SC22-458

In the Supreme Court of Florida

STATE OF FLORIDA,
Petitioner,

v.

ZACHARY JOSEPH PENNA,
Respondent.

On Petition for Discretionary Review from the
Fourth District Court of Appeal
DCA No. 4D20-345

REPLY BRIEF ON THE MERITS

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INTRODUCTION

The three dissenting Justices in *Shelly v. State* had it right: when a suspect reinitiates contact with police after previously invoking his rights under *Miranda*, there is no per se requirement that police "remind" the suspect of the *Miranda* warnings. 262 So. 3d 1, 22 (Fla. 2018) (Lawson, J., dissenting, joined by Canady, C.J., and Polston, J.). Instead, whether the suspect's waiver of his *Miranda* rights was knowing, intelligent, and voluntary turns on the totality of the circumstances. *Id.*

A bare majority in *Shelly* nevertheless adopted a categorical rule that requires police to re-read *Miranda* any time a suspect reinitiates contact. That holding is odd indeed. *Shelly* compels a court to suppress the freely given and reliable confession of a defendant who was read *Miranda*, invoked his rights, yet just minutes later reinitiated and knowingly waived those rights, solely because no formalistic second warning was given.

Respondent's case is a real-world example of the harms of that rule. An apparent fan of the television show Law and Order, R.616, Respondent knew his rights even *before* initially being read them—well enough, in fact, that he interrupted a detective who was reading

Respondent his rights to announce them himself. R.537. Respondent then invoked his right to counsel—further proof of his understanding. R.538–39. And an officer again alluded to those rights when Respondent later reinitiated contact with the police, reminding Respondent that his words could be used against him. R.669. The trial court therefore found that Respondent was "familiar with," and validly waived, *Miranda*. T.11.

The Court should recede from *Shelly* and find Respondent's confessions admissible. As for Respondent's alternative claims for a new trial, they need not long detain the Court.

ARGUMENT

I. Respondent's confessions were admissible.

A. There is no per se requirement that police re-read *Miranda* warnings when a suspect reinitiates an interrogation.

Precedent, common sense, and history all dictate that *Shelly* was clearly erroneous. The Court should now hold that the knowingness and voluntariness of a suspect's post-reinitiation waiver of the *Miranda* rights must be assessed "under the totality of the circumstances," *Oregon v. Bradshaw*, 462 U.S. 1039, 1045, 1046 (1983) (plurality op.) (quoting *Edwards v. Arizona*, 451 U.S. 477, 486 n.9

(1981)), not under a per se rule requiring re-recitation of the *Miranda* warnings.

1. *Shelly* departs from U.S. Supreme Court precedent.

Respondent's attempts (Ans. Br. 4–13) to make *Shelly* seem "consistent" with U.S. Supreme Court precedent fall short.

Pointing to language in *Miranda* itself, Respondent claims that *Shelly* follows from *Miranda*'s reasoning that "a warning at the time of interrogation is indispensable to overcome its pressures and to insure that the individual knows he is free to exercise the privilege *at that point in time*." Ans. Br. 10, 26 (quoting *Miranda v. Arizona*, 384 U.S. 436, 469 (1966)) (emphasis added by Respondent). Those same pressures, Respondent asserts, arise when a suspect reinitiates contact with police and must be dispelled by additional warnings. *See, e.g.*, Ans. Br. 12. There are two problems with that idea. First, *Miranda* had nothing to do with the scenario where the suspect reinitiates contact with the police. *Edwards* did, and there the Supreme Court unequivocally held that "in the course of a meeting initiated by the accused, . . . whether the purported waiver was knowing and

intelligent" is to be "found . . . under the totality of the circumstances." *Edwards*, 451 U.S. at 486 n.9.

Second, *Miranda*'s concern about the coercive pressure inherent in police interrogation is inapplicable, or at least substantially blunted, when the *suspect* elects to reinitiate the conversation with police.[1] In that circumstance there is little risk that a suspect will be bent to the will of law enforcement. Indeed, a suspect who reinitiates contact is comfortable enough with the police that he opts to do so. And he has already been warned that he has no obligation to speak about that very police investigation.

