

IN THE SUPREME COURT OF FLORIDA

THOMAS H. FLETCHER,

Appellant,

vs.

CASE No. SC20-1862

L.T. No. 19 CF 526

STATE OF FLORIDA,

Appellee.

_____ /

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

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STATEMENT OF THE CASE AND FACTS

This is an appeal from a final order of the circuit court for Santa Rosa County, Florida, sentencing Thomas H. Fletcher to death for killing Kenneth Davis, a fellow inmate in the Florida Department of Corrections. (R. 3970-87.) This Court has jurisdiction pursuant to article V, section 3(b)(1) of the Florida Constitution.

I. Pretrial proceedings.

Mr. Fletcher and Mr. Davis were cellmates at Blackwater Correctional Facility on September 22, 2018, when Mr. Davis was killed. At that time Mr. Fletcher was serving a life sentence for killing Milton Grossman in July 1994; his trial and sentencing for the earlier offense took place in 1995. (R. 1394-1410.)

An Indictment for first-degree premeditated murder was filed on March 19, 2019. (R. 21-22.) On the same date the State filed its Notice of Intent to Seek Death Penalty. (R. 23-24.) The Notice alleged four aggravating factors: that the capital felony was committed by a person previously convicted of a felony and under sentence of imprisonment, that the defendant was previously convicted of a capital or violent felony, that the capital felony was

especially heinous, atrocious or cruel, and that the capital felony was committed in a cold, calculated and premeditated manner without any pretense of justification. (R. 23.) In June 2019, through appointed counsel, Mr. Fletcher served a Motion and then an Amended Motion to Waive Right to Jury Trial on Penalty Phase and Presentation of Mitigation. (R. 43-46; 47-50.) He also signed a plea agreement in which he pleaded guilty as charged. (R. 52-56.)

On August 29, 2019, the trial court conducted a hearing on Mr. Fletcher's guilty plea as well as his amended motion to waive a jury trial and the presentation of mitigation. (R. 4067.) The court questioned Mr. Fletcher about his understanding of the proceedings involved. (R. 4067-73.) Mr. Fletcher asked whether he could enter a plea deal guaranteeing the death penalty would be imposed, and the court responded that was not the way the court understood the applicable law. (R. 4071-72.) In the course of the inquiry Mr. Fletcher asked whether he could resolve the case without an attorney, and the court indicated it would conduct a Faretta hearing. (R. 4073-76.) Counsel explained to Mr. Fletcher on the record that having counsel could assist him in resolving the appeal more speedily, and that there were certain procedures that would have to be followed with or without appointed counsel. (R. 4077-80.)

The court then asked “So do you want to keep counsel?” and Mr. Fletcher responded “May as well, sir.” (R. 4080.) The court resumed its plea colloquy. (R. 4081-87.) The State presented a factual basis for the plea, “[t]hat on or about September the 22nd, 2018, in the assigned prison cell located in the Blackwater Correctional Facility in Santa Rosa County, Thomas Fletcher killed his cell mate Kenneth Jeff Davis by choking him to death. (R. 4087.) The court accepted Mr. Fletcher’s guilty plea and found it was knowingly, voluntarily, and freely given. (R. 4088.)

Next the court questioned Mr. Fletcher about his understanding of the penalty phase, including the burden of proof to prove aggravating circumstances. (R. 4088-93.) Defense counsel stated the defense had conducted no mitigation investigation because Mr. Fletcher did not want his attorneys to investigate or present mitigating evidence, and Mr. Fletcher confirmed this was his instruction. (R. 4093-99.) The court concluded its inquiry and found Mr. Fletcher’s waiver of a jury trial for the penalty phase, as well as his waiver of the right to present mitigation, was done knowingly, voluntarily, and freely. (R. 4100-03.) Mr. Fletcher signed a written waiver. (R. 64.)

The court ordered a “comprehensive” presentence investigation (R. 70-71) and the defense offered to file copies of Mr. Fletcher’s DOC records and other documents the defense had compiled. (R. 72, 4104-14.) The State filed approximately 115 pages of the transcript of testimony from the penalty phase of Mr. Fletcher’s 1995 trial. (R. 1174-1290.) Mr. Fletcher stated he had no objection to the court reviewing the records before receiving the complete presentence investigation report. (R. 4114.) The court indicated it would review the records before deciding whether to appoint special counsel for purposes of presenting mitigation. (R. 4110-12, 4116-20.) At a status conference on October 24, 2019, the court determined that “significant mitigation might exist” and appointed Attorney Michelle Hendrix as special counsel for purposes of presenting mitigating evidence. (R. 1291, 1301-03, 1304-19.) A presentence investigation report was filed but most sections simply noted “unable to verify due to offender refusal to participate in PSI.” (R. 1293-1300.)

II. Penalty phase/ *Spencer* hearing.

When the penalty phase trial began on June 18, 2020, the court confirmed Mr. Fletcher’s waiver of a jury. (R. 3813-14.) The court also confirmed Mr. Fletcher understood a jury verdict would

have to be unanimous. (R. 3817-18.) Mr. Fletcher consented to certain witnesses appearing via Zoom. (R. 3815-16.)

Agent Paul Kelly. The first witness was Special Agent Paul Kelly, Florida Department of Law Enforcement. (R. 3820.) On September 22, 2018 Agent Kelly was called to investigate a death at Blackwater CI, Cell 203, Dorm A. (R. 3822.) The two residents of that cell were Kenneth Davis, and Thomas Fletcher. (R. 3822.) Mr. Davis's death was discovered during an inmate count at about 3:30 p.m. (R. 3822.) Mr. Fletcher had been removed from the cell when Agent Kelly arrived. (R. 3823.) Agent Kelly saw Mr. Davis on the upper bunk, facing the wall, covered up. (R. 3824.) He had strips of a white sheet loosely tied around his neck and when officers moved him they saw his legs were tied together as well. (R. 3824-25.) He had been dead for about 24 hours. (R. 3825.)

