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IN THE SUPREME COURT OF FLORIDA

MARK H. WILSON,

Appellant,

vs.

Case No. SC2023-0320
L.T. No. 2020-CF-1021

STATE OF FLORIDA,

Appellee.
_____/

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

REPLY BRIEF OF APPELLANT

MATTHEW J. METZ
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

/s/ Nancy Ryan
NANCY RYAN
ASSISTANT PUBLIC DEFENDER
Florida Bar No. 0765910
444 Seabreeze Boulevard, Ste. 210
Daytona Beach, Florida 32118
Phone: (386) 254-3758
ryan.nancy@pd7.org

COUNSEL FOR APPELLANT

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SUMMARY OF ARGUMENTS

Point one. The CCP aggravator should not have gone to the jury. While the judge stated that in his view a separate aggravator in itself justifies the death penalty as to one of the victims, the jury's weighing process may have been affected by the State's argument emphasizing the CCP factor. The State has not shown beyond a reasonable doubt that the jury's recommendation, which presumptively was given great weight in the sentencing process, was not in itself affected by the error. A new penalty phase is warranted.

Point two. The judge's finding that *only* Appellant's own claims support a finding of drug-induced psychosis is not entitled to deference, because the bizarre allegations on the confession tape also support that mitigating factor. This Court should remand for reconsideration of the sentencing order, to the extent that order was based on the judge's limited view of what evidence is relevant to mitigation.

Point three. This Court should hold that the victims' families past travails were not relevant under the section of the Florida Statutes that governs victim-impact statements. On the record of this emotional case, a new penalty phase is appropriate.

Point four. The State argues that the jury-instruction change requested on this point had potential to confuse jurors. However, it acknowledges that the defense offered to withdraw the specific requested language it now objects to. The remaining language would have established that in Florida a life sentence is *de facto* as well as *de jure* a life sentence. That accurate statement would have supported counsel's effort to alleviate a common misconception; it amounted both to an abuse of discretion and to constitutional error to deny the request.

Point five. The jury was instructed, in accordance with Florida's standard instructions but over objection, that evidence offered in mitigation must *reasonably* support a life verdict. In closing, the State emphasized the reasonableness requirement. A new penalty phase should follow.

Point six. Appellant relies on his initial brief on this point.

Point seven. The jury was instructed, in accordance with Florida's standard instructions but over objection, that it may not exercise sympathy in reaching its penalty-phase verdict. The State has mistakenly identified the language that was objected to in the trial court; the record shows that the objected-to phrase was in fact read to the jury. Appellant maintains his position that constitutional error resulted.

Points eight through eleven. Appellant relies on the arguments made in his initial brief.

ARGUMENT

POINT ONE

IN REPLY: THE TRIAL COURT ERRED AS A MATTER OF LAW BY ALLOWING THE JURY TO CONSIDER THE "COLD, CALCULATED, AND PREMEDITATED" AGGRAVATING FACTOR.

The State relies on the jury's general guilt-phase verdict to support the decision to instruct on the CCP aggravator. (Answer Brief at 36-39) It does not grapple with the effect of the jurors' then-recent question, *i.e.*, how to proceed "if we are not unanimous as to premeditation?" (R 1118; T 878) The State alternatively relies on the judge's finding that in the penalty phase the jurors "reflected on the evidence and concluded that the Defendant did indeed premeditate and plan this murder." (Answer Brief at 38) It does not grapple with the argument made in the initial brief, *i.e.*, that the judge had no way of divining what drove the deliberations. Appellant relies on the arguments made in his initial brief as to the presence of error.