Respondent next tries to square *Shelly* with *Bradshaw* by stressing that the police in *Bradshaw* gave a fresh set of warnings to the defendant. Ans. Br. 10. To be sure, the defendant in *Bradshaw* was reminded of his rights after he reinitiated contact with police and consented to a polygraph test, and that was one factor the Court cited in finding that the defendant knowingly and intelligently waived his rights. *Bradshaw*, 462 U.S. at 1042, 1046 (plurality op.). At no point,

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[1] When a suspect invokes the right to counsel during a first interrogation, that suspect benefits from the *Edwards* rule, which holds that only the suspect, not the police, can reinitiate the interrogation. *Edwards*, 451 U.S. at 484–85.

however, did the Court suggest that repeated warnings were *required*. Far from adopting *Shelly*'s rule, *Bradshaw* twice quoted *Edwards*' totality-of-the-circumstances test word for word and applied it. 462 U.S. at 1045, 46.

Finally, Respondent contends that *Shelly* is consistent with *Michigan v. Mosley*, 423 U.S. 96 (1975), and *Arizona v. Roberson*, 486 U.S. 675 (1988), which he characterizes as holding that "if a suspect invokes the right to silence," the police must cease questioning but may, "after a significant passage of time, and a fresh set of *Miranda* warnings, question the suspect again." Ans. Br. 7–8. But those cases are inapposite. They do not concern the circumstances here: a suspect's reinitiation of contact with police to discuss the same crime as to which the suspect has already received *Miranda* warnings. *Mosley* upheld the police's reinitiation of contact to question a Mirandized suspect about a *different* crime, citing among other factors that the police had delivered a fresh set of warnings as to that separate crime. 423 U.S. at 106. *Roberson* subsequently held that the police may not reinitiate contact, period, to interrogate a suspect about a different crime if he explicitly cuts off questioning until he has counsel. *Roberson*, 486 U.S. at 680–81. But the Court reiterated that the rule

would be different if "the accused himself initiates further communication, exchanges, or conversations with the police." *Id.* at 682 (quoting *Edwards*, 451 U.S. at 485).

The dissenting Justices in *Shelly* were thus quite right that "the United States Supreme Court has never articulated or implied a third inquiry or standard requiring that police 'remind' the accused of his or her *Miranda* rights." 262 So. 3d at 22 (Lawson, J., dissenting). "Rather, both *Edwards* and *Bradshaw* make clear that the waiver issue involves a totality-of-the-circumstances test." *Id.*

2. All federal circuits and a broad consensus of states have adopted the totality-of-the-circumstances test.

Rather than apply *Shelly*'s per se rule, "[t]he federal courts unanimously ask whether a waiver was knowing and voluntary under the totality of the circumstances." Init. Br. 16; *see also id.* at 16 n.2 (citing cases). And the state courts are overwhelmingly in accord. *Id.* at 16 & n.3.

Respondent claims that "almost all the cases [the State] cites address a different issue." Ans. Br. 13. Specifically, several of them involve what Respondent calls "seriatim interrogation," where "the suspect waives his rights, is interrogated, and then is interrogated

again" later. Ans. Br. 13, 16–17. Because of varying lapses in time between the giving of rights and the second interrogation, those courts have had to decide whether the previously given *Miranda* warnings became "stale" such that the officers should have re-Mirandized the suspect and obtained a new waiver before the subsequent interrogation. Ans. Br. 13–14.

But Respondent makes no effort to explain why that distinction matters. Nor could he. Seriatim interrogation cases bear on the reinitiation context because they eschew per se rules and use the totality-of-the-circumstances test to decide whether a defendant, after time has passed since being *Mirandized*, knowingly and intelligently waived his rights during the second or subsequent interrogation. *See, e.g.*, *In re Miah S.*, 861 N.W.2d 406, 412 (Neb. 2015) ("There is no fixed time limit as to how much time must pass before the warnings are ineffective, because courts must consider the totality of the circumstances with respect to a suspect's waiver of his or her rights under *Miranda*."); *In re Kevin K.*, 7 A.3d 898, 907 & n.7 (Conn. 2010) ("[W]e apply a totality of the circumstances test . . . to determine whether the police are required to readvise a suspect of his *Miranda* rights following a lapse or interruption in the suspect's questioning.

. . . The [United States] Supreme Court has eschewed per se rules mandating that a suspect be re-advised of his rights in certain fixed situations in favor of a more flexible approach focusing on the totality of the circumstances." (quotation omitted)); *State v. Hale*, 453 N.W.2d 704, 708 n.1 (Minn. 1990) ("Although prudent police officers will perhaps choose to give a defendant another *Miranda* warning before resuming custodial interrogation of a suspect, it is not necessary as a matter of law to do so unless circumstances have changed in some significant way."). Across contexts, all the same principles apply. If anything, a suspect in the reinitiation context is even *more likely* to know his rights, having already invoked them.

