IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

KEITH BERNARD BROWN,

Respondent.

CASE NO. 83,759

PETITIONER'S REPLY BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, the State of Florida, the Appellee in the First District Court of Appeal and the prosecuting authority in the trial court, will be referenced in this brief as Petitioner, the prosecution, or the State. Respondent, Keith Bernard Brown, the Appellant in the First District Court of Appeal and the defendant in the trial court, will be referenced in this brief as Respondent or his proper name.

References to the opinion of the First District Court of Appeal, found in Appendix 4 of this brief and under review here, will be noted in this Reply by its Southern Second citation.

As in the State's Initial Brief on the Merits and Respondent's Brief on the Merits, the following conventions will be used to refer to this case's appellate ancestry (listed in chronological order, with the date of decision appearing first).

8-6-90, BrownI: Brown v. State, 565 So. 2d 369 (Fla. 1st DCA 1990)(attached as Appendix 1)

1-2-91, BrownII: Brown v. State, 576 So. 2d 285 (Fla. 1991)(attached as Appendix 2)

5-7-93, BrownIII: Brown v. State, 617 So. 2d 1105 (Fla. 1st DCA 1993)(attached as Appendix 3)

3-24-94, BrownIV: Brown v. State, 634 So. 2d 735 (Fla. 1st DCA 1994)(attached as Appendix 4)

References to Respondent's Brief on the Merits will be noted as "RB," followed by the appropriate page numbers. Similarly, Petitioner's Initial Brief on the Merits will be designated as "PB," followed by appropriate page numbers.

The symbol "R" will refer to the record on appeal; the symbol will be followed by the appropriate page number in parentheses.

All emphasis is supplied unless the contrary is indicated.

ARGUMENT

ISSUE

IN VIEW OF *SMITH V. STATE*, 598 So.2d 1063 (Fla. 1992), DOES THE DECISION IN *REE V. STATE*, 565 So.2d 1329 (Fla. 1990), REQUIRE REVERSAL AND REMAND FOR IMPOSITION OF A GUIDELINES SENTENCE IN A CASE THAT WAS PENDING ON DIRECT APPEAL WHEN *REE* WAS DECIDED, WAS FINALLY DISPOSED OF IN ACCORDANCE WITH *REE*, AND IN WHICH THE ISSUE WAS RAISED AGAIN BY MOTION FOR POST-CONVICTION RELIEF AFTER ISSUANCE OF *SMITH*? (certified question)

A. The upward departure from the Sentencing Guidelines was fair.

Respondent's Brief on the Merits repeatedly cries "fairness,"[1] (RB 3, 8, 18, 19) yet he ignores fairness to the victim, Michael Cole, whom he murdered and robbed:

> The facts presented during the trial of this case displayed a particularly aggravated set of circumstances which sets this case far and above the average Second Degree Murder *** [T]he victim, Michael Cole, was driving home from work during the pre-dawn early morning hours. The defendant ... decided that he wanted the [victim's] automobile and would forcibly take it at gunpoint. The victim was randomly selected by the defendant simply because the victim had something that the defendant wanted, his automobile. The victim had done nothing wrong except for being at the wrong place at the wrong time.
>
> The defendant had bumped the victim's car from behind to simulate a traffic accident. *** The defendant already had control of the automobile through Steven Holloway when he shot the victim, leaving him in the middle of the road to die.

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[1] Respondent also claims that because he raised a claim in BrownI and BrownII, he should receive the benefit he requests. As the State will argue in the ensuing pages, the law, as well as fairness, dictate that he did not deserve the benefit then, and he does not deserve it now. He somehow thinks that because he raised an ummeritorious claim earlier, he should prevail now and receive a windfall.

Therefore, Respondent's briefs and motion attached in the appendix to his Brief on the Merits are irrelevant to this Court's decision here. The State generally will ignore them.

> Michael Cole was a randomly selected victim who was unnecessarily murdered due to the defendant's violence and greed.

