IN THE SUPREME COURT OF FLORIDA

TIMOTHY W. FLETCHER,

Appellant,

vs. CASE NO. SC23-0058

STATE OF FLORIDA,

Appellee.
_____ /

APPEAL FROM THE CIRCUIT COURT
IN AND FOR PUTNAM COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

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SEVENTH JUDICIAL CIRCUIT

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POINT I

In Reply that in violation of the Eighth and Fourteenth Amendments of the United States Constitution, the jury wrongfully ignored mitigation evidence.

Appellee states at the end that "the court … considered the jury's lack of finding mitigation in deciding how much weight to give their verdict."

The judge found in his sentencing order that the jury's checkmark (re: mitigation) was contrary to the weight of the evidence, in that the State conceded that the co-defendant's life sentence mitigation was present. The argument on Point I is based on that finding, not on Appellee's speculation.

The appellant relies upon the initial brief in reply to the appellee.

POINT II

In reply that a violation of the Fifth and Fourteenth Amendments of the United States Constitution, the Absence of an Enmund/Tison Jury Instruction or finding was fundamental error.

The State, in the Answer, has taken the position that the jury is not tasked with making written Enmund/Tison related findings. But this papers over the strict requirements of Ring v. Arizona, 536 U.S. 584 (2002). Ring is clear: It is unconstitutional to have a judge, rather than a jury, decide the critical sentencing issues in a death penalty case. It is the sole authority of the fact finder – the jury – to make such findings. These cases are clear that a sentencing judge cannot substitute his pen for express answers to factual questions from the jury.

Cruz v. State, 320 So.3d 695 (Fla. 2021) involves interrogatory responses from the jury as to exactly who did what and establishing Mr. Cruz as the shooter. ("The jury made special findings on the verdict form that Cruz possessed a firearm during the commission

of the crimes and that Cruz discharged a firearm causing the death of Jemery.") In the present case, there were no equivalent jury interrogatories. Thus, the reliance on Cruz is misplaced.

The appellant relies upon the initial brief in reply to the appellee.

POINT III

In Reply that Defense burden to show mitigation is error.

Placing a burden on the defense to show mitigating circumstances exist by a greater weight of the evidence is error, as the legislature has allocated no such burden, and the burden undercuts and is not logically consistent with death penalty jurisprudence.

Appellee states in its Answer Brief: "He [Appellant] also argues that there is no presumption that standard jury instructions are presumptively accurate, which is patently inaccurate." Citing the 2003 civil case BellSouth Telecommunications, Inc. v. Meeks, 863 So. 2d 287, 292 (Fla. 2003) for authority for this proposition. ("Standard jury instructions are not binding precedent; however, the instructions are published under this Court's authority and are presumed to be correct.") Freeman v. State, 761 So.2d 1055, 1071 (Fla. 2000).

The Appellee then completely ignores the Appellant's cited and quoted and more recent Court pronouncements on this very point, such as In re Amendments to Florida Rules of Judicial Admin., Florida Rules of Civil Procedure, & Florida Rules of Criminal Procedure Standard Jury Instructions, 45 Fla. L. Weekly S121 (Fla. Mar. 5, 2020).

The Court cannot abdicate its Constitutional duty, as a co-equal branch of government, to interpret the law by delegation to a Florida BAR committee.

Appellee states that "a fundamental omission in Appellant's argument is that if mitigating circumstances don't have to meet the bare minimum preponderance of evidence standard, what standard applies?"

This statement is answered by Justice Antonin Scalia in Kansas v. Carr, 577 U.S. 108, 119 (2016). Justice Scalia wrote "Jurors," he said, "will accord mercy if they deem it appropriate, and withhold mercy if they do not." An allowance for Mercy is key. The Court has

observed that "what our case law is designed to achieve" in the selection process is a conscious jury decision to accord or withhold mercy. Also held that the Eighth Amendment does not require capital-sentencing courts to instruct a jury that mitigating circumstance need not be proved beyond a reasonable doubt. This is consistent with the Court's holding in Gregg v Georgia, 428 U.S. 153 (1976), allowing the death penalty in carefully drawn circumstances: "The jury is not required to find any mitigating circumstance in order to make a recommendation of mercy that is binding on the trial court(.)" Gregg at 197.

