Appeal No. 23-CO-802

DISTRICT OF COLUMBIA COURT OF APPEALS

ERVIN ROGERS,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the Superior Court of the District of Columbia
Criminal Division
Case No. 1992-FEL-005718

REPLY BRIEF FOR APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

OTHER:

ARGUMENT

I. The trial court erred by misapplying factor ten of D.C. Code § 24-403.03(c).

Mr. Rogers argued in his initial brief that the trial court erred by misapplying factor ten of D.C. Code § 24-403.03(c) to the IRAA analysis, as evidenced by the following findings:

> As to factors (1), (9), and (10), Mr. Rogers was nineteen at the time he committed the offenses. IRAA, reflecting the evolving scientific consensus about brain development during the transition from adolescence to adulthood, recites "immaturity, impetuosity, and failure to appreciate risks and consequences" as "hallmark features of youth . . . which counsel against" lengthy sentences for "juveniles and persons under age 25[.]" **The Court observes that Mr. Rogers was not a juvenile when he committed the underlying offense, and that the offense required Mr. Rogers to choose "to engage in the robbery, arm himself, and put himself in the situation that led to him shooting and killing Mr. Sayles**." The Court notes that Mr. Rogers shot and killed Mr. Sayles within the context of a premeditated armed robbery with three co-conspirators, with Mr. Rogers only possessing the shotgun after the group entered the house and the other co-conspirators left Mr. Rogers alone with Mr. Sayles while they searched the rest of the house. **The Court further observes that the record suggests that Mr. Rogers was susceptible to negative peer pressure and antisocial behavior . . . which likely may have contributed to his joining in the robbery that**

> **resulted in Mr. Sayles's killing, but also that Mr. Rogers understood the severity of his offense and ultimately took responsibility for his killing of Mr. Sayles – albeit after surviving a likely revenge killing and conferring with his mother before turning himself in and confessing.**

R. at 571-72 (internal citations omitted) (emphasis added).

The above findings violate this Court's holding in *Bishop v. United States*, 310 A.3d 629, 647 (2024) that "factor ten must weigh categorically in favor of the movant and [] the trial court may not inquire, on a case-by-case basis, whether or to what extent 'the hallmarks of youth' played a role in the underlying offense." The government disagrees with Mr. Rogers's argument, but its arguments are meritless for the reasons set forth below.

A. It is clear from the trial court's reliance on the fact that Mr. Rogers was 19 instead of a juvenile at the time of his offense that it misapplied factor ten, and the government concedes that the trial court's analysis "could be clearer."

The government concedes that the trial court's analysis "could be clearer." Gov. Br. at 29.[1] As such,

[1] "Gov. Br." refers to the Brief for Appellee. "R." refers to the record.

the government implicitly concedes that the trial court failed to make clear that it treated factor ten as weighing "categorically in favor of the movant." *See Bishop*, 310 A.3d at 647. The government goes to great lengths to justify the trial court's error by arguing that the structure of its findings was meant to make the analysis of factor ten flow into the analysis of factor nine. Specifically, the government argues that:

> [h]ere, the court did not state (or imply, clearly or otherwise) that based on its observations, it viewed factor 10 as weighing against (or even less favorably to) Rogers. Instead, the comments led directly into the court's permissible discussion of Roger's "role in the offense," and that of his co-conspirators, under D.C. Code § 24-403.03(c)(9).

Gov. Br. at 24. The government also claims that the trial court "assessed all of the requisite components of factor 10 while also weighing them against the countervailing considerations in factors 1 and 9: Rogers's age at the time of the offense and his role in the homicide." *Id.* at 25. The government's argument fails.

The fact that the trial court stated that Mr. Rogers was 19 at the time of his offense is not the error, nor

is the fact that it described Mr. Rogers's role in the offense. ***The error is that the trial court relied on the fact that Mr. Rogers "was not a juvenile"*** and tied that fact to his choice to engage in the offense and his understanding of the severity of the offense. *See* R. at 571-72 (emphasis added).

In *Bishop*, this Court explained that comparing a 23-year-old to a 16-year-old when weighing factor ten would be a misapplication of the factor, and it follows that the trial court's consideration that Mr. Rogers was 19 rather than a juvenile at the time of his offense was equally as erroneous. *See* 310 A.3d at 646. The government's concession that the trial court's analysis "could be clearer" and its need to speculate about the reasons for the lack of clarity support Mr. Rogers's assertion that, at minimum, the appropriate remedy is to remand this case to the trial court with instructions to weigh factor ten categorically in favor of Mr. Rogers, as the case law demands.