(R 102-103) Respondent was convicted of Second Degree Murder and Armed Robbery. (R 60)

Respondent's call for fairness also ignores the compelling reason for upwardly departing from the sentencing guidelines. The State provided pre-sentencing notice of its intent to rely upon, inter alia, an escalating pattern of criminality as a reason to upwardly depart from the sentencing guidelines. (R 50-52) Accordingly, the trial court justifiably used this as a reason for its upward departure:[2]

> The defendant's prior criminal history reflects the following convictions:
> A. November 26, 1986, Grand Theft Auto ... .
> B. November 26, 1986, Burglary to Auto ... .
> C. December 11, 1986, Trespass ... .
> D. December 11, 1986, Grand Theft Auto ... .
> E. December 11, 1986, Grand Theft Auto ... .
> F. December 11, 1986, Burglary to Auto ... .
> G. December 11, 1986, Petit Theft ... .
> H. December 11, 1986, Making Threats ... .
> I. December 11, 1986, Aggravated Battery ... .
> J. December 11, 1986, Aggravated Battery ... .
> K. February 24, 1988, Grand Theft Auto ... .

(R 60-61) The trial court appropriately concluded that Respondent

> has gone from stealing and burglarizing automobiles to the forcible taking of an automobile with violence, resulting in an unnecessary death. *** This defendant's prior record, including the offense for which he is being sentenced, indicates an escalating pattern of criminal conduct that, as such, is a clear and convincing reason for this Court to depart from the Sentencing Guidelines.

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[2] Although the sentencing hearing is not part of the record on appeal in this case, Respondent has attached his prior briefs to his Brief on the Merits. Although the inclusion of those briefs is inappropriate, it is interesting to note that one of the briefs discussed the sentencing hearing, at which an escalating pattern of criminality was litigated by the parties. (RB A-20) The State notes this in the event that the Court does consider those briefs.

(R 61) The trial court indicated that this reason alone was "in and of itself sufficient to justify a departure from the sentencing guidelines to the extent of the sentence imposed." (R 64)

In sum, the thrust of Respondent's fairness argument is

- **not** that he deserved a lighter sentence for the robbery and murder of Michael Cole as the victim drove home from work;
- **not** that the trial court incorrectly concluded that Respondent's prior criminal record clearly and convincingly demonstrated an escalating pattern of criminality, as Respondent moved from non-violent auto thefts and non-violent auto burglaries to aggravated batteries to armed robbery and murder;
- **not** that the State provided insufficient notice that it would seek an upward departure due his escalating pattern of criminality;
- **not** that the trial court failed to adequately consider at the sentencing hearing arguments of counsel pertaining to his escalating pattern of criminality.

To the contrary, Respondent, was treated fairly (1) given the Armed Robbery and Murder he committed in this case, (2) the fair notice he received, and (3) his fair opportunity to be heard at the sentencing hearing.

B. In light of Ree and Smith's policy and historical contexts, a fair application of them excludes Respondent.

Instead of focusing on whether he deserved his sentence and the fairness of the mechanism by which that sentence was determined, Respondent claims that it would be "fundamentally unfair to deny relief to [him] ... and others similarly situated who diligently raised the issue on direct appeal but whose cases fell between the cracks of this Court's

decisions Ree and Smith." (RB 8) Respondent's argument entirely ignores the "big picture," not only in terms of his sentence fitting his crime and criminal history and the fairness of the vehicle by which it was determined, but also in terms of the policy rationales for Ree v. State, 565 So. 2d 1329 (Fla. 1990) and the broad historical context of Smith v. State, 598 So. 2d 1063 (Fla. 1992). The discussion focuses upon policy first, followed by historical context.

Smith described the fundamental policy underlying Ree:

> As we stated in that opinion, fundamental principles of justice compel a court to carefully and thoroughly think through its decision when it restricts the liberty of a defendant beyond the period allowed in the sentencing guidelines.

598 So. 2d at 1067. Respondent has not claimed that the trial court violated this policy, but rather that he should blindly get the benefit of Smith. Respondent ignores this policy that motivated Smith, which is the application of a new rule announced in Ree, which was an interpretation of a rule of criminal procedure that implemented a statute, See Ree, 565 So. 2d at 1331, which no longer exists, See §921.016(1)(c), Fla. Stat. (1993)(fifteen day window for trial court to provide written reasons for guidelines departures).

