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IN THE SUPREME COURT OF FLORIDA

WILLIAM E. WELLS, III,

Appellant,

vs.

CASE No. SC21-1001
L.T. No. 04-2019-CF-000706

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE EIGHTH JUDICIAL CIRCUIT,
IN AND FOR BRADFORD COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

JESSICA J. YEARY
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

BARBARA J. BUSHARIS
Assistant Public Defender
Fla. Bar No. 71780
Leon County Courthouse
301 S. Monroe St., Suite 401
Tallahassee, Florida 32301
(850) 606-8500
barbara.busharis@flpd2.com

ATTORNEY FOR APPELLANT

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I. The Court Abused Its Discretion When It Denied the Defense a Continuance for Adequate Time to Investigate Potential Mitigation after Reappointing Counsel Halfway through the Penalty Phase Even Though the Defense Identified Numerous Specific Ways in Which It Was Hampered in Preparing to Present Mitigation.

The Answer Brief is extremely dismissive of the effect of the COVID-19 pandemic on trial counsel's ability to prepare for the penalty phase, especially given the many and specific examples trial counsel provided of ways in which the defense preparation was hampered.

In August 2020, for example, defense counsel informed the court that the pandemic had "severely hindered" any preparation after counsel was reappointed.[1] At that time the defense had been unable to work with experts or depose any witnesses. (R. 678-79.) Seven months later, defense counsel filed a motion asking for

[1] This Court's administrative order *In re: Response of the Florida State Courts System to Coronavirus Disease 2019 (COVID-19)*, No. AOSC20-12, was issued on March 11, 2020 and was just the vanguard of a series of orders which, among other things, suspended criminal trials and related proceedings for several months.

adequate time for preparation and again represented that the pandemic had "seriously hindered" counsel's ability to prepare, including deposing witnesses and reviewing thousands of pages of records. (R. 988-1015.) Among other things, counsel stated it was not ethically acceptable to simply re-use mitigation from a former case without additional investigation. (R. 994, 1022-23.) The Answer Brief ignores this ethical issue.

In response to the remainder of the State's argument as to this issue, Mr. Wells relies on his Initial Brief.

II. The Court Abused Its Discretion in Disregarding Uncontroverted Expert Testimony Concluding Both That Mr. Wells Was Experiencing Extreme Mental and Emotional Distress at the Time of the Charged Offense, and That He Was Unable to Conform His Conduct to the Requirements of Law.

To say the penalty phase transcript is "devoid of any opinion that Wells experienced mental or emotional distress and could not conform his conduct at the time of the killing" is inaccurate at best. The State may disagree with the weight to give the expert testimony, but the transcript, at page 409, contains exactly the opinion the State claims is not there, in the testimony of Dr. Kupers:

> [T]he capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance. Absolutely.
>
> And number F, the capacity of the defendant to appreciate the criminality of his or her conduct or conform his or her conduct to requirements of law was substantially impaired. Absolutely.

(T. 409.)

It would be hard for that opinion to be more clearly expressed.

The State claims Appellant argued that evidence of his advance planning is of no importance. *See* Ans. Br. at 62. The Initial Brief speaks for itself. The argument presented, which Mr.

Wells reasserts here, is that evidence of his planning was consistent with the expert testimony, and therefore did not provide a basis for completely discounting it. Dr. Kuper's testimony, among others, addressed this very point and explained that Mr. Wells retained the ability to make knowing decisions at the same time that his ability to exercise judgment and conform his conduct was substantially impaired. (T. 401-09.)

Bargo v. State, 331 So. 3d 653 (Fla. 2021), on which the State relies, does not justify disregarding the expert testimony the defense presented. First, in *Bargo*, the trial court found the defendant had established the mitigating circumstance that the capital offense was committed while the defendant was under an extreme mental or emotional disturbance. *Id.* at 660. The issue there was not that the court completely disregarded expert testimony, but that the court assigned it slight weight. *Id.* at 660-61. Second, in *Bargo*, the State presented expert testimony that directly contracted the defense expert's conclusion that the defendant was acting under a mental or emotional disturbance. *Id.* at 661. In that context, this Court stated "we have upheld the outright rejection of this mitigating circumstance where the facts of the crime 'show[ed] an element of planning' and the defendant was not shown to be under the

influence of a disturbance 'at the time of the murder.'" *Id.* at 662 (citations omitted).

Here, where there was no expert testimony affirmatively claiming that Mr. Wells was not acting under the influence of an extreme mental or emotional disturbance at the time of the charged offense, extensive and consistent testimony about Mr. Wells's mental health issues, and finally, a clear expert opinion that this statutory mitigator was present, the court's ruling as to the statutory mitigator was an abuse of discretion.

