IN THE SUPREME COURT OF FLORIDA

LEONARD LEE SMALLEY,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 72,785

APPEAL FROM THE CIRCUIT COURT
IN AND FOR SUMTER COUNTY
FLORIDA

REPLY BRIEF OF APPELLANT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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REPLY BRIEF OF APPELLANT

POINT I

THE AGGRAVATING CIRCUMSTANCE OF AN ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL MURDER IS UNCONSTITUTIONALLY VAGUE UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

PRESERVATION:

The state argues, [the constitutionality of this statutory aggravating factor] was not timely raised before the trial court and thus has not been preserved for appellate review." (AB at 14) 1/ The state woefully overlooks that the arguments presented herein concern the death penalty and fundamental 2/ violations of Due Process and the Eighth Amendment. As noted by this Court, such fundamental violations of the Eighth Amendment must be raised in the direct appeal, even when wholly unpreserved

1/ (AB) refers to the Answer Brief of Appellee.
2/ See Maynard v. Cartwright, 486 U.S.__, 108 S.Ct.__, 100 L.Ed.2d 372, 380 (1988).

by counsel at trial level, or they shall be deemed waived. See Woods v. State, 531 So.2d 79 (Fla. 1988); Copeland v. Wainwright, 505 So.2d 425 (Fla. 1987); Sireci v. State, 469 So.2d 119 (Fla. 1985), cert. denied, 106 S.Ct. 3308 (1986).

> The prosecutor's supposed comments on Woods' failure to produce evidence [which were unobjected to] also should have been raised on appeal. Presenting that claim under the alternate guise of ineffective assistance of counsel is unavailing. See Sireci. Likewise, the court's reliance on certain material in sentencing could and should have been raised on appeal. Caldwell is not such a change in the law as to give relief in post-conviction proceedings. Foster v. State, 518 So.2d 901 (Fla. 1987). Therefore, the claim regarding the jury's role in sentencing should have been raised, if at all, on appeal."

Woods v. State, 531 So.2d at 83 (emphasis added)(bracketed portion set forth in facts of case, Woods, 531 So.2d at 80).

> If defense counsel at trial had perceived any injury or prejudice in the instructions given to the jury concerning the consideration of mitigating circumstances, he could have raised the issue by appropriate motion, objection, or request for alternative instructions based on Lockett and Songer. Thus the argument that improperly restrictive instructions were given could have been raised at trial and, had no appropriate relief been given by the trial judge, argued on appeal. Matters that could have been raised on appeal are not proper grounds for motion by means of a Rule 3.850 motion.

Copeland, 505 So.2d at 427.

Under the foregoing cases a violation of the Eighth Amendment must be raised on direct appeal notwithstanding the

total absence of an objection by trial counsel and/or a ruling by the trial court lest the Eighth Amendment challenge be waived for post-conviction proceedings. If such an unobjected to claim must be raised on direct appeal or waived, it follows that it must also be preserved for appellate review.

This follows because, in capital cases, this Court scrupulously "examine[s] the record to be sure that the imposition of the death sentence complies with all of the standards set by the constitution, the legislature and the Court." Stone v. State, 378 So.2d 765, 773 (Fla. 1980)(emphasis added). See Harvard v. State, 375 So.2d 833 (Fla. 1977)("The Legislature has imposed a duty upon this Court to examine every case in which the death penalty was imposed."). Because this Court undertakes a de novo review of the record in capital cases "to be sure that the death sentence complies with all standards of the constitution", capital defendants on direct appeal must be able to advance de novo arguments concerning the sufficiency of evidence and/or the constitutional standard that the evidence must satisfy in order to assist this Court in its de novo review. Any such fundamental error in sentencing requires no objection to preserve it for appeal. State v. Whitfield, 487 So.2d 1045 (Fla. 1986). Additionally, as a practical matter, this Court must review its own decisions. A trial court is bound by the previous rulings of this Court, especially where the issue concerns the constitutionality of Florida's death penalty scheme. See State v. Dixon, 283 So.2d 1 (Fla. 1973) and its progeny. An attorney is not required to perform a useless act to preserve an issue that has been so

clearly litigated by this Court. See Thompson v. State, 419 So.2d 634 (Fla. 1982); Brown v. State, 206 So.2d 377, 384 (Fla. 1968)("A lawyer is not required to pursue a completely useless course when the judge has announced in advance that it will be fruitless."). Trial counsel cannot be faulted for not raising an issue that has been so frequently rejected by this Court.