Agent Kelly and Special Agent Barry Hatton spoke with Mr. Fletcher; Mr. Fletcher was not rude or uncooperative, but said he did not want to speak with them at that time. (R. 3825.) The next morning Agent Kelly got a call notifying him Mr. Fletcher wanted to speak with them, so they returned to Blackwater. (R. 3829.) They mirandized him and he agreed to make a statement. (R. 3830.) He

was “cordial, cooperative, matter of fact.” (R. 3831.) The recording of their interview was published in court without objection. (R. 3831.)

In the interview, Mr. Fletcher said:

I did kill Kenny Davis. I strangled him. I've been planning this for a while, and not necessarily him. I was planning it on about three or four different inmates, child molesters, piece of craps, because I'm tired of doing this life sentence, tired of living like this — and decided, you know, the only thing that would help me out is maybe getting the death penalty, let the State kill me.

(R. 3835.)

Mr. Fletcher described moving into the cell with Mr. Davis; he said he liked him and they became friends. (R. 3835.) Mr. Davis talked about committing suicide once or twice. (R. 3835.) At one point Mr. Fletcher tried to commit suicide, but failed. (R. 3836, 3851-52.) He decided killing another inmate was the solution, and realized Mr. Davis would be “a good candidate” because it would help both of them end their sentences. (R. 3836.)

The night Mr. Davis was killed he had obtained some methamphetamine. (R. 3836.) Mr. Davis and Mr. Fletcher snorted it and talked throughout the night. (R. 3837.) At one point they talked about suicide. (R. 3838.) They continued snorting the methamphetamine. (R. 3839.) At about 3:30 a.m. Mr. Fletcher came

up behind Mr. Davis and put him in a yoke hold. (R. 3839.) Mr. Davis fought back by stabbing Mr. Fletcher in the leg with a pencil, but Mr. Fletcher continued to choke him, telling him to “take it easy” and “go to the light.” (R. 3839.) After Mr. Davis was dead Mr. Fletcher thought about putting him on Mr. Fletcher’s bed, but decided he had to get him into his own bed so no one would wonder why Mr. Davis was in Mr. Fletcher’s bed. (R. 3840.) Mr. Fletcher used pieces of a sheet to tie around Mr. Davis and hoist him into the upper bunk. (R. 3840, 3853-54.)

In the morning Mr. Fletcher went to breakfast alone; he said other inmates did not question Mr. Davis’s absence and assumed he was sleeping in. (R. 3840.) Mr. Fletcher used the additional time to continue getting high. (R. 3841.) Another inmate came to his cell for a tattoo and Mr. Fletcher told him and anyone else who asked Mr. Davis was sick. (R. 3841-42.) When officers came around in the afternoon he knew they would realize what had happened and was “ready for it to be over.” (R. 3842-43.)

Mr. Fletcher said he had no regrets that Mr. Davis was dead, but regretted that it would hurt Mr. Davis’s mother and children. (R. 3843.) He said he had helped Mr. Davis: “I helped that man EOS. That’s how I see it from my point of view. And, in return,

hopefully it helps me EOS, you know, who knows. That's it." (R. 3843.)

Agent Kelly asked Mr. Fletcher whether he had said "it was him or me" when officers first escorted him out, and he answered yes, he had joked with Mr. Davis about stabbing Mr. Fletcher in the neck to "help him out," but Mr. Davis had responded "I ain't getting no life sentence, screw that." (R. 3844.) Mr. Fletcher said he learned about a yoke hold from being raised by a "biker whore mother" whose boyfriends were "old bikers, Vietnam vets, whatever" who taught him how to defend himself. (R. 3845-46.)

Agent Hatton asked "what do you want out of this? You want the death penalty?" and Mr. Fletcher responded "Yes, sir, that's what I'd like." (R. 3848.) Mr. Fletcher said he wished he had been given a death sentence for his 1994 conviction. (R. 3848.)

Agent Kelly told Mr. Fletcher his story didn't match the evidence because of marks on Mr. Davis's neck suggesting he was strangled with the sheet. (R. 3854.) Mr. Fletcher explained how the marks had been caused by his arm as Mr. Davis struggled to break free. (R. 3855.)

Mr. Fletcher repeated he wanted to be killed: "If I could kill myself right now with a handful of pills, I'd appreciate it; but as far

as manually killing myself, no, that ain't — I ain't going to do that. And now there ain't no bother me messing — no way for me to even think about doing it now anyway. I can sit back and relax, and wait for it to happen now, hopefully.” (R. 3860.) When asked what would happen if the State did not execute him, he answered, “Then, when I get out of CM and back on the compound, I'll do it again. I'll find me another inmate and kill him again, straight up.” (R. 3860.) Mr. Fletcher asked the officers to tell Mr. Davis's mother he was sorry, saying “I just know that Kenny loved her and she loved him.” (R. 3861.) He stated he was going to push for a “fast and speedy trial immediately.” (R. 3862.) He confirmed he was speaking with the agents voluntarily and the interview concluded, as did Agent Kelly's testimony. (R. 386.)

Defense counsel had no questions for Agent Kelly; Mr. Fletcher confirmed he did not want his attorney to ask any questions. (R. 3866.)

Judy Belew. Judy Belew, a deputy clerk with the Santa Rosa County Clerk of Court, presented three letters Mr. Fletcher had written, without objection. (R. 3868-71.) She read the letters into the record. (R. 3871.) The first was dated December 10, 2018 and in it, Mr. Fletcher wrote “I am awaiting charges for a murder that I had

committed at Blackwater River Correctional Facility on September 22nd, 2018.” The letter asked for a case number and requested a speedy trial, adding “Please tell a judge — my judge or any judge — that I want a plea deal of the death penalty. With that, I can forgo all of the trial nonsense. Thank you, Respectfully, Thomas Fletcher.” (R. 3871.)