Respondent's fairness argument also fails to consider the historical context of Ree, Smith, and his case, as illustrated by the following chart depicting major events pertaining to the issue on a vertical time-line. The chart does consume some substantial space, but the volume of this space graphically represents some crucial points that follow the chart.

1983		Sentencing Guidelines, effective
•••		[To conserve space, rows representing 1983 to 1989, omitted]
1989	August	Respondent sentenced and written reasons provided
	Sept	
	Oct	

	Nov	Ree initially decided
	Dec	
1990	Jan	
	Feb	
	Mar	
	Apr	Pope v. State, 561 So. 2d 554 (Fla. 1990) decided
	May	
	June	
	July	Ree final: prospective only
	Aug	BrownI
	Sept	BrownI mandate
	Oct	
	Nov	
	Dec	
1991	Jan	BrownII: Florida Supreme Court denies review of BrownI
	Feb	
	Mar	
	Apr	
	May	
	June	
	July	
	Aug	
	Sept	
	Oct	
	Nov	
	Dec	
1992	Jan	
	Feb	
	Mar	
	Apr	Smith decided
	May	
	June	
	July	
	Aug	
	Sept	

	Oct	
	Nov	Respondent's Motion for Post-Conviction Relief filed
	Dec	Respondent's Motion for Post-Conviction Relief denied
1993	Jan	
	Feb	
	Mar	
	Apr	
	May	
	June	
	July	
	Aug	
	Sept	
	Oct	
	Nov	
	Dec	
1994	Jan	§921.016(1)(c), Fla. Stat. effective: 15-day window
	Feb	
	Mar	Brown IV: The DCA reversed the trial court's denial of the motion at issue here

This chart graphically shows that Respondent seeks the benefit of the Ree rule, where it has no bearing on the substance or fairness of **his** sentence, where those sentenced to upward departures for approximately seven years (1983, the year of guidelines implementation, to 1990, the year of Ree) did not have the benefit of the rule, and where those sentenced from January 1, 1994, onward do not have the benefit of it.

Somehow, Respondent feels that the applicability of the Ree's contemporaneous-writing rule should be artificially expanded to include him even though, by its express language, Ree was applicable only to sentences occurring after July 19, 1990, Ree, 565 So. 2d at 1331.

Somehow, Respondent feels that Ree should be applied to him, even though it was final eleven months after he was sentenced.

Somehow, Respondent feels that Smith's pipeline rule should be applied to him even though Smith was decided thirty-two months after he was sentenced.

Respondent feels that Smith's pipeline rule should, in effect, negate the effect of BrownI even though Smith was decided fifteen months after this Court, in BrownII, denied review of BrownI and even though Smith was decided nineteen months after the First District Court of Appeal issued its mandate in BrownI.

In sum, respondent claims that it would be unfair to deny him the benefit of Ree and Smith, yet he offers no substantive reason that would entitle him to a windfall afforded to others. Substance requires that Respondent receive the sentence to which the trial court rationally and thoughtfully determined that he deserved in accordance with law existing at the time of the sentence.

C. It is fair to uphold the trial court because it sentenced Respondent in accordance with the law that existed at the time.

Ree wisely indicated that it would be prospective only, and this Court in Wuornos v. State, 19 Fla. L. Weekly S455 (Fla. Sept. 22, 1994), assured the clarity of Ree's prospective only language vis-a-vis Smith: "We read *Smith* to mean that new points of law established by this Court shall be deemed retrospective with respect to all non-final cases **unless this Court says otherwise.**" 19 Fla. L. Weekly at S459 n. 4 (italics in original).

