, to decide on the objective of his defense: to admit guilt in the hope of gaining mercy at the sentencing stage, or to maintain his innocence, leaving it to the State to prove his guilt beyond a reasonable doubt. (Emphasis in original.)

Koon forces trial counsel to interfere with a competent defendant's right to autonomy in two ways: first, by requiring counsel to investigate potential mitigation; and second, by requiring counsel to proffer that mitigation in court. *See Koon*, 619 So. 2d at 250 ("Counsel *must* indicate whether, based on his investigation, he reasonably believes there to be mitigating evidence that could be presented and what that evidence would be.") (emphasis added).

As to the first, *Koon* prevents a competent defendant from instructing counsel to forgo any mitigation investigation. *See Ferrell v. State*, 29 So. 3d 959, 990 (Fla. 2010) (Canady, J., concurring in part and dissenting in part) ("I acknowledge that *Koon* [], may be read as establishing that a defendant may not categorically preclude counsel's investigation of mitigation."). As a

result, if a competent defendant does not want certain people interviewed, then he might lack the ability to prevent counsel from doing so. *See, e.g.*, *Mora*, 814 So. 2d at 331-32:

> [Counsel] wanted to contact Mora's siblings in Spain to see if any mitigation could be developed through them. Mora specifically prohibited [counsel] from doing so because Mora was afraid that his siblings would not be able to handle learning of their brother's first-degree murder conviction because his siblings were quite elderly and weak.
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> . . . .
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> …The trial court instructed [counsel] to contact Mora's siblings in Spain.

But see id. at 333 ("We find that the trial court's application of our opinion in *Koon* was erroneous.").

As to the second, *Koon* requires trial counsel to proffer any mitigation uncovered during the investigation. *See Evans v. State*, 975 So. 2d 1035, 1050 (Fla. 2007) ("In accordance with the procedures in *Koon* [], defense counsel proffered additional mental health evidence, including the mental health reports from the appointed experts, depositions from codefendants, and letters to the court from family and friends."); *see also Robinson v. State*, 913 So. 2d 514, 517 (Fla. 2005) ("Relying on *Koon* [] the defense proffered mitigating evidence which it had received from a psychologist, Dr. Berland, and appellant's mother.").

As with the investigation, if a competent defendant does not want certain facts discussed in open court, then he might lack the ability to prevent counsel from doing so. *See, e.g.*, *Hojan v. State*, 3 So. 3d 1204, 1215 (Fla. 2009) ("Hojan repeatedly affirmed that he had reviewed the [mitigation] packet and did not want it presented in any form—not to the jury, not to the court *in camera*, and not to this Court in his appeal."); *but see id*. (finding "no error in the trial court's determination that the defendant knowingly, intelligently, and voluntarily waived his right to mitigation" when "significant information about the defense's preparation for presenting mitigation [to include the names of potential witnesses] exists in the record.").

Ultimately, *Koon* forces trial counsel to do the exact opposite of what a competent defendant might want, to wit: investigate mitigation and discuss that mitigation in open court — even if only to a judge. A competent defendant might consider it worthwhile to endure this indignity — believing that a proffer to the judge will prevent actual presentation to a jury. *See generally McCoy*, 138 S. Ct. at 1508, quoting *Wiggins*, 465 U.S. at 176-77 (*supra*); *see also Edwards*, 554 U.S. at 186-87 (*supra*); *Robertson*, 143 So. 3d at 915 (Canady, J., dissenting) (*supra*). It might be all for naught, however, as the trial court may appoint mitigation counsel to present evidence to the jury anyway. *See Marquardt v. State*, 156 So. 3d 464, 470

(Fla. 2015).

Thus, a competent defendant may endure one Sixth Amendment violation (*Koon* inquiry) in order to prevent another Sixth Amendment violation (trial counsel presenting mitigation over defendant's objection) only to have a Sixth Amendment violation occur anyway (court-appointed mitigation counsel presenting mitigation over defendant's objection).

Koon Inquiries and the Conformity Clause

Because the Supreme Court stated that a mitigation waiver is not required by the Eighth Amendment, *Koon* may run afoul of the Conformity Clause. *Cf*. *Lawrence v. State*, 308 So. 3d 544 (Fla. 2020) (State constitutional conformity clause, requiring that the state prohibition against cruel and unusual punishment be construed in conformity with the Eighth Amendment, which requires no comparative proportionality review of death sentences, precludes comparative proportionality review of death sentences under the state constitution.)

Appointment of Mitigation Counsel Interferes with a Defendant's Sixth Amendment Autonomy

If a competent defendant does not want to present mitigation, then no one should present such evidence on his "behalf." *See, e.g.*, *Gill v. State*, 14 So. 3d 946, 955 (Fla. 2009) ("[T]he court also considered mitigation presented by the State *on Gill's behalf*, as well as that appearing elsewhere

in the record of the case.") (emphasis added); *but see Martinez v. Court of Appeal of Cal., Fourth Appellate Dist.*, 528 U.S. 152, 165 (2000) (Scalia, J., concurring in judgment) ("Our system of laws generally presumes that the criminal defendant, after being fully informed, knows his own best interests and does not need them dictated by the State.").

Unfortunately, this Court's caselaw encourages trial courts to appoint mitigation counsel to do the very thing that a competent defendant does not want — i.e., the presentation of mitigation. *See Marquardt*, 156 So. 3d at 470. And, it authorizes court-appointed counsel to present mitigation over the objection of a competent defendant. *See, e.g.*, *Grim v. State*, 971 So. 2d 85, 90-91 (Fla. 2007) ("Grim did not present any mitigating evidence and objected to presentation by special counsel. Despite Grim's objection, special counsel presented available mitigating evidence.").

When trial courts in Florida do this, however, they interfere with a competent defendant's Sixth Amendment right to autonomy. *Cf. United States v. Hasan*, 80 M.J. 682, 703 (Army Crim. App. 2020), review dismissed, 81 M.J. 48 (C.A.A.F. 2021):

> As standby counsel did at trial, appellate defense counsel now rely on the example of three states to support their argument for independent presentation of mitigation evidence. Those states, North Carolina, New Jersey, and Florida, each have statutory capital sentencing schemes that either explicitly, or through judicial interpretation, require the admission of mitigation

> evidence in a capital trial, even over the accused's objection. Appellate defense counsel argue the military judge was obliged to follow the example of those states and direct the independent presentation of mitigation evidence over appellant's objection to ensure the constitutional validity of his death sentence. We disagree.
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> . . . .
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> The capital sentencing schemes in the three states relied upon by appellate defense counsel are merely suggestive to this court, and we do not find their logic compelling. In our view, forcing the independent presentation of mitigation evidence over a pro se accused's objection undermines the right to self-representation. . . .

Whose Trial Is It, Anyway?

In this case, Appellant clearly communicated to the trial court that he did not want counsel to present mitigation. R-1316-17. Nevertheless, the lower court appointed mitigation counsel to present such evidence anyway. The court stated that the appointment was for the public's benefit — not Appellant's. *See* R-1314 ("but really special counsel is really for the benefit of the public"). Skeptical, Appellant criticized the court for "hiring an outside individual to do mitigation for [the court's] curiosity." R-1388, 3874.

Whether for the public's or the court's benefit, the lower court's statement mirrors language from decisions declaring that automatic appeals in death penalty cases are for the benefit of the Court, not the defendant. *See, e.g.*, *Klokoc v. State*, 589 So. 2d 219, 221-22 (Fla. 1991) ("[C]ounsel

for the appellant is hereby advised that in order for the appellant to receive a meaningful appeal, *the Court must have the benefit* of an adversary proceeding with diligent appellate advocacy addressed to both the judgment and the sentence.") (emphasis added); *see also Robertson v. State*, 143 So. 3d 907, 909 (Fla. 2014) ("In *Klokoc . . .* we denied the defendant's request to dismiss the direct appeal, stating that *this Court required the benefit of an adversary proceeding* to provide a meaningful review of both the judgment and the sentence.") (emphasis added). These cases, however, interfere with a defendant's Sixth Amendment right to autonomy — a personal right that empowers the defendant to determine the objectives of the defense at trial. *See McCoy*, 138 S. Ct. at 1508.