The second letter, dated February 27, 2019, repeated that Mr. Fletcher was “willing to forgo any trial and accept the plea of the death penalty for my crime.” (R. 3872-73.) The third and longest letter, dated December 22, 2019, was addressed to Judge J. Scott Duncan and asked why it was taking so long to resolve the case. (R. 3873-77.) The letter repeated Mr. Fletcher’s confession to killing Mr. Davis and said the court could find all the mitigation it needed in the record of Mr. Fletcher’s prior trial. (R. 3874-75.) However, the letter added, “a lot of that 1994-95 trial was based on lies that I and my attorney had fabricated to save my life.” (R. 3874.) The letter also stated “I don’t want to have to kill again in the future, but I have no problem with it if I have to...The death penalty is all I want.” (R. 3876.) “If you don’t give it to me...I won’t care who it is that has to die.” (R. 3877.)

Mr. Fletcher confirmed he did not want defense counsel to ask any questions of the witness after the three letters were read into the record. (R. 3878.)

Shandra Hall. Shandra Hall, Mr. Davis's sister-in-law, read a victim impact statement. (R. 3879-80.) Before reading it she indicated her husband, Daniel Hall, Mr. Davis's's brother, was present; Mr. Davis's mother, Margo Davis, his sister, Paula Adresen, and his brother David Hall were also present. (R. 3879.)

Dr. Timothy Gallagher. Medical examiner Dr. Timothy Gallagher performed the autopsy on Kenneth Jeff Davis, age 33, two days after Mr. Davis died. (R. 3882-83.) Dr. Gallagher observed ligature marks around his neck and some minor cuts and abrasions that could have been consistent with defensive wounds. (R. 3884.) On internal examination he observed some injury to the neck area, described as "bleeding and crush injuries." (R. 3884-85.) The cause of death was manual asphyxiation. (R. 3885.) It probably took three to four minutes before Mr. Davis's brain was irreparably deprived of oxygen, leading to death. (R. 3885, 86.) It probably took 30 to 45 seconds for him to lose consciousness. (R. 3886.) Mr. Fletcher

confirmed he did not want defense counsel to ask any questions of the witness. (R. 3887-88.)

Detective Michael Walley. Detective Michael Walley, who investigated the 1994 killing of Milton Grossman, testified remotely. (R. 3891-93.) At the time of the killing he was a homicide detective in Fort Lauderdale. (R. 3893.) The Hollywood police department had been contacted by a confidential informant who said he would be able to make a narcotics purchase from two individuals, one of whom was later identified as Mr. Fletcher. (R. 3895.) The informant negotiated a transaction with someone named Kenneth Kaplan and Mr. Fletcher; Mr. Kaplan was taken into custody after leaving and told Hollywood officers he had information about a murder in Fort Lauderdale, which in turn led to the discovery of Mr. Grossman's body. (R. 3895-96.) Meanwhile, Mr. Fletcher had engaged in a standoff with police, during which he also told police he had killed Mr. Grossman. (R. 3896.)

When Detective Walley arrived at Mr. Grossman's apartment he saw the victim with a number of stab wounds, including defensive wounds. (R. 3897.) There was a "tremendous amount" of blood at the scene and throughout the apartment. (R. 3897.)

Detective Walley interviewed Mr. Fletcher at the Hollywood police

station. (R. 3898.) Mr. Fletcher had been a driver for Mr. Grossman for several years and helped him conduct narcotics transactions. (R. 3898.) Mr. Fletcher was 26 at the time and Mr. Grossman was 65. (R. 3900.) When W met with Mr. Fletcher, Mr. Fletcher was “disheveled, ...animated,...[and] a little bit wired.” (R. 3900.) Mr. Fletcher told him Mr. Grossman was killed during a struggle after he refused to unlock his safe for Mr. Fletcher. (R. 3901.) It took Mr. Fletcher several hours to break into the safe after Mr. Grossman died. (R. 3892.) Mr. Fletcher left that night in one of Mr. Grossman’s cars; he returned the next night to take a different car, and also took “some kind of electronic device” from the condominium. (R. 3902.)

Mr. Fletcher confirmed he did not want his lawyer to ask any questions of the detective. (R. 3904.)

The State introduced a certified judgment and sentence from Mr. Fletcher’s first trial, without objection. (R. 3904.)

Dr. Lance Davis. The final witness was Dr. Lance Davis, the medical examiner who conducted the autopsy on Mr. Grossman, who also testified remotely. (R. 3905.) Mr. Grossman was wearing only underwear when he was found and was in a state of early decomposition. (R. 3908.) Dr. Davis found wounds on the abdomen

and posterior and anterior neck; a small wound to the left kidney; superficial wounds to the fingers and palm of the right hand; an abrasion to the right forehead; and additional superficial wounds to the face. (R. 3908-09.) The neck wounds were the most serious; one of the cut the jugular vein, which would result in death in a matter of minutes. (R. 3909.) The wound to the abdomen would also have caused severe bleeding but would have taken “a couple of hours” to cause death. (R. 3909.)

Mr. Fletcher confirmed he did not want his lawyer to ask any questions of the medical examiner. (R. 3910.)

Following Dr. Davis’s testimony, the court asked Mr. Fletcher to confirm he did not want to present any evidence, and he answered affirmatively. (R. 3912-14.) Counsel stated he had nothing else to present because Mr. Fletcher did not want any mitigation inquiry or presentation of mitigation evidence. (R. 3914-15.)

