IN THE SUPREME COURT OF FLORIDA

BENJAMIN SMILEY, JR.
Appellant,

v.

CASE NO. SC18-385
L.Ct. 532015CF004903A000XX

STATE OF FLORIDA
Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
TENTH JUDICIAL CIRCUIT, POLK COUNTY
STATE OF FLORIDA

INITIAL BRIEF OF THE APPELLANT

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PRELIMINARY STATEMENT

This appeal arises from a sentence of death imposed by the trial court. The Appellant, Benjamin Davis Smiley, Jr., will be referred to as Mr. Smiley and the State of Florida as the State. The appellate record will be referenced as follows: All documents from the clerk's office and the trial transcripts, numbering pages 1-8813, shall be referenced by page number as the record received by undersigned counsel has no consistent volume numbers. The penalty phase, which has been paginated separately from the other portions of the record and contains page numbers 1-2682, shall be referenced by "P" followed by the page number. No volume numbers are present for the penalty phase record received by undersigned counsel, thus no volume number will be used.

STATEMENT OF THE CASE AND FACTS

On July 15, 2015, the Grand Jury in and for the Tenth Judicial Circuit, Polk County, Florida, returned an Indictment charging the Appellant, Benjamin Smiley, Jr., with the following offenses which occurred on April 16, 2013: First-degree murder with a Firearm While Engaged in the Commission of or Attempt to Commit a Robbery of Clifford Drake, a capital offense under to §782.04, §812.13, §777.01, and/or §777.04 or §775.087 (Fla. Stat.)(2013).[59] In addition to the charge of first-degree murder, Mr. Smiley was also indicted for the offenses of Robbery

with a Firearm, a first degree felony punishable by life in prison under §812.13, §777.011 and §775.087 (Fla. Stat.)(2013); Tampering with Physical Evidence, a third degree felony under §918.13 (Fla. Stat.)(2013); Aggravated Assault with a Firearm of Mark Wilkerson, a second degree felony under §784.021 and §775.087 (Fla. Stat)(2013); and Burglary of a Dwelling with an Assault or Battery While Armed with a Firearm of Clifford Drake and Mark Wilkerson, a first-degree felony punishable by life in prison under §810.02 and §775.087(Fla. Stat.)(2013).[58-64] The State's first Notice of Intent to Seek the Death Penalty was filed on September 2, 2015.[86]

Mr. Smiley was also charged under a separate case number, 2015CF-005388, with the first-degree murder and armed robbery of Carmen Riley.[the "Riley" case hereafter] The State initially sought the death penalty.

All pretrial motions were filed under both case numbers and all pretrial hearings and rulings were made applicable to both cases.

Mr. Smiley requested and was granted *pro se* status by the trial court in the initial stages of this case.[5653-65;5889-5945;6093-6154] The trial court appointed standby counsel on September 28, 2015.[113,116-18] Second chair stand-by counsel was appointed on October 9, 2015.[139-40;5764-67] Mr. Smiley

abandoned his request to proceed *pro se* and both stand-by attorneys were appointed as counsel.[608;612-13;8311-8342]

Numerous motions attacking the constitutionality of Florida's pre-*Hurst* death penalty statute were filed.[164-502;553-601] The trial court denied the motions to require jury unanimity as to sentence, to declare §921.141 (Fla. Stat.) (2013) unconstitutional, to prohibit any reference to the role of the penalty phase jury as advisory, and to require the jury to provide findings of fact in penalty phase. [648;650;651;655;656;657;660;661;663;669;672;673;8672-8736]

The guilt phase trial in the Riley case was held in November 2015. The parties agreed to bifurcate the guilt and penalty phases, intending to have only a single penalty phase for both cases should Mr. Smiley be convicted in both cases.[5531-53] Mr. Smiley was convicted of first degree-murder and robbery in the Riley case.