The State does argue that on this point, any error clearly resulted in no harm to Appellant. (Answer Brief at 39-40) It does not discuss Brown v. Sanders, 546 U.S. 212 (2006), relied on in the initial brief. Appellant acknowledges that Brown v. Sanders is a California case, and that California is a jury-sentencing state. In Florida, of course, the penalty-phase verdict operates as a recommendation, provided it is for a death

sentence. *See* Section 921.141(3)(a), Florida Statutes. However, that recommendation is given great weight by the trial court. Ault v. State, 53 So. 3rd 175, 200 (Fla. 2010); Valle v. State, 502 So. 2d 1225, 1226 (Fla. 1987). Since the jury's verdict has fundamental significance in the death-sentencing decision in Florida, the federal courts have reason to extend the rule of Brown v. Sanders to Florida's sentencing scheme. Applying that rule would require reversal here, for the reasons set out in the initial brief.

The State relies on the judge's statement, in his sentencing order, that as to Tayton Baker's death, the EHAC aggravator on its own is sufficiently strong to support a death sentence. (Answer Brief at 40) It cites Middleton v. State, 220 So. 3rd 1152, 1172 (Fla. 2017), and Smith v. State, 28 So. 3rd 838, 868 (Fla. 2009), for a rule that such a statement on its face establishes harmless error whenever an aggravating factor is struck on appeal. This Court, however, has historically looked to whether the case for mitigation was weak or strong, in deciding whether sending an aggravating factor to the jury resulted in harm. Hurst v. State, 819 So. 2d 689, 696 (Fla. 2002); Jennings v. State, 782 So. 2d 853 n.9 (Fla. 2001); Castro v. State, 644 So. 2d 987, 991 (Fla. 1994); Green v. State, 641 So. 2d 391, 396 (Fla. 1994); Reaves v. State, 639 So. 2d 1, 6 (Fla. 1994). Here the case in mitigation is significant: the proof showed that the defendant had no record

of being a violent man, whether intoxicated or sober. (R 1685, 2111, 2932, 2940-41) The proof further showed that he was led into addiction during childhood. (R 1720, 1559) The jury's discussion of the mitigating effect of voluntary intoxication on those facts may have been short-circuited by the State's emphasis on the CCP factor. This Court should hold that the State has failed to show, on this record, that the error identified on this point caused no harm during deliberations. Reversal for a new penalty phase is warranted.

POINT TWO

IN REPLY: THE TRIAL COURT ERRED IN EXCLUDING MITIGATING EVIDENCE FROM IT'S WEIGHING PROCESS.

The State argues that the judge correctly rejected the proffered mitigating circumstance of voluntary intoxication, because the evidence of intoxication before the trial court was not in fact mitigating. (Answer Brief at 48, 45) There were two distinct questions before that court: (a) *whether the evidence supported a finding of voluntary intoxication,* and (b) *if so, whether intoxication is mitigating here*. As to the former, the judge's finding was that only Appellant's own claims supported a finding of intoxication. (Answer Brief at 44) That finding is not supported by the record, and thus is not entitled to deference, in that the bizarre allegations on the confession tape also support that mitigating factor.

When mitigating evidence is improperly rejected, this Court employs harmless-error analysis. Martin v. State, 107 So. 3rd 281, 320-21 (Fla. 2012); Downs v. Dugger, 514 So. 2d 1069, 1072 (Fla. 1987). Martin provides an instructive comparison regarding harm. In that case, the trial court appeared not to have considered a transcript of a defense expert's deposition which was filed after the penalty phase was complete. 107 So. 3rd at 320. This Court noted that the content of the deposition was

cumulative of other proof. Id. at 320, 321. This Court further noted that the overlooked deposition expressed views adverse to the defendant, including aspersions on his truthfulness. Id. at 321. Ultimately, this Court concluded in Martin that "it is unlikely that had the trial court considered [the] deposition when assessing the aggravating and mitigating circumstances, it would have altered the result such that the court would have imposed a life sentence." 107 So. 3rd at 321.

Here, the State argues that any error is harmless because the record supports the judge's findings that the Appellant "planned these homicides with precision" and "took steps to cover [them] up when complete." (Answer Brief at 43, 41) As argued in the initial brief, the record does not in fact reflect careful forethought in aid of an intended goal. To the extent the State suggests that leaving bloody evidence under one of the sinks on the Bakers' property tends to reflect a well-thought-out plan, this Court has rejected just such an argument. *See* Middleton v. State, 220 So. 3rd 1152, 1172 (Fla. 2017) (disposing of bloody clothes and a murder weapon with the means at hand does not tend to show pre-planning).