If a competent defendant chooses to forgo the presentation of mitigation as part of his determination of the objective for the penalty phase of his trial, then the court cannot override that decision by appointing mitigation counsel to do the exact thing that the defendant commanded defense counsel not to do. In other words, the court cannot determine the objective of the defense for the defendant — only he can do that.

At first glance, it may appear that *McCoy* involves the ability of counsel, not the court, to override a decision by the defendant. *See McCoy*, 138 S. Ct. at 1509 ("If, after consultations with English concerning the management

of the defense, McCoy disagreed with English's proposal to concede McCoy committed three murders, it was not open to English to override McCoy's objection."). However, the Supreme Court faulted the trial court for allowing counsel to usurp control. *See McCoy*, 138 S. Ct. at 1511 ("[T]he violation of McCoy's protected autonomy right was complete when the court allowed counsel to usurp control of an issue within McCoy's sole prerogative.").

Furthermore, any distinction between counsel and the court remains irrelevant as *McCoy* cites to *Jones v. Barnes*, a decision in which the Supreme Court held that the defendant enjoys "the *ultimate authority* to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal." *Jones v. Barnes*, 463 U.S. at 751 (emphasis added).

Words matter, and the Court clearly chose the word "ultimate" to describe the final authority of a competent defendant to make key decisions at trial. *See* https://dictionary.cambridge.org/us/dictionary/english/ultimate. Thus, for the purposes of the Sixth Amendment right to autonomy, it matters not whether counsel or the trial court seeks to force a defendant to plead guilty, waive a jury, testify on his own behalf, take an appeal, or determine the objective of the defense. Whether forced by counsel or the court, the defendant's constitutional rights are interfered with either way.

To demonstrate this point: consider the possibility that a trial court would force a competent defendant to plead guilty, waive a jury trial, or testify on his own behalf. Such a prospect seems inconceivable. It seems equally inconceivable that an appellate court would direct a trial court to take such action simply for the appellate court's own benefit. And yet, that is exactly what happens when a trial court forces a capital defendant to take an appeal or when a trial court forces mitigation upon a defendant who does not want any. *See Boyd v. State*, 910 So. 2d 167, 190 (Fla. 2005) ("Boyd attempts to analogize the instant case to that of *Klokoc v. State*, 589 So. 2d 219 (Fla. 1991), *where this Court held that a defendant cannot prevent his counsel from challenging a sentence on appeal*.") (emphasis added).

If it would be unconstitutional for a court to order a defendant to plead guilty, waive a jury trial, or testify on one's own behalf, then it must be equally unconstitutional for a court to force a competent defendant to take an appeal or to appoint mitigation counsel against a competent defendant's wishes. *Cf. Singleton v. Lockhart*, 962 F.2d 1315, 1322 (8th Cir. 1992) ("If a defendant may be found competent to waive the right of appellate review of a death sentence, we see no reason why a defendant may not also be found competent to waive the right to present mitigating evidence that might forestall the imposition of such a sentence in the first instance.").

These decisions belong to the same constitutionally protected class of decisions that a defendant — and only a defendant — can make. *See Jones v. Barnes*, 463 U.S. at 751; *see also McCoy*, 138 S. Ct. at 1508-09. No one else can make them for him. *Cf. United States v. Davis*, 285 F.3d 378, 384 (5th Cir. 2002) ("*Faretta* teaches us that the right to self-representation is a personal right. It cannot be impinged upon merely because society, or a judge, may have a difference of opinion with the accused as to what type of evidence, if any, should be presented in a penalty trial.").

My Trial, My Defense?

Returning to this case, the objective of the defense during the penalty phase was clear: do not present any mitigation; and, do not object to the State's aggravation unless the evidence is false. *See* R-3914-15:

> I just wanted to add to the record just to reiterate what was said during the [plea]-colloquy, when you accepted his plea and the representation made to the Court then that he did not want us to conduct [any] mitigation investigation, did not want to present any mitigation evidence at these proceedings, or for us to object unless something was considered a lie. As far as I know, he doesn't think anybody has lied about anything today; so, I've made no objections on those grounds. But he did not want to contest it, so accordingly we see any further preparation for this proceeding have nothing — nothing to present today.

Despite this clear communication, Appellant claims on appeal that "[a] criminal defendant's autonomy is not absolute." IB-35, citing *Martinez*, 528 U.S. at 162-63. That may be true, but Appellant relies on a Supreme Court

decision involving the ability of a competent defendant to chart the course of an appeal — a legal proceeding during which the Sixth Amendment does not apply. *See Martinez*, 528 U.S. at 159-60:

> The *Faretta* majority's reliance on the structure of the Sixth Amendment is also not relevant. The Sixth Amendment identifies the basic rights that the accused shall enjoy in "all criminal prosecutions." They are presented strictly as rights that are available in preparation for trial and at the trial itself. The Sixth Amendment does not include any right to appeal.

Therefore, *Martinez* does not apply to a case involving a competent defendant's personal right to autonomy at trial.

Additionally, Appellant argues that the public's Eighth Amendment interests outweigh a competent defendant's personal right to autonomy under the Sixth Amendment. *See* IB-36, quoting *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982). In *Eddings*, however, the trial court refused to consider mitigation evidence offered by a juvenile defendant concerning his "violent background." *See Eddings*, 455 U.S. at 109. The Court found error, noting that the rejected mitigation could include evidence "of a difficult family history and of emotional disturbance." *Id*. at 115. Unacknowledged by Appellant, *Eddings* involved mitigation rejected by the trial court — not the defendant. Therefore, *Eddings* has no application to a mitigation waiver case.

Muhammad* and *Marquardt

Initially, this Court's caselaw honored the personal right to autonomy

under the Sixth Amendment as well as the permissive right to present mitigation under the Eighth Amendment. *See, e.g.*, *Hamblen v. State*, 527 So. 2d 800, 804 (Fla. 1988):

> Hamblen had a constitutional right to represent himself, and he was clearly competent to do so. To permit counsel to take a position contrary to his wishes through the vehicle of guardian ad litem would violate the dictates of *Faretta*. In the field of criminal law, there is no doubt that "death is different," but, in the final analysis, all competent defendants have a right to control their own destinies. . . .
>
> . . . .
>
> We hold that there was no error in not appointing counsel against Hamblen's wishes to seek out and to present mitigating evidence and to argue against the death sentence.

See also Lockhart v. State, 655 So. 2d 69, 74 (Fla. 1995).

Subsequently, however, the Court gradually adopted the dissenting view articulated by Justice Barkett in *Hamblen*. *Compare Hamblen*, 527 So. 2d at 806 (Barkett, J., dissenting):

> Despite the majority's focus on the application of *Faretta*, the issue in this case is not a defendant's right to represent himself. . . . The core issue, rather, is whether the state has an independent interest in presenting a case for mitigation in those rare instances when the defendant chooses not to present one for himself. Although the majority concedes that the state or society has the obligation not to administer the death penalty by default and to prevent executions from becoming a vehicle by which a prisoner can commit suicide, it fails to address the question of how the state is to meet that obligation in a case such as this.

With Muhammad, 782 So. 2d at 363:

> With having continued to struggle with how to ensure reliability, fairness, and uniformity in the imposition of the death penalty in these rare cases where the defendant waives mitigation, we have now concluded that the better policy will be to require the preparation of a PSI in every case where the defendant is not challenging the imposition of the death penalty and refuses to present mitigation evidence.