Additionally, the trial court's failure to weigh factor ten categorically in favor of Mr. Rogers defeats the government's harmless error argument. The government's argument is that "[t]he court's analysis of factor 10 did not 'substantially' (if at all) sway the court's decision to deny the IRAA motion," and that any error was harmless because the court relied on Mr. Rogers's disciplinary history, "inconsistent" programming, and capacity to reoffend. Gov. Br. at 31. In *Bishop*, the trial court weighed factors such as these in its analysis but nevertheless erred because it misapplied factor ten. A weighing of other factors does not cure the error with respect to factor ten.

B. The government's emphasis on the fact that the trial court relied on the current version of D.C. Code § 24-403.03 is a red herring and misinterpretation of this Court's holding in *Bishop*.

The government emphasized several times in its brief that the trial court in Mr. Rogers's case relied on the current version of D.C. Code § 24-403.03, as opposed to the trial court in *Bishop*. Gov. Br. at 21, 29. This is a

red herring, and the government misinterprets the error made in *Bishop*. In *Bishop*, this Court stated that:

> [b]y using the previous version of the IRAA, the trial court neglected to consider Mr. Bishop's "personal circumstances" at the time of his motion, particularly as those circumstances relate to an aging out of crime. Although the court considered generally Mr. Bishop's characteristics at the time of the offense, it did not weigh his current age, brain maturation, and likely changes in material circumstances, such as Mr. Bishop's reentry plans, suitability for employment, and current relationships.

310 A.3d at 644. The issue in Mr. Rogers's case is not whether the trial court failed to weigh his current age, brain maturation and changes in material circumstances against his reentry plans, suitability for employment, and current relationships.

Rather, the error is that the trial court failed to weigh factor ten categorically in favor of Mr. Rogers. *See Bishop*, 310 A.3d at 641 (quoting *Vining v. District of Columbia*, 198 A.3d 738, 754 (D.C. 2018) ("A court by definition abuses its discretion when it makes an error of law.)) The application of the current version of D.C.

Code § 24-403.03 is separate and apart from the misapplication of factor ten.

As an additional matter, the government relied on the current version of D.C. Code § 24-403.03 in its opposition to Mr. Rogers's IRAA motion before the trial court, yet it urged the trial court to weigh factor ten against Mr. Rogers. The government argued:

> **Here, the defendant was a young adult, not a juvenile, when he shot and killed Mr. Sayles**. Although a failure to appreciate risks and consequences may have played a role, **defendant still chose to engage in the robbery, arm himself, and put himself in the situation that led to him shooting and killing Mr. Sayles**. Accordingly, this factor does not weigh in the defendant's favor.

R. at 493 (emphasis added). The trial court followed suit and adopted the government's argument almost word for word, even quoting the government when explaining that:

> [t]he Court observes that **Mr. Rogers was not a juvenile** when he committed the underlying offense, and that the offense required Mr. Rogers to "**choose to engage in the robbery, arm himself, and put himself in the situation that led to him shooting and killing Mr. Sayles**."

R. at 571-72 (quoting R. at 493)(emphasis added). It is disingenuous to now argue that, despite adopting the

government's argument nearly word for word, the trial court somehow rejected the government's invitation to weigh factor ten against Mr. Rogers. It is clear that the trial court agreed with the government that factor ten did not weigh in Mr. Rogers's favor, and this constitutes error.

C. The government fails to accept this Court's holding in *Bishop* by continuing to suggest that the trial court was justified in considering that Mr. Rogers was not a juvenile at the time of his offense.

In its brief, the government argues that:

> the scientific literature underlying *Roper v. Simmons*, 543 U.S. 551 (2005), and its progeny, the D.C. Council's passage of the IRAA, and the 2021 extension to individuals who were under 25 years old at the time of the offense, reflects a gradual maturation and development of the brains of youth, not a single on-off switch that is flipped when an individual celebrates his 25th birthday.