Special Counsel Michelle Hendrix. Ms. Hendrix stated she had received approximately 3,000 pages of transcripts a few days before the hearing. (R. 3915.)¹ Her presentation of mitigating evidence was based on the penalty phase testimony and arguments

¹ The hearing was held on June 18, 2020, a Thursday; Ms. Hendrix stated she received the transcripts “Tuesday afternoon.” (R. 3915.)

from Mr. Fletcher's first trial (R. 3916.), DOC records (R. 3934.), the FDLE investigative report (R. 3936.), and Mr. Fletcher's interview (R. 3938.). Ms. Hendrix summarized the following mitigation evidence from the records:²

- An art teacher from the facility where Mr. Fletcher was incarcerated at the time of his first trial testified that he attended classes regularly, had a good attitude, and displayed professional ability. (R. 3916-18.)
- Mr. Fletcher's sister, Mary Fletcher, who was three years younger than her brother, testified to a family history of physical and sexual abuse. (R. 3918-24.) Their father left the family when Mr. Fletcher was six years old. (R. 3918.) The siblings were close and Mr. Fletcher often was her protector. (R. 3919, 3921-22.) Their mother was an alcoholic who beat both children and allowed her boyfriends to beat them as well. (R. 3919.) The only time

² In addition to the testimony summarized by the Special Counsel, the mitigation testimony in 1995 also included testimony from Deputy Sheriff Kevin Kirkpatrick, who had known Mr. Fletcher as an inmate. (R. 1175-80.) Deputy Kirkpatrick described him as cooperative and said he had volunteered to testify on Mr. Fletcher's behalf because Mr. Fletcher was "one of the few [inmates] I've had no problems with." (R. 1180.)

Ms. Fletcher remembered her mother not drinking was a short time she was bedridden after a car accident. (R. 3920-21.) Her mother was unable to work because of her drinking and the family survived on public assistance. (R. 3920.) Her mother also allowed people to have sex with both children for money. (R. 3921-22.) The children were forced to drink alcohol. (R. 3922.) Mr. Fletcher often took beatings for his sister. (R. 3922.) There were times when the children lived with family members, but their mother always intervened to get them back. (R. 3923.) Ms. Fletcher said her brother was intelligent but that he left their home when he was 13 or 14 because he couldn't take the abuse any more. (R. 3923-24.) After that he worked and would bring money to his sister for things she needed. (R. 3924.) A younger sister had died at the age of two months; she may have been accidentally smothered when their father, drunk, rolled over on her. (R. 3924.)

- Dr. Ross Seligson testified as an expert in clinical and forensic psychology. (R. 3924.) Dr. Seligson interviewed Mr. Fletcher approximately five times, reviewed records,

and reviewed witness statements; he also spoke with Mr. Fletcher's sister and father. (R. 3925.) Dr. Seligson opined that Mr. Fletcher was under the influence of extreme mental or emotional disturbance at the time of the 1994 offense, and that at the time of the offense Mr. Fletcher had consumed a large amount of cocaine, along with marijuana and vodka, given to him by the victim. (R. 3925-27.) The victim and Mr. Fletcher had been in a close relationship, including a sexual relationship, and Mr. Fletcher had keys to several of the victim's homes and cars. (R. 3926, 3931.) Dr. Seligson also referred to reports that Mr. Fletcher and his sister had been beaten, including with electrical cords and switches, by their mother and other adults; were exposed to drug and alcohol use; and were prostituted by their mother (R. 3827-29.) By the time Mr. Fletcher was a teenager he was using cocaine and marijuana, and Dr. Seligson said he would be diagnosed as having a cocaine addiction disorder. (R. 3930.) In school, despite an IQ in the upper average range, he repeated the 9th grade three times. (R. 3930-31.) This was likely due to the chaotic, abusive, and

neglectful family situation. (R. 3930-31.) Another doctor diagnosed him with a long-term depressive disorder. (R. 3931.)

- Dr. O'Brien testified in the guilt phase of the earlier trial, and his testimony was referred to in closing arguments. (R. 3932.) He stated Mr. Fletcher was driven by his addiction to cocaine. (R. 3932.)

Special counsel noted mitigating factors at the first trial were “the drug use, the sleep deprivation, the drug addiction, the level of cocaine that he had taken, as well as the relationship with Mr. Grossman and the fact that Mr. Grossman initiated a confrontation.” (R. 3933.) Another mitigating factor was Mr. Fletcher’s age at the time; it was also noted that the weapon was a weapon of convenience rather than something Mr. Fletcher brought to the confrontation. (R. 3933.) After the offense Mr. Fletcher was suicidal. (R. 3933.)

Documents the special counsel reviewed indicated Mr. Fletcher frequently tested positive for drug use while in prison. (R. 3934.) Also, he had almost no visitors. (R. 3935-37.) One visitor was suspected of wanting to help him escape, as well as of introducing contraband into the facility, and their visits were cut off on more

than one occasion. (R. 3935-36.) Interviews with other inmates after the 2018 offense, as well as letters written by Mr. Fletcher, indicated he was suicidal and that the 2018 killing was part of a plan to be moved to death row. (R. 3937-39.)

Following the special counsel's testimony, the court heard closing argument from the State. (R. 3946-49.) The defense declined to present a closing argument, with Mr. Fletcher's consent. (R. 3949-50.) The parties agreed no separate *Spencer* hearing was necessary. (R. 3951.) The court set a date of July 7 for imposing sentence. (R. 3964.) Because of transportation issues related to the pandemic, sentencing was delayed to November 24, 2020. (R. 4019.)

III. Sentencing.

On November 24, 2020, the court pronounced sentence. The court found the State had proved four aggravating factors beyond a reasonable doubt: that the capital felony was committed by a person in prison for a previous felony (great weight); that the defendant was previously convicted of another capital felony or violent felony (great weight); that the capital felony was especially heinous, atrocious or cruel, supported by evidence of manual strangulation (great weight); and that the capital felony was

committed in a cold, calculated, and premeditated manner (great weight). (R. 4024-30.)

Regarding mitigation, the court stated that “most of the mitigation is gleaned from special counsel[’s] summary of the penalty phase from the trial on the 1994 murder.” (R. 4030.) The court did not find any statutory mitigators, but found that several nonstatutory mitigating circumstances had been proven by the greater weight of the evidence:

- The defendant was physically and sexually abused as a child (some weight);
- The defendant was raised by an alcoholic mother (slight weight);
- The defendant had an unstable home life (slight weight);
- The defendant was protective of his sister, who was being physically and sexually abused (some weight);
- The defendant helped to provide for his sister after he left home when he was about 14 (slight weight);
- The defendant was exposed to alcohol and drugs at an early age and became addicted (some weight);
- The defendant has artistic talent and demonstrated a desire to develop that ability (very slight weight);
- The defendant has lost all hope (very slight weight);
- The defendant quickly cooperated with law enforcement (very slight weight); and
- The defendant was courteous and respectful in court (very slight weight).

