

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

REPLY BRIEF OF APPELLANT

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ARGUMENT IN REPLY

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

As a threshold matter, Appellant declines to accept the State's restatement of this issue. Appellant is not arguing for some novel duty on the part of the trial court, and has not argued ineffective assistance in this direct appeal. What Appellant has done is point to a duty this Court has recognized multiple times, which is grounded in the requirement of individualized sentencing for capital defendants.¹

The State's Answer Brief ranges widely afield of the issues presented in this direct appeal, and for that matter, of any arguments presented to the trial court at any time in this case. The State participated in established procedures for imposing a death sentence with no argument or objection until after the Initial Brief was filed. Then the State sought to essentially invalidate a sentencing hearing and an appellate process to which it had not

¹ *E.g., Kansas v. Marsh*, 548 U.S. 163, 173-74 (2006).

objected. As already stated in Appellant's Response to the State's Motion to Remand or Dismiss and Appellant's Response to the State's Motion to Request Briefing Schedule and Request Oral Argument, the State is now seeking a sweeping change in the law by purporting to assert Appellant's personal constitutional rights, which it has no standing to do. Appellant relies on his earlier filings and incorporates them here, in addition to the arguments and authorities in his Initial Brief; but he asks that this appeal be limited to the issues preserved and briefed. *See Puzio v. State*, 320 So. 3d 684, 688 (Fla. 2021).

With that said, this argument in reply will focus on specific aspects of the State's Answer Brief. First, although a defendant in Florida can waive the personal right to present a mitigation case, the waiver process itself does not violate the defendant's constitutional rights. Second, requiring the presentation of mitigation by someone other than the defendant, so that the court can fulfill its duty of individualized sentencing, does not violate the defendant's constitutional rights. When the defendant's objective is obtaining an order that will directly result in his death, the public interest in reliability in sentencing is paramount.

A. Waivers of Mitigation Do Not Violate Constitutional Rights.

Mr. Fletcher exercised his right to waive the presentation of all but a limited amount of mitigating evidence and did not challenge the validity of his waiver on appeal. The State never questioned or objected to the mitigation-related procedures used in the trial court.

Whether the right to present mitigation is termed permissive or something else, the opportunity for the sentencer to consider mitigation is of constitutional dimension:

The Eighth Amendment jurisprudence of this Court establishes two separate prerequisites to a valid death sentence. First, sentencers may not be given unbridled discretion in determining the fates of those charged with capital offenses. The Constitution instead requires that death penalty statutes be structured so as to prevent the penalty from being administered in an arbitrary and unpredictable fashion. Second, even though the sentencer's discretion must be restricted, the capital defendant generally must be allowed to introduce any relevant mitigating evidence regarding his “character or record and any of the circumstances of the offense.” Consideration of such evidence is a “constitutionally indispensable part of the process of inflicting the penalty of death.”

California v. Brown, 479 U.S. 538, 541 (1987) (internal citations omitted).

A court does not violate a constitutional right when it inquires of a defendant before he declines to exercise it. *See Iowa v. Tovar*, 541 U.S. 77, 81 (2004) (discussing the requirement of “knowing, intelligent” waiver of constitutional rights). Therefore, Florida’s procedures for waiving mitigation in a capital case do not violate a defendant’s Sixth Amendment rights. To clarify the holding of *Schriro v. Landrigan*, 550 U.S. 465, 479 (2007) on this point, *Landrigan* did not directly rule on the necessity or validity of a waiver of mitigation; the decision assumed, without deciding, that such a waiver had to be knowing and intelligent.

Landrigan was an appeal from the denial of post-conviction relief, in which the defendant sought an evidentiary hearing to develop a claim of ineffective assistance of counsel based on his trial counsel’s failure to conduct a thorough investigation into mitigating circumstances. *Id.* at 472-73. After a federal district court denied relief, the Ninth Circuit held Mr. Landrigan was entitled to the hearing and that counsel had done little to prepare for sentencing. *Id.* On review, then, the Supreme Court was applying both the deferential standard accorded a district court’s discretionary decisions and the strict standard for granting federal habeas relief. *Id.* at 473-74.

