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IN THE SUPREME COURT OF FLORIDA

STEVEN J. LORENZO,

Appellant,

vs.

CASE NO. SC23-0539
LT NO. 16-CF-008779

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRTEENTH JUDICIAL CIRCUIT,
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

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Appellant relies upon his argument made in his initial brief. Appellee primarily relies on *Noetzel v. State*, 328 So. 3d. 933 (Fla. 2021) to argue the trial court did not abuse its discretion in failing to appoint counsel, and that the error is not preserved because it does not rise to the level of fundamental error. Appellee focuses his argument on Appellant's claims the trial court lacked jurisdiction due to his sovereign citizenship theory under the Uniform Commercial Code during the guilt phase. However, Appellant continued to show confusion and lack of a grasp of understanding of the proceedings throughout the penalty phase.

During the pre-trial hearing held on January 21, 2022 when the State announced it would continue to seek the death penalty,

Appellant announced he was withdrawing his offer (S4354). Appellant stated:

> Because as far as I'm concerned, this -- the defense is giving up too many comforts and, what do you call it, benefits by the State withdrawing the death penalty. *So we don't want to withdraw the death penalty*. I already made that clear in the mitigation.

(S4354-4355) (emphasis added). Appellant's statements clearly do not make sense, and clearly show he did not understand. Even though the State announced it would continue to seek the death penalty, Appellant announced he was withdrawing his offer (to plea) because he did not want the death penalty withdrawn which was exactly what the State had just announced. There are also Appellant's conflicting statements about the imposition of the death penalty in his motion rejecting mitigation and a reference to a nonexistent agreement regarding releasing information about other victims (R2142-2158). Thus, there was substantial evidence before the trial court to call into question Appellant's competency to represent himself.

Noetzel did not involve any unsound or contradictory legal arguments such as those presented in the case at bar. In *Noetzel,*

this Court explained the trial court's responsibility in ensuring the integrity of the proceedings by appointing counsel against a defendant's wishes:

> Although the technical skill of a criminal defendant to represent himself is not part of the *Faretta* inquiry, "the government's interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant's interest in acting as his own lawyer." *Edwards*, 554 U.S. at 177, 128 S.Ct. 2379 (quoting *Martinez v. Court of Appeal*, 528 U.S. 152, 162, 120 S.Ct. 684, 145 L.Ed.2d 597 (2000)). Thus, the Supreme Court held in *Edwards* that "the Constitution permits States to insist upon representation by counsel for those competent enough to stand trial under *Dusky* but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves." *Edwards*, 554 U.S. at 178, 128 S.Ct. 2379.
>
> Following *Edwards*, this Court amended Florida Rule of Criminal Procedure 3.111(d)(3) to "implement the narrow limitation upon the right to self-representation recognized in Edwards," but did so "[w]ithout deciding whether Edwards compels states to provide additional protection to severely mentally ill defendants." *In re Amends. to Fla. Rule of Crim. Proc. 3.111*, 17 So. 3d 272, 274 (Fla. 2009). Rule 3.111(d)(3) thus authorizes trial courts to force counsel upon a competent criminal defendant who has waived the right to counsel and seeks to represent himself at trial in the limited instance where the defendant "suffer[s]

> from severe mental illness to the point where [he] is not competent to conduct trial proceedings by himself."

Noetzel, 326 So. 3d at 949. The question left open is the definition of being capable of conducting trial proceedings. Naturally, the ability to prepare and argue an adversarial position against the prosecution would be crucial to be a check on the State's ability to prosecute. Otherwise, the State and the trial court become participants in State sponsored assisted suicide.

Another factual distinction between *Noetzel* and the case at bar is that Appellant was not personally evaluated by Dr. Gamache. The trial court's request for a competency evaluation occurred early in the case. The basis for that concern, Appellant's irrational arguments, did not dissipate as the case progressed. In fact, in some ways, the frequency and magnitude of the irrational and contradictory claims multiplied casting doubt upon Appellant's ability to represent himself.

Appellee points to Appellant's intelligence and appropriate courtroom behavior as evidence of Appellant's competence, but the true measure of a defendant's competence to represent himself should be whether the defendant can put forth some legitimate

theory of defense against the State to protect his constitutional right to a fair trial guaranteed by the Sixth Amendment. Otherwise, what is the purpose for holding these proceedings but for a check against the State's prosecutorial power and the judicial power to impose the absolute penalty?

The record in this case repeatedly showed Appellant's inability to offer a coherent, legal defense to the State's prosecution of him. In its Answer Brief, the State conceded Appellant's theory that he was a sovereign citizen had no legal merit. The State failed to cite any coherent legal theory put forth by Appellant as proof of his competency to represent himself because there was none.

This Court should rule the trial court committed fundamental error in finding Appellant competent to proceed, and reverse Appellant's judgment and sentence, and remand for a new trial.

II. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION TO CONSIDER THE MITIGATION REPORT COMPOSED BY STANDBY COUNSEL AFTER ACCEPTING APPELLANT'S WAIVER OF MITIGATION EVIDENCE OTHER THAN WHAT HE PRESENTED?

Appellant relies on his argument in his Initial Brief. Appellee argued this issue is not preserved because Appellant did not make a contemporaneous objection. (Answer Brief, page 38). This Court explained that the purpose for the contemporaneous objection rule was to place the trial judge on notice that an error may have been committed, and provide him an opportunity to correct it. *Castor v. State*, 365 So. 2d 701, 705 (Fla. 1978). The other purpose is to prevent counsel from allowing errors in the proceedings to go unchallenged and later using the error to the client's tactical advantage. *See, J.B. v. State,* 705 So. 2d 1376, 1378 (Fla. 1998). However, "no 'magic words' are needed to make a proper objection." *State v. Paulk*, 813 So. 2d 152, 154 (Fla. 3d DCA 2002). If an attorney's articulated concern informs the trial court of the alleged error, then the issue is properly preserved for appeal. *Id.* at 154. Further, a "general objection" is sufficient when the basis

for the objection is clear from the context. *State v. Roberts*, 963 So. 2d 747 (Fla. 3d DCA 2007).

