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IN THE SUPREME COURT OF FLORIDA

DONALD HUGH DAVIDSON JR.,

Appellant,

vs. CASE NO. SC19-1851

STATE OF FLORIDA,

Appellee.

_____________________________/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR CLAY COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

ANDY THOMAS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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I. 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, Which Are Determinations Increasing the Penalty for the Charged Offenses.

To date the United States Supreme Court has not accepted review of a case involving whether Florida's capital sentencing scheme creates "elements" in addition to the existence of one or more statutory aggravating circumstances so as to justify imposing a death sentence. *See Rogers v. State*, 285 So. 3d 872, 885-86 (Fla. 2019), *pet. for cert. denied*, Case No. 19-8473 (U.S. Oct. 5, 2020); *State v. Poole*, 297 So. 3d 487 (Fla.), *pet. for cert. filed*, Case No. 20-250 (U.S. Aug. 28, 2020).[1] The Court's decision in *McKinney v. Arizona*, 589 U.S. ___, 140 S. Ct. 702, 708-09 (2020), does not directly address Defendant's argument, and involved a reweighing of sentencing factors on collateral review. As to the merits of the argument, and to preserve the argument for further review, Defendant relies on his Initial Brief.

[1] A petition for certiorari has not yet been filed in *Santiago-Gonzalez v. State*, 2020 WL 3456751 (Fla. June 25, 2020).

II. The Trial Court Improperly Rejected the Statutory Mitigating Factor that Defendant's Ability to Conform His Conduct to the Requirements of the Law was Substantially Impaired, and Improperly Weighed Non-Statutory Mitigation.

A. The trial court's rejection of the statutory mitigating factor that Defendant's capacity to conform his conduct to the requirements of the law was substantially impaired is not supported by competent, substantial evidence.

The issue here is not Defendant's ability to appreciate the criminality of his conduct; the issue is his ability to conform his conduct to the requirements of the law. See Section 921.141(7)(f), Fla. Stat. (2019) (recognizing as mitigating that "[t]he capacity of the defendant to appreciate the criminality of his or her conduct *or* to confirm his or her conduct to the requirements of law was substantially impaired.") (emphasis added). Defendant presented the testimony of three experts in support of the contention that his capacity to conform his conduct to the requirements of law was substantially impaired, and it is that testimony that was unrefuted. Unless this Court reads the phrase beginning "or to conform his or her conduct" as mere surplusage, that phrase creates a separate test that is not automatically satisfied by evidence a particular defendant was able to appreciate the criminality of his conduct.

As in *Coday v. State*, 946 So. 2d 988, 1003-05 (Fla. 2006), the expert testimony here related directly to Defendant's ability to conform his conduct to the requirements of law being substantially impaired. Dr. Ouaou, who personally evaluated and tested Defendant's cognitive functioning, concluded Defendant had executive function and memory impairments that would impair his ability to regulate his impulses — which is merely another way of saying his ability to conform his conduct. (R. 1923, 1928.) Dr. Ouaou also opined Defendant's impairment was exacerbated by cocaine use at the time of the offenses. (R. 1933-34.) Dr. Bigler testified that studies of Defendant's brain revealed changes in the areas regulating behavior. (R. 1969, 1974.) Finally, Dr. Gold testified that Defendant had a lengthy history of adverse childhood experiences or "ACEs," which are known to create permanent changes in the developing brain, and that these changes include a lack of impulse control. (R. 2072-77.) Dr. Gold added, consistently with Dr. Ouaou, that Defendant's cocaine use would have further impaired his ability to control his conduct. (R. 2083-84.)

The unrefuted expert testimony, which was consistent with observations of various lay witnesses, demonstrated that Defendant's ability to conform his behavior to the requirements of the law was substantially compromised. Whether Defendant appreciated the nature of his conduct, as evidenced in purposeful actions taken during and immediately after the offenses, is a separate inquiry from whether his ability to conform his conduct to the requirements of the law was substantially impaired, as provided in section 921.141(7)(f). The court erred in dismissing that statutory mitigator.

B. The trial court's assignment of "little weight" to numerous items of nonstatutory mitigation was an abuse of discretion, given that it assigned the same weight to Defendant's behavior in court.

An abuse of discretion occurs when a trial court rules in a way that is "arbitrary, fanciful, *or* unreasonable." *Canakaris v. Canakaris*, 382 So. 2d 1197, 1202-03 (Fla. 1980) (emphasis added). The sentencing order in this case was detailed, as the State notes, and Defendant does not argue it was fanciful. However, it was arbitrary and unreasonable to assign the same weight to Defendant's courtroom behavior as was assigned to Defendant's childhood abandonment and extensive family history of sex offenses.

