

No. 267PA21

TWELFTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

STATE OF NORTH CAROLINA)

)

v.)

From Cumberland County

)

FRANCISCO TIRADO)

DEFENDANT-APPELLANT'S REPLY BRIEF

No. 267PA21

TWELFTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

STATE OF NORTH CAROLINA)	
)	
v.)	<u>From Cumberland County</u>
)	
FRANCISCO TIRADO)	

DEFENDANT-APPELLANT'S REPLY BRIEF

In addition to the arguments and authorities in his Brief, Mr. Tirado submits the following reply in response to the State's Brief:

ARGUMENT

I. MR. TIRADO'S DISCUSSION OF FEDERAL CONSTITUTIONAL CASE LAW IS RELEVANT AND IMPORTANT TO HIS CLAIM.

The State contends that the discussion in Mr. Tirado's New Brief on pages 21-27 apply to his first proposed issue in his PDR, which was denied review by this Court, and therefore should be disregarded. (St. New Br. pp 8-9).

However, Mr. Tirado does not argue this Court should find the Court of Appeals erred because of any standard based on federal constitutional case

law, but rather argues that the Court of Appeals' reasoning for not analyzing Mr. Tirado's as-applied state constitutional challenge was incorrect.

The Court of Appeals denied review to Mr. Tirado's claims under both the state and federal constitutions on the same basis: that the Supreme Court of the United States' holding in *Jones v. Mississippi* meant that the Court of Appeals was not required to review Mr. Tirado's as-applied challenges. 141 S. Ct. 1307, 1321 (2021); *State v. Tirado*, 278 N.C. App. 149, 858 S.E.2d 628 (2021) (unpublished).

Further, as the State notes in their brief, historically, state constitutional claims under Article 1, Section 27 were analyzed "the same" as they were analyzed under the United States' Constitution. (St. New Br. p 11). As Mr. Tirado acknowledges in his opening brief, the change to this historical rule enunciated in *State v. Kelliher* does not apply to his case, which inherently results in his claim being functionally analyzed under the North Carolina Constitution just as it would be under the United States Constitution. 381 N.C. 558, 873 S.E.2d 366 (2022) (Def. New Br. p 30) ("The issue in this matter does not rely on *Kelliher's* holding that the North Carolina Constitution requires more than the United States Constitution, but rather on the complete denial of appellate review of Paco's as-applied challenge to his sentence.").

The State further claims Mr. Tirado waived review of this issue by, in their estimation, not sufficiently pleading it in his brief in the Court of Appeals. (St. New Br. p 10). However, as discussed above and in the State's New Brief, at the time that brief was written, the state and federal constitutional claims were reviewed "in lockstep" with each other, therefore a separate and distinct argument was not made and not necessary. (St. New Br. pp 10-11) ("For decades before the Court of Appeals issued its opinion in this case on 15 June 2021, claims of cruel and/or unusual punishment were analyzed the same under both the United States Constitution and the North Carolina Constitution.").

II. THE COURT OF APPEALS DISTINCTLY DID NOT REVIEW MR. TIRADO'S AS-APPLIED CHALLENGE.

The State alleges that the Court of Appeals "rejected," in summary fashion, Mr. Tirado's as-applied state constitutional claim. (St. New Br. p 11). This is directly contradicted by the Court of Appeals statement that "we need not address any as-applied constitutional challenge." *Tirado*, 278 N.C. App. 149, 858 S.E.2d 628. The Court of Appeals plainly declared they would not review the as-applied challenge.

CONCLUSION

For the foregoing reasons and authorities, as well as those in his opening brief, Francisco Tirado, the Defendant-Appellant herein, respectfully requests

this Court to vacate the decision of the Court of Appeals and remand for merits review of his as-applied constitutional challenge.

Respectfully submitted this, the 29th day of February, 2024.

Electronically Submitted

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CERTIFICATE OF COMPLIANCE WITH RULE 28(j)(2)(B)

Undersigned counsel hereby certifies that this Reply Brief is in compliance with N.C.R. App. P. 28(j)(2)(B), in that it is printed in 13-point Century Schoolbook font and contains no more than 3,750 words in the body of the brief, footnotes and citations included, as indicated by the word-processing program used to prepare the Brief.

This, the 29th day of February, 2024.

Electronically Submitted

Kellie Mannette

Attorney for Defendant-Appellant

CERTIFICATE OF FILING AND SERVICE

I hereby certify that the original Defendant-Appellant's Reply Brief has been duly filed, pursuant to Rule 26, by electronic means with the Clerk of the North Carolina Supreme Court.

I further certify that a copy of the foregoing Reply Brief has been served upon Heidi M. Williams, Assistant Attorney General, by sending it electronically to the following current email address, hwilliams@ncdoj.gov.

This the 29th day of February, 2024.

Electronically Submitted

Kellie Mannette

Attorney for Defendant-Appellant