IN THE SUPREME COURT OF FLORIDA

ERIC LEE SIMMONS,

Appellant,

vs.

CASE NO. SC14-2314

STATE OF FLORIDA,

Appellee.

_____/

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

APPELLANT'S REPLY BRIEF

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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SUMMARY OF ARGUMENTS

Point one. The State asserts that *de novo* review is not appropriate, because the contested proof was excluded pursuant to the inherent discretionary power to prevent confusion of issues. Dr. Cunningham's testimony was in fact excluded based on a bright-line analytical rule that no longer exists, and this court should therefore review that ruling *de novo.*

The contested proof was properly offered in mitigation, to assist the jury in understanding the various raw IQ scores they heard. The State has not offered a reason why the United States Supreme Court's new rule - that the defendant in a capital case must be allowed to explain the inaccuracy inherent in raw IQ scores - should not be applied when that evidence is offered in mitigation at the penalty phase.

The State argues that any error in excluding Dr. Cunningham's testimony is harmless, because another defense expert, Dr. Mings, covered the same material. Dr. Cunningham's proffered testimony was not merely cumulative of the brief testimony Dr. Mings devoted to the misleading nature of raw IQ scores.

The State further argues that any error is harmless because the court eventually heard Dr. Cunningham's testimony, then found childhood intellectual disability to be present and mitigating. The court's actions do not alleviate the problem, which is that the jurors did not hear the proffered explanation of the raw test scores they did hear.

Point two. The parties agree that the portion of the trial court's order which addresses adaptive functioning is "superfluous."

The State dismisses as "speculative" the defense experts' testimony that the brain damage in this case was such as to affect Appellant's behavior. That testimony in fact clearly tied Appellant's unfortunate experience with oxygen deprivation to later impulse control problems, and clearly established that those problems are likely to manifest themselves under stress rather than continually.

Point three. The cases cited by the State in support of its view that death is the appropriate sentence in this case are inapposite. This is not one of the least mitigated death-row cases this court has reviewed.

Points four, five and six. The appellant will rely on the arguments made in his initial brief on these points.

ARGUMENT

POINT ONE

IN REPLY: RELEVANT MITIGATION EVIDENCE WAS EXCLUDED AT THE SECOND PENALTY PHASE. THE ERROR AMOUNTED TO AN ABUSE OF DISCRETION AND A VIOLATION OF THE EIGHTH AMENDMENT TO THE FEDERAL CONSTITUTION.

STANDARD OF REVIEW

The State asserts that *de novo* review is not appropriate, because the contested proof was excluded pursuant to the inherent discretionary power to prevent confusion of the issues. (Answer brief at 36, n.15) Dr. Cunningham's testimony was excluded after the State argued "Florida recognize[s] the 70 bright-line test, there's no evidence of anything below that... Florida doesn't recognize any error rate or this Flynn effect." The court's response was "I agree with the State that to cross that threshold...invokes a[n] arena of problems." (Initial brief at 21; XX 1124-25) Dr. Cunningham's testimony was thus excluded based on a bright-line analytical rule that no longer exists. See Hall v. Florida, 134 S. Ct. 1986, 2000 (2014).

Hall applies to this pipeline case. "[T]he decisional law in effect at the time of a *de novo* resentencing or before that resentencing is final applies to those proceedings and the issues raised on appeal." State v. Fleming, 61 So. 3d 399, 408 (Fla. 2011). A ruling on admissibility that does not reflect the governing caselaw is

subject to *de novo* review. Bearden v. State, 161 So. 3d 1257, 1263-64 (Fla. 2015); Olesky ex rel. Estate of Olesky v. Stapleton, 123 So. 3rd 592, 594 (Fla. 2d DCA 2013), *rev. den.,* 139 So. 3rd 888 (2014). As it did in Bearden, 161 So. 3d 1257, this court should review *de novo* the ruling excluding the contested testimony.

HALL v. FLORIDA

The State has not offered a reason why the rule of Hall - i.e., that the defense in a capital case must be allowed to explain the inaccuracy inherent in raw IQ scores - should not be applied at the penalty phase. Instead, the State insists that the defense in this case offered proof of intellectual disability as part of an "attempt to undermine the dictates of" the criminal procedure rule which requires prior notice before initiating proceedings in bar of execution. (Answer brief at 41) It asserts that "[t]he sole purpose of [the contested evidence] was so that [Dr. Cunningham] could opine that Appellant was mentally retarded and therefore ineligible for the death penalty." (Answer brief at 41) However, the record shows that the contested evidence was offered not in bar of execution, but in mitigation. It is clearly the view of the United States Supreme Court that *as to sentencing,* intellectual disability is inherently mitigating. See Smith v. Texas, 543 U.S. 37, 45 (2004); Tennard v. Dretke, 542 U.S. 274, 288 (2004). (See initial brief at 38) Proceedings in bar of execution do not feature a jury, and can lead to relief only in those cases where the defense

affirmatively shows by clear and convincing evidence that the defendant is currently intellectually disabled. (See initial brief at 47) In this case the contested proof was properly offered in mitigation, to assist the jury in understanding the various raw IQ scores they heard, and it should have been admitted. Hall; Skipper v. South Carolina, 476 U.S. 1 (1986).