The Eighth Amendment argument here advanced is fundamental and squarely controlled by Maynard v. Cartwright, 486 U.S.__, 108 S.Ct.__, 100 L.Ed.2d 372 (1988), but this issue is NOT to be reviewed by the erroneous standard advanced on page 15 of the State's Answer Brief. That standard is used to review a due process claim of a statute being void for vagueness. That precise argument, now advanced to this Court by the state, is the same erroneous argument the state made in Maynard; it was flatly rejected by the United States Supreme Court. The Court clearly held:

> Claims of vagueness directed at aggravating circumstances defined in capital punishment statutes are analyzed under the Eighth Amendment and characteristically assert that the challenged provision fails adequately to inform juries what they must find to impose the death penalty and as a result leaves them and appellate courts with the kind of open-ended discretion which was held invalid in Furman v. Georgia, 408 U.S. 238, 33 L.Ed.2d 346, 92 S.Ct. 2726 (1972).

Maynard, 100 L.Ed.2d at 390 (emphasis added). The Court went on to hold that the Oklahoma aggravating factor which is identical to Florida's, is unconstitutional because "the language of the Oklahoma aggravating circumstance at issue -- 'especially heinous,

atrocious or cruel' -- gave no more guidance than the 'outrageously or wantonly vile, horrible or inhuman' language in [Godfrey v. Georgia, 446 U.S. 420 (1980)]". Maynard, 100 L.Ed.2d at 382. That is precisely the problem here, lack of guidance to the sentencer and appellate court.

Using the wrong standard, the state emphasizes the emotional facts of this crime to argue that these facts can be considered heinous by anyone. (AB 12-13) Even if true, that is irrelevant. The facts of the crime are simply not pertinent to this issue. Rather, the propriety of the instructions used at the penalty phase must remain the focus of review.

The jury was provided nothing other than the bare wording of the statutory aggravating circumstance held invalid in Maynard. (R1058-62)(Appendix A).

> THE COURT: The aggravating circumstances that you may consider are limited to any of the following that are established by the evidence: The crime for which the defendant is to be sentenced was especially heinous, atrocious or cruel.

(R1059). Since only the one statutory aggravating factor was given the jury and the jury recommended death, it must be concluded that this very factor is the basis for the jury recommendation.

The state's reliance on appellate review to cure the vagueness is misguided. It is a violation of the separation of powers for this Court to provide the substantive definition of what the legislature intended with such vague language in an area where enhanced judicial scrutiny is absolutely necessary.

These statutory factors must be specific and exact. Allowing the court who must review use of the aggravating factors the ability to provide the definition that is used is the crux of an Eighth Amendment challenge of vagueness.

Further appellate review/application of this vague statutory aggravating factor totally eliminates any meaningful role of the jury in sentencing the defendant. Florida's "trifurcated" system becomes at best a bifurcated system, with the trial judge making critical findings of fact which in actuality are substantive elements of the crime for which the defendant is to be punished. The failure of the jury to make the critical findings violates the Sixth Amendment. See Adamson v. Rickets, (CA-9 en banc) 44 Cr.L. 2265 (1989). The failure to allow the jury any meaningful input to the sentencing absolutely violates the Eighth Amendment.

As this Court stated in Elledge v. State, 346 So.2d 998, 1003 (Fla. 1977), "Regardless of the existence of other authorized aggravating factors we must guard against any unauthorized aggravating factor going into the equation which might tip the scales of the weighing process in favor of death." Significantly, there are no other aggravating factors in this case. A fortiori, the very presence of this undefined, unconstitutionally vague statutory aggravating factor improperly tipped the scale in favor of death. Should this aggravating factor be found constitutional because of the appellate review provided by this Court, it is nonetheless manifest that the death recommendation issued by this jury is unreliable, in that the jury, in

rendering the recommendation, used an unconstitutionally vague aggravating factor that under the circumstances is susceptible to being misinterpreted as three separate statutory aggravating factors based on the manner that the instruction was given:

> THE COURT: The aggravating circumstances that you may consider are limited to any of the following that are established by the evidence:
>
> The crime for which the defendant is to be sentenced was especially heinous, atrocious, or cruel.
>
> If you find the aggravating circumstances do not justify the death penalty, your advisory sentence should be one of life imprisonment without possibility of parole for twenty-five years.
>
> Should you find sufficient aggravating circumstances do exist, it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances. Among the mitigating circumstances you may consider, if established by the evidence, are:
>
> * * *

(R1059)(emphasis added). Any contention that the instruction was not unconstitutionally vague and misleading under these particular facts is untenable.

POINT II

SMALLEY'S DEATH SENTENCE IS EXCESSIVE UNDER FLORIDA LAW AND CRUEL AND UNUSUAL PUNISHMENT UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The undersigned counsel contends that the death sentence imposed in this case is disproportionate to the crime when all of the mitigating factors are considered, and several cases have been cited for that premise in the Initial Brief of Appellant. The state responds, "The overwhelming aggravating circumstance in this case clearly overwhelms the marginally mitigating circumstances." (AB at 29)(emphasis added). NO authority whatsoever is advanced by the state to support the premise that the four statutory mitigating circumstances found in this case, factors expressly recognized as mitigation by the Florida legislature and the non-statutory factors aside, have ever been deemed "marginal". If these considerations warrant legislative recognition as valid mitigation, they are worthy of substantial weight and deference.

If the death penalty in this case is so "overwhelmingly" appropriate, it should be a simple matter for the state to point to at least one other case where imposition of the death penalty has been approved by this Court with this single statutory aggravating factor and the seven (4 statutory, 3 non-statutory) mitigating circumstances. Significantly, the state has not done so, and cannot do so.

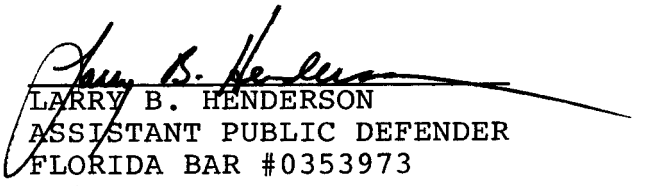
Interestingly, rather than address the argument in the Initial Brief of Appellant that the jury recommendation is unreliable due to the presence of an unconstitutionally vague

statutory aggravating factor, the state responds, "This issue having been addressed fully under Point I and previously under this point [it] will not be addressed further by the Appellee." (AB at 30). The state has not addressed at any time the reliability of the jury recommendation, especially after the state argues under an erroneous standard that review by this Court after the jury and the trial courts use a vague standard can somehow cure the vagueness that preceded the review. How in the world does after-the-fact review by this Court, even assuming that it corrects misapplication of the factor, make the prior jury recommendation reliable when the jury based the recommendation on a bad instruction? How is the recommendation itself reliable? In light of Maynard, it is a given that the bare language of an "especially heinous, atrocious or cruel murder" does not pass constitutional muster. Perhaps the state can better explain at oral argument why the jury recommendation, which rests solely on one constitutionally infirm factor, is "reliable" and should be given any weight whatsoever by this Court.

CONCLUSION

The death sentence must be reversed and the matter remanded for imposition of a life sentence with no parole for twenty-five years because the sole aggravating circumstance in this case is unconstitutional and, even assuming it to be valid, the mitigating factors specifically found by the trial judge make a death sentence disproportionate to the offense under the Eighth Amendment and prior decisions of this Court.

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT



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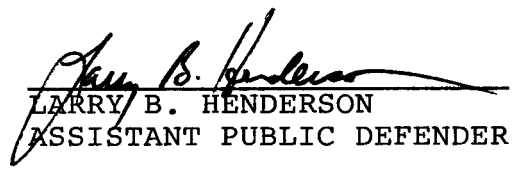
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Honorable Robert A. Butterworth, Attorney General, 125 N. Ridgewood Avenue, 4th floor, Daytona Beach, Fla. 32014 in his basket at the Fifth District Court of Appeal and mailed to Mr. Leonard Lee Smalley, #112115, P.O. Box 747, Starke, Fla. 32091 on this 3d day of March 1989.



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