The State does not dispute that intoxication can be mitigating; its view is that the evidence of intoxication *in this case* is not mitigating. This Court should hold that the extraordinary comments made on the confession tape

are in fact relevant to mitigation, and that the trial court should reconsider whether that mitigation supports an ultimate finding of diminished culpability.

POINT THREE

IN REPLY: VICTIM IMPACT TESTIMONY SHOULD NOT HAVE INCLUDED REFERENCES TO PAST TRAUMA TO THE VICTIMS' FAMILY.

As the State correctly acknowledges, Section 921.141 of the Statutes limits the content of the victim-impact statements that may be admitted at a penalty phase. (Answer Brief at 49) Such statements *shall* demonstrate the victim's uniqueness as an individual human being *and* the loss engendered by the victim's death. Section 921.141(8), Fla. Stat. While the disputed testimony in this case explained the extent of loss, it did not tend to demonstrate the victims' uniqueness as individuals. Both must be present. "The Legislature is conclusively presumed to have a working knowledge of the English language." Florida State Racing Comm'n v. McLaughlin, 102 So. 2d 574, 575 (Fla. 1958). "[W]hen a statute has been drafted in such manner as to clearly convey a specific meaning the only proper function of the Court is to effectuate this legislative intent." Id.

The State relies on the fact that the disputed statement "did not ask for a specific sentence or punishment." (Answer brief at 49) As Judge Daniel Pearson of the Third DCA once wrote, "[e]nter the straw man." *See* Kindell v. State, 413 So. 2d 1283, 1288 (Fla. 3rd DCA 1982). The Appellant has not argued that the impact statement touched on an area expressly

forbidden by Section 921.141(8); he has argued, instead, that the statement failed to fit the outer parameters of what the Legislature has allowed in that subsection. “Straw man” arguments are disfavored. *See generally* David v. State, 306 So. 3rd 228, 234-35 (Fla. 3rd DCA 2020).

The State further relies on the fact that the impact statement in question dealt, in part, with permissible matters. (Answer brief at 52-53) Appellant’s position is that the impermissible portion of the statement should have been redacted on the defendant’s motion, not that the statement should have been excluded in its entirety. This Court should hold that the victims’ families past travails were not relevant under Section 921.141(8). *See* Loyd v. State, 379 So. 3rd 1080 (Fla. 2023). The outcome in Loyd is distinguishable: here the error was harmful, based on the State’s dramatic lead-in to the penalty phase, which directly preceded introduction of the victim-impact statements. *See* Initial Brief at 49, and R 2244. On the record of this emotional case, a new penalty phase is warranted.

POINT FOUR

IN REPLY: THE TRIAL COURT ERRED IN DENYING A SPECIAL JURY INSTRUCTION WHICH WOULD HAVE CLARIFIED THAT A SENTENCE OF "LIFE WITHOUT THE POSSIBILITY OF PAROLE" IMPOSED IN FLORIDA IN FACT VIRTUALLY PRECLUDES RELEASE.

The State argues that the trial court did not abuse its discretion on this point, based on its view that the factors laid out in Stephens v. State, 787 So. 2d 747, 756 (Fla. 2001) are not met. The State does not address the constitutional argument made on this point, *i.e.*, that the jury's instructions lacked the heightened reliability required by the federal Eighth Amendment in capital cases.