(R. 4030-37.)

The court then found “that sufficient aggravating factors exist to warrant the death penalty,” and “that the aggravating factors far

outweigh the mitigating circumstances and that a sentence of death, rather than life, is appropriate in this case.” (R. 4038.) The court ordered and adjudged that Mr. Fletcher be sentenced to death for the first-degree murder of Kenneth Davis. (R. 4038.) The court’s written sentencing order reiterating these findings was entered on the day of the hearing. (R. 3970-82.)

SUMMARY OF THE ARGUMENT

The trial court failed to guarantee that all available mitigating evidence was presented and considered, which is necessary to ensure that the death penalty is only imposed for the most aggravated and least mitigated of offenses. 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. The principle of respecting an individual defendant's autonomy and allowing him to control his own defense must be balanced with society's expectation that the death penalty is reserved for the most aggravated and least mitigated of offenses. In this case, despite ordering a presentencing investigation and appointing special counsel, the court relied on 25-year-old evidence in mitigation and took no steps to bring forth or consider current mitigating evidence.

In addition, Florida's capital sentencing scheme requires multiple determinations before the death penalty can be imposed. These determinations include a finding that one or more aggravating factors are present, a finding that the aggravating factor or factors are sufficient to impose death as a penalty, and a finding

that the aggravating factor or factors outweigh any mitigating evidence presented. *See* § 921.141(2), Fla. Stat. A jury can recommend death only after making these findings. *Id.* In a bench trial, although a jury recommendation is necessarily absent, the remaining findings are still required. *Id.* at (3)(b), (4).

These findings increase the penalty available for the charged crime and, therefore, must be proven beyond a reasonable doubt. However, here the trial court did not make the requisite findings beyond a reasonable doubt, and imposing sentence without meeting that burden of proof was fundamental error.

ARGUMENT

I. Even When a Defendant Waives Mitigation, the Court has an Independent Duty to Ensure All Available Mitigation is Brought Forth and Considered.

The death penalty is “reserved for only the most aggravated and least mitigated of first-degree murders.” *Urbín v. State*, 714 So. 2d 411, 416 (Fla. 1998) (citing *State v. Dixon*, 283 So. 2d 1, 7 (Fla. 1973) and *Jones v. State*, 705 So. 2d 1364, 1366 (Fla. 1998)). To pass constitutional scrutiny, a capital sentencing scheme must allow the court “to render a reasoned, individualized sentencing determination based on a death-eligible defendant’s record, personal characteristics, and the circumstances of his crime.” *Kansas v. Marsh*, 548 U.S. 163, 173-74 (2006). Under Florida law, when a defendant waives mitigation, “the trial court should appoint an independent, special counsel to represent the public interest in bringing forth all available mitigation for the benefit of the...trial court, and this Court, in order to assist the judiciary in performing its statutory and constitutional obligations in death penalty cases.” *Marquardt v. State*, 156 So. 3d 464, 491 (Fla. 2015). The death penalty cannot be “administered by default.” *Hamblen v. State*, 527 So. 2d 800, 804 (Fla. 1988).

The trial court's rulings relating to mitigation are reviewed for abuse of discretion. *E.g.*, *Spann v. State*, 857 So. 2d 845, 854 (Fla. 2003).

A. The death penalty cannot constitutionally be imposed by default despite a defendant's personal choice to waive the presentation of mitigation evidence.

When a defendant is represented by counsel, the Court has imposed certain duties on both counsel and the trier of fact to ensure that available mitigation is brought forth and the death penalty is not imposed by default. In *Koon v. Dugger*, 619 So. 2d 246 (Fla. 1993), where the defendant was represented by counsel, the Court required a threshold level of investigation of mitigation when a defendant, against counsel's advice, waives the right to present any mitigating evidence:

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.

Id. at 250.

In *Muhammad v. State*, 782 So. 2d 343, 363 (Fla. 2001), the Court recognized that a defendant's refusal to present mitigation could hamper the trial court's ability to perform its sentencing responsibilities. The defendant in *Muhammad* wanted to waive a penalty phase jury, which would have been advisory under then-existing law, and did not want to present mitigating evidence. *Id.* at 361. The defendant discharged penalty phase counsel, but not before counsel informed the trial court of potential mitigation he had discussed with the defendant. *Id.* at 350, 361. Although the State did not object to the waiver of an advisory jury, the court denied the request to waive a jury, which then heard only arguments in favor of a death sentence, and a majority of the jurors recommended death. *Id.* at 350. In sentencing, the court considered mitigating circumstances set out in the presentence investigation report, which the jury had not seen. *Id.*

On appeal, the Court upheld the denial of the waiver of an advisory jury, but found reversible error in sentencing the

defendant based on a recommendation made without any consideration of mitigation:

[I]n light of Muhammed’s requested waiver of both mitigation and an advisory jury and the State's lack of objection to that waiver, we find that reversible error occurred when the trial court gave great weight to the jury’s recommendation in imposing the death penalty despite the fact that no mitigating evidence was presented for the jury's consideration.

Id. at 361. The Court noted the “failure of the trial court to provide for an alternative means for the jury to be advised of available mitigating evidence.” *Id.* at 361-62.

The Court reasoned that the applicable sentencing scheme required the jury to base its advisory sentence on both the sufficiency of the aggravating circumstances and a comparison of the aggravating circumstances with the mitigating circumstances, noting that “[t]he jury’s responsibility in the process is to make recommendations based on the circumstances of the offense and the character and background of the defendant.” *Id.* at 361 (quoting *Herring v. State*, 446 So. 2d 1049, 1056 (Fla. 1984)). The defendant’s decision to present no mitigating evidence, the Court continued, “hindered the jury’s ability to fulfill its statutory role in sentencing in any meaningful way.” *Id.*

The Court outlined procedures to follow on resentencing in the event the defendant again refused to present mitigating evidence:

It is clear from our previous cases that we expect and encourage trial courts to consider mitigating evidence, even when the defendant refuses to present mitigating evidence. We have repeatedly emphasized the duty of the trial court to consider all mitigating evidence “contained anywhere in the record, to the extent it is believable and uncontroverted.” 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.”