And compare with Marquardt, 156 So. 3d at 470:

> [R]ecognizing the tension that may exist when a trial court appoints standby counsel to present mitigation evidence in these circumstances, as was done in this case, we prospectively modify the *Muhammad* procedures to the limited extent that trial courts should utilize an independent, special counsel—rather than standby counsel—to represent the public interest in bringing forth all available mitigation for the benefit of the jury, the trial court, and this Court.

But see Wiggins, 465 U.S. at 184 ("Nor does the Constitution require judges to take over chores for a *pro se* defendant that would normally be attended to by trained counsel as a matter of course.").

Worth noting, however, *Marquardt*'s encouragement to appoint mitigation counsel appears to be based upon Eighth Amendment concerns that no United States Supreme Court decision has expressly identified. *Compare Sparre v. State*, 164 So. 3d 1183, 1205 (Fla. 2015) (Pariente, J., concurring in part and dissenting in part), quoting *Koon*, 619 So. 2d at 251 (Barkett, C.J., specially concurring) ("As then-Chief Justice Barkett opined over twenty years ago, the appointment of special counsel is critical in order

for this Court 'to ensure a reliable and proportionate sentence.'"), with *Allen v. State*, No. SC19-1313, 2021 WL 2232499, at *10 n.5 (Fla. June 3, 2021) ("allowing the trial court to force a mitigation presentation upon an unwilling, competent defendant in order to avoid a potential Eighth Amendment problem, *see generally Muhammad v. State*, 782 So. 2d 343, 363-64 (Fla. 2001), that no United States Supreme Court decision says exists. . . .").

Nonetheless, this Court held that the presentation of mitigation evidence over the objection of the defendant does not violate the Sixth Amendment right to self-representation. *See Barnes v. State*, 29 So. 3d 1010, 1022-23 (Fla. 2010):

> Barnes contends that the trial court violated his *Faretta* right to self-representation by appointing special court counsel to investigate and present mitigation over his objection. He argues that as both the client and the attorney, he had the absolute right to limit the court's consideration of mitigation only to the fact that he came forward to confess to an unsolved crime and took full responsibility for his actions. . . . We disagree. . . .

Worth noting, *Barnes v. State* did not address the right to self-representation under the Florida Constitution. *See generally Johnson v. State*, 305 So. 3d 9, 10 (Fla. 3d DCA 2019), citing *Jimenez v. State*, 196 So. 3d 499, 501 (Fla. 3d DCA 2016):

> The access to courts provision of the Florida Constitution — Article I, section 21 — provides an avenue for an incarcerated person in Florida to challenge the legal basis of his or her incarceration; however, the right to proceed pro se is not

> unfettered and may be forfeited if that person abuses the judicial process.

In its decision in *Barnes v. State*, the Court distinguished on two grounds the Fifth Circuit's decision in *Davis*, 285 F.3d at 381: (1) "the mitigation evidence presented by independent counsel in this case did not conflict with anything presented by Barnes . . ."; and (2) the mitigation evidence in *Barnes v. State* was presented to a judge, not a jury. *Barnes v. State*, 29 So. 3d at 1024. However, neither distinction enjoys any meaningful significance for Sixth Amendment purposes.

First, *Barnes v. State* fails to acknowledge that mitigation is the defense during the penalty phase of a capital trial. *See generally California v. Brown*, 479 U.S. 538, 561 (1987), holding modified by *Boyde v. California*, 494 U.S. 370 (1990) (Blackmun, J., dissenting) ("The defense's goal in the penalty phase of a capital trial is, of course, to receive a life sentence.").

As a defense to the death penalty, mitigation is inherently personal to a defendant. *See generally Zant v. Stephens*, 462 U.S. 862, 879 (1983) ("What is important at the selection stage is an *individualized* determination on the basis of the character of the individual and the circumstances of the crime.") (emphasis in original).

It often includes evidence of a traumatic childhood marred by physical, emotional, substance, and sexual abuse as well as possible mental health

concerns. Consequently, a competent defendant may want some, but not all, of this evidence presented in court. *See, e.g.*, *United States v. Roof*, No. 17-3, 2021 WL 3746805, at *17 (4th Cir. Aug. 25, 2021):

> Roof first argues that, although he preferred not to waive counsel, he went forward with that waiver for one reason alone—"to prevent the presentation of mental health mitigation evidence." He asserts that his decision to represent himself was not made knowingly; that it was instead made under misinformation from the district court because the court told him, if he employed counsel, then counsel would have "exclusive authority over presentation of penalty-phase evidence."

Because this type of evidence is so personal, the decision whether to present any part of it should be characterized as strategic, not tactical. *Cf. McCoy*, 138 S. Ct. at 1508; *but see Roof*, 2021 WL 3746805, at *19, quoting *United States v. Chapman*, 593 F.3d 365, 369 (4th Cir. 2010) ("The presentation of mental health mitigation evidence is, in our view, 'a classic tactical decision left to counsel . . . even when the client disagrees.'").

Therefore, a competent defendant should enjoy a personal right under the Sixth Amendment to choose for himself what that mitigation, if any, will be. *See McCoy*, 138 S. Ct. at 1508 ("These are not strategic choices about how best to *achieve* a client's objectives; they are choices about what the client's objectives in fact *are*.") (emphases in original); *but see Roof*, 2021 WL 3746805, at *18-19:

> Relying on *McCoy*, Roof claims that the district court misadvised

> him that he could not choose as a primary "objective" of his defense that he not be labeled as mentally ill or autistic. Defense counsel wished to present evidence that conflicted with Roof's aversion to any suggestion of a diminished mental capacity. Roof contends that counsel should have been forced to conform to his objective and that he should have been advised that he could constrain his counsel in that way.
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> . . . .
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> We do not subscribe to Roof's interpretation of *McCoy*.

Hence, if the defendant in *Barnes v. State* did not want some mitigation presented, then the fact that the evidence offered by mitigation counsel did not conflict with anything actually presented by the defendant misses the point. It was the existence of the mitigation, not its nature, that interfered with the right to autonomy. In other words, the extent of the conflict in no way reflects the severity of the violation. *Cf. McCoy*, 138 S. Ct. at 1511 (*supra*). A usurpation is a usurpation, however slight. *Cf. Dave v. Morgan's L. & T. R.R. & S.S. Co.*, 14 So. 911, 912 (La. 1894) ("In trespass arising from injury to the person, any force, however slight, in the commission of an unlawful act, may be sufficient to constitute the offense."). Or stated somewhat differently, a partial usurpation is still a usurpation. *Cf. People v. Zimmerman*, 189 N.W.2d 259, 266 (Mich. 1971) ("In that way we can maintain the integrity and constance of the right of trial by jury, and guard against even partial usurpation, by hired interpreters of fact, of the fact-

finding function of juries.").

Second, interference with the right to autonomy is no less problematic just because it occurs in front of a judge instead of a jury. When such a personal right is at stake, the focus should remain on the individual, not the audience. *Cf. McCoy*, 138 S. Ct. at 1507, quoting *Faretta*, 422 U.S. at 834 ("As this Court explained, '[t]he right to defend is personal,' and a defendant's choice in exercising that right 'must be honored out of "that respect for the individual which is the lifeblood of the law."'").

Nevertheless, *Barnes v. State* drew a distinction between judge and jury because the Fifth Circuit expressed a concern in *Davis* that the "presentation of mitigation by an independent counsel in front of a jury might 'give[ ] the independent counsel's presentation an aura of superiority over whatever is presented by the prosecution and the defense.'" *Barnes v. State*, 29 So. 3d at 1024 (Fla. 2010), quoting *Davis*, 285 F.3d at 381 n.1. While that might be true, the absence of that fact did not lessen the severity of the Constitutional violation in *Barnes v. State*. Whether the usurpation occurred in front of the jury or the judge, the defendant's Sixth Amendment right to autonomy was interfered with just the same. *Cf. McCoy*, 138 S. Ct. at 1511.