As to the first Stephens factor, the State now dismisses the study the defense relied on below as "unsubstantiated," although it acknowledges that it did not challenge the study's reliability below. (Answer Brief at 57) The defense motion cited to the website of the national Death Penalty Information Center. (R 192) The DPIC is a clearinghouse formed in 1990. *See* https://deathpenaltyinfo.org/about. Its studies have been accepted as authoritative by nine state supreme courts and two federal Circuit Courts. *See* People v. Weinstein, 2024 WL 1773181 (N.Y. 2024); State v. Hoffman, 326 So. 3rd 232, nn. 5, 7 (La. 2021); State v. Bartol, 368 Or. 598, 496 P. 3rd 1013, 1019 n.5 (Or. 2021); State ex rel. Johnson v. Blair, 628 S.W. 3rd 375,

391 n.20 (Mo. 2021); Com. v. Bredhold, 599 S.W. 3rd 409, 422 n.19 (Ky. 2020); People v. Penunuri, 5 Cal. 5th 126, 233 Cal. Rptr. 3rd 324, 418 P. 3rd 263, 307-08 and n.4 (Cal. 2018); State v. Santiago, 251 Conn. 285, 122 A. 3rd 1, nn. 66 et seq. (Conn. 2015); Weisheit v. State, 26 N.E. 2d 3, 8 n.3 (Ind. 2015); and State v. Abdullah, 158 Idaho 386, 348 P. 3rd 1, 71 (Idaho 2014). *See also* Arthur v. Comm'n'r, Alab. Dep't. of Corr., 680 Fed. Appx. 894, 910 (11th Cir. 2017), and Harbison v. Little, 571 F. 3rd 531, 536 (6th Cir. 2009). Justices Labarga and Breyer have relied on the DPIC's studies. *E.g.*, Lawrence v. State, 308 So. 2d 544, 556 n.10 (Fla. 2020) (Labarga, J., dissenting); Glossip v. Gross, 576 U.S. 863, 911, 917, 924-25, 931, 936, 939-40, 942-43 (Breyer, J., dissenting). The State appears to suggest that statisticians must be brought into the Circuit Courts to substantiate the published studies a capital litigant cites, *even where the reliability of those studies is not challenged by the opposing party*. It cites no authority for such a rule.

Regarding the second Stephens factor, the State continues to rely on those standard instructions which convey that life without parole is one of two capital sentencing options. As noted, that reliance rests on the assumption that jurors are likely to know on their own that in Florida, a life sentence *without parole* and a life sentence *without release* are in fact the

same thing. (Initial Brief at 51-52) As the Supreme Court wrote, to the contrary, in Simmons v. South Carolina, 512 U.S. 154 (1994), "[i]t can hardly be questioned that most juries lack accurate information about the precise meaning of 'life imprisonment' as defined by the States." 512 U.S. at 169. This is so because "[f]or much of our country's history, parole was a mainstay of state and federal sentencing regimes, and every term (whether a term of life or a term of years) in practice was understood to be shorter than the stated term." Id.

The State argues that the third Stephens factor likewise is not met, in that the last requested sentence had potential to confuse jurors. (Answer Brief at 59, 54) However, as it acknowledges, the defense offered to withdraw that last proposed sentence. (Answer Brief at 55) The remaining language would have established that "in the State of Florida a life sentence is in fact a life sentence." (See Answer Brief at 54, R 192) That concise and accurate statement would have supported counsel's effort to alleviate a common misconception, and thus would have distinctly improved the standard instructions' reliability. It amounted both to an abuse of discretion and to constitutional error to deny the request. The death sentence appealed from should be reversed, and the case remanded for another penalty phase where the instruction can be read.

POINT FIVE

IN REPLY: THE TRIAL COURT ERRED IN DENYING THE DEFENSE REQUEST TO AMEND THE STANDARD JURY INSTRUCTIONS TO REMOVE THE "REASONABLE" QUALIFIER FROM THE DEFINITION OF "MITIGATING CIRCUMSTANCES."

Appellant asks this Court to reverse on this point, in light of the State's express reliance on the disputed jury instruction in its closing argument. (R 3407-08)

POINT SIX

IN REPLY: THE DEFENSE REQUEST FOR AN EXPRESS JURY INSTRUCTION ON MERCY SHOULD HAVE BEEN GRANTED.

The State correctly asserts that abuse of discretion is the appropriate standard of review for denial of a special instruction. Counsel did not intend to mislead this Court, and regrets the inapt statement of law.

On the merits, the Appellant will rely on his initial brief as to this point.