THE STATE'S HARMLESS ERROR THEORIES

The State argues that any error in excluding Dr. Cunningham's testimony is harmless, because another defense expert, Dr. Mings, covered the same material. (Answer brief at 41-42) In context, Dr. Mings was the first mental-health expert called by the defense; he recounted the history he took from the defendant and gleaned from his school records (XVII 523-36), summarized the expert reports he had relied on (XVII 537-42), explained tests he himself conducted of the defendant's IQ and executive functioning (XVII 542-58), and testified to his conclusions (XVII 558-62). After Dr. Mings, the defense called Drs. Wood, Wu, and Foley to elaborate on MRI and PET scan results which Dr. Mings had summarized. (Cf. XVII 539-42 with XVII 577 - XIX 818) The defense then called Dr. Cunningham, who established that as an actuarial matter the defendant's background made it likely he would offend violently. (XIX 959 - XX 1096, 1129-52, 1158-76) The defense further proffered Dr. Cunningham's summary of testimony he would give about the scores the defendant

had achieved on intelligence tests and about "the meaning of those scores," in light of the standard error of measurement, "the obsolete nature of the norms of the test," and "psychometric considerations about...measuring IQ's in the lower IQ range." (XX 1117-18)

The brief testimony Dr. Mings devoted to the misleading nature of raw IQ scores is quoted in full in the answer brief. (Answer brief at 42; XVII 543-45) That testimony raises more questions than it answers. Dr. Mings's initial statement, "there's variability because they understand that IQ scores are not exact," is unclear. (See answer brief at 42, XVII 544). His explanation of margin of error asserts that a range of 68 to 77 could be applied to this case *if the defendant's IQ was consistently measured.* (Answer brief at 42, XVII 544) Since the jurors heard raw scores ranging from 72 to 85, they may well have concluded that the defendant's IQ was *not* consistently measured and that margins of error consequently do not apply to this case.

As the State notes, in contrast, the testimony Dr. Cunningham ultimately gave in the Spencer hearing on the misleading nature of raw IQ scores went into "great detail." (Answer brief at 43, citing XI 2084-2107) He explained to the court that "there is inherent and inescapable error associated with" intelligence-measuring instruments, because the standard error of measurement only allows a confidence

level of 95% if IQ is expressed as a range of about plus or minus five. (XI 2086, 2092, 2100) The doctor elaborated that "[n]o serious scientist disputes the standard error [of] measurement." (XI 2090) He also explained that outdated norms call for further clinical interpretation of older IQ scores. (XI 2093-99) In short, Dr. Cunningham's testimony was not merely cumulative of Dr. Mings's testimony.

The State argues in the alternative that any error on this point is harmless because the court eventually heard Dr. Cunningham's full testimony, then found that childhood intellectual disability was present in this case and is somewhat mitigating. The court's actions do not alleviate the problem in this case, which is that the jurors did not hear the proffered clear explanation of the raw test scores they did hear. After the State argued mental retardation had not been shown (XXI 1301), those jurors split 6-6 on the question whether non-statutory mitigation was shown, and recommended a death sentence by a split of 8-4. Since evidence of significantly impaired intellectual functioning clearly might serve as a reason for a life recommendation, see Tennard v. Dretke, *supra*, and since the error raised on this point limited the jurors' understanding of the fact that raw scores are misleading, the error in excluding the contested proof from their consideration cannot reasonably be deemed harmless.

POINT TWO

IN REPLY: THE TRIAL COURT ERRED IN WEIGHING MITIGATING EVIDENCE OF BRAIN DAMAGE AND RESULTING CHILDHOOD INTELLECTUAL DISABILITY. THE COURT FURTHER ERRED IN REJECTING THE STATUTORY MITIGATOR OF SUBSTANTIAL INABILITY TO CONFORM TO THE REQUIREMENTS OF LAW.

