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IN THE SUPREME COURT OF THE STATE OF FLORIDA

MICHAEL WAYNE JONES,

Appellant,

vs. SUPREME COURT CASE NO. SC23-0696

STATE OF FLORIDA,

Appellee.
______________________/

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

REPLY BRIEF OF APPELLANT

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IN REPLY TO THE STATE'S ANSWER ON POINT ONE

On the question of error. In Point One of the Initial Brief, Appellant argued that the lower court erred in rejecting his request for a special jury instruction defining the "avoid arrest" aggravator – and reading only the text of the aggravator instead – as all three Stephens[1] factors were met. Specifically, Appellant argued that (1) the requested instruction was supported by the evidence, as none of the victims were law enforcement officers or witnesses to any other offense, (2) the standard instruction did not adequately cover the theory of defense to this aggravator, as it omitted the "sole or dominant motive" element, and (3) the requested instruction was a correct statement of the law and not misleading or confusing, as it was all but a verbatim recitation of this court's holdings and was deemed by the lower court to be "absolutely accurate".

In response, the State has not contested that the first and third Stephens factors were met: the State does not argue that the instruction was not supported by the evidence, nor that the lower

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[1] Stephens v. State, 787 So. 2d 747 (Fla. 2001).

court's description of the instruction as "absolutely accurate" was incorrect. Instead, the State's defense of the lower court's rejection of the instruction appears to rest on the premise that the second Stephens factor was not met. (AB 47-48). Appellant respectfully disagrees.

In addressing the second Stephens factor, the Initial Brief argued that "[t]his factor is present here – and unavoidably so – because the standard instruction effectively omits an element which the state must prove beyond a reasonable doubt." (IB 39). In response, the State has claimed that the omission of this element was remedied by the general "reasonable doubt" instruction. (AB 48-49). This claim is without merit. It is apodictic that the "reasonable doubt" instruction – which informs jurors that the State must prove the elements of each aggravating circumstance beyond a reasonable doubt – is incapable of remedying the *omission* of one of those elements.

The State further argues that the rejection of the requested instruction was proper because "this Court has repeatedly upheld the constitutionality of the standard jury instruction for the avoid

arrest aggravator", citing to Sweet v. Moore, 822 So. 2d 1269, 1274 (Fla. 2002), Davis v. State, 698 So. 2d 1182 (Fla. 1997); Whitton v. State, 649 So. 2d 861 (Fla. 1994) and Jackson v. State, 648 So. 2d 85 (Fla. 1994). (AB 49-50). Yet, the Stephens factor at issue is *not* whether the factor is unconstitutionally vague, but whether "the standard instruction did not adequately cover the theory of defense." Stephens, at 756.

Moreover, none of the cases cited by the State involve a lower court's rejection of a special "avoid arrest" instruction. In Sweet, the defendant's appellate challenge to this instruction was denied because the instruction was not requested below. Sweet, 822 So. 2d 1269, 1274-75 (Fla. 2002). In Davis, the challenge to the instruction was similarly raised for the first time on appeal, as was the challenge in Whitton to the constitutionality of the aggravator generally. See Davis, 698 So. 2d 1182, 1192-93 (Fla. 1997); Whitton, 649 So. 2d 861, 867 (Fla. 1994). And in Jackson, the defendant requested a merger instruction, not a special instruction on the "sole or dominant motive" element of the avoid arrest aggravator. Jackson, 648 So. 2d 85, n.7 (Fla. 1994).

On the question of harmlessness. As noted in the Initial Brief, the Supreme Court held in Brown v. Sanders, 546 U.S. 212 (2006) that "an invalidated sentencing factor (whether an eligibility factor or not) will render the sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process *unless* one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances." Brown v. Sanders, 546 U.S. 212, 220 (2006) (emphasis in original). In response, the State has claimed that "all the facts and circumstances admissible to establish the 'arrest aggravator' were also properly adduced as aggravating facts bearing upon 'HAC' and 'CCP'." (IB 56). Appellant respectfully disagrees.

As Justice Scalia explained in Brown, "[t]his test is not, as Justice BREYER describes it, 'an inquiry based solely on the admissibility of the underlying evidence.' " Brown, at 220 (internal citations omitted). Rather, "[t]he issue we confront is the skewing that could result from the jury's considering as aggravation properly admitted evidence that should not have weighed in favor of the death penalty. See, e.g., Stringer, 503 U.S., at 232, 112 S.Ct. 1130 ("[W]hen

the sentencing body is told to weigh an invalid factor in its decision, a reviewing court may not assume it would have made no difference if the thumb had been removed from death's side of the scale")." Brown, at 221 (emphasis in original). "As we have explained, such skewing will occur, and give rise to constitutional error, only where the jury could not have *given aggravating weight* to the same facts and circumstances under the rubric of some other, valid sentencing factor." Brown, at 221 (emphasis added).