The United States Supreme Court issued its decision in *Hurst v. Florida*, 136 S.Ct. 616 (2016), in January 2016. In response, the State re-filed a Notice of Intent to Seek Death Penalty and Disclosure of Aggravating Factors on March 30, 2016 and again on April 14, 2016.[717-18;745-46] Defense counsel moved for rehearing on the previously denied motions to declare §921 unconstitutional, to require jury unanimity, and to prohibit references to the jury's role as advisory.[842-871]

The parties then agreed to proceed with the guilt phase of the instant case despite *Hurst v. Florida* in September 2016.[5632-42;8565-81] The evidence from the guilt phase of the trial is summarized as follows:

Summary of Trial Testimony

Lakeland police officer Michael Lewis was dispatched to 524 West 12th Street, Lakeland, FL, the home of Clifford Drake, at nineteen minutes after midnight on April 16, 2013.[3799-3803] Off. Lewis arrived four and a half minutes later and found Mark and Mario Wilkerson standing outside the house with Officer Collins.[3804]

Mario "Peanut Butter" Wilkerson lived at 524 West 12th Street with his stepfather, Clifford Drake, his mother, and his brother, Mark Wilkerson.[3939] Mario had returned home around 11:00 p.m. on April 15, 2013.[3944] Clifford Drake was home, his mother was working, and Mark was not at home.[3944] Mario had been drinking that night and fell asleep quickly.[3945]

Mark Wilkerson testified he lives at the Drake residence.[3971] On the night of April 15, 2013 he had been at the home of Mareashia Wilkerson, his twin sister, visiting her and his other brother, Antoine Tinsley.[3974] Mark rode his bike home, past the Dakota Park Apartments.[3978] The apartments are separated from the backyard of the Drake residence by a fence, a field, and a second fence at the border of the Drake

residence.[3982-83] Mark stopped to talk with his friend Chris outside the apartment complex for a few minutes.[3979] Mark rode home, parked his bike, and headed toward the backyard.[3981]

Mark heard a rattling noise by the fence.[3982] He looked over and saw two men.[3984] Mark called out, asking who they were and what they were doing. There was no response.[3984] Mark then saw a flash and one of the men told him to approach the fence, telling him to "Shut the f--- up".[3984] Mark approached and found one of the men pointing a gun at him.[3985] The men jumped the fence.[3985]

Both men were black.[3985] One was brown skinned with a small afro, a little taller than 6'2", wearing a black hoodie and carrying a book bag.[3986-7] Mark did not see this man with a gun.[3987] The other man was shorter than the first man.[3988] He had darker skin, was about 5'8" and 140 to 150 lbs., had a little afro, wide eyes, fat cheeks, no tattoos, and was wearing a hoodie with the hood up. He carried a gun. [3989;3998;4054;4056;4069] Mark focused on the faces and nowhere else.[4055] Mark did not think the gunman wore gloves.[4061] The gun was a silver revolver.[3991]

The man with the gun told Mark to undress, so he removed his shirt and pants.[3992] His blue shirt ended up on the fence.[3993] The man with the gun told him to get face down on

the ground, and Mark complied.[3993] The man with the gun kept asking where the money was.[3993] One of the men stated Mario had said Mr. Drake had a safe.[3994;4067] Mark kept saying he didn't know about money or a safe.[3994] The man with the gun grabbed his pants, put them over Mark's head, and went through the pockets.[3995] Mark's house key, a small amount of money, and cell phone were in his pants' pockets.[3995] The man with the gun took those items.[T3996;4059]

The man with the gun asked where the key went. He told Mark to put his pants back on.[3997] Mark complied and went with the men to the front door with the gun pointed at him.[3997] Mark was given the key and opened the front door.[4001]

The three men entered the house and went towards the bedroom where Mr. Drake was sleeping.[4001] The gunman entered Mr. Drake's bedroom and struck a lighter to look into the closet.[4002] Mark remained out in the hallway.[4003] The gunman exited the room, grabbed the back pack from the other man, and said they were going to "do this" and wake up Mr. Drake.[4003]