782 So. 2d at 363-64 (citations omitted).

To foster reliability and fairness in the imposition of death sentences, the Court then decided that a PSI would be required “in every case where the defendant is not challenging the imposition of the death penalty and refuses to present mitigation evidence.” *Id.* at 363. The PSI “should be comprehensive and should include information such as previous mental health problems (including hospitalizations), school records, and relevant family background.” *Id.* at 363-64. The State could be required to place in the record any potentially mitigating evidence in its possession, including school, military, and medical records. *Id.* at 364. If anything in the PSI or records submitted suggested to the trial court “the probability of

significant mitigation,” the trial could either call its own witnesses, appoint counsel for the specific purpose of presenting mitigation, or use standby counsel. *Id.*; see also *Sparre v. State*, 164 So. 3d 1183, 1193-95 (Fla. 2015) (reiterating that PSI reports prepared when a capital defendant waives the right to present mitigation must be “comprehensive”); Fla. R. Crim. P. 3.710(b).

The Court refined these sentencing procedures in *Marquardt*, recognizing “the tension that may exist when standby counsel is appointed by the trial court...to assist the court in its consideration of mitigation evidence.” 156 So. 3d at 490. Accordingly, the Court modified the procedures it had established in *Muhammad* to clarify that “independent, special counsel” would “*represent the public interest in bringing forth all available mitigation* for the benefit of the jury, the trial court, and this Court, in order to assist the judiciary in performing its statutory and constitutional obligations in death penalty cases.” *Id.* (emphasis added).

Here, although 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. The order appointing special counsel cited Defendant’s drug use as a potential source of mitigation:

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.

(R. 1302.)

Other than mentioning Mr. Fletcher's drug use while in prison (R. 3934), however, the mitigation presented by special counsel did not address the effect of Mr. Fletcher's drug use on the night in question. The potential relationship between his drug use and suicidal ideation was not explored at all.

In addition, the trial court should have been alerted to the possibility of significant mitigation in the form of "substantial early childhood adversity," *see Tisdale v. State*, 257 So. 3d 357, 362 (Fla. 2018) (Pariente, J., concurring), based on testimony from Mr. Fletcher's 1995 trial about the abuse and neglect he experienced as a child. As highlighted by special counsel and recognized in the trial court's sentencing order, 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. (R. 3916-24.)

These experiences are properly classified as Adverse Childhood Experiences (ACEs), and a large body of research in recent years has documented the lasting damage these experiences cause. See *Tisdale*, 257 So. 3d at 362-36 and n.8. Moreover, an “increased number of ACEs affects a child’s health and brain development.” *Id.* at 363. These experiences have long-lasting consequences for behavior and health:

When children live in situations of abuse and neglect, there can be chronic or frequent activation of the child’s physiologic stress response system without the adequate response of a supportive responsive caregiver. [Pediatricians] have labeled this toxic stress. Toxic stress leads, through excessive or prolonged activation of physiologic stress response systems, to alterations in neurodevelopment, gene translation, and immune response, resulting in predictable behavioral, learning, and health issues. Those areas of the brain involved in cognition, rational thought, emotional regulation, activity level, attention, impulse control, and executive function are particularly vulnerable, especially in the young child.

Heather C. Forkey, *Children Exposed to Abuse and Neglect: The Effects of Trauma on the Body and Brain*, 30 J. Am. Acad. Matrim. Law. 307, 311 (2018), cited in *Tisdale*, 257 So.3d at 362 n.8; see

also Kathleen Wayland, *The Importance of Recognizing Trauma Throughout Capital Mitigation Investigations and Presentations*, 36 Hofstra L. Rev. 923, 935 (2008) (“exposure to stress during childhood is associated with changes in the brain structure, brain chemistry, and brain function.”), cited in *Tisdale*, 257 So.3d at 362 n.8.

ACEs were only beginning to be studied in the 1990s. See, e.g., Yael Cannon & Dr. Andrew Hsi, *Disrupting the Path From Childhood Trauma to Juvenile Justice: An Upstream Health and Justice Approach*, 43 Fordham Urb. L.J. 425, 430 (2016). At Mr. Fletcher’s first trial counsel could present facts about his childhood, but could not draw on advances in research or expert testimony to explain the damage those facts caused at a young age. The mitigation presented by special counsel merely summarized facts from a 25-year-old record without investigating the possibility that those facts now provide even more compelling mitigation than they did at Mr. Fletcher’s 1995 trial. 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.

B. The PSI prepared for Mr. Fletcher's sentencing added virtually no information to what was already in the record.

The trial court in this case ordered a “comprehensive presentence investigation,” in accordance with *Muhammad* and Florida Rule of Criminal Procedure 3.710(b). (R. 70-71.) The order stated:

The report shall be comprehensive and shall include all information that would be in a standard Presentence Investigation Report. It will also include such information as previous mental health problems (including hospitalizations), school records, relevant family background, psychological issues, intellectual abilities, and criminal history.

(R. 70.) In addition, the order directed the Department of Corrections to address the potential existence of any statutory mitigators and to include, among other things, the Defendant's medical history. (R. 70-71.)

Despite the trial court's detailed order, the PSI filed in this case was not comprehensive; it was at best a formality that restated information available elsewhere. (R. 1293-1300.) The longest narrative section of the PSI summarized evidence presented against Mr. Fletcher at trial. (R. 1294.) Other than reviewing Mr. Fletcher's criminal history, the PSI did not provide any specific information

about his background, education, employment, or medical history. (R. 1295-99.) The PSI did identify two living family members and noted Mr. Fletcher's drug use before and after going to prison. (R. 1298-99.) In eight different portions of the standard form, the report simply noted that the defendant refused to participate in the presentence investigation. (R. 1294-1300.)