POINT SEVEN

IN REPLY: THE TRIAL COURT ERRED IN DENYING THE DEFENSE MOTION FOR JURY INSTRUCTIONS THAT DO NOT PRECLUDE SYMPATHY AS A FACTOR IN THE SENTENCING DECISION.

The State again asserts that abuse of discretion is the appropriate standard of review on this point. Here, the Appellant disagrees: what he sought was *omission* of "any statement that sympathy for the Defendant is an improper consideration." (Initial Brief at 63-64; R 245) The court denied the motion, and read a statement in the standard instructions that "your decision must not be based upon the fact that you feel sorry for anyone." (R 1410, 3403) Whether that statement correctly sets out the governing law presents a question of law, which this Court reviews *de novo*. *See generally* State v. Floyd, 186 So. 3rd 1013, 1019 (Fla. 2016).

The State asserts that the issue raised on this point is moot, because the court did not read a second standard reference to jury sympathies, *i.e.*, "[y]our decisions should not be influenced by feelings of prejudice or racial or ethnic bias, *or sympathy*." (See Answer Brief at 67) The italicized words were removed from Standard Instruction 7.11 in 2018. *See* In Re Standard Criminal Jury Instructions in Capital Cases, 244 So. 3rd 172, 195 (Fla.

2018).[1] The State is incorrect when it asserts that the defense "moved to exclude the word 'sympathy' from the penalty phase jury instructions;" as noted, what the defense moved to exclude was "any statement that sympathy for the defendant is an improper consideration." The trial court understood what language the motion addressed. (R 1880, lines 6-10)

On the merits, Appellant maintains his position that the "sorry for" statement is inconsistent with the demands placed by the Eighth Amendment.

[1] In 2023, after the trial of this case, the entire list of considerations headed "weighing the evidence" was relegated to optional status in the final standard penalty-phase instruction, no. 7.11. *See* West's Florida Criminal Laws and Rules 2024 (Thomson Reuters) at J-82. *See also* floridabar.org/rules/florida-standard-jury-instructions/criminal-jury-instructions.

POINTS EIGHT through ELEVEN

IN REPLY: PROPORTIONALITY ANALYSIS SHOULD BE CONDUCTED; THIS COURT'S DECISION IN LAWRENCE v. STATE WAS INCORRECTLY DECIDED.

IN REPLY: FLORIDA'S DEATH PENALTY SCHEME FAILS TO NARROW THE CLASS OF PERSONS ELIGIBLE FOR THAT PENALTY.

IN REPLY: THE JURY WAS DEATH-QUALIFIED OVER THE DEFENSE'S OBJECTION.

IN REPLY: THE DEATH PENALTY IS UNCONSCIONABLE.

As to these points, the Appellant will rely on his initial brief.

CONCLUSION

The appellant asks this Court to reverse his death sentence and remand for a new penalty phase, based on the arguments set out in the briefs at Points One, Three, Four, Five, Six, Seven, and Ten.

He asks this Court to reverse his sentence and remand for reconsideration of the sentencing order, based on the argument made on Point Two.

As to Points Eight, Nine, and Eleven, he asks this Court to reverse his death sentence and remand for imposition of a sentence of life in prison.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing has been filed electronically through the Florida Courts E-Filing Portal in the Fifth District Court of Appeal, at www.myflcourtaccess.com; which will email a copy to Assistant Attorney General, Doris Meacham, at doris.meacham@myfloridalegal.com; the Office of the Attorney General, at capapp@myfloridalegal.com; and a true and correct copy thereof delivered by USPS to Mr. Mark Howard Wilson, DOC# G19924, Union Correctional Institution, P.O. Box 1000, Raiford, FL 32083, on this 1st day of July, 2024.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the font used in this brief is 14 point proportionally spaced Arial, in compliance with Rule 9.045(b), Florida Rules of Appellate procedure, and the word count complies with Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

/s/ Nancy Ryan
NANCY RYAN
ASSISTANT PUBLIC DEFENDER