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IN THE SUPREME COURT OF THE STATE OF FLORIDA

ALLEN WARD COX,

Appellant,

vs. SUPREME COURT CASE NO. SC22-1553

STATE OF FLORIDA,

Appellee.
_____/

APPEAL FROM THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT, IN AND FOR LAKE COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

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IN REPLY TO THE STATE'S ANSWER ON POINT ONE

In Point One of the Initial Brief, Appellant argued (1) that the court erred in finding that the nonstatutory mitigating circumstance that Appellant suffers from the early signs of dementia was not established by the greater weight of the evidence because it was definitively established by expert testimony. In response, the State claims the mitigating circumstance was not established. (AB 28). Appellant respectfully disagrees.

The State's Answer Brief takes the position that "there is no doubt that the court's failure to find that Appellant was suffering from the early signs of dementia was proper given the evidence." Yet, the State conceded it was proven in the proceedings below. In Section VII of the State's sentencing memo, the State expressly conceded that Appellant had "proven" that "he suffers from various medical conditions such as early onset dementia":

> **VII. Current Medical Issues**
>
> **Defendant alleges** as non-statutory mitigation, pursuant to Florida Statute section 921.141 (7)(h), **that he suffers from various medical conditions such as early onset dementia** and other physical illnesses associated with the aging process. **Though proven**, such current medical

> conditions have no bearing on Defendant's character, background or life, or the circumstances of the offense, such that mitigating circumstances pertaining to his current medical condition deserve little to no weight.

(R 1930) (emphasis added).

As argued in the Initial Brief, the disregarded evidence here might reasonably be viewed as ameliorating the weight of both aggravating factors found in this case (that the defendant had committed prior violent felonies and was still under sentence of imprisonment for one of them). This Court should accordingly vacate the death sentence appealed from, and remand for consideration of the disregarded evidence.

IN REPLY TO THE STATE'S ANSWER ON POINT TWO

In the proceedings below, the lower court acknowledged that four defense experts agreed that impulse control deficits are present, but – relying on its own finding that the defendant's actions leading up to the murder showed he could control his behavior – nevertheless ruled that the non-statutory mitigating circumstance that Appellant "suffers from impulse control deficits" is not mitigating on the facts of this case. (R 2021, 2035-36).

In Point Two of the Initial Brief, Appellant argued that "[t]he record of this case does not contain competent, substantial evidence to support the trial court's rejection of the defense experts' uniform view that the incident which gave rise to the murder charge reflects significantly diminished impulse control." (IB 42).

In response, the State claims that the lower court's rejection of the impulse control mitigator was based on substantial, competent evidence. Specifically, the State takes the same position as the court below: "Appellant established by the greater weight of the evidence that he had impulse control issues throughout his life, but given the

unique facts of this case, this factor was not mitigating because Appellant could control his impulses." (AB 34).

Respectfully, the State misses the point. The evidence demonstrated that Appellant had a diminished ability to control his impulses at the time of the offense. This diminished capacity is neurological in nature. It is and was ever-present. As Dr. Bigler testified, individuals with these impairments "don't have the same kind of control over impulses over emotional regulation that someone without an injury would have." (T 892-93).

The defense called three expert witnesses – a radiologist, a neurologist, and a neuropsychologist – who each testified that significant damage has affected areas of the defendant's brain which control impulsivity. (T 724-62, 857-58, 882-92, 1094-95, 1101).

Three more neuropsychologists[1] testified that their testing supports that conclusion. (T 980-84, 1025-26, 1224-29, 1268-70, 1274-75). One of those experts specified that the defendant "when he gets angry…can't calm himself down." (T 771-72).

> Q. The fact that he wasn't able to calm down from that and he wasn't able to process that and logically think about it

[1] Dr. Robert Ouaou, Dr. Henry Lee, and Dr. Elizabeth McMahon.

and react like a normal human being would, is that a direct result of his brain abnormalities?

A. **Yes, a loss of emotional regulation is something that you can see on the MRIs now**, which is documented in Dr. McMahon's neuropsych testing, even back in 2000, and that was present then. Even Mr. Stamp mentioned that he his emotions were -- he had mental problems, as he said. So those have been present for a long time. **So when he gets angry, he can't calm himself down and he certainly isn't looking at all the possibilities of what can happen from his actions.**

Q. Inherently impulsive too?

A. That's **inherently impulsive** as well.

(T 771-72) (emphasis added).

Q. In regard to the abnormalities that you see and the emotional dysregulation that you see, based on the scans and based on the neuropsychological testing, **what happens when Mr. Cox is under a stressful situation and he gets upset, can he calm down like the rest of us?**

A. He has a more difficult time calming down.

Q. As opposed to a human being with a normal brain that doesn't have all these abnormalities?

A. Right. A lot of people get angry, they're over it if they don't have anything keeping it going, will stay angry and I think **more executive function becomes impaired with planning become poor.**

> **Q. So it's not that he can't control himself, it's that he has a hard time regulating those emotions?**
>
> **A. Correct.**
>
> **Q. And that certainly affects the choices that he makes?**
>
> **A. It does.**

(T 857-58) (emphasis added).

> A. **He's not able to process** I'm going to get him and kill him and that's going to be bad and I'm going to go – he doesn't process that. He's -- **he can't control his emotions.** He doesn't plan well. **His process just does not work.**

(T 772) (emphasis added).