The Ninth Circuit had based its decision, in part, on a lack of record evidence that Mr. Landrigan’s original waiver of mitigation was “informed and knowing.” *Id.* at 478-49. In that context, the Court noted, “[W]e have never imposed an ‘informed and knowing’ requirement upon a defendant’s decision not to introduce evidence.” *Id.* The Court then assumed, without deciding, that an “informed and knowing” waiver requirement existed, and explained why Mr. Landrigan could not obtain relief under that standard. *Id.* Among the reasons was that the Court had “never required *a specific colloquy* to ensure that a defendant knowingly and intelligently refused to present mitigating evidence.” *Id.* (emphasis added).

In its discussion of the “informed and knowing” requirement, the Court cited its previous decision in *Tovar*, 541 U.S. 77. *Tovar* involved “the extent to which a trial judge, before accepting a guilty plea from an uncounseled defendant, must elaborate on the right to representation.” *Id.* at 81. At issue there were two specific admonitions required by the Iowa Supreme Court for uncounseled pleas, but which were not given to the defendant: that waiving counsel created the danger of overlooking a viable defense, and that he would be losing the opportunity for an independent opinion on whether his guilty plea was wise. *Id.* at 91.

The Tovar decision began with the premise that “[w]aiver of the right to counsel, *as of constitutional rights in the criminal process generally*, must be a ‘knowing, intelligent ac[t] done with sufficient awareness of the relevant circumstances.’” *Id.* at 81 (emphasis added). The Court reasoned that a waiver is “knowing, intelligent, and sufficiently aware if the defendant fully understands the nature of the right and how it would likely apply *in general* in the circumstances — even though the defendant may not know the *specific detailed* consequences of invoking it.” *Id.* at 92 (quoting *United States v. Ruiz*, 536 U.S. 622, 629 (2002) (emphasis in original)). The Court also noted that whether a waiver of counsel was knowing and intelligent would depend on case-specific factors. *See id.* (citations omitted).

Based on those principles, the Court held the specific admonitions at issue were not constitutionally required, although it was careful to note that its holding did not limit the power of States to craft their own waiver colloquies:

We note, finally, that States are free to adopt by statute, rule, or decision any guides to the acceptance of an uncounseled plea they deem useful. See, *e.g.*, Alaska Rule Crim. Proc. 39(a) (2003); Fla. Rule Crim. Proc. 3.111(d) (2003); Md. Ct. Rule 4-215 (2002); Minn. Rule Crim. Proc. 5.02 (2003); Pa. Rule Crim. Proc. 121,

comment (2003). We hold only that the two admonitions the Iowa Supreme Court ordered are not required by the Federal Constitution.

Id. at 94.

Landrigan and *Tovar* support the conclusion that the waiver of the right to present mitigation must be knowing and intelligent in the context of an individual case; that the Court has not required specific language to constitute a knowing and intelligent waiver of mitigation, and that States are likely free to adopt “by statute, rule, or decision” such guides to accepting a mitigation waiver as the States deem useful.

This Court’s decision in *Koon v. Dugger*, 619 So. 2d 246 (Fla. 1993), is such a “rule or decision.”² *Koon* both reaffirms “the right of a competent defendant to waive presentation of mitigating evidence,” *id.* at 249, and establishes a rule for accepting waivers:

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 court’s decision. Counsel must indicate whether, based on his investigation, he reasonably believes there to be mitigating

² The Answer Brief asserts without explanation at page 56 that “*Koon* may run afoul of the Conformity Clause.” But the Supreme Court has not held that a waiver of mitigation is not necessary in capital cases, so the Conformity Clause is not offended. Moreover, this is insufficient to show that *Koon* was clearly erroneous.

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.

The basis for this rule was the Court's concern with "the problems inherent in a trial record that does not adequately reflect a defendant's waiver of his right to present any mitigating evidence."

Id.

The waiver procedure set out in *Koon* does not undercut a constitutional right; it protects one. To treat mitigation with less seriousness than other constitutional rights during a criminal prosecution would be contrary to the Supreme Court's recognition that considering mitigation is constitutionally indispensable to the process of sentencing a person to death. Florida's procedures for presenting mitigation reflect a careful balancing of a defendant's right to determine the objectives of his defense — or to conduct the defense himself, *pro se* — with the court's constitutional obligation to provide individualized sentencing in capital cases.

B. Alternative Means of Presenting Mitigation Do Not Violate the Right of Self-Representation.

The procedures this Court has developed for allowing individualized sentencing do not violate a defendant's right of self-representation.