III. 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.

Mr. Wells relies on his Initial Brief regarding the appropriate burden of proof for findings that are required before imposing a death sentence, with the clarification that the Initial Brief did indeed acknowledge the prevailing law on this issue. *See* Init. Br. at 57 ("*But see, e.g.*, *Craft v. State*, 312 So. 3d 45 (Fla. 2020) (rejecting the argument that the identical omission created fundamental error), rehearing denied (Fla. Mar. 4, 2021), and petition for certiorari denied, 142 S. Ct. 490 (2021).").

IV. Florida's Capital Sentencing Scheme Violates the Eighth Amendment to the United States Constitution and Its State Counterpart, Article I, Section 17 of the Florida Constitution Because It Does Not Meaningfully Limit the Class of Defendants Eligible for the Death Penalty.

The expansion of aggravating factors has been steady since Florida's post-*Furman* sentencing statute was enacted. The limitations, in effect, are swallowing the rule.

The function of death penalty aggravators is to distinguish the few cases in which death is appropriate from the many in which it is not. *See Furman v. Georgia*, 408 U.S. 238, 313 (1972) (White, J., concurring); *Zant v. Stephens*, 462 U.S. 862, 876-77 (1983). In *State v. Dixon*, 283 So. 2d 1 (Fla. 1973), and *Proffitt v. Florida*, 428 U.S. 242 (1976), the Florida Supreme Court and the United States Supreme Court held constitutional the post-*Furman* Florida death penalty statute, which contained eight aggravating factors. Both courts specifically noted the number of aggravating factors in reaching the conclusion that the sentencing scheme adequately narrowed the sentencer's discretion. *Dixon*, 283 So. 2d at 9-10; *Proffitt*, 428 U.S. at 253.

During the decades since *Dixon* and *Proffitt* were decided, the Florida Legislature has completely changed the "narrowing" function of the death penalty statute by doubling the number of aggravating factors. The aggravating factors that have been added or expanded are:

- In 1979, section 921.141(6) (i) , that the capital felony was a homicide committed in a cold, calculated, and pre-meditated manner without any pretense of moral or legal justification, was added. *See* Ch. 79-353, Laws of Fla.
- In 1987, section 921.141(6) (j), that the victim of the capital felony was a law enforcement officer engaged in the performance of his or her official duties, was added. *See* Ch. 87-368, Laws of Fla.
- In 1988, section 921.141(6) (k), that the victim of the capital felony was an elected or appointed public official engaged in the performance of his or her official duties if the motive for the capital felony was related, in whole or in part, to the victim's official capacity, was added. *See* Ch. 88-381, § 10, Laws of Fla.

- In 1991 section 921.141 (6)(a) was expanded to include defendants who are on community control or felony probation. *See* Ch. 91-270, § 1, Laws of Fla.
- In 1995, section 921.141(6) (l), that the victim of the capital felony was a person less than 12 years of age, was added. *See* Ch. 95-159, § 1, Laws of Fla.
- In 1995 and 1996, section 921.141 (6)(d) was expanded to include additional felony murder aggravators: aggravated child abuse and abuse of an elderly person or disabled adult resulting in great bodily harm, permanent disability or permanent disfigurement. *See* Ch. 95-159, § 1, Laws of Fla.; Ch. 96-302, § 1, Laws of Fla.
- In 1996, section 921.141(6) (m), that the victim of the capital felony was particularly vulnerable due to advanced age or disability, or because the defendant stood in a position of familial or custodial authority over the victim, was added. *See* Ch. 96-290, § 5, and Ch. 96-302, § 1, Laws of Fla.

- Also in 1996, section 921.141(6) (n), that the capital felony was committed by a criminal gang member, was added. *See* Ch. 96-290, § 5, Laws of Fla.
- In 2005, section 921.141(6) (o), that the capital felony was committed by a person designated as a sexual predator pursuant to section 775.21 or a person previously designated as a sexual predator who had the sexual predator designation removed, was added. *See* Ch. 2005-28, § 7, Laws of Fla.
- In 2010, section 921.141(6) (p), that the capital felony was committed by a person subject to an injunction against the petitioner who obtained the injunction, or any spouse, child, sibling, or parent of the petitioner, was added. *See* Ch. 2010-120, § 1, Laws of Fla.