The parties agree that the portion of the trial court's order which addresses adaptive functioning is "superfluous." (Answer brief at 49; see initial brief at 46-49)

The State quotes Carr v. State, 156 So. 3rd 1052 (Fla. 2015), in support of its position that the mitigation proved in this case was inapposite to Appellant's culpability. (Answer brief at 46-48) Carr involved mitigation evidence describing that defendant's difficult early life; that case did not involve brain damage of a kind this court has held to be "vastly mitigating." Cf. Hawk v. State, 718 So. 2d 159, 163 (Fla. 1998) abrogated by Connor v. State, 803 So. 2d 598 (Fla. 2001). The State dismisses as "speculative" the defense experts' testimony that the brain damage in this case was such as to affect Appellant's behavior. (Answer brief at 54) That testimony in fact clearly tied Appellant's unfortunate experience with oxygen deprivation to later impulse control problems, and clearly established in addition that those problems are likely to manifest themselves under stress rather than continually. (XVIII 781-85) Reweighing of the mitigation evidence is warranted by this record.

POINT THREE

IN REPLY: THE DEATH PENALTY IS NOT PROPORTIONATE IN THIS CASE.

The State relies on Mansfield v. State, 758 So. 2d 636 (Fla. 2000); Dessaure v. State, 891 So. 2d 455 (Fla. 2004); and Singleton v. State, 783 So. 2d 970 (Fla. 2001) in support of its view that the death penalty is proportionate in this case. (Answer brief at 59) In Mansfield, 758 So. 2d 636, this court noted in passing that the defendant proved the existence of "a brain injury due to head trauma." 758 So. 2d at 642. The trial court gave that mitigating factor "some weight;" this court did not address that finding.

Singleton, a case where the defendant suffered from dementia, involved a passing mention of the fact that both statutory mental health-related mitigators were found. Singleton, 783 So. 2d at 972-73. This court held that death was the proportionate sentence in Singleton's case; again, no details about the nature of the defendant's disability appear in this court's opinion.

Dessaure did not involve any mental health-related mitigation. Dessaure, 891 So. 2d at 464. Here as on Point Two, the cases cited by the State are inapposite, and Appellant relies on the argument made in his initial brief that this is not one of the least mitigated death-row cases this court has reviewed.

POINT FOUR

IN REPLY: THE JURY WAS INCORRECTLY INSTRUCTED ON THE "ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL" AGGRAVATING FACTOR.

The appellant will rely on the arguments made in his initial brief on this point.

POINT FIVE

IN REPLY: THE JURY HEARD THAT THE PROCEEDING WAS A RESENTENCING. IN LIGHT OF OTHER COMMENTS MADE IN THE JURY'S PRESENCE, THE MISTRIAL SOUGHT BY THE DEFENSE SHOULD HAVE BEEN GRANTED.

The State argues that Appellant has mischaracterized the record by arguing that venire member Bott "repeatedly insist[ed]" the defendant was previously sentenced to death. (Answer brief at 65-66) What Appellant has argued is that Mr. Bott *suggested,* in an insistent *manner*, that the previous outcome must have been a sentence of death. (Initial brief at 64) Appellant maintains his position that the trial judge should have heeded his own initial assessment of the likely effect on the jury, and should have granted the mistrial the defense sought.

POINT SIX

IN REPLY: THE TRIAL COURT ERRED IN DENYING RELIEF PURSUANT TO RING v. ARIZONA.

The State argues that "it is well established that jury unanimity is not a constitutional requirement." (Answer brief at 70) As he did in the initial brief, Appellant urges this court to hold this matter in abeyance until the United States Supreme Court decides that question in Hurst v. Florida, 135 S. Ct. 1531 (2015) (granting review). Appellant further urges this court to permit additional briefing on this point in the event the Supreme Court's Hurst decision may warrant relief in this case.

CONCLUSION

Appellant has shown that this court should vacate Appellant's death sentence and remand for imposition of a life sentence.

If that relief is denied, Appellant has shown that this court should vacate the sentence imposed below and remand for a new penalty phase, on the grounds argued on Points One, Four, Five and Six above.

As to Point Six, Appellant asks this court to hold this matter in abeyance until Hurst v. Florida is decided, and asks this court to permit further briefing if any aspect of the Supreme Court's decision in Hurst may warrant relief in this case.

If the foregoing relief is denied, this court should vacate the sentence and remand for reweighing of the aggravating and mitigating factors on the basis urged on Point Two above.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing reply brief has been electronically delivered to Assistant Attorney General Stephen Ake, stephen.ake@myfloridalegal.com and capapp@myfloridalegal.com, and mailed to the Appellant on this 20th day of October, 2015.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with Fla. R. App. P. 9.210(2)(a), in that it is set in Times New Roman 14-point font.

Nancy Ryan

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