A misplaced burden of proof requires the defense to "prove mercy." Obviously, one seeks, rather than proves, mercy. As argued in the Initial Brief, mercy is an essential part of the death penalty phase. Yet, if Campbell is to be followed, the defense is required to prove "mercy" mitigation by a greater weight of the evidence. This is illogical as well as impossible. The flaw is in allocating a greater weight of the evidence burden on the defense in the first place.

Appellant acknowledges the decision in Loyd v. State, 48 Fla. L.

Weekly S221 (Fla. Nov. 16, 2023), reh'g denied sub nom. Markeith D. Loyd, Appellant(s) v. State of Florida, Appellee(s), SC2022-0378, 2024 WL 472283 (Fla. Feb. 7, 2024) but asserts that Loyd is wrongly decided.

The appellant relies upon the initial brief in reply to the appellee.

POINT IV

In Reply that a Mercy instruction should have been given.

Mr. Fletcher's request for an express jury instruction on "mercy" should have been granted.

The appellant relies upon the initial brief in reply to the appellee.

POINT V

In Reply that victim impact statements should not have been presented to the jury.

The jury's penalty phase verdict was tainted by improper victim impact evidence, rendering the death sentence unconstitutional under the Eighth and Fourteenth Amendments to the United States Constitution and Article I Section 17 of the Florida Constitution.

The appellant relies upon the initial brief in reply to the appellee.

POINT VI

In Reply that the improper argument in closing by the prosecutor in the penalty phase improperly converted mitigation into aggravation and improperly diminished valid mitigation.

The appellant relies upon the initial brief in reply to the appellee.

POINT VII

In Reply that Mr. Fletcher's convictions and sentence of death must be vacated due to the cumulative effect of the errors.

The appellant relies upon the initial brief in reply to the appellee.

POINT VIII

In Reply that Florida's Death Penalty Scheme, Section 921.141 Florida Statutes, is unconstitutional under the Eighth and Fourteenth Amendments of the United States Constitution and Article I Section 22 of the Florida Constitution.

Point VIII asserts that Florida's death penalty scheme, as currently constituted, is not Constitutional. This is a big picture argument based primarily on Federal Constitutional guarantees. Yet the Answer Brief is surprising devoid of Federal precedent, instead relying heavily on Florida Supreme Court case law that is constantly and rapidly changing. While this is not fatal to the argument, especially since this Court is reviewing the case, Federal Supremacy must be heeded.

Federal law precludes a death penalty scheme that is arbitrary. Furman v. Georgia, 408 U.S. 238 (1972). ("death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual.") in support of this point, Appellant argued in

the Initial Brief, “Practically every conceivable fact situation that would be charged as first-degree murder includes at least one of Florida's aggravating factors.” (IB98) This is a true statement.

The Appellee states in the Answer Brief, “He goes so far as to argue that every conceivable fact situation that could support a charge of first-degree murder includes at least one of Florida’s aggravating factors.”

This is not a correct restatement of the argument made in the Initial Brief, which is “***Practically*** every conceivable fact situation that would be charged as first-degree murder includes at least one of Florida's aggravating factors.” (emphasis added) While there may be some complex fact scenario that would fulfil the challenge, Appellee proposes none. The point is that if the overwhelming majority of first-degree murder cases would qualify, then Florida’s statutory scheme fails to narrow and is therefore unconstitutional.