Thus, contrary to the holding in *Barnes v. State*, the appointment of mitigation counsel over the objection of a competent defendant interferes

with that defendant's right to autonomy under the United States and Florida Constitutions. *See Allen*, 2021 WL 2232499, at *10 n.5:

> As the State's brief suggests, allowing the trial court to force a mitigation presentation upon an unwilling, competent defendant in order to avoid a potential Eighth Amendment problem, *see generally Muhammad v. State*, 782 So. 2d 343, 363-64 (Fla. 2001), that no United States Supreme Court decision says exists also potentially implicates the conformity clause of the Florida Constitution, *see* art. I, § 17, and the right to self-representation under both the United States and Florida Constitutions.

Cf. State v. Hausner, 280 P.3d 604, 629 (Ariz. 2012) (en banc) ("Indeed, requiring the defense to present mitigating evidence over the defendant's opposition arguably would conflict with the defendant's Sixth Amendment right to self-representation.").

If that usurpation qualifies as structural error, then it cannot be cured, deemed harmless, or distinguished away. *Cf. McCoy*, 138 S. Ct. at 1511, quoting *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1908 (2017):

> An error may be ranked structural, we have explained, "if the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest," such as "the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty."

Anything that happens afterwards is a legal nullity. *Cf. Middleton v. State*, 41 So. 3d 357, 364 (Fla. 1st DCA 2010) ("Courts have addressed whether a trial is rendered a nullity due to 'structural defect' or 'structural error.'").

Muhammad and *Marquardt* Are Not Good Law

Binding caselaw from the Supreme Court states that a competent defendant has the final authority to make certain, fundamental decisions at trial. *See Jones v. Barnes*, 463 U.S. at 751; *see also McCoy*, 138 S. Ct. at 1508-09. To the extent *McCoy* added to *Jones v. Barnes* by including the objective of the defense as part of the list of fundamental decisions that only a competent defendant can make, other courts clearly identified the Sixth Amendment prohibition against forcing a mitigation presentation upon an unwilling, competent defendant. *See, e.g.*, *Davis*, 285 F.3d at 381:

> We find that the district court's decision to appoint an independent counsel violates Davis's Sixth Amendment right to self-representation. An individual's constitutional right to represent himself is one of great weight and considerable importance in our criminal justice system. This right certainly outweighs an individual judge's limited discretion to appoint amicus counsel *when that appointment will yield a presentation to the jury that directly contradicts the approach undertaken by the defendant*.

(Emphasis added.) *Cf. Arguelles*, 63 P.3d at 753:

> Although the United States Supreme Court has never decided whether a defendant may waive the presentation of mitigating evidence, its opinions suggest that such a right naturally extends from the Sixth Amendment. The Court has emphasized that the right to represent oneself is at the very core of the Sixth Amendment. *Faretta v. California*, 422 U.S. 806, 832 (1975). The right to counsel, the Court has said, is a personal right and may be waived by the defendant. *Id*. at 834. Further, the Court has determined that a capital defendant may waive the right to appeal, *Gilmore v. Utah*, 429 U.S. 1012, 1015 (1976), and that a

> self-representing defendant must be allowed to control the course of the proceedings. *McKaskle v. Wiggins*, 465 U.S. 168, 179-81 (1984). Given the importance of the right to represent oneself and direct the proceedings, we are loathe to take a stance that would run directly contrary to this right. We agree with the statement of the Fifth Circuit Court of Appeals:
>
> > An individual's constitutional right to represent himself is one of great weight and considerable importance in our criminal justice system. This right certainly outweighs an individual judge's limited discretion to appoint amicus counsel when that appointment will yield a presentation to the jury that directly contradicts the approach undertaken by the defendant. *Davis*, 285 F.3d at 381.
>
> As other courts have recognized, a rule requiring the court to appoint counsel to present evidence against defendant's wishes would not only undermine the defendant's Sixth Amendment rights, it would be largely unenforceable.

Indeed, it appears that Florida has been an outlier on this issue for decades. *See Arguelles*, 63 P.3d at 752-53 (citations omitted):

> Some courts have held that in capital cases the Eighth Amendment requires admission of all available mitigating evidence to ensure the reliability of the death verdict, regardless of whether the defendant approves of having such evidence presented. The vast majority of courts considering this issue, however, have reached the opposite conclusion, determining that a defendant's Sixth Amendment right to represent himself and control the course of the proceedings carries with it the right to choose how much—if any—mitigating evidence is offered.

Furthermore, *McCoy* should have come as no surprise, as it involved a fact pattern strikingly similar to Fifth Circuit's decision in *Davis*. The former (*McCoy*) involved a conflicting approach by trial counsel whereas the latter

(*Davis*) involved a conflicting approach by court-appointed mitigation counsel. *Compare McCoy*, 138 S. Ct. at 1508-09 (citations omitted):

> Counsel may reasonably assess a concession of guilt as best suited to avoiding the death penalty, as English did in this case. But the client may not share that objective. He may wish to avoid, above all else, the opprobrium that comes with admitting he killed family members. Or he may hold life in prison not worth living and prefer to risk death for any hope, however small, of exoneration. When a client expressly asserts that the objective of "his defence" is to maintain innocence of the charged criminal acts, his lawyer must abide by that objective and may not override it by conceding guilt.

With *Davis*, 285 F.3d at 384-85:

> Davis has indicated that he intends to employ an admittedly risky strategy during the penalty phase. Instead of presenting traditional mitigating evidence, he intends to attack the strength of the government's case as to his guilt. This is a specific tactical decision. Davis has made it quite clear that he does not want any traditional mitigating evidence to be presented on his behalf. Nevertheless, the district court has appointed the independent counsel specifically for the purpose of presenting a full penalty phase defense which will utilize traditional mitigating factors. As such, Davis's strategy is in direct conflict with the independent counsel's approach. Because Davis's right to self-representation encompasses the right to direct trial strategy, the district court's decision to impose an independent counsel into these proceedings is overturned.

No Stare Decisis Protections for *Muhammad* and *Marquardt*

Because the decisions conflict with binding Supreme Court caselaw, neither *Muhammad* nor *Marquardt* enjoy any continuing force as legal precedent. *See State v. Poole*, 297 So. 3d 487, 507 (Fla. 2020); *see*

generally People v. Albanese, 473 N.E.2d 1246, 1269 (Ill. 1984) (Simon, J., concurring in part and dissenting in part) ("In this classic confrontation between the doctrine of *stare decisis* and constitutional principles, however, the supremacy clause of the United States Constitution requires that constitutional principles prevail.").

Muhammad **and** ***Marquardt*** **Run Afoul of the Conformity Clause**

In addition to conflicting with Supreme Court caselaw interpreting the Sixth Amendment, *Muhammad* and *Marquardt* run afoul of the Eight Amendment Conformity Clause in the Florida Constitution.

Marquardt was based, at least in part, on a perceived need for trial courts to develop mitigation so that this Court could conduct proportionality review on direct appeal. *Compare Marquardt*, 156 So. 3d at 491:

> This procedure will continue to help ensure that every death sentence in this state is reliable, proportionate, and imposed in accordance with all constitutional and statutory directives, while avoiding any tension that may exist if standby counsel is used for the limited purpose of presenting mitigation.

With Yacob v. State, 136 So. 3d 539, 549-50 (Fla. 2014), *receded from by Lawrence*, 308 So. 3d 544 ("Therefore, in deciding whether death is a proportionate penalty, the Court makes a 'comprehensive analysis in order to determine whether the crime falls within the category of both the most aggravated and the least mitigated of murders, thereby assuring uniformity

in the application of the sentence.'") (citations omitted).