Appointing special counsel to present mitigation does not force the defendant to put on a case he does not wish to present, and does not violate the defendant's Sixth Amendment rights. This Court analyzed precisely that situation in *Barnes v. State*, 29 So. 3d 1010 (Fla. 2010) (*Barnes I*). In *Barnes I*, the defendant was charged with one first-degree murder while he was already serving a sentence for another. He waived counsel following a *Faretta*³ hearing and represented himself with standby counsel present. *Id.* at 1014. He then entered a guilty plea and waived a penalty phase jury. *Id.* After the State presented its evidence of aggravating factors, the defendant stated he would rely, as mitigation, on the fact that he came forward and took responsibility; he refused to present other mitigation. *Id.* Over his objection, the court appointed special counsel to present mitigating evidence; the court had

³ *Faretta v. California*, 422 U.S. 806, 807 (1975) (recognizing the right of a criminal defendant to elect to represent himself at trial).

previously ordered a presentence investigation report and a psychological evaluation. *Id.*

On appeal, the defendant argued his Sixth Amendment rights had been violated when the trial court appointed special counsel and considered the presentencing investigation. *Id.* This Court acknowledged a Fifth Circuit Court of Appeals decision finding that “appointment of special mitigation counsel under certain circumstances can violate a defendant’s right to represent himself.” *Id.* at 1023 (citing *United States v. Davis*, 285 F.3d 378 (5th Cir. 2002)). The circumstances in the Fifth Circuit case were that the defendant wanted to continue to assert his innocence as mitigation, but special counsel was appointed for the purpose of developing other mitigation: “The court found this appointment to be error under the circumstances, where the mitigation presented by special counsel directly contradicted the defendant’s mitigation.” *Id.*

This Court distinguished those circumstances from the situation presented in *Barnes I* in two ways. First, the Court stated, Mr. Barnes had presented no mitigating evidence other than the fact that he took responsibility by pleading guilty. *Id.* at 1024. Thus, the mitigation presented by special counsel did not conflict with Mr. Barnes’s mitigation evidence. *Id.* And second, the Court noted that

the federal case had involved presentation of evidence to a jury, but no jury was present for Mr. Barnes's sentencing hearing. *Id.*

Therefore, Mr. Barnes's right to represent himself was not subverted. *See id.*

The decision in *Barnes I* makes clear that this Court was relying not just on its own precedent, but on Eighth Amendment jurisprudence. *See id.* at 1025-26. The Court noted that the death penalty is unique and qualitatively different from other punishment. *Id.* at 1025 (citing *Gregg v. Georgia*, 428 U.S. 153, 195 (1976)). The Court also emphasized that presentation of mitigation is directly related to "the requirement of individualized sentencing in capital cases that is required by the Eighth and Fourteenth Amendments to the United States Constitution." *See id.* (citing *Eddings v. Oklahoma*, 455 U.S. 104, 105 (1982) and *Kansas v. Marsh*, 548 U.S. 163, 174 (2006)). Finally, the Court concluded:

Because the trial court and this Court each has a constitutional obligation to ensure that Barnes received individualized sentencing and that the death penalty is fairly and constitutionally imposed, Barnes' right to self-representation was not violated by the appointment of independent counsel under the facts and circumstances present in this case.

Id. at 1026.

Mr. Barnes subsequently sought federal post-conviction relief based on, inter alia, the alleged violation of his Sixth Amendment right to self-representation. See *Barnes v. Secretary, Dep't of Corrections*, 888 F.3d 1148 (11th Cir. 2018) (*Barnes II*). That court denied relief, holding this Court had not reached a result contrary to Supreme Court precedent:

There is no basis to conclude that the Florida Supreme Court's denial of Petitioner's Sixth Amendment self-representation claim was either "contrary to" or an "unreasonable application" of Supreme Court precedent, or that it resulted from an "unreasonable determination of the facts." Consequently, federal habeas relief is not warranted on the claim, and the district court properly denied it.

Id. at 1159.

In reaching this conclusion, the Eleventh Circuit emphasized that *Faretta* allowed a trial court to appoint standby counsel, even over objection. *Id.* at 1156-57 (citation omitted). It noted other limitations on the right of self-representation, including a distinction between competency to stand trial and competency to proceed pro se, see *id.* at 1156 (citing *Indiana v. Edwards*, 554 U.S. 164 (2008), and the Court's refusal to extend the constitutional right of self-representation to appeals, see *id.* at 1157 (citing *Martinez v. Court of App. Of Cal., Fourth App. Dist.*, 528 U.S. 152

(2000)). The Court observed that the “core rights” protected by *Faretta* were “(1) the right of a pro se defendant to ‘have his voice heard’ and (2) the right of a pro se defendant to ‘present his case in his own way.’” *Id.* at 1157 (citing *McKaskle v. Wiggins*, 465 U.S. 168 (1984)).