The prospectivity of Ree was consistent with the orderly administration of justice and fairness to trial judges who, from the time of the Ree decision onward, were on notice that trial courts' written reasons for upward sentencing departures must be contemporaneous with the sentencing. See Smith, 598 So. 2d at 1067 (Grimes and Harding concurring in result

only). Indeed, this was a material point in the Order Denying Respondent's Motion for Post-Conviction Relief. (R 33 n. 1)

Accordingly, the trial court sentenced Smith on December 1, 1989, which was after November 16, 1989, the date of the initial decision in Ree, 14 Fla. L. Weekly S565 (Fla. Nov. 16, 1989). Thus, in Smith the trial court, at the time of sentencing, was on notice as to Ree's contemporaneous writing requirement. The trial court that sentenced Respondent had no such notice whatsoever.

D. Respondent's arguments ignore the law in effect at the time of BrownI that dictated the result of BrownI, thereby appropriately establishing the law of this case.

Respondent quarrels with the First District Court of Appeals' phrasing of the certified question. He claims that BrownI was not "finally disposed of in accordance with Ree." (RB 5) He is incorrect. Ree, on rehearing, expressly stated that it "shall only be applied prospectively." Ree, 565 So. 2d at 1331. **Ree, as it was written on rehearing, was the law of the State of Florida at the time BrownI was decided.** Therefore, BrownI was correctly decided, and it thereby established the law of this case and resolved through a final direct appeal the issue Respondent presented in his motion for post-conviction relief.

Respondent claims that because the District Court of Appeal decided a few cases between Ree's initial opinion on November 16, 1989, and its final opinion on July 19, 1990, he should get the benefit of Ree's rule, (RB 6-7) yet he fails to discuss why he should receive an undeserved windfall when others may have received one. As the First District correctly

phrased the certified question, BrownI was, in fact, decided in accordance with Ree, as it established Florida law on its rehearing.[3]

E. Respondent's arguments ignore Smith's explicit qualification distinguishing collateral review from direct appeal.

Respondent virtually ignores the analyses of Witt v. State, 387 So. 2d 922 (Fla. 1980), and related cases in Petitioner's Initial Brief on the Merits, (PB 18-23). These cases are dispositive. Respondent's claim should not be allowed through a collateral review.

Similarly, Respondent ignores the crucial language in the case in which he purportedly totally relies. That language, quoted at PB 1819, indicates that Smith is not to be applied through collateral review, See Smith, 598 So. 2d at 1066 n. 5. Accord, Wuornos, 19 Fla. L. Weekly at S459 n. 4 ("with respect to all **non-final** cases").

Therefore, Respondent's treatment of collateral review is grounded upon discussions of non-final cases rather than discussions of collateral review: "appellate process is not completed until a mandate is issued" (RB 11); "applied to all cases pending on direct appeal at the time Neill became final" (RB 12); "cases not yet final on appeal" (RB 12) "all nonfinal cases" (RB 13).

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[3] Moreover, since Ree was not final until it disposed of the motion for rehearing, and since Ree changed Florida law, any District Court cases relying upon Ree prior to July 19, 1990, were decided in error, or, if you will, contrary to the law that Ree ultimately established on rehearing. Respondent, in essence, is asking that other cases' deviations from Ree be compounded.

Therefore, contrary to Respondent's assertion, Morales v. State, 613 So. 2d 922 (Fla. 3d DCA 1993), is not on point. The initial reversal there occurred as a result of Ree's non-final opinion. A fortiori, Morales did not discuss Witt or the law of the case, which the State has raised here. Moreover, the Third DCA decided both Morales cases; therefore, to the degree they are on point, they are not binding on this Court and deviations from the law Ree's rehearing ultimately established.

To the degree Respondent's cases concerned collateral review, he has ignored the thrust of the case law indicating that retroactively applying a new judicially created rule through through collateral review is the extreme exception. See State v. Glenn, 558 So. 2d 4, 8 n. 3 (Fla. 1990); McCuiston v. State, 534 So. 2d 1144, 1146 (Fla. 1988). Even Smith continued to recognize this exceptional nature of collateral application, as Smith continued to maintain the distinction between cases "pending on direct review or not yet final," 598 So. 2d at 1066, and cases on collateral review, 598 So. 2d at 1066 n. 5.

Respondent fails to cope with the simple fact that Smith, by its own language and by long-honored principles of finality and law of the case, did not apply to him. He does not get an undeserved windfall. Instead, he gets the sentence he deserved — a sentence rendered in accordance with then existing law.