Problematically, motive is not a fact which can be given aggravating weight under either EHAC or CCP. As this Court explained in Allen v. State, 137 So. 3d 946 (Fla. 2013), "[t]he HAC aggravator does not focus on the intent and motivation of the defendant, but on the 'means and manner in which death is inflicted and the immediate circumstances surrounding the death.' " Allen, 137 So. 3d at 962 (citations omitted). Similarly, "[t]he CCP aggravating circumstance focuses on the defendant's state of mind and the manner in which the defendant executed the capital offense, whereas the avoid-arrest aggravating circumstance focuses on the defendant's motivation for the crime." Wright v. State, 19 So. 3d 277,

298 (Fla. 2009) citing Rodriguez v. State, 753 So. 2d 29, 48 (Fla. 2000). Thus, while evidence of motive may be *admissible* on grounds that it is relevant to the CCP aggravator, see Miller v. State, 379 So. 3d 1109, 1120 (Fla. 2024), it may not be given *aggravating weight*.

As the Supreme Court has explained, "[e]mploying an invalid aggravating factor in the weighing process 'creates the possibility ... of randomness,' Stringer v. Black, 503 U.S. 222, 236, 112 S.Ct. 1130, 1139, 117 L.Ed.2d 367 (1992), by placing a 'thumb [on] death's side of the scale,' id., at 232, 112 S.Ct., at 1137, thus 'creat[ing] the risk [of] treat[ing] the defendant as more deserving of the death penalty,' id., at 235, 112 S.Ct., at 1139." Sochor v. Florida, 504 U.S. 527, 532 (1992). "Even when other valid aggravating factors exist, merely affirming a sentence reached by weighing an invalid aggravating factor deprives a defendant of 'the individualized treatment that would result from actual reweighing of the mix of mitigating factors and aggravating circumstances.' " Clemons, supra, 494 U.S., at 752, 110 S.Ct., at 1450 (citing Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), and Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982)); see Parker v. Dugger, 498

U.S. 308, 321, 111 S.Ct. 731, 739, 112 L.Ed.2d 812 (1991)." Sochor, 504 U.S. at 532.

In Sochor, the defendant challenged, in relevant part, the jury's consideration of an invalid aggravating factor. In rejecting Sochor's challenge, the Court reasoned that "[b]ecause the jury in Florida does not reveal the aggravating factors on which it relies, we cannot know whether this jury actually relied" on the invalid factor. Sochor, at 538. As of 2016, however, this rationale is no longer applicable in Florida.

As this Court is well-aware, while – at the time of Sochor's trial in the late 1980s – Florida did not require the jury to identify the specific aggravating factors it found to have been proven, Florida's capital sentencing statute has since been amended to so require. And unlike the silent verdict form in Sochor, here the jury expressly found the "avoid arrest" aggravator to have been proven in each of the four capital counts before them. The omission of an element of this aggravating factor in the jury instructions – notably, over objection – rendered it imprecisely defined and, as the Supreme Court explained in Stringer, the consideration of an imprecisely

defined aggravating factor "creates the risk that the jury will treat the defendant as more deserving of the death penalty than he might otherwise be by relying upon the existence of an illusory circumstance." Stringer v. Black, 503 U.S. 222, 235 (1992).

IN REPLY TO THE STATE’S ANSWER ON POINTS TWO & THREE

Appellant will rely on his Initial Brief as to these points.

CONCLUSION

Appellant respectfully requests, as to the issues raised in Point 1, this Court vacate Appellant's death sentence and remand for a new penalty phase.

As to the issues in Points 2 and 3, Appellant requests this Court vacate his sentence and remand with directions to impose 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 Florida Supreme Court, at www.myflcourtaccess.com; e-mailed to the Office of the Attorney General, at capapp@myfloridalegal.com; and a true and correct copy thereof sent by mail to Mr. Michael Wayne Jones, Inmate #X90752, Union Correctional Institution, P.O. Box 1000, Raiford, Florida, 32083, on this 10th day of June, 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
Robert Jackson Pearce III
Assistant Public Defender