In addition to these legislative amendments, this Court has interpreted aggravators in a way that broadens rather than narrows their scope. For example, in subsection 921.141(6)(b), "previously convicted" of a violent felony has been interpreted to include contemporaneous convictions. *E.g.*, *Pardo v. State*, 563 So. 2d 77, 80 (Fla. 1990). In subsection (6)(c), "many persons" appears to be

any number greater than three. *See Bello v. State*, 547 So. 2d 914, 917 (Fla. 1989). The Florida Legislature has also amended the burglary statute to include a "remaining in" theory of burglary allowing a defendant to be convicted of burglary after being invited onto the premises where an underlying offense occurred. *See* § 810.02(1)(b), Fla. Stat. (2021). The result is that under section 921.141(6)(d), the aggravating factor that a capital felony was "committed in the course of a burglary" is broader than it was when *Dixon* and *Proffitt* were decided.

Because a single aggravating factor can make a defendant death-eligible, and because any additional aggravators will, by definition, be weighed in favor of a death sentence, the changes in the aggravating factors since *Dixon* and *Proffitt* have greatly expanded, rather than narrowed, the number of cases in which the death penalty can be imposed.

It can no longer be said that the Florida statute ensures "reasonable and controlled" discretion to make certain that the death penalty will be imposed "for only the most aggravated, the most indefensible of crimes." The present statute violates the due process clauses and cruel or unusual punishment clauses of the Florida and United States Constitutions because it does not

sufficiently channel the discretion of the sentencer and thus encourages arbitrary and capricious sentencing.

In *Cruz v. State*, 320 So. 3d 695, 730-31 (Fla. 2021), this argument was characterized, without explanation, as "one[] this Court has repeatedly rejected." The *Cruz* decision cited *Lugo v. State*, 845 So. 2d 74, 119 (Fla. 2003), which similarly stated "We have previously rejected the claim that the death penalty system is unconstitutional as being arbitrary and capricious because it fails to limit the class of persons eligible for the death penalty." The decision in *Lugo*, in turn, cited *Shere v. State*, 579 So. 2d 86, 95 (Fla. 1991), which simply said: "This claim has been rejected previously…and merits no further discussion," citing *Proffitt v. Florida*, 428 U.S. 242 (1976) (upholding a statute containing eight aggravating factors); *Smalley v. State*, 546 So. 2d 720 (Fla. 1989); and *Rogers v. State*, 511 So. 2d 526 (Fla. 1987).

In effect, as the list and scope of aggravating factors has steadily increased, the court has just as steadily declined to consider the effect of adding more and more factors to the list, and has instead continued to rely on its own earlier holdings — some of which predated the expansion at issue.

V. The Eighth Amendment Precludes Execution of the Seriously Mentally Ill.

Defendant declines to accept the State's attempt to mischaracterize this argument as one based on competency, intellectual disability, or youth. Defendant's position is that the Eighth Amendment, through the Fourteenth Amendment, precludes the execution of those with serious mental illness. The fact that the Court has previously rejected this argument is not a bar to raising it, any more than *Penry v. Lynaugh*, 492 U.S. 302, 341 (1989) was a bar to raising the separate but analogous argument in favor of a categorical bar on the execution of the mentally retarded — an argument eventually accepted in *Atkins v. Virginia*, 536 U.S. 304 (2002).

The Answer Brief cites a number of decisions in which this Court has declined to impose a categorical bar on executing the seriously mentally ill. Ans. Br. at 98-100. It does not acknowledge that the American Bar Association, American Psychiatric Association, the American Psychological Association, the Idaho Medical Association, and the National Alliance of the Mentally Ill have all opposed the execution of the seriously mentally ill. *See* Init. Br. at 82-86. The positions of these organizations, which comprise

both legal and medical experts, is valid evidence of a growing consensus against executing the seriously mentally ill. *See Graham v. Florida*, 560 U.S. 48, 62 (2010) (recognizing the views of medical and other experts are appropriate measures of society's evolving standards regarding the death penalty).

CONCLUSION

For the reasons stated above and in his Initial Brief Mr. Wells requests that his sentence of death be vacated as unconstitutional; alternatively, he 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 Janine D. Robinson, Assistant Attorney General, Capital Appeals Division, on April 26, 2022. I certify that this brief complies with the word count provisions of the Florida Rules of Appellate Procedure.

Respectfully submitted,

JESSICA J. YEARY
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

/s/ Barbara J. Busharis
BARBARA J. BUSHARIS
Assistant Public Defender
Fla. Bar No. 71780
Leon County Courthouse
301 S. Monroe St., Suite 401
Tallahassee, Florida 32301
(850) 606-8500
barbara.busharis@flpd2.com

ATTORNEY FOR APPELLANT