F. Respondent's collateral-review and related arguments would apply Ree and any other newly announced rule to all defendants in perpetuity.

If Respondent's argument is taken to its logical conclusion, courts could never draw any line to determine who gets the benefit of a new announced rule. Respondent claims that Witt's doctrine of finality must fall to "fairness and uniformity." (RB 18) In essence, Respondent's argument would apply all newly announced rules or holdings to all litigants — past, present, and future. He wishes no lines drawn that distinguish to whom newly announced rules apply.

No matter where a line is drawn, there always will be someone who can argue that he/she is close enough to the line to warrant the benefit of the rule applicable to those on the other side of the line. If the courts respond to the argument of that claimant by moving the line to cover him/her, then there will be someone else who claims to be close to the new line to

warrant the benefit of the rule applicable to those on the other side. And so on, in perpetuity until the line is drawn so that everyone receives the benefit of the rule — in other words, in effect, until there is no meaningful line whatsoever.

The principles of Witt and law of the case draw a line that determines who receives the benefit of Ree, and here, where the

- Respondent was lawfully sentenced at the time, in accordance with pre-Ree law,
- Respondent received notice of the State's intention to seek an upward departure based upon Respondent's escalating pattern of criminality,
- Respondent has not demonstrated that the trial judge failed to rationally consider the departure prior to announcing the sentence, and
- Respondent deserved the sentence he received,

the line should not be moved to enable Respondent to benefit from Ree's rule. Moving the line would exalt technicality over substance.

G. Respondent is not similar to Smith.

Respondent claims that he was "similarly situated with Smith and others whose cases were in the pipeline" and that, therefore, he should be treated similarly. (RB 15) Respondent's argument is incorrect. Respondent's situation was not similar to Smith's. As noted above, Smith was sentenced after Ree was initially decided. Even though Ree was not yet final at the time Smith was sentenced, the trial court in Smith had notice of this Court's intended interpretation of the rule of criminal procedure that implemented the statute. Here, the trial court had no such notice whatsoever. Respondent was sentenced months prior to the non-final public release of Ree.

H. Conclusion.

Respondent would cast aside Witt, the principle of the law of the case, the policy of finality underlying Witt and the law of the case, and this Court's clarification of Smith v. State, 598 So. 2d 1063 (Fla. 1992), as announced in Wuornos v. State.

Respondent attempts to argue that fairness requires that he receive the benefit of Smith, yet he ignores the fundamental nature of Smith as he would apply it here. Smith expressly limited itself "to all similar cases pending on **direct** review." 598 So. 2d at 1066. Respondent would have this Court expand Smith beyond that limitation to his undeserved situation. This application would extend a windfall to a situation where the substance of the trial court's decision comported with Smith's **purpose** of maximizing rational guidelines departures, where the trial judge followed the law as it existed at the time it made its decision, where the First District Court of Appeal, deciding this case on final direct appeal in BrownI, followed the law as it existed at the time it made its decision, and where the trial court's denial of Respondent's motion for post conviction relief followed the law as it existed at the time it made its decision. Petitioner asks that the application of the Ree rule be limited so that respondent does not receive a windfall, and so that fairness to victims, the State, and the trial court are furthered while maximizing fairness to Respondent by providing the sentence that he deserves.

CONCLUSION

Based on the foregoing discussions, the State respectfully requests this Honorable Court answer the certified question in the negative, disapprove the decision of the First District

Court of Appeal (Brown IV), and affirm the trial court's denial of the motion for post-conviction relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing PETITIONER'S REPLY BRIEF ON THE MERITS and its Appendix, have been furnished by U.S. Mail to Paula S. Saunders, Assistant Public Defender, and Matthew Ream, Certified Legal Intern, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, Florida 32301, this 17th day of October, 1994.

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APPENDIX TO
PETITIONER'S REPLY BRIEF ON THE MERITS

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4. Brown v. State, 634 So. 2d 735 (Fla. 1st DCA 1994)(the opinion being reviewed here)(BrownIV)