In the case at bar, Appellant asked the trial court during the hearing on December 6, 2022 whether the mitigation packet put together by standby counsel was going to be considered by the trial court, and the trial court answered it had to weigh it:

> THE DEFENDANT: Yes. So the mitigation packet, the mitigation that my mitigator put together, none of that is going to be used? That's all I'm asking.
>
> THE COURT: It will be considered. I have to weigh it.
>
> THE DEFENDANT: For my mitigator?
>
> THE COURT: I have to weigh it against the aggravating circumstances.
>
> THE DEFENDANT: Oh. So you are going to use what I'm asking not to be used?
>
> THE COURT: Yes, I have to.
>
> THE DEFENDANT: I'm not down with that.
>
> THE COURT: I will listen to -- I will give you an opportunity representing yourself to make argument to me as to what the appropriate sentence is and I will greatly consider that.
>
> THE DEFENDANT: Okay. Because the law specifically says that if I don't want any mitigation -- that was put together for me

> personally. Now, if the State wants to or the Court wants to do it independently, they need to do their own investigation.

(T61). Thus, the trial court was on notice that Appellant objected to its consideration of the mitigation packet put together by standby counsel when it ordered standby counsel to put the mitigation packet prepared by standby counsel in to evidence (T434). Moreover the trial court referred to Appellant's objection to its consideration of the mitigation packet in the hearing held on February 20, 2023 by stating, "And yes, I did, against your or over your objection, accept the mitigation packet because the Supreme Court requires me to seek out and find any potential mitigation and weigh that" (T567).

Appellee asserts that the trial court was obligated to consider the mitigation packet prepared by standby counsel simply because standby counsel had previously given the State the packet. (Answer Brief, page 42 n. 19). In *Fletcher v. State,* 343 So. 3d 55, 57 (Fla. 2022), this Court outlines the trial court's responsibility when a capital defendant waives mitigation evidence:

> We have "repeatedly recognized the right of a competent defendant to waive presentation of mitigating evidence." … However, we have also

> held that a capital defendant's mitigation waiver "does not eliminate the court's responsibility to consider mitigating evidence in the record." …And, in cases like Fletcher's where a capital defendant entirely waives the presentation of mitigation, we require the trial court to order a "comprehensive" PSI that "include[s] information such as previous mental health problems (including hospitalizations), school records, and relevant family background." We have further left it within the trial court's discretion to appoint special counsel.

Id. at 58 (citations omitted). In *Marquardt v. State,* 156 So. 3d 464 (Fla. 2015), this Court found there was no fundamental error when the trial court sought the mitigation evidence obtained by the defendant's investigators and standby counsel because Marquardt completely waived all mitigation whereas Appellant in this case sought to limit the mitigation evidence to the PSI and his own motion containing mitigation. Also, this Court recognized the potential harm in trial courts ordering standby counsel to release any mitigation evidence over a pro se defendant's objection:

> Nevertheless, while no error occurred, we recognize the tension that may exist when standby counsel is appointed by the trial court, even as an "officer of the court" and not as counsel for the defendant, to assist the court in its consideration of mitigation evidence. In order to avoid any appearance or

> potential of a conflict of interest, and to foster uniformity in the procedures to be followed in all cases where the defendant waives mitigation, we take this opportunity to prospectively modify *Muhammad*[1] in one important respect.
>
> Rather than utilizing standby counsel to present mitigation, the trial court should appoint an independent, special counsel to represent the public interest in bringing forth all available mitigation for the benefit of the jury, the trial court, and this Court, in order to assist the judiciary in performing its statutory and constitutional obligations in death penalty cases. This procedure will ensure that all available mitigation evidence is placed in the record at the time of the original sentencing proceeding, but will not prevent the defendant himself or herself from arguing in favor of the death penalty.

Marquardt, 156 So. 3d at 490 (citations omitted).

As *Fletcher* and *Marquardt* explain, every capital defendant whether represented by counsel or pro se, has the right to limit the scope of the evidence of mitigation. The only time the trial court's legal obligation to consider mitigation evidence over a capital defendant's objection is when the capital defendant completely objects to any and all mitigation evidence.

[1] *Muhammad v. State*, 782 So.2d 343 (Fla.2001).

In the case at bar, Appellant did not object to all evidence of mitigation; he objected to the consideration of standby counsel's packet of mitigating evidence because he wanted to enter his own motion of mitigating evidence. Appellant had the right to limit the scope of mitigation evidence considered by the trial court. Therefore, this Court should find the trial court committed fundamental error by considering the mitigation packet prepared by standby counsel, and remand for a new penalty phase.

CONCLUSION

In light of the foregoing authorities and arguments, Appellant respectfully requests this Honorable Court to reverse the trial court's judgment and sentence, and remand for a new guilt and penalty trial due to Appellant's incompetence to represent himself, or in the alternative, a new penalty phase based on the trial court's unconstitutional consideration of standby counsel's mitigation evidence.

CERTIFICATES

I hereby certify, pursuant to Florida Rule of Appellate Procedure 9.045, that this brief complies with the applicable font and word-count-limit requirements. I hereby certify that this brief was served, via the Florida Courts E-Filing Portal, on Stephen D. Ake, Assistant Attorney General, at crimappTPA@myfloridalegal.com, on March 13, 2024.

Respectfully submitted,

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