The Eleventh Circuit said this Court had correctly recognized the right to self-representation, under *Faretta* and its progeny, is not absolute, and “the participation of standby counsel, even over the objection of a pro se defendant, is consistent with *Faretta* as long as counsel does not seriously interfere with the defendant’s opportunity to present his own case or undermine the jury’s perception that the defendant is representing himself.” *Id.* In Mr. Barnes’s case, he was allowed to represent himself fully, including filing and arguing motions, making objections, and questioning witnesses. *Id.* at 1160. He was allowed to present his own theory of mitigation, which was then supplemented with special counsel’s mitigation presentation. *Id.* The Eleventh Circuit noted, as had this Court, that the mitigation presentation was made to the trial judge and not a jury, and that without it, the trial judge’s ability to provide individualized sentencing would have been limited. *Id.*

The Answer Brief dismisses the distinctions drawn by both this Court and the Eleventh Circuit Court of Appeals, arguing it is not significant that the mitigation evidence presented by special counsel in *Barnes I* did not conflict with the mitigation presented by the defendant or that it was not presented to a jury. Ans. Br. at 67, 70. But the State's real quarrel with *Barnes I* and *Barnes II* is that special counsel was appointed at all. Of course information in a mitigation case is personal to the defendant. It is not realistic to equate every aspect of mitigation with the overall object of the litigation. The manner of presenting or objecting to evidence, choosing and questioning witnesses, and the like is either within counsel's role, if a defendant is represented, or the responsibility of a defendant who chooses self-representation. That trial reality does not address the situation of a court that has to impose a death sentence without information about a defendant's history or individual characteristics.

The decision in *Barnes II* explains why this Court's precedents regarding the presentation of mitigation, including *Muhammad v. State*, 782 So. 2d 343 (Fla. 2001) and *Marquardt v. State*, 156 So. 3d 464 (Fla. 2015), do not violate a defendant's Sixth Amendment rights. But the Answer Brief also asserts that *Muhammad* and

Marquardt violate Florida's Conformity Clause because, when they were decided, this Court was concerned with the proportionality of death sentences. Both opinions, however, reflect more than concern with comparative proportionality; they reflect the Court's "struggle with how to ensure reliability, fairness, and uniformity in the imposition of the death penalty." *Muhammad*, 782 So. 2d at 363. Uniformity may no longer be a goal, but reliability and fairness are still required under federal constitutional standards. *E.g.*, *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) ("Because of [the] qualitative difference [between a death sentence and life imprisonment], there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.").

The issue of when and how capital defendants should be empowered to waive various rights has inspired extensive commentary. Although this Court, in *Muhammad*, referred to "these rare cases where the defendant waives mitigation," 782 So. 2d at 363, such cases are less rare today. It has been reported that "[about 11% of those executed in the United States are death-sentenced prisoners who sought their own execution." Meredith Martin Rountree, *Volunteers for Execution: Directions for Further*

Research Into Grief, Culpability, and Legal Structures, 82 UMKC L. Rev. 295 (Winter 2014). Even under Florida's procedures for ensuring the presentation of mitigation and requiring direct review of death sentences, the number of prisoners who, like Mr. Fletcher, seek to expedite the process is not negligible. The danger is that rights, once waived, cannot be recaptured. When the goal of self-representation is an order imposing a death sentence, fundamental respect for the humanity of the individual must be commensurate with the promotion of individual autonomy.

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.

As to this issue, the Answer Brief correctly states Appellant is arguing that “the jury’s § 921.141(2) recommendation determines the maximum authorized sentence under Florida law for a first-degree murder conviction.” Ans. Br. at 88. Because that recommendation is what exposes a defendant to a greater sentence, it is subject to a burden of proof. The determination that at least one aggravating factor exists, the determination that sufficient aggravating circumstances exist to justify a death sentence, and the determination that aggravating factors outweigh any mitigating circumstances, are distinct findings. *See* § 921.141 (2) (a)-(b). Whether the Florida Legislature labeled these determinations “elements” or not, the relevant inquiry is whether they increase the available penalty for a crime.

This reply will focus on the determination that “sufficient aggravating factors exist,” which is present in a small number of state capital sentencing schemes, and will rely on the arguments in

Appellant’s Initial Brief as to the remaining sentencing requirements.