Gov. Br. at 26-27. The government also cites outdated scientific information from the Brief of the American Medical Association, filed in *Roper v. Simmons*, 543 U.S. 551 (2005), such as "regions of the adolescent brain do not reach a fully mature state until after the age of 18"

and "psychosocial maturity is incomplete until age 19, at which point it plateaus." Gov. Br. at 26, note 4. Of course, we now know that "[d]evelopmental research shows that young adults continue to mature well into their 20s and exhibit clear differences from both juveniles and older adults," which is the scientific basis for making IRAA relief available to individuals under the age of 25.[2] Simply put, the government cannot get around the fact that being 19 rather than a juvenile at the time of the offense cannot be considered in the application of factor ten.

II. The trial court abused its discretion by failing to consider and weigh several relevant factors in its analysis of dangerousness.

Mr. Rogers argued in his initial brief that the trial court abused its discretion by failing to consider and weigh several relevant factors in its analysis of dangerousness. Notably, in its dangerousness analysis, the trial court made no mention of Mr. Rogers's

[2] D.C. Council, Comm. on the Judiciary & Public Safety, Rep. on Bill 23-127, *Omnibus Public Safety and Justice Amendment Act of 2020*, at 15 (Nov. 23, 2020).

diminished culpability as an offender under the age of 25, the hallmark features of youth, and personal circumstances supporting an aging out of crime. *See* R. at 581-83. The trial court also failed to address in its analysis of dangerousness Mr. Rogers's current age (over 50 years old) and brain maturation as supporting an aging out of crime. *See id.* The failure to consider these relevant factors constitutes abuse of discretion. *See Dumas v. Woods*, 914 A.2d 676, 679 (D.C. 2007) ("A failure by the trial court to make findings as to each of the relevant factors requires remand.")

The government disagrees, claiming that "[t]he court's analysis explicitly discussed each of the eleven factors that the statute requires it to consider in the dangerousness inquiry." Gov. Br. at 33. However, the issue in Mr. Rogers's case is not whether the trial court discussed the eleven factors, but rather whether the trial court properly considered and applied the factors to its analysis of dangerousness.

III. Upon remand, the trial court should address the "interests of justice" prong of D.C. Code § 24-403.03 (a)(2).

The government incorrectly argues that Mr. Rogers "takes issue with the trial court's decision not to address 'the interests of justice' prong of IRAA." Gov. Br. at 35. Mr. Rogers never argued that this was error. Mr. Rogers did, however, observe correctly that the trial court's decision to deny his IRAA motion was based entirely upon the dangerousness prong of D.C. Code § 24-403.03 (a)(2), which is problematic due to the misapplication of factor ten.

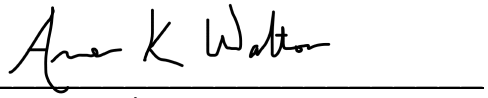
Furthermore, the government incorrectly argues that "[t]he 'interests of justice' prong is a consideration that the trial court must weigh only after the court first has found the movant satisfied the non-dangerousness prong." Gov. Br. at 35 (citing D.C. Code § 24-403.03(a)(2)). On the contrary, trial courts can, and often do, analyze the "interests of justice" prong after finding that a defendant is dangerous. In fact, this is what the trial court did in *Bishop*. *See* 310 A.3d at 640.

Indeed, the government requests that, "[i]n the event this court finds error that was not harmless, the appropriate remedy would be to remand for the trial court to reconsider its dangerousness finding, and if necessary, rule on the interests of justice prong." Gov. Br. at 36, note 7. Mr. Rogers agrees, and again asserts that, at the very least, his case should be remanded to the trial court, and that the trial court should make findings with respect to both the dangerousness and the interests of justice prongs of D.C. Code § 24-403.03(a)(2).

CONCLUSION

For the reasons stated above, Mr. Rogers respectfully requests that this Court reverse the trial court's order denying his IRAA motion, or, in the alternative, remand his case to the trial court with instructions to properly apply factor ten in accordance with this Court's holding in *Bishop*.

Respectfully submitted,



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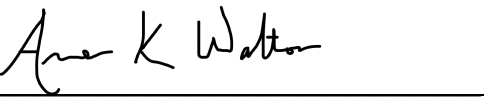
CERTIFICATE OF SERVICE

I hereby certify that, on January 4, 2025, a copy of the foregoing Reply Brief for Appellant was served via the court's e-filing system on Assistant United States Attorneys Amanda Claire Hoover, Esq., and Chrisellen R. Kolb, Esq., Chief of the Appellate Division of the United States Attorney's Office for the District of Columbia.



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