The Answer the goes on to say, “Even if we assume this assertion is

correct for the sake of argument (which it is not), it completely ignores how the death penalty is implemented in the State of Florida. The existence of an aggravating factor is only the first step in the process Florida uses to narrow the number of first-degree murder cases that result in the death penalty to only the worst of the worst." (AB 52-53)

In response, Appellant in this case asserts that the aggravating circumstances serve no narrowing function at all because virtually every first-degree murder case presents facts that could support at least one of the legislature's aggravating circumstances. Attempting to dispute the accuracy of this claim, Appellee simply disagrees. Disagreement is not argument, and the rebuttal is left hanging with no coherent response.

It is the law that must narrow – the law that is set up by the Florida legislature. In Zant v. Stephens, 462 U.S. 862, 878 (1983), the Court held that narrowing is a "constitutionally necessary function at the stage of legislative definition." 462 U.S. at 878 (emphasis

added); see also Gregg, 428 U.S. at 174 n.19 ("[The Eighth] Amendment was intended to safeguard individuals from the abuse of legislative power." (emphasis added)). Lowenfield v. Phelps, 484 U.S. 231, 246 (1988) made very clear that it is "the legislature" that must provide a means of "narrow[ing] the class of death-eligible murderers." 484 U.S. at 246 (emphasis added). The Florida legislature instead has broadened the application of the death penalty to the current Constitutional breaking point.

The constitutionality of Florida's sentencing scheme depends on whether the aggravating circumstances impose statutory limits on capital sentencing discretion. They do not. Instead, they render practically every defendant death eligible, returning Florida to the pre-Furman days in which the "unique penalty" of death is "so wantonly and so freakishly imposed" that there is no meaningful difference between those who receive this most severe of all possible penalties and those that do not. This Court's intervention is necessary to prevent this blatantly unconstitutional scheme from going forward.

Appellee argues that the additional checks and balances the California death penalty statute had when reviewed in Pulley are not materially indistinguishable from Florida's scheme. Appellee lists four elements of Florida's death penalty scheme for support that the protections afforded an accused are "robust. (AB54-55) First, in comparing California's approved system in Pulley to Florida's current scheme, that first a jury must find at least one special circumstance; second, that there is a second penalty phase; third that the judge can override a jury recommendation of death; and fourth, that there is mandatory State supreme court review.

Without repeating the arguments made in the Initial Brief, these defenses of Florida's current framework are flawed. Because a jury must find at least one special circumstance is invalidated by the aggravator creep problem that qualifies practically every first-degree murder for the sentence of death. The mandatory review is likewise flawed if, for example, that review rubber stamps death sentences as a matter of habit, or, for an additional example, if proportionality review is not conducted.

Florida's system is distinguishable from California's system at the time of Pulley, or Florida's system at the time of Proffitt, is that Florida's system today fails to sufficiently narrow the class of defendants eligible for the death penalty. It contains double the number of aggravators present in Pulley (7) and Proffitt (8), and many individual aggravators have themselves significantly broadened in scope (e.g. CCP, felony murder).

As to proportionality, Appellee in its Answer Brief points to Pulley v. Harris, 465 U.S. 37 (1984) for the proposition that proportionality is not required in order to pass constitutional muster. In Walker v. Georgia, 555 U.S. 979, 983–84 (2008), the Court explained Pulley v. Harris, 465 U.S. 37 (1984): "We stated in that case that the Eighth Amendment does not require comparative proportionality review of every capital sentence. Id., at 44–46, 104 S.Ct. 871; see also McCleskey, 481 U.S., at 306, 107 S.Ct. 1756 ("[W]here the statutory procedures adequately channel the sentencer's discretion, such proportionality review is not constitutionally required"). But that

assertion was intended to convey our recognition of differences among the States' capital schemes and the fact that we consider statutes as we find them, id., at 45, 104 S.Ct. 871; it was not meant to undermine our conclusion in Gregg and Zant that such review is an important component of the Georgia scheme." In fact, Gregg v. Georgia, 428 U.S. 153 (1976) specifically mentioned a mandatory proportionality analysis by the Georgia Supreme Court as one of three procedural elements that allowed the death penalty to be re-implemented after the de facto Furman moratorium. Gregg at 154, 163-168.