Respondent also deems irrelevant those cases holding that "a suspect need not be re-*Mirandized* when the re-initiation follows immediately on the heels of the invocation of rights," Ans. Br. 21, presumably because the longer gap between Respondent's invocation and confession makes him less likely to have remembered his rights. But these cases prove the State's point. If those courts had to follow *Shelly*'s rule, they would have reached the absurd result of requiring a second round of warnings right after the defendant received the first round and invoked his rights. Those courts instead properly

applied the totality-of-the-circumstances test and found another set of warnings unnecessary. *Poyner v. Murray*, 964 F.2d 1404, 1413 (4th Cir. 1992); *United States v. Velasquez*, 885 F.2d 1076, 1086 (3d Cir. 1989); *United States v. Muhammad*, 196 F. App'x 882, 887 (11th Cir. 2006).

More to the point, though, Respondent identifies not even one case aligning itself with *Shelly*. The nearest he comes is his citation to *State v. Staats*, 658 N.W. 2d 207, 214 (Minn. 2003), for the proposition that if a *Mirandized* suspect "invokes his or her right to counsel, initiates contact with the police, and is questioned, . . . [t]he police must . . . re-*Mirandize*" the suspect. Ans. Br. 15–16. In truth, however, *Staats* says only that "[t]he state must show the suspect affirmatively acknowledges that he or she is revoking a previously invoked right to counsel," providing no per se parameters for what an "affirmative acknowledg[ment]" looks like. 658 N.W. 2d at 214.

3. History provides no support for expanding *Miranda*.

Respondent also misreads constitutional history. Ans. Br. 26–28. It is true that English magistrates in the late-eighteenth and early-nineteenth centuries "began to caution suspects they examined

that their statements could be used against them." Wesley MacNeil Oliver, *Magistrates' Examinations, Police Interrogations, and* Miranda*-Like Warnings in the Nineteenth Century*, 81 Tul. L. Rev. 777, 789 (2007). And it is true that the practice migrated to America. Nineteenth century treatise writers, for example, instructed magistrates that offering a warning could ensure that a confession was deemed voluntary. *See* Simon Greenleaf, *A Treatise on the Law of Evidence* 257–58 (Boston, Charles C. Little & James Brown 1842), available at https://tinyurl.com/53ccmk4u. Critically, however, early English and American courts did not hold that the "[f]ailure to give the warnings" was "itself a basis for excluding the statement"; rather, without a warning a statement would be more likely found involuntary under the circumstances. Oliver, *supra*, at 791; *see also O'Brien v. People,* 48 Barb. 274, 280 (N.Y. Sup. Ct. 1867) (explaining that if a confession was induced by "threats, or the sanction of an oath, without the proper caution," then it should be excluded).

That history—with warnings being a part of a voluntariness inquiry, but not dispositive—explains why pre-*Miranda* courts routinely concluded that warnings were not constitutionally required. *E.g.*, *Powers v. United States*, 223 U.S. 303, 313–15 (1912); *Pierce v.*

United States, 160 U.S. 355, 357 (1896); *Wilson v. United States*, 162 U.S. 613, 623–24 (1896); *see also Dickerson v. United States*, 530 U.S. 428, 448–49 (2000) (Scalia, J., dissenting) (collecting cases); Dep't of Just., *Rep. to the Att'y Gen. on the Law of Pre-Trial Interrogation* ii (Feb. 12, 1986), available at https://tinyurl.com/2p8kkncv ("Between the late nineteenth century and the late 1950's, the Supreme Court reviewed numerous cases which raised questions concerning the procedures that were later imposed by the *Miranda* decision—such as warnings and a right to counsel—and held uniformly that such procedures were not required in pre-trial interrogation."); *id.* at 26–28 (discussing the early Supreme Court cases); *State v. Turnquest*, 827 S.E.2d 865, 872 (Ga. 2019) ("[P]rior to *Miranda*, it does not appear that the failure to warn a suspect of his rights, without more, was widely considered a basis to exclude a statement.").[2]

[2] In any event, the historical evidence Professor Oliver relies on does not add up to his conclusion that warnings are constitutionally required. As he admits, magistrates in New York—apparently the earliest state to adopt the practice of giving warnings—were not regularly providing warnings until "the early 1820s." *See* Oliver, *supra*, at 791. For at least three decades after the framing, in other words, *Miranda*-style warnings were not in practice and would certainly not have been thought mandatory.

But even setting aside *Miranda*'s dubious original underpinnings, Respondent's discussion of history supplies no basis for expanding that decision further. Even charitably read, the history does not say that *multiple* warnings were necessary.

