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IN THE SUPREME COURT OF FLORIDA

THOMAS BEVEL,

Appellant,

vs.

CASE No. SC22-210
L.T. No. 16-2004-CF-4525

STATE OF FLORIDA,

Appellee.

_____/

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

REPLY BRIEF OF APPELLANT

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ARGUMENT IN REPLY

I. The Court Abused Its Discretion in Disregarding Uncontroverted Expert Testimony That Mr. Bevel Was Under Extreme Mental and Emotional Distress at the Time of the Charged Offenses.

Unrefuted and corroborated expert testimony established that Mr. Bevel suffers from persistent PTSD and depression, including at the time of the charged offenses. The statutory mitigator set out in section 921.141(7)(b), that "[t]he capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance," does not require causation. The statutory language requires that the mental or emotional disturbance be present at the time of the charged offense, not that the disturbance caused the offense to happen.

This mitigator does not require a defendant to demonstrate a condition interfering with the defendant's "knowledge of right and wrong"; that is addressed by a separate mitigating factor involving the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law. *See, e.g.*, *Duncan v. State*, 619 So. 2d 279, 283 (Fla. 1993). As this Court has explained,

> […E]xtreme mental or emotional disturbance as used in section 921.141(6)(b), is interpreted as "less than insanity but more than the emotions of an average man, however inflamed." […S]ubstantial impairment of the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law, as used in section 921.141(6)(f), refers to mental disturbance that "interferes with but does not obviate the defendant's knowledge of right and wrong."

Id. (internal citations omitted).[1]

In *Allen v. State*, 137 So. 3d 946 (Fla. 2013), the trial court's error in considering this mitigating factor was found harmless because it was not directly supported by expert testimony:

> While Allen insists that evidence of brain damage showed that she was under an extreme mental or emotional disturbance at the time of the murder, neither of her expert witnesses so testified. In fact, neither of her experts was asked if he had an opinion about this mitigator. Given the total lack of evidence supporting this mitigator, the trial court's rejection of this mitigator is supported by competent substantial evidence in the record.

Id. at 965.

[1] The statutory references have changed slightly, but the two mitigators are still codified separately at sub-sections (b) and (f) of section 921.141(7), Florida Statutes.

In contrast, here Dr. Gold repeatedly stated his opinion that Mr. Bevel was under the influence of post-traumatic stress disorder and depression at the time of the charged offenses. These are mental and emotional disturbances, and they existed contemporaneously with the charged offense. The statute does not require more.

Because the trial court failed to properly consider this statutory mitigating factor, Mr. Bevel's death sentence violates his right to be free from cruel and unusual punishment under the Eighth Amendment and the Florida Constitution. Amend. VIII, U.S. Const.; Art. I, § 17, Fla. Const.

II. The Court Erred in Denying the Defense's Requested Jury Instruction on the Role of Mercy in Capital Sentencing.

The trial court's denial of the requested jury instruction was an abuse of discretion because the request was correct under Florida law and, without the requested language, the standard instructions did not adequately inform the jury of what could be considered. *See Coday v. State*, 946 So. 2d 988, 994 (Fla. 2006). This Court has stated that the presumption of correctness accorded standard jury instructions is just that, a presumption, that does not obviate the trial court's duty to charge the jury according to the individual demands of each case:

> As noted above, standard jury instructions are presumed to be correct. However, because this is merely a presumption and during the formulation and approval process this Court does not express an opinion on the correctness of the standard jury instructions, the trial judge still retains the responsibility of correctly charging the jury. As a result, the trial judge makes the initial determination of the applicable substantive law, and the standard jury instructions, where available, serve merely as guidelines that are subject to the trial judge's modifications. In other words, even where there are standard jury instructions at play, there is the ability for both parties to engage in a dialogue about properly adjusting instructions that may not fully satisfy the demands of the individual situation.

State v. Floyd, 186 So. 3d 1013, 1022–23 (Fla. 2016) (internal citations omitted).

This Court has also recognized that the function of the "selection" step in the imposition of the death penalty is "to give the defendant an opportunity for mercy if it is justified by the relevant mitigating circumstances and by the facts surrounding his crime." *State v. Poole*, 297 So. 3d 487, 503 (Fla. 2020), reh'g denied, clarification granted, SC18-245, 2020 WL 3116598 (Fla. Apr. 2, 2020).[2]

Refusing to instruct the jury it can always consider mercy deprives the jury of vital information, both about its role and about how the capital sentencing scheme functions. This violates a defendant's right to due process under the state and federal constitutions, as well as his right to be free from cruel and unusual punishment under the state and federal constitutions. Amends. V, VIII, XIV, U.S. Const.; Art. 1, §§ 9 & 17, Fla. Const.

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[2] *Poole* involved section 921.141(3)(b) of a former version of the capital sentencing statute, but the general principle that Florida's capital sentencing scheme provides an opportunity for mercy is unchanged.

III. Fundamental Error Occurred When the Court Failed to Instruct the Jury It Had 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. Bevel relies on this Initial Brief as to this argument, which is raised for the purpose of preserving the issue for further review.

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 Answer Brief relies on, among other cases, *Poole*, for the assertion that the sentencer's discretion is "suitably directed and limited" under Florida law. *See* Answer Brief at 43-44. The discussion in *Poole* regarding Florida's pre-2016 statutory framework did not address the proliferation of aggravators, and the State's analysis does not give sufficient weight to the principle that capital sentencing statutes must "genuinely narrow the class of persons eligible for the death penalty." *Lowenfield v. Phelps*, 484 U.S. 231, 244 (1988) (quoting *Zant v. Stephens*, 462 U.S. 862, 777 (1983)).

Mr. Bevel acknowledges this Court has repeatedly disagreed with arguments that the expansion of aggravating factors undermines the ability of Florida's capital sentencing scheme to "genuinely narrow" the class of persons eligible for the death penalty, but believes the doubling of the number of aggravating factors, itself, warrants clarification regarding how the definition of

death-eligible is "genuinely narrowed" under Florida's current sentencing statute.

V. The Court Erred in Granting the State's Motion in Limine and Precluding Any Argument to the Jury about the Proportionality of Mr. Bevel's Possible Sentence.

The trial court's ruling on this issue did not prevent the defense from using the phrase "worst of the worst," but nonetheless limited the defense in how it could argue to the jury that Mr. Bevel's case was not among the small number where a death sentence is justified. Mr. Bevel respectfully disagrees that trial counsel "conceded to the State's proportionality argument." *See* Answer Brief at 53. On the contrary, trial counsel acknowledged that it would be improper to call witnesses to testify regarding sentences that had been imposed in other cases. Counsel informed the trial court that the State's effort to preclude any kind of proportionality argument would have a chilling effect on the defense. (R. 1684-88.)

Mr. Bevel's sentence violates his right to be free from cruel and unusual punishment under the Eighth Amendment and the Florida Constitution. U.S. Const., amend. VIII; Art. I, § 17, Fla. Const.

CONCLUSION

Mr. Bevel 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 Doris Meacham, Assistant Attorney General, Capital Appeals Division, on January 23, 2023. I certify that this brief complies with the font and word count provisions of the Florida Rules of Appellate Procedure.

Respectfully submitted,

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