Indeed, *Marquardt* looked to language in *Muhammad* about the need for "reliability, fairness, and uniformity in the imposition of the death penalty" for support. *Marquardt*, 156 So. 3d at 491, quoting *Muhammad*, 782 So. 2d at 363 ("In all other respects, we adhere to the procedures set forth in *Muhammad*, which have served this state well for over a decade in ensuring 'reliability, fairness, and uniformity in the imposition of the death penalty in these rare cases where the defendant waives mitigation.'").

This Court used the same language from *Muhammad* to justify the imposition of counsel on capital defendants engaged in post-conviction litigation. *See Lambrix v. State*, 124 So. 3d 890, 899 (Fla. 2013), citing *Muhammad*, 782 So. 2d at 364 ("[A]fter the conviction is affirmed on direct appeal, a defendant's right to self-determination must be balanced with this Court's obligations to ensure reliability, fairness, and uniformity in the imposition of the death penalty.").

And, this Court used similar language to justify holding that "it is not inconsistent for [a defendant] to waive his right to present mitigating evidence at the trial level, yet have appellate counsel appointed against his wishes." *Ocha*, 826 So. 2d at 964; *see also id*. ("[O]n appeal, this Court must examine Ocha's death sentence to ensure the uniform application of law, evidentiary

support, and *proportionality*.") (emphasis added).

All of these cases, however, run afoul of the Eighth Amendment Conformity Clause because they provide greater cruel and unusual punishment "protections" than that required by pertinent United States Supreme Court caselaw. *See Allen*, 2021 WL 2232499, at *10 n.5.

No Fundamental Error in This Case

Appellant faults the trial court for failing to uncover sufficient evidence explaining: (1) Appellant's substance abuse in prison; and, (2) the psychological impact of the Adverse Childhood Experiences (ACEs) that Appellant endured. *See* IB-30-32. In his Initial Brief, Appellant devotes more attention to the latter (ACE claim) than the former (substance abuse in prison). In its Answer Brief, the State does the same.

To support the ACE claim, Appellant lists several facts in his Initial Brief that document his traumatic childhood. IB-30-31:

> Mr. Fletcher experienced childhood physical and sexual abuse; saw his younger sister being physically and sexually abused; experienced physical neglect; was abandoned by his father; lived with a series of abusive "stepfathers"; grew up with a chronically alcoholic mother; was encouraged to use alcohol and drugs at an early age and became addicted to them; and left the household when he was still a teen.

On pages 1-7 of its Answer Brief, the State outlines Appellant's traumatic childhood in relation to the ACEs. Quite possibly, Appellant scored

a 10 out of 10 — a rare number for any person. *See Ellerbee v. State*, 232 So. 3d 909, 929 (Fla. 2017); *see also Bright*, 200 So. 3d at 726-27; *Jackson v. State*, 213 So. 3d 754, 768 (Fla. 2017).

As the number of ACE factors increases, experts predict an increased risk of psychological trauma and developmental challenges that last well into adulthood. *See Bright v. State*, 299 So. 3d 985, 995 (Fla. 2020); *see also Ellerbee*, 232 So. 3d at 929; *Tisdale*, 257 So. 3d at 363 (Pariente, J., concurring); *Jackson*, 213 So. 3d at 768; *Davidson v. State*, No. SC19-1851, 2021 WL 2834613, at *3 (Fla. July 8, 2021).

While mitigation counsel in this case did not call an expert to explain the correlation between ACEs and psychological development, counsel nonetheless presented ample evidence of Appellant's traumatic childhood. As part of that presentation, mitigation counsel introduced the penalty phase testimony from Appellant's 1994 capital trial. That evidence included testimony from Dr. Ross Seligson, "an expert in the field of clinical and forensic psychology." R-1247. After listing numerous examples of Appellant's traumatic experiences, Dr. Seligson testified that Appellant's childhood was "[e]xtremely chaotic" and "highly dysfunctional." R-1261.

While Dr. Seligson's testimony largely focused on the impacts of cocaine use on the night Appellant murdered Mr. Grossman, Dr. Seligson

nevertheless highlighted Appellant's childhood use of alcohol and drugs as well as Appellant's exposure to physical, emotional, and sexual abuse in order to place that murder in context. *See* R-1250-51, 1254-55, 1257-61, 1263. Identifying Mr. Grossman as a sexual partner who provided Appellant with large quantities of cocaine, Dr. Seligson described the relationship between Appellant and Grossman as follows: "I think it's interesting to note that [Mr. Grossman] was a father figure but he was also an abuser. [Appellant] was being abused a lot. [Appellant] was always used to being abused by older people simply." R-1264, 1254, 1261; *see also* R-1250, 2545-46, 3051 ("Mr. Grossman had supplied over the years large amounts of cocaine and marijuana and other substances to [Appellant]. They had a very close relationship. They had been sexually intimate and the victim had given [Appellant] the keys of several of his homes and cars.").

And the trial court took note. In the sentencing order, six out of the ten mitigating circumstances found by the trial court clearly reflect Appellant's childhood traumas. R-3976-80. Thus, even though an expert did not testify specifically about the correlation between ACEs and developmental challenges, the trial court was well aware of Appellant's childhood traumas — to include the impact of those childhood traumas (e.g., physical, emotional, sexual, and substance abuse) on Appellant's decision-making as

an adult (e.g., murder of Mr. Grossman).

Furthermore, Appellant's trial counsel conceded the appointment of a mental health expert would not be necessary because Appellant would not cooperate with one. R-1314 ("There's no need for [appointed special counsel] to seek to have experts appointed, because the defendant simply will not cooperate."). And, Appellant concedes in his Initial Brief that a PSI "was filed but most sections simply noted 'unable to verify due to offender refusal to participate in PSI.'"). IB-4, quoting R-1293-1300. Hence, it remains unclear what additional mitigation, aside from an academic discussion of ACEs, could have been developed in this case.

Finally, the evidence of aggravation was overwhelming. Appellant was serving a life sentence for a previous first-degree murder conviction when he committed this murder — one that was cold, calculated, and premediated as well as heinous, atrocious, and cruel. R-3972-76. In Appellant's own words, he murdered his cellmate so that Appellant could "retire" to death row. R-1388-90, 3875-77.

Ultimately, Appellant cannot establish that the failure by the trial court to uncover additional mitigation undermined confidence in the sentence to the extent that a death sentence "could not have been obtained without the assistance of the alleged error." *Colley v. State*, 310 So. 3d 2, 17 (Fla. 2020).

ISSUE II: DID THE CIRCUIT COURT COMMIT FUNDAMENTAL ERROR WHEN IT FAILED TO WEIGH THE AGGRAVATING FACTORS AND MITIGATING CIRCUMSTANCES BEYOND A REASONABLE DOUBT? (Restated)

I. Summary

Appellant waived a penalty-phase jury; on appeal, he claims that the trial court committed fundamental error by imposing the death penalty without making all the "finding[s]" necessary to establish the maximum authorized sentence. *See* IB-38. Specifically, Appellant argues that the trial court "found the existence of aggravating factors beyond a reasonable doubt, but did not make the findings that the aggravating factors were sufficient and that they outweighed the mitigating factors using the standard of proof beyond a reasonable doubt." IB-49.

Appellant has a prior violent felony conviction for the murder of Mr. Grossman. By including a jury finding of guilt beyond a reasonable doubt, the verdict in that case provided the minimum fact-finding necessary for death sentence eligibility in this case. *See McKinney v. Arizona*, 140 S. Ct. 702, 707 (2020); *see also Jones v. United States*, 526 U.S. 227, 249 (1999). Thus, Appellant was Constitutionally eligible to receive a death sentence immediately upon the trial court's acceptance of his guilty plea. *See Duest v. State*, 855 So. 2d 33, 51-52 (Fla. 2003) (Pariente, J., specially concurring). Therefore, no Sixth Amendment error occurred. *See Hilton v. State*, Case

No. SC19-373, 2021 WL 3779154, at *6 (Fla. Aug. 26, 2021).