Given that the presentence investigation was ordered precisely because the defendant was electing to waive mitigation and refused to allow arguments to be made on his behalf, the defendant's lack of participation in the presentence investigation is not surprising; acquiescing in that choice by doing no investigation whatsoever renders the *Muhammad* procedures meaningless.

C. A sentencing court has an obligation to ensure the integrity of the sentencing process and the fair imposition of society's highest penalty.

Mr. Fletcher's choice to seek the death penalty for himself does not obviate "society's duty to see that executions do not become a vehicle by which a person could commit suicide." *Hamblen*, 527 So. 2d at 802. "[T]he waiver concept was never intended as a means of allowing a criminal defendant to choose his own sentence." *Commonwealth v. McKenna*, 383 A.2d 174, 181 (Pa. 1978) (citations

omitted); *see also Grasso v. State*, 857 P.2d 802, 811 (Okla. Crim. App. 1993) (Chapel, J., concurring) (“The State must not become an unwitting partner in a defendant’s suicide by placing the personal desires of the defendant above the societal interests in assuring that the death penalty is imposed in a rational, non-arbitrary fashion.”).

A criminal defendant’s autonomy is not absolute. *See Martinez v. Ct. of Appeal of California, Fourth App. Dist.*, 528 U.S. 152, 162-63 (2000). For a number of reasons, including “the overriding state interest in the fair and efficient administration of justice,” *id.* at 163, it does not extend to a criminal appeal. In addition, a criminal defendant can be questioned about his desire to represent himself, and must be advised of the dangers of self-representation. *Id.* at 161-62. The trial court can appoint standby counsel, even without the defendant’s consent. *Id.* at 162. The trial court can terminate the defendant’s self-representation if necessary to ensure the “integrity and efficiency of the trial.” *See id.* Similarly, the trial court can appoint special counsel for the purposes of mitigation, even over the objection of a defendant who wants to waive the presentation of mitigation evidence. *See Marquardt*, 156 So. 3d at 490.

In addition, the Eighth Amendment requires consideration of any mitigating circumstances: “the fundamental respect for humanity underlying the Eighth Amendment...requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.” *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976).

A trial court’s respect for a defendant’s autonomy and strategic choices should not extend to allowing an individual defendant to circumvent the requirements that capital punishment be imposed “with reasonable consistency, or not at all,” as stated in *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982). This is because the death penalty “differs from all forms of criminal punishment, not in degree but in kind.” *Furman v. Georgia*, 408 U.S. 238, 306 (1972) (Stewart, J., concurring). The penalty is, and must be, “reserved for a narrow category of crimes and offenders.” *Roper v. Simmons*, 543 U.S. 551, 569 (2005). And, as this Court has already recognized, the responsibilities of those involved in sentencing are not “suspended simply because the accused invites the possibility of a death sentence.” *Hamblen*, 527 So. 2d at 804.

Therefore, although the death penalty in this case may have resulted in part from Mr. Fletcher's deliberate choices, it violates constitutional guarantees of due process and freedom from cruel and unusual punishment. Amends. V, VIII, XIV, U.S. Const.; Art. 1, §§ 9, 17, Fla. Const.

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

Any determination increasing the penalty for a crime must be found beyond a reasonable doubt by the finder of fact. *Alleyne v. United States*, 570 U.S. 99, 104 (2013) (citing *Apprendi v. New Jersey*, 530 U.S. 466, 483 n.10, 490 (2000)). Under 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.³ Fundamental error "goes to the foundation of the case...and is equivalent to a denial of due process." *F.B. v. State*, 852 So. 2d 226, 229 (Fla. 2003) (citation omitted). Fundamental error "is not subject to harmless error review." *Ramroop v. State*, 214 So.3d 657,

³ *But see Craft v. State*, ___ So. 3d ___, 45 Fla. L. Weekly S293, 2020 WL 6788794 (Fla. Nov. 19, 2020) (rejecting the argument that the identical omission created fundamental error), rehearing denied (Fla. Mar. 4, 2021).

665 (Fla. 2017) (“By its very nature, fundamental error has to be considered harmful.”).

This Court held in *Rogers v. State*, 285 So. 3d 872, 885-86 (Fla. 2019), that the findings that the aggravating factors are sufficient to impose death, and that the aggravating factors outweigh the mitigating circumstances, are not “elements” that can be subjected to the standard of proof beyond a reasonable doubt. In so holding, the Court receded from language in *Perry v. State*, 210 So. 3d 610, 640 (2016), indicating that these findings had to be made unanimously and beyond a reasonable doubt. The Court also held in *State v. Poole*, 297 So. 3d 487 (Fla. 2020), that any determinations beyond the existence of one or more aggravating factors were not “elements” that had to be proven beyond a reasonable doubt, explicitly receding from *Hurst v. State*, 202 So. 3d 40 (Fla. 2016) (requiring unanimous jury findings that aggravating factors were sufficient to justify imposing death and that aggravating factors outweighed mitigating circumstances before a death sentence could be considered).

However, United States Supreme Court jurisprudence is clear that any 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. *Alleyne*, 570 U.S. at 104 (citing *Apprendi*, 530 U.S. at 483 n.10, 490). For the reasons set forth below, *Rogers* and *Poole* are incompatible with Supreme Court precedent.

A. Required findings increasing the penalty for a crime, including findings required to authorize the death penalty after a guilty verdict on the underlying offense, require the same degree of proof as the elements of the underlying offense — i.e., proof beyond a reasonable doubt.

If the “required finding expose[s] the defendant to a greater verdict than that authorized by the [verdict],” the Sixth Amendment and Due Process clauses of the federal constitution require that the finding be subject to the standard of proof beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 494 (2000). That issue is “one not of form, but of effect.” *Id.*; cf. also *Jones v. United States*, 526 U.S. 227, 232-33 (1999) (noting, in the context of a federal carjacking statute, “[t]he “look” of the statute, then, is not a reliable guide to congressional intentions”).