These facts are incompatible with the lower court's rationale for rejecting this mitigating circumstance, which rests on the unsupported presumption – contradicted by the expert testimony on the matter – that Appellant's ability to control his impulses was somehow *not* diminished during the commission of the underlying offense. "[T]he rejection of the expert testimony must have a rational basis." Williams v. State, 37 So. 3d 187, 204 (Fla. 2010). The rejection here did not.

Notably, even in Gill v. State, 14 So. 3d 946 (Fla. 2009) – which the State has cited to defend the lower court's rejection of this circumstance as nonmitigating – the judge afforded the circumstance weight.

IN REPLY TO THE STATE'S ANSWER ON POINT THREE

The Initial Brief argued that (1) several unobjected-to comments in the State's closing argument were improper, and (2) cumulatively, these improper comments were so prejudicial as to taint the jury's recommended sentence, especially considering the close decision reflected by the jury's rejection of both CCP and EHAC.

Regarding the former, the State's Answer Brief has conceded that some, but not all, of the comments in question were improper. On the issue of the comments' propriety, Appellant relies on his Initial Brief.

Regarding the latter, the State argues that the improper comments do not rise to the level of fundamental error. In the State's view, "there is no indication that the jury gave 'significant weight' to any alleged mitigator" and "[i]n fact, quite the opposite", because the jury ultimately "found that the two aggravating factors outweighed the mitigation and that death was the appropriate sentence."[2] (AB 45-46). To this end, the State has challenged the Initial Brief's claim

[2] Notably, this rationale would apply to *every* case where a defendant is sentenced to death.

– based on the jury's rejection of both CCP and EHAC – that the "record supports the conclusion that the jurors' ultimate decision was not easily reached" as a "bold" assertion "entirely unsupported by the record and completely speculative." (AB 45). Appellant respectfully disagrees.

Four aggravating factors were presented to the jury. Of them, only two – CCP and EHAC – were disputed by the Defense. The majority of the evidence presented by the Defense unavoidably served a dual purpose: specifically, it served both (1) to challenge the State's proof of the CPP aggravator, and (2) to establish as mitigation the cognitive impairments and psychological conditions underlying the offense for which Appellant faced the death penalty. Stated differently, a significant amount of the Defense's mitigating evidence was inextricably intertwined with the Defense's challenge to the CCP aggravator. The jury ultimately found that the State had not proven CCP beyond a reasonable doubt, and the verdict form affirmed that one or more jurors found that one or more mitigating circumstances were established by the greater weight of the evidence. It is, therefore, reasonable to infer that one or more members of the jury

afforded significant weight to, at the very least, the portions of the Defense's mitigation evidence which related to CCP and the causes of the underlying offense.

IN REPLY TO THE STATE'S ANSWER ON POINT FOUR

Appellant concedes that this issue has, since the time the Initial Brief was filed, been decided by this Court's decision in Loyd v. State, 2023 WL 7815783 (Fla. Nov. 16, 2023).

IN REPLY TO THE STATE'S ANSWER ON POINT FIVE, SIX, AND SEVEN

Appellant will rely on his Initial Brief as to this point.

CONCLUSION

Appellant respectfully requests, as to the issues raised in Points 3 and 4, this Court vacate Appellant's death sentence and remand for a new penalty phase.

As to the issues in Points 1 and 2, Appellant requests this Court vacate his sentence and remand with directions for the trial court to reweigh the aggravating and mitigating circumstances.

As to the issues in Points 5, 6, and 7, Appellant requests this Court vacate his sentence and remand with directions to impose a sentence of life in prison.

CROSS-APPELLEE'S ANSWER BRIEF

In its cross-appeal, "the State requests that in the event Appellant's death sentence is vacated, this Court direct the lower court to allow the former testimony of Dr. Gutmore in any future resentencing proceedings." (AB 64).

Appellant responds that, as the State's remedy appears to concede, a ruling on this issue would only be appropriate in the event this Court reverses.

> [T]he Florida courts have held that an appellate proceeding may not be used as a method of obtaining the answer to an abstract legal issue. There must be a real and substantial dispute and there must be a present need for resolution. An appellate proceeding may not be used to obtain an advisory opinion on an issue that may be in dispute in the future. The appellate courts have an independent duty to consider each of these issues in every case and to dismiss an appeal or petition that does not present a genuine controversy.

Long v. State, 271 So. 3d 938, 949 (Fla. 2019) (J. Luck, concurring) quoting Padovano, Florida Appellate Practice §18:5 (2018).

Accordingly, in the event this Court affirms Appellant's sentence in his direct appeal, Appellant respectfully requests this Court dismiss the State's cross-appeal.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing has been filed electronically through the Florida Courts E-Filing Portal in the Florida Supreme Court, at www.myflcourtaccess.com; the Office of the Attorney General, Assistant Attorney General Stephen Ake, at capapp@myfloridalegal.com; and a true and correct copy thereof delivered by mail to Mr. Allen Ward Cox, DOC #188854, Union Correctional Institution, P.O. Box 1000, Raiford, Florida 32083, on this 22nd day of February, 2024.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing initial brief complies with the Florida Rules of Appellate Procedure in that it is set in Bookman Old Style 14, and in that it does not exceed the word count set out in the Rules.

/s/ Robert Jackson Pearce III
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Assistant Public Defender