Furthermore, this Court has repeatedly rejected claims that the sufficiency and weighing of aggravating factors and mitigating circumstances are factual findings subject to the beyond a reasonable doubt standard. *See, e.g.*, *Craven v. State*, 310 So. 3d 891, 902 (Fla. 2020). To the extent any sentencing error did occur, it was not fundamental given the overwhelming aggravation in this case. *Cf. Brown v. State*, 304 So. 3d 243, 277 (Fla. 2020).

II. Standard of Review

Fundamental error. *See Craft*, 312 So. 3d at 56 n.6.

III. Law

Eligibility Phase

A capital defendant in Florida becomes eligible to receive the death penalty once the jury unanimously finds at least one aggravating factor beyond a reasonable doubt. *See* § 921.141(2)(b)2., Fla. Stat. ("If the jury . . . [u]nanimously finds at least one aggravating factor, [then] the defendant is eligible for a sentence of death. . . ."); *see also Poole*, 297 So. 3d at 502-03 ("Under longstanding Florida law, there is only one eligibility finding required: the existence of one or more statutory aggravating circumstances."); *McKinney*, 140 S. Ct. at 707 ("Under *Ring* [*v. Arizona*, 536 U.S. 584 (2002),] and *Hurst*[*v. Florida*, 577 U.S. 92 (2016)], a jury must find the aggravating

circumstance that makes the defendant death eligible.").

By finding the existence of an aggravating factor beyond a reasonable doubt, the jury necessarily determines that aggravating factor is "sufficient" to warrant a death sentence. *See* § 921.141(2)(b)2.a., Fla. Stat. ("Whether sufficient aggravating factors exist."); *see also Poole*, 297 So. 3d at 502 ("[O]ur Court was wrong in *Hurst v. State*[, 202 So. 3d 40 (Fla. 2016),] when it held that the existence of an aggravator and the sufficiency of an aggravator are two separate findings, each of which the jury must find unanimously."). Thus, for the purposes of the § 921.141(2)(b)2.a., "sufficient" means "one or more." *Poole*, 297 So. 3d at 502, quoting *Miller v. State*, 42 So. 3d 204, 219 (Fla. 2010) ("sufficient aggravating circumstances" means "one or more such circumstances") (emphasis omitted).

Selection Phase

The finding of at least one aggravating factor concludes the jury's role in the sentence eligibility phase — but not its role in the overall sentencing process; if the jury unanimously finds at least one aggravating factor beyond a reasonable doubt, then the jury proceeds to the sentence selection phase where it must weigh the aggravating factors and mitigating circumstances and make a sentence recommendation. *See Poole*, 297 So. 3d at 502 (identifying the weighing of aggravating factors and mitigating circumstances

as the "selection finding"); *see generally Tuilaepa v. California*, 512 U.S. 967, 971 (1994) ("Our capital punishment cases under the Eighth Amendment address two different aspects of the capital decision-making process: the eligibility decision and the selection decision.").

In performing its role during the selection phase, the jury must weigh two considerations: (1) "[w]hether aggravating factors exist which outweigh the mitigating circumstances found to exist"; and, (2) "whether the defendant should be sentenced to life imprisonment without the possibility of parole or to death." § 921.141(2)(b)2.b.-c., Fla. Stat.; *see generally Tuilaepa*, 512 U.S. at 972, quoting *Zant v. Stephens*, 462 U.S. at 879,

> We have imposed a separate requirement for the selection decision, where the sentencer determines whether a defendant eligible for the death penalty should in fact receive that sentence. "What is important at the selection stage is an *individualized* determination on the basis of the character of the individual and the circumstances of the crime."

(Emphasis in original.)

After weighing those considerations, the jury must recommend to the trial court either "a sentence of death" or "a sentence of life imprisonment without the possibility of parole." § 921.141(2)(c), Fla. Stat. If the jury recommends death, then the trial court may impose either a death sentence or a sentence of life imprisonment without the possibility of parole. § 921.141(3)(a)2., Fla. Stat. If, however, the jury recommends a sentence of

life without the possibility of parole, then the trial court can only impose a life sentence. § 921.141(3)(a)1., Fla. Stat.

IV. Analysis

Appellant's Claim

Appellant essentially argues that the Florida Legislature unknowingly created additional "elements" for death sentence eligibility beyond that required by the Eighth Amendment. *See* IB-39-40 ("[A]ny determination increasing the penalty for a crime must be found beyond a reasonable doubt by the factfinder, whether it is called an element or something else."); *see generally Tuilaepa*, 512 U.S. at 971-72 ("To render a defendant eligible for the death penalty . . . the trier of fact must convict the defendant of murder and find one 'aggravating circumstance' (or its equivalent). . . .").

Even though the Florida Legislature expressly stated that the finding of one aggravating factor is all that is required for death sentence eligibility, *see* § 921.141(2)(b)2., Fla. Stat., Appellant nevertheless claims that a defendant convicted of first-degree murder in Florida is ineligible to receive a death sentence unless the jury: (1) unanimously finds beyond a reasonable doubt the existence of at least one aggravating factor; (2) unanimously finds beyond a reasonable doubt that any established aggravating factors are sufficient to justify the death penalty; (3) unanimously finds beyond a

reasonable doubt that the aggravating factors outweigh the mitigating circumstances; and (4) unanimously recommends death. *See* IB-47:

> 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 by weighing additional factors, and those factors include two additional findings: whether sufficient aggravating factors exist, and whether aggravating factors outweigh the mitigating circumstances.

See also Hurst v. State, 202 So. 3d at 57:

> [B]efore 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.

Receded from Poole, 297 So. 3d at 491 ("As for the sentencing issue, we agree with the State that we must recede from *Hurst v. State* except to the extent that it held that a jury must unanimously find the existence of a statutory aggravating circumstance beyond a reasonable doubt.").

By arguing that a jury's role in determining sentence eligibility extends beyond objective fact-finding and continues into the subjective consideration of aggravating factors and mitigating circumstances, Appellant claims that the jury's consideration of those factors takes place during the eligibility

phase, not the selection phase of Florida's capital sentencing process. Under Appellant's view, the jury objectively considers a set of aggravating factors and mitigating circumstances during the eligibility phase, but the trial court subjectively considers those same factors and considerations (and potentially even more mitigation) during the selection phase. Thus, Appellant claims that only the jury's weighing of aggravating factors and mitigating circumstances is subject to the beyond a reasonable doubt standard; in contrast, the trial court's weighing of those same aggravating factors and mitigating circumstances is not.

According to Appellant, the judge is the sole sentencer in Florida; hence, the jury's recommendation is not part of the selection phase. Under this view, the weighing of aggravating factors and mitigating circumstances occurs prior to the establishment of the maximum sentence — i.e., prior to the jury's sentencing recommendation; therefore, weighing "must" be an eligibility determination subject to the beyond a reasonable doubt standard. *See* IB-23 ("These findings increase the penalty available for the charged crime and, therefore, must be proven beyond a reasonable doubt."); *see also* IB-44 ("[R]equired findings that expose the defendant to a greater punishment than that authorized by the conviction on the underlying offense must be proved beyond a reasonable doubt.").

Thus, Appellant argues that the jury's § 921.141(2) recommendation determines the maximum authorized sentence under Florida law for a first-degree murder conviction. *See* IB-47:

> What this means is that a capital defendant in Florida is not "exposed to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone," *see Apprendi*[*v. New Jersey*], 530 U.S. [466,] 483 [(2000)], merely because the finder of fact 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 the additional findings, the jury cannot make its recommendation, and the court has no discretion to impose the death penalty.