* * *

Other than arguing that *Shelly* was rightly decided, Respondent does not contend that *stare decisis* warrants standing by that precedent. He does not claim, for instance, that criminal defendants have relied on *Shelly*. Thus, should the Court conclude that *Shelly* was clearly erroneous, it should recede from it. Init. Br. 26–28.

B. Respondent's statements were admissible under the totality-of-the-circumstances test.

Under the totality-of-the-circumstances test, Respondent knowingly and intelligently waived his rights after reinitiating contact with Deputy Nettles. Init. Br. 28–34. Though the gap between when Respondent was given *Miranda* warnings and when he confessed to Deputy Nettles was about a month-long, the record establishes that he was especially familiar with the warnings, so there is no reason to infer that he forgot them when speaking to Deputy Nettles. Indeed, Respondent knew his rights so well that, as Detective D'Angelo

testified, he interrupted the reading of the warnings, "explained" his *Miranda* rights, and "recited them." R.541. And even while being treated for his bullet wounds, Respondent was able to twice invoke his rights. R.539–40. He needed no reminder of them.

Respondent's waiver at the time he reinitiated conversation was likewise knowing considering that Deputy Nettles "reminded [Respondent] that he was law enforcement, and that he was going to . . . write down or type everything that [Respondent] told him." T.13. He also told Respondent that Respondent's statements could be used against him—one of the warnings required by Miranda. R.669.

As for Respondent's alleged "fragile 'intellectual and emotional state,'" Ans. Br. 24–26, Deputy Nettles testified that Respondent was cogent when they spoke and "knew what he was saying." R.620–21; *accord* R.669–70, 673–74. And no evidence shows that Deputy Nettles pressured Respondent. Far from it, Deputy Nettles consistently testified that he did not do anything to coerce or entice Respondent's remarks. *E.g.*, R.594, 595, 601, 604, 606, 612, 613, 620. Deputy Nettles also testified that he did not force, threaten, or coerce Respondent to speak with him. R.620. Neither did Deputy Nettles offer

Respondent a "quid pro quo" for his statements. *Id.* Respondent's statements to Deputy Nettles were admissible.

C. At a minimum, Respondent's statements were admissible to impeach his prior statements supporting his claim of insanity.

In response to the State's argument that Respondent's statements to Deputy Nettles were admissible, one way or the other, to rebut his prior statements, introduced through doctors, indicating insanity, Init. Br. 34–37, Respondent speculates that "[h]ad the trial court granted the motion to suppress, [Respondent]'s presentation of evidence (or even his defense) might have been different so as not to open the door" to the statements at issue. Ans. Br. 28–29. This ignores that discovery made clear that Respondent would pursue an insanity defense. R.128 (Penna participated in discovery); R.339 ("The Defendant has put his mental status at issue in this case by filing his Notice of Intent to Rely on Sanity at the Time of the Crime."); R.1533–37 (defense expert report documenting Penna's statements); R.1544–49 (same); R.1557–59 (same). The State's use of anticipatory rebuttal was not improper.

Even if it were, any error was harmless because the statements would ultimately have been admitted on rebuttal to impeach Penna's

claimed insanity—the timing of that impeachment was immaterial. *See United States v. Winchenbach*, 197 F.3d 548, 557 (1st Cir. 1999) ("[T]he trial court's use of an improper ground for admission of evidence is harmless if the evidence was admissible for the same purpose on some other ground.").

Respondent next argues that the State could not have introduced the statements at all, even on rebuttal, because Respondent's statements introduced through the doctors were not offered for the truth of the matter asserted, and therefore could not be subject to impeachment. Ans. Br. 29–30. But the statements at issue would not have been "introduced by the state as an admission constituting evidence of guilt, but as revealing the state of mind of the [Respondent] at the time made, as it might bear on the question of his sanity"—in other words, to impeach his earlier statements to the doctors indicating that he was insane. *Collins v. State*, 227 So. 2d 538, 539 (Fla. 3d DCA 1969). A defendant should not be able to "choose from the entire spectrum of his post-arrest behavior only those pieces tending to prove insanity." *Allah v. State*, 471 So. 2d 121, 126 (Fla. 3d DCA 1985) (Pearson, J., specially concurring). "It is hardly unfair to permit

the State 'to contradict an erroneous self-serving impression' which the defendant, through his questioning of witnesses has created.'" *Id.*

The confessions were therefore admissible regardless the result of the Fifth Amendment inquiry.