The functional elements of a crime for sentencing purposes are not limited to the defined elements required for conviction. See *Apprendi*, 530 U.S. at 495-96. In addition, the distinction between

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

The principles set out in *Apprendi* were applied in *Ring v. Arizona* to invalidate a state statute allowing a trial judge to determine the existence of aggravating factors so as to justify imposition of the death penalty. 536 U.S. at 589 (overruling *Walton v. Arizona*, 497 U. S. 639 (1990)). Under the statute at issue in *Ring*, the maximum punishment the defendant could have received based on the jury’s verdict of guilt on a charge of first-degree

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

The central holding of *Apprendi* was reaffirmed in *Blakely v. Washington*, 542 U.S. 296, 305 (2004), which held a state statute allowing a trial court to impose an “exceptional” sentence in excess of a defined statutory range, and without a jury finding regarding the reasons justifying the exceptional sentence, violated the defendant’s right to a trial by jury.

Similarly, in *Alleyne*, the Court held unconstitutional a statute imposing a mandatory minimum sentence on the basis of judicial fact-finding. 570 U.S. at 103 (overruling *Harris v. United States*, 536 U.S. 545 (2002)). As it had done before, the Court rejected the

argument that the sentence actually imposed in that case could have been imposed in theory even without additional fact-finding. *Id.* at 112-15. And in *United States v. Haymond*, 139 S. Ct. 2369, 2373-74 (2019), the Court held a statute violated the Sixth Amendment and Due Process clause where it authorized a mandatory minimum sentence for a violation of supervised release without requiring jury findings or proof of the violation beyond a reasonable doubt. The Court held that subjecting the defendant to an increased sentencing range based on the trial court’s fact-finding violated the Fifth and Sixth Amendments. *Id.* at 2378-79. The plurality rejected an argument that the Sixth Amendment does not apply to post-judgment sentencing proceedings, saying “any ‘increase in a defendant’s authorized punishment contingent on the finding of a fact’ requires a jury and proof beyond a reasonable doubt ‘no matter’ what the government chooses to call the exercise.” *Id.* at 2379 (citing *Ring*, 536 U.S. at 602).

B. Due process requires proof beyond a reasonable doubt of any determination that must be made before the death penalty can be imposed in a specific case.

Due Process requires proof beyond a reasonable doubt to convict an individual of a crime. *E.g.*, *In re Winship*, 397 U.S. 358,

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

Society’s interest in the reliability of the verdict is even stronger in capital cases than in other criminal cases because of the “qualitative difference between death and other penalties.” *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion); see also *Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993) (reversing a conviction where the jury was improperly instructed on the meaning of “reasonable doubt”). Therefore, as a matter of due process, required 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.

C. Florida’s capital sentencing scheme requires a finding that aggravating factors are sufficient to justify the death penalty before the finder of fact reaches the ultimate decision of whether a death sentence can be imposed.

Under Florida’s capital sentencing scheme, the determinations that *the aggravating factors in a particular case are sufficient to justify death* and *the aggravating factors outweigh the mitigating circumstances* increase the maximum authorized penalty from life in prison to death. See § 921.141(2)-(3), Fla. Stat. The existence of one or more aggravators in Florida does not allow a death sentence to be imposed *until* other findings are made.

First-degree murder is a “capital felony” under section 782.04(1)(a), Florida Statutes. Obtaining a conviction for first-degree murder based on premeditation requires the State to establish the following elements: (1) a victim is dead; (2) the death was caused by the criminal act of the defendant; and (3) the killing was premeditated. See Fla. Std. Jury Instr. (Crim.) 7.2 (2019). Despite the statutory “capital felony” label, under Florida’s capital sentencing scheme, the findings necessary to convict a defendant of first-degree premeditated murder are insufficient to sentence the defendant to death. See § 782.04(1)(b). A separate proceeding must

be held, as provided in sections 775.082 and 921.141, Florida Statutes.

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

If the jury:

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

a. Whether sufficient aggravating factors exist.

b. Whether aggravating factors exist which outweigh the mitigating circumstances found to exist.

c. Based on the considerations in sub-subparagraphs a. and b., whether the

defendant should be sentenced to life imprisonment without parole or to death.

§ 921.141(2)(b).

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

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*, 530 U.S. at 483, 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 additional findings, the jury cannot make its recommendation, and the court has no discretion to impose the death penalty.

In this case, because Mr. Fletcher waived his right to a jury determination of the facts allowing a death sentence to be imposed, the Court must also apply section 921.141(3)(b) and (4), requiring the trial court to make the same findings the jury would have made: “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).

In summary, absent the further proceedings and findings defined in section 921.141, the maximum available sentence for first-degree murder in Florida is life in prison. *See* § 775.082(1)(a); § 921.141(3)(a). Therefore, for purposes of the burden of proof, these additional findings are treated as elements of the crime, whether they are called “elements” or something else, and require proof beyond a reasonable doubt.

D. The trial court’s sentencing order failed to make required findings before imposing the death penalty.

Here, the court’s sentencing order found that the State had proved the existence of four alleged aggravating circumstances beyond a reasonable doubt. (R. 3972-76.) The court also found no statutory mitigators had been proved (R. 3976), but that there was

evidence of ten non-statutory mitigating factors. (R. 3976-80.) The order 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. 3980-81.)

The 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. Without those express findings, subject to proof beyond a reasonable doubt, the death sentence in this case is constitutionally deficient under Amendments V, VI, and XIV to the U.S. Constitution, as well as Article I, section 9, of the Florida Constitution.

CONCLUSION

Mr. Fletcher requests a new penalty phase trial.

CERTIFICATES OF SERVICE AND FONT SIZE

I certify that a copy of the foregoing has been furnished electronically via the Florida Courts e-filing portal to Michael T. Kennett, Assistant Attorney General, Capital Appeals Division, on May 25, 2021. I certify that this brief complies with the word count provisions of the Florida Rules of Appellate Procedure.

Respectfully submitted,

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