Appellant does not argue that the constitution necessarily requires that a jury weigh aggravating factors and mitigating circumstances during the eligibility phase of the capital sentencing process or that the constitution requires that a jury find such weighing beyond a reasonable doubt. Rather, Appellant argues that the Florida Legislature placed the jury's weighing of aggravating factors and mitigating circumstances in the eligibility phase instead of the selection phase, thereby transforming the consideration of those factors into elements of the offense that must be found unanimously beyond a reasonable doubt. *See, e.g.*, IB-38:

> Any determination increasing the penalty for a crime must be found beyond a reasonable doubt by the finder of fact. . . . Under current Florida law, this includes the determination that the aggravating factors were sufficient to justify death. The trial court's failure to make this required finding beyond a reasonable

doubt before considering a death sentence reduced the burden of proof on the State and thus denied Mr. Fletcher due process of law, creating fundamental error.

The following table illustrates where this Court interprets the Legislature's placement of the various § 921.141(2) considerations as well as where Appellant seeks to place them:

Statutory Section	Consideration	Where this Court places the consideration	Where Appellant seeks to place the consideration
921.141(2)(b)2.	"at least one aggravating factor"	Eligibility phase	Eligibility phase
921.141(2)(b)2.a.	"whether sufficient aggravating factors exist"	Eligibility phase	Eligibility phase
921.141(2)(b)2.b.	"whether aggravating factors exist which outweigh the mitigating circumstances found to exist"	Selection phase	Eligibility phase
921.141(2)(b)2.c.	"whether the defendant should be sentenced to life imprisonment without the possibility of parole or to death"	Selection phase	Eligibility phase

No *Hurst* Error Could Occur in This Case

Nearly three decades ago, a jury found Appellant guilty of the first-degree murder of Mr. Grossman. *See Fletcher v. State*, 53 So. 3d 1249, 1250 (Fla. 4th DCA 2011) ("Following a jury trial in January 1995, Defendant was found guilty as charged of first degree murder and armed robbery, alleged to have occurred on July 3, 1994."). As a result of that prior violent felony conviction, Appellant was Constitutionally eligible to receive a death sentence immediately upon the trial court's acceptance of his guilty plea in this case. *See Duest*, 855 So. 2d at 51-52 (Pariente, J., specially concurring) ("Therefore, I conclude that the 'bare fact' of Duest's robbery conviction, relied upon to support the prior conviction aggravator, made him eligible for the death penalty under *Apprendi* and *Ring*.").

As to the prior violent felony aggravating factor, the previous jury served as a fact-finding substitute in this case. Hence, any Sixth Amendment requirement in the present case was satisfied by the verdict in the prior case. *See generally Jones*, 526 U.S. at 249 ("[U]nlike virtually any other consideration used to enlarge the possible penalty for an offense, and certainly unlike the factor before us in this case, a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees.").

Because it involves a unanimous jury finding of guilt beyond a reasonable doubt, that conviction established the existence of at least one statutory aggravating factor — thereby making Appellant eligible for a death sentence immediately upon his first-degree murder conviction in this case. *See Duest*, 855 So. 2d at 51 (Pariente, J., specially concurring) ("I continue to believe that the strict holding of *Ring* is satisfied where the trial judge has found an aggravating circumstance that rests solely on the fact of a prior conviction, rendering the defendant eligible for the death penalty.").

Therefore, no *Hurst* error could occur in this case. *See Hilton v. State*, Case No. SC19-373, 2021 WL 3779154, at *6 (Fla. Aug. 26, 2021):

> Hilton had both prior (Georgia murder) and contemporaneous (kidnapping) felony convictions. *Hilton* [*v. State*, 117 So. 3d 742, 749 (Fla. 2013)]. Pursuant to *Poole*, there is no *Hurst* error in Hilton's case because a unanimous jury finding establishes the existence of at least one statutory aggravating circumstance beyond a reasonable doubt.

Rejection of Appellant's *Hurst* Claim

To the extent it seeks to address Appellant's *Hurst* claim, this Court stated unequivocally that the eligibility phase ends once the jury finds at least one aggravating factor beyond a reasonable doubt. *See also Poole*, 297 So. 3d at 501 (contrasting the "eligibility decision" with the "selection decision" and concluding that "*Hurst v. Florida* is about eligibility, not selection").

Hence, the finding of an aggravating factor — not the jury's

recommendation — establishes the maximum authorized sentence of death in a capital case. *See Poole*, 297 So. 3d at 503 ("The selection finding does not 'expose' the defendant to the death penalty by increasing the legally authorized range of punishment. As we have explained, under longstanding Florida law, it is the finding of an aggravating circumstance that exposes the defendant to a death sentence.").

Weighing is not Fact-Finding

As part of the selection phase, the weighing of aggravating factors and mitigating circumstances does not involve the type of objective fact-finding that triggers Sixth Amendment protections. *See Poole*, 297 So. 3d at 504 (interpreting a previous version of the statute and concluding that "because the . . . selection finding is not a 'fact' that exposes the defendant to a greater punishment than that authorized by the jury's guilty verdict, it is not an element."). In short, weighing is not fact-finding. *See Nunnery v. State*, 263 P.3d 235, 251 (Nev. 2011) ("Weighing is not fact-finding.").

Even if Appellant is correct that, under Florida's current statute, the maximum authorized sentence is not established until the jury recommends death, the only facts that support an increase in punishment are the aggravating factors. *See Apprendi*, 530 U.S. at 490 ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the

prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."); *see also Ring*, 536 U.S. at 589 ("Capital defendants, no less than noncapital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment."); *Alleyne v. United States*, 570 U.S. 99, 103 (2013) ("[A]ny fact that increases the mandatory minimum is an 'element' that must be submitted to the jury."). Therefore, the only facts that must be found beyond a reasonable doubt are those aggravating factors.

For Constitutional purposes, anything beyond the finding of at least one aggravating factor involves the exercise of discretion. *See Poole*, 297 So. 3d at 504; *see also Apprendi*, 530 U.S. at 481 ("We should be clear that nothing in this history suggests that it is impermissible for judges to exercise discretion—taking into consideration various factors relating both to offense and offender—in imposing a judgment *within the range* prescribed by statute.") (emphasis in original); *Alleyne*, 570 U.S. at 116 ("Our ruling today does not mean that any fact that influences judicial discretion must be found by a jury. We have long recognized that broad sentencing discretion, informed by judicial factfinding, does not violate the Sixth Amendment.").

No Conflict with Supreme Court Caselaw

Poole does not conflict with *Alleyne*, *Apprendi*, *Hurst v. Florida*, or *Ring*. Those decisions deal with objective facts that increase the maximum authorized sentence — not subjective considerations that involve questions of mercy. *See Apprendi*, 530 U.S. 466 at 490; *see also Ring*, 536 U.S. at 589; *Alleyne*, 570 U.S. at 103. Hence, those cases apply to the eligibility phase, not the selection phase. *See Poole*, 297 So. 3d at 501 ("*Hurst v. Florida* is about eligibility, not selection."); *accord Turner v. Quarterman*, 481 F.3d 292, 299-300 (5th Cir. 2007) ("The terms about which Turner complains are not invoked until after the defendant has been judged death-eligible and the jury is being instructed how to decide whether selection of the death penalty is appropriate. *Ring* is inapposite to any discussion of the constitutional requirements of the selection phase."); *Oken v. State*, 835 A.2d 1105, 1152 (Md. App. 2003) ("*Ring*, by its terms, only addresses the finding of aggravating factors during the eligibility phase of the sentencing process, as dictated by the Supreme Court's post-*Furman* [*v. Georgia*, 408 U.S. 238 (1972),] jurisprudence. *Ring* does not pertain to the selection phase of the sentencing process.").

To the extent Appellant argues *Hurst v. Florida* categorizes the weighing of aggravating factors and mitigating circumstances as eligibility

phase determinations, *see Hurst*, 577 U.S. at 99-100, both *Kansas v. Carr*, 577 U.S. 108 (2016), and *McKinney* eliminated any possible confusion: a capital defendant becomes eligible to receive a death sentence once the trier of fact makes an objective, factual determination that at least one aggravating factor exists beyond a reasonable doubt. *See Carr*, 577 U.S. at 119 (identifying the aggravating-factor determination as the so-called "eligibility phase," which involves a purely factual determination); *see also McKinney*, 140 S. Ct. at 707 ("[A] jury must find the aggravating circumstance that makes the defendant death eligible.").