Defendant's position is not, as the State suggests, that a court can only assign "little weight" to child abuse when there is evidence the abuse stopped when the child was young. Answer Brief at 31. Defendant argues it is arbitrary and unreasonable to assign "little weight" to child abuse of the nature and duration established *in this case*. In addition, even assuming for the sake of argument that the effects of childhood abuse may be tempered through subsequent positive developments in a child's life, as in *Morton v. State*, 789 So. 2d 324 (Fla. 2001) (assigning "little weight" to childhood abuse because it stopped when the defendant was eight years old and his mother remarried a stable father figure) and

Douglas v. State, 878 So. 2d 1246 (Fla. 2004) (finding the defendant had "kind" relationships with various father figures, including a stepfather, after his abusive father left the family), the record in this case is devoid of any such positive developments.

The court assigned "little weight" to substantial portions of the mental health mitigation, including evidence Defendant was paranoid at the time of the crime; that he had hallucinations beginning in childhood and continuing into adulthood; that he had been involuntarily committed at least three times, twice after taking an overdose of medication; his history of suicide attempts; his reliance on cocaine, which exacerbated other neurological issues; the abnormalities in his brain that reflected repeated trauma; and his difficulty regulating his behavior as a result of brain dysfunction. (R. 1325-31.) To assign the same weight to these factors as to his behavior in the courtroom was also arbitrary and unreasonable. As to the remaining mitigation evidence and whether it was weighed appropriately, Defendant relies on his Initial Brief.

III. Section 921.141, Florida Statutes, is Unconstitutional Because the "Prior Violent Felony" Aggravator is Unconstitutionally Vague and Overbroad.

Defendant relies on his Initial Brief.

IV. Proportionality.

Defendant disagrees with the State's proportionality analysis. *See* Answer Brief at 40-43. Although there are similarities between the charged offenses here and in *Orme v. State*, 677 So. 2d 258 (Fla. 1996), where a death sentence was upheld as proportionate, the mitigation evidence in *Orme* was not nearly as extensive as the mitigation here. The court in *Orme* gave "some weight" to two statutory mental mitigators, and rejected as mitigation the defendant's "age (30), his love for his family, an unstable childhood, potential for rehabilitation, and good conduct while awaiting trial." *Id.* at 261. This comes nowhere near approaching the degree and nature of the abuse and abandonment Defendant experienced as a child and does not include any evidence of the nature presented by the defense experts in this case.

The mitigation evidence in *Brant v. State*, 21 So. 3d 1276 (Fla. 2009), may present a closer comparison. However, although there are similarities between the mitigation evidence in *Brant* and the evidence here, notably in the effects of substance abuse on a preexisting lack of impulse control, the evidence of childhood abuse was not as strong, *see id.* at 1280 (noting the defendant was bullied and physically abused), and the impairment of that defendant's ability to conform his conduct appears primarily have been caused by a severe dependence on methamphetamine, *id.* at 1281.

A case considered, but ultimately rejected, by the Court in *Brant* may be instructive, namely *Crook v. State*, 908 So. 2d 351 (Fla. 2005). In *Crook*, nonstatutory mitigating circumstances included "substantial and unrebutted evidence of brain damage and other mental defects that the mental health experts related to the instant murder. *Id.* at 353. The defendant in *Crook* would have lacked "the ability to modulate his impulses" as a result. *Id.* at 354. The court assigned only slight weight to a number of other "background" and nonstatutory mitigating factors. *Id.* at 355-56. Nevertheless, this Court agreed that, while the crime was substantially aggravated, it was also strongly mitigated. *Id.* at 356-58 (reducing sentence to life without parole). The Court particularly noted the expert testimony linking the defendant's "brain damage and substance abuse to his behavior at the time of the murder." *Id.* at 359.

Based on *Crook*, and compared with *Orme* and *Brant*, Defendant's offenses may be highly aggravated but are also highly mitigated, and thus the death sentence is disproportionate in this case.

CONCLUSION

For the reasons stated above and in his Initial Brief, Mr. Davidson requests a new penalty phase trial; alternatively, he requests remand for appropriate consideration of statutory and non-statutory mitigating circumstances; finally, he requests that his death sentence be vacated.

CERTIFICATES OF SERVICE AND FONT SIZE

I certify that a copy of the foregoing has been furnished electronically via the Florida Courts e-filing portal to William David Chappell, Assistant Attorney General, Capital Appeals Division, on October 5, 2020. I certify that this brief has been prepared using Times New Roman 14-point font.

Respectfully submitted,

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