Florida and at least one other state require a separate finding — independent of any weighing of aggravating and mitigating factors — that aggravating factors sufficient to justify imposing a death sentence exist. *See id.*; Ark. Code Ann. § 5-4-603(a)(2021) (requiring imposition of a death sentence only if jury returns three findings including “(3) Aggravating circumstances justify a sentence of death beyond a reasonable doubt.”). If the State were correct that the mere finding of a single aggravator allows a defendant to be executed, the word “sufficient” would be unnecessary. The sentencing statute says “whether sufficient aggravating factors exist,” not “whether aggravating factors exist.” § 921.141(2)(b)2.a.

Given that the number of potential aggravating factors has doubled since capital punishment was reinstated in Florida,⁴ this determination ensures that circumstances in a particular case not only fall into one of the enumerated categories, but also rise to a

⁴ When Florida rewrote its capital sentencing law following the Supreme Court’s decision in *Furman v. Georgia*, 408 U.S. 238 (1972), the law contained eight aggravating factors. *See Proffitt v. Florida*, 428 U.S. 242, 251 (1976). The statute now contains 16. *See* § 921.141(6)(a)-(p) (2021).

level justifying the death penalty.⁵ Otherwise, the use of “sufficient” is “mere surplusage.” *E.g.*, *State v. Miller*, 227 So. 3d 562, 564 (Fla. 2017) (“This Court also endeavors to give meaning to each word of a statute rather than treat any word as “mere surplusage.”).

This view of the “sufficiency” finding is consistent with Supreme Court precedent such as *McKinney v. Arizona*, 140 S. Ct. 702 (2020) and *Kansas v. Carr*, 577 U.S. 108 (2016). The issue in *McKinney* was whether it was permissible to conduct appellate reweighing of aggravating and mitigating factors, *see* 140 S. Ct. at 707-08; that issue is separate from the issue of sufficiency, or the level of certainty required for the Florida requirement that the factfinder determine that the aggravating circumstances justify death before proceeding to the choice of sentence. The sufficiency requirement is a finding of ultimate fact, just as a finding that the “especially heinous, atrocious, or cruel” or “cold, calculated, and premeditated” aggravators were present is a finding of ultimate fact. *See generally U.S. v. Gaudin*, 515 U.S. 506, 514-15 (1995) (discussing the jury’s role in determining not just historical facts,

⁵ *But see State v. Poole*, 297 So. 3d 487, 502 (Fla. 2020) (construing “sufficient aggravating circumstances” in the predecessor statute to mean “one or more.”

but the “ultimate facts” about whether the element of a crime has been satisfied).

Moreover, the 1993 Arizona sentencing statute applied in *McKinney* specified that the trial court “alone” would make all factual determinations necessary to impose a death sentence. Ariz. Rev. Stat. Ann. § 13-703B (1993). The statute made death an available punishment for every first-degree murder, with the trial court making the selection. *Id.* § 13-703E.⁶ In contrast to the former Arizona statute, the current Florida sentencing scheme limits the court’s ability to impose a death sentence in several ways — one of which is making that ability dependent on the findings in section 921.141(2)(b)2.a.-c.

Finally, the ultimate fact of the sufficiency of the aggravating circumstances is distinct from the “mercy decision” referred to in *Carr*, 577 U.S. at 119. In Florida’s current capital sentencing scheme, both the jury and the trial court have the opportunity to make that ultimate choice between a life sentence and a death sentence. *See* §§ 921.141(2)(b)2.a.-c.; 921.141(3)(a)1.-2. Appellant is

⁶ The current Arizona provision is substantially similar, with the substitution of “trier of fact” for “court” and some other small revisions. *See* Ariz. Rev. Stat. Ann. § 13-751E (2021).

not arguing that Florida’s capital sentencing scheme attaches any particular burden of proof to the jury’s ultimate recommendation of a death sentence (or sentence of life in prison). Once the predicate determinations are made, both the jury and the trial court have the opportunity to “accord mercy if they deem it appropriate.” *Carr*, 577 U.S. at 119.

CONCLUSION

Mr. Fletcher conducted these proceedings according to established law, and now asks for a ruling on the merits of his direct appeal.

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 Jennifer A. Davis, Assistant Attorney General, Capital Appeals Division, on February 21, 2022. I certify that this brief complies with the word count provisions of the Florida Rules of Appellate Procedure.

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