McKinney clearly confirms that the finding of at least one aggravating factor beyond a reasonable doubt is all that is required for a defendant convicted of murder to be eligible for a sentence of death. *See, e.g.*, *McKinney*, 140 S. Ct. at 707 ("Under *Ring* and *Hurst*, a jury must find the aggravating circumstance that makes the defendant death eligible."). Therefore, *McKinney* clearly supports both § 921.141(2)(b)2. and *Poole*. *Compare McKinney*, 140 S. Ct. at 705 ("Under this Court's precedents, a defendant convicted of murder is eligible for a death sentence if at least one aggravating circumstance is found."), *with* § 921.141(2)(b)2. ("If the jury . . . [u]nanimously finds at least one aggravating factor, [then] the defendant is eligible for a sentence of death. . . ."), *and with Poole*, 297 So. 3d at 502-03

("Under longstanding Florida law, there is only one eligibility finding required: the existence of one or more statutory aggravating circumstances.").

And, *Carr* supports this Court's conclusion that the weighing of aggravating factors and mitigating circumstances is a subjective determinations that does not lend itself to an objective standard. *Compare Poole*, 297 So. 3d at 503 ("[A selection phase determination "does not lend itself to being objectively verifiable."), *with Carr*, 577 U.S. at 119:

> Approaching the question in the abstract, and without reference to our capital-sentencing case law, we doubt whether it is even possible to apply a standard of proof to the mitigating-factor determination (the so-called "selection phase" of a capital-sentencing proceeding). It is possible to do so for the aggravating-factor determination (the so-called "eligibility phase"), because that is a purely factual determination. The facts justifying death set forth in the Kansas statute either did or did not exist—and one can require the finding that they did exist to be made beyond a reasonable doubt. Whether mitigation exists, however, is largely a judgment call (or perhaps a value call); what one juror might consider mitigating another might not. And of course the ultimate question whether mitigating circumstances outweigh aggravating circumstances is mostly a question of mercy—the quality of which, as we know, is not strained. It would mean nothing, we think, to tell the jury that the defendants must deserve mercy beyond a reasonable doubt; or must more-likely-than-not deserve it. It *would* be possible, of course, to instruct the jury that *the facts establishing* mitigating circumstances need only be proved by a preponderance, leaving the judgment whether those facts are indeed mitigating, and whether they outweigh the aggravators, to the jury's discretion without a standard of proof. If 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. In the last analysis, jurors will accord mercy if they deem it appropriate, and withhold mercy if they do not, which is what our case law is designed to achieve.

(Emphases in original.) *Accord Ex parte Waldrop*, 859 So. 2d 1181, 1189 (Ala. 2002) ("[T]he weighing process is not a factual determination. In fact, the relative 'weight' of aggravating circumstances and mitigating circumstances is not susceptible to any quantum of proof."); *Borchardt v. State*, 786 A.2d 631, 652 (Md. App. 2001):

> The weighing process is purely a judgmental one, of balancing the mitigator(s) against the aggravator(s) to determine whether death is the appropriate punishment in the particular case. This is a process that not only traditionally, but quintessentially, is a pure and Constitutionally legitimate sentencing factor, one that does not require a determination to be made beyond a reasonable doubt.

Furthermore, *McKinney* holds that the jury is not constitutionally required to weigh the aggravating factors and mitigating circumstances during any phase of the capital sentencing process; the judge alone can make that subjective determination. *See McKinney*, 140 S. Ct. at 707 ("[I]n a capital sentencing proceeding just as in an ordinary sentencing proceeding, a jury (as opposed to a judge) is not constitutionally required to weigh the aggravating and mitigating circumstances or to make the ultimate sentencing decision within the relevant sentencing range.").

Finally, *McKinney*'s recognition that the jury need not participate in the

selection phase weakens any claim that any such participation automatically transforms subjective considerations of aggravating factors and mitigating circumstances into the functional equivalents of elements. Regardless of whether the capital sentencer is the judge, the jury, or a combination of both, the weighing of aggravating factors and mitigating circumstances involves a subjective question of mercy that, by definition, takes place during the selection phase. *See generally Carr*, 577 U.S. at 119. Put simply, what happens in the selection phase stays in the selection phase.

No Fundamental Error in This Case

To the extent any error did occur, the evidence clearly supports the four, weighty aggravators found by the trial court. *See* R-3972-76. Given the overwhelming evidence of aggravation in this case, any alleged sentencing error was inconsequential to the outcome of this case. *Cf. Brown v. State*, 304 So. 3d 243, 278 (Fla. 2020):

> Accordingly, we hold that, under the circumstances of this case, there is no reasonable doubt that a "rational jury," properly instructed, would have found beyond a reasonable doubt the existence of the statutory aggravating circumstance that the capital murder was committed while Brown was engaged in the commission of a kidnapping.

Therefore, no fundamental error occurred. *See Sanford v. Rubin*, 237 So. 2d 134, 137 (Fla. 1970) ("'Fundamental error,' which can be considered on appeal without objection in the lower court, is error which goes to the

foundation of the case or goes to the merits of the cause of action.").

Assignment of Weight Unconstitutional?

Finally, Appellant challenges the lower court's compliance with section 921.141(4), Florida Statutes, *see* IB-48, which requires the trial court to:

> [E]nter a written order addressing the aggravating factors set forth in subsection (6) 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), Fla. Stat.

Specifically, Appellant claims that the lower court failed to "make the findings that the aggravating factors were sufficient and that they outweighed the mitigating factors using the standard of proof beyond a reasonable doubt." IB-49. However, neither § 921.141(4) nor the Constitution require what Appellant demands. *See Poole*, 297 So. 3d at 502-04. Therefore, no fundamental error occurred.

Of note, § 921.141(4) does not require the assignment of weight to aggravating factors and mitigating circumstances. To the extent this Court's caselaw forces trial courts to do so, *see Campbell v. State*, 571 So. 2d 415, 420 (Fla. 1990), the Eighth Amendment imposes no such requirement. *Compare Mullens v. State*, 197 So. 3d 16, 30 (Fla. 2016), citing *Campbell* at

419-20 ("The court then must assign weight to every established mitigating and aggravating circumstance and weigh the aggravating and mitigating circumstances in determining whether the death penalty is the appropriate punishment."), *with Jones v. Mississippi*, 141 S. Ct. 1307, 1320 (2021):

> In a series of capital cases over the past 45 years, the Court has required the sentencer to consider mitigating circumstances when deciding whether to impose the death penalty. . . . But the Court has never required an on-the-record sentencing explanation or an implicit finding regarding those mitigating circumstances. . . . A sentencing explanation is not necessary to ensure that the sentencer in death penalty cases considers the relevant mitigating circumstances.

(Emphasis omitted.) *See also Harris v. Alabama*, 513 U.S. 504, 512 (1995) ("[T]he Constitution does not require a State to ascribe any specific weight to particular factors, either in aggravation or mitigation, to be considered by the sentencer.").

Given the clear language from the Supreme Court's decision in *Jones v. Mississippi*, this Court's judicially imposed requirement to assign weight to aggravating factors and mitigating circumstances may run afoul of Florida's Eighth Amendment Conformity Clause. *See* art. I, § 17, Fla. Const.; *cf. Lawrence*, 308 So. 3d at 551; *cf. also Allen*, 2021 WL 2232499, at *10 n.5.

CONCLUSION

Based on the foregoing, Appellee, the State of Florida, respectfully requests that this Court affirm the conviction and sentence.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via the eportal to Counsel for Appellant, this 1st day of October, 2021.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 14-point Arial, in compliance with Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

Respectfully submitted,

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