II. The Fourth District correctly summarily rejected Respondent's other claims.

Apart from his Fifth Amendment arguments, Respondent asks the Court to weigh in on two issues outside the scope of the certified question: whether the trial court properly admitted alleged hearsay and whether it properly instructed the jury on Respondent's insanity defense. Ans. Br. 31–38. Those fact-bound questions, each committed to the sound discretion of the trial court, *see* Ans. Br. 32, 36, do not warrant the expenditure of this Court's resources. Indeed, in the Fourth District's words, Respondent's alternative arguments "lack merit, without [need for] further discussion." *Penna v. State*, 344 So. 3d 420, 440 (Fla. 4th DCA 2021). As this Court has often done with requests for sheer error correction in discretionary review proceedings, it should exercise its discretion not to address the claims. *See, e.g.*, *Shine v. State*, 273 So. 3d 935, 935 n.1 (Fla. 2019). In any event, neither has merit.

1. *Hearsay claim.* At trial, the State called a medical expert to rebut Respondent's experts' opinion regarding his mental state. He testified that Respondent had a personality disorder and manipulative tendencies, not a major mental illness. T.2266–68. In explaining that diagnosis, the State's expert testified, based on medical records, that a prior therapist reported that Respondent's mother told the therapist that Respondent said if she made him get a job, he would "start drinking again." T.2273. Respondent objected to this admission, arguing that it was double hearsay. T.2269–70. The trial court overruled the objection. T.2272. Respondent now argues that the trial court abused its discretion in doing so. Ans. Br. 31–34. Respondent concedes that the reporting of his statement by his mother falls under the party-opponent exception, Ans. Br. 32, so it is only the therapist's statement in the medical records that is at issue.

The trial court did not err. Under Section 90.704, "[f]acts or data [upon which an expert relies] that are otherwise inadmissible may not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that *their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect*." § 90.704, Fla. Stat. (emphasis added). The

trial court in this case did not put its findings for that determination on the record, but a reviewing court may still conduct the balancing on appeal to decide if the trial court erred. *See Coverdale v. State*, 940 So. 2d 558, 562 (Fla. 2d DCA 2006). And here, admitting the statement, which the experts on both sides had access to, helped the jury evaluate the experts' opinions about Respondent's mental state. Given a trial court's "wide discretion concerning the admissibility of evidence," *Jent v. State*, 408 So. 2d 1024, 1029 (Fla. 1981), it was not an abuse of discretion to admit that statement.

2. *Jury instructions claim.* The trial court told the jury, as part of the standard jury instruction on the insanity defense, that "[i]f your verdict is that the defendant is not guilty by reason of insanity, that does not necessarily mean he will be released from custody. I must conduct further proceedings to determine if the defendant should be committed to a mental hospital, or given other outpatient treatment, or released." T.2510, 2543; Fla. Std. Jury Instr. (Crim.) 3.6(a). Respondent asserts that the trial court erred in denying his request for a special instruction adding further detail about the process of determining whether to commit a defendant. Ans. Br. 35–36. Respondent argues that the standard instruction is insufficient because "[t]he

jury needs to know *how* [the further proceedings] will be determined; and the jury needs to know most importantly that if the defendant is dangerous, *he will not be released*," or else the jury may convict just to keep a perceived dangerous person off the streets. Ans. Br. 37.

Respondent's argument lacks merit. "[T]he failure to give special jury instructions does not constitute error where the instructions given adequately address the applicable legal standards." *Stephens v. State*, 787 So. 2d 747, 755 (Fla. 2001). The standard instruction here informed the jury that a not-guilty-by-reason-of-insanity verdict "does not necessarily mean he will be released from custody," and that after further proceedings the defendant might be committed to a mental hospital. Given the adequacy of the standard instruction in addressing any concerns the jury might have about Respondent's potential release, the trial court did not abuse its discretion in denying the special instruction. *Coday v. State*, 946 So. 2d 988, 995 (Fla. 2006).

CONCLUSION

This Court should answer the certified question in the negative and quash the portion of the Fourth District's decision addressing *Miranda*. It should either decline Respondent's invitation to address

his alternative arguments for a new trial or otherwise approve the Fourth District's rejection of those claims.

Date: June 15, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served via the e-filing portal to Paul Edward Petillo, Assistant Public Defender, at appeals@pd15.state.fl.us and ppetillo@pd15.org on this **fifteenth** day of June 2023.

/s/ Allen L. Huang
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CERTIFICATE OF COMPLIANCE

I certify that this brief was prepared in Bookman Old Style, 14-point font, in compliance with Rule 9.045(b) of the Florida Rules of Appellate Procedure; and that it contains 3,962 words, in compliance with Rule 9.210(a)(2)(B) of the Florida Rules of Appellate Procedure.

/s/ Allen L. Huang
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