Appellant would additionally reply, "Unless we are to abandon the moral commitment embodied in the Eighth Amendment, proportionality review must never become effectively obsolete." United States v. Rivera-Ruperto, 852 F.3d 1, 36 (1st Cir. 2017) citing Graham v. Florida, 560 U.S. 48 (2010), as modified (July 6, 2010). The death penalty is the ultimate sanction requiring maximum due process. For proportionality analysis to exist in the context of fines or forfeitures and not death is a serious

Constitutional blunder. Florida needs to reconsider this error.

Florida's trend away from protections for capital defendants does not serve the "heightened standards" of due process protection required under the Eighth Amendment for capital defendants. See Anna VanCleave, *The Illusion of Heightened Standards in Capital Cases*, University of Illinois Law Review (April 3, 2023).

Appellee claims that the initial brief "severely" misrepresents the facts in Colley v. State, 310 So.3d 2 (Fla. 2020). Counsel is aware that for the purposes of direct appeal, the Appellate Court must defer to a trial court's findings of fact as long as they are supported by competent, substantial evidence. See Ross v. State, 45 So. 3d 403, 414 (Fla. 2010), as revised on denial of reh'g (Sept. 8, 2010). However, one of the victims in Colley, Lindy Dobbins, was killed by a single gunshot to the head, dying with the cell phone she used to call 911 still resting against her head, and this served as a partial basis for EHAC.

Counsel is aware of Zant v. Stephens, 462 U.S. 862, 878 (1983) that found that the failure of one aggravating circumstance does not invalidate a death sentence that is otherwise adequately supported by other aggravating circumstances. However, this rule was refined in Tuggle v. Netherland, 516 U.S. 10, 11 (1995) by stating, "In Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983), we held that a death sentence supported by multiple aggravating circumstances need not always be set aside if one aggravator is found to be invalid. Id., at 886–888, 103 S.Ct., at 2747–2749. We noted that our holding did not apply in States in which the jury is instructed to weigh aggravating circumstances against mitigating circumstances in determining whether to impose the death penalty. Id., at 874, n. 12, 890, 103 S.Ct., at 2741, n. 12, 2749." See also Johnson v. Mississippi, 468 U.S. 578 (1988) (wherein the Court vacated a death sentence because one of the aggravating factors was a prior New York conviction, which had been invalidated by the New York Court of Appeals.) In Florida, the jury is instructed to weigh aggravating circumstances against mitigating circumstances in determining whether to impose the death penalty.

Regardless, litigating those questions here does not impact the overall point. That, taken as a whole, Florida's death penalty scheme is unconstitutional.

The appellant otherwise relies upon the initial brief in reply to the appellee.

POINT IX

In Reply that this case fails proportionality.

The appellant relies upon the initial brief in reply to the appellee.

CONCLUSION

Based upon the foregoing cases, authorities, policies, and arguments, as well as those cited in the Initial Brief, appellant respectfully requests this Honorable Court to reverse the sentences of death and order a new penalty phase trial with a new jury, or in the alternative reverse the sentences of death with directions that the appellant be sentenced to life in prison.

Respectfully submitted,

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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; served on the Office of the Attorney General, Assistant Attorney General Patrick Albert Bobek, at capapp@myfloridalegal.com; and a copy thereof delivered by mail to Mr. Timothy Fletcher, DOC# V14470, Union Correctional Institution, P.O. Box 1000, Raiford, Florida, 32083, on this 20th day of February, 2024.

CERTIFICATE OF FONT COMPLIANCE

The undersigned certifies that the foregoing reply 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 Florida Rules of Appellate Procedure 9.210 and 9.045.

/s/Steven N. Gosney
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