The gunman forced Mark into Mr. Drake's bedroom at gunpoint and followed him in.[T4004] Mark turned on the light.[4005] The gunman walked up to the bed where Mr. Drake was sleeping and hit Mr. Drake in the head with the gun.[4005] Mr. Drake woke up and the gunman began demanding money.[4006]

Mr. Drake sat up on the edge of the bed with his hands over his face. He kept saying he didn't have any money.[4006] Mr. Drake was trying to move away from the gun and the bed bounced.[4007] Mark heard a gunshot.[4007] Mr. Drake's left side was facing the gunman when he fired.[4009] The gunman continued to ask where the money was, then fired a second shot, hitting Mr. Drake in the hip.[4009] The gunman again demanded money, said he was "fixing to kill his a—", and fired again.[4010]

The gunman demanded that Mark help him find the money.[4011] Mark pulled drawers out of the dresser.[4011] The second man said "Someone's coming".[4012] Both men ran out of the house.[4013] Mark was on the floor and saw their feet leave. He jumped up, locked the bedroom door, waited a few seconds, then ran to get Mario.[4014] Mark identified Exhibit 105, the black backpack found in the bedroom as the one brought by the men.[4015]

Mario was awakened by Mark, who told him Mr. Drake had been shot. Mark used Mario's phone to call 911.[3946;4014] Mario did not hear any gunshots; he slept through the incident and could not identify anyone.[3948]

Mark's cell phone, #863-934-8156, was under his mother's name.[4018] The last person who Mark spoke to with his phone was a girl named Rachel with a 407 area code.[4018]

Mario knew John "Little Mike" McDonald.[3949] McDonald's mother lived diagonal from the Drake residence.[3949] Mario occasionally hung out with McDonald, playing cards and drinking.[3950] Mario recalled one time, about a month before the crime, Mr. Drake told McDonald he had money or a safe.[3953]

Mark knew McDonald and knew he drove a white Buick.[3980] Mark saw the white Buick speed out of the Dakota Apartments after Mr. Drake was shot.[4022] Mark would have recognized McDonald if McDonald had been in the house at the time of the crime.[4021] McDonald was not one of the two men.[4021]

The day after Mr. Drake died McDonald came into the yard of the Drake residence and was confronted by Mark.[3951;4023] McDonald told them, despite rumors to the contrary, he was not involved in the crime.[3951] McDonald claimed he had been at the Dakota Apartments visiting his baby mama.[4024]

Paramedic Jason Vickers arrived at the Drake residence at 12:28 a.m.[3825] He located Clifford Drake between his bedroom and the hallway.[3830] Mr. Drake had three gunshot wounds and had died.[3831-32]

An autopsy was performed on Mr. Drake.[3873;4470-4502] The medical examiner opined Mr. Drake may have lived for a minute or slightly longer after being shot.[4493] A bullet [Exhibit 103] was recovered from his body during the autopsy and turned over

to CST Jean Gardner.[3873;4140] Mr. Drake was shot twice-one bullet remained in the body and one bullet exited.[4148]

Crime scene technicians Grice and Patterson processed both the interior and exterior of the Drake residence.[3837;3910] The Drake residence had a fenced backyard that bordered on the Dakota Apartment complex.[3810] A blue t-shirt was collected from the rear fence.[Exhibits 15 & 109; 3838;3845,3850-]

CST Grice described the interior of the home as neat, with the exception of the bedroom where Mr. Drake's body had been.[3840] That bedroom had been ransacked.[Exhibits 43-63;3841;3861;4837] The front door and bedroom door were processed for fingerprints with no success.[3842-43] A black back pack [Exhibit 64-65 & 105], a Sentry safe[3861;4503-4521], a cell phone, a .22 caliber gun [Exhibit 111], a bullet on top of an afghan on the bed [Exhibit 104], and some .22 caliber bullets that differed from the bullet on the afghan were collected.[Exhibit 112;3845] The backpack was empty.[3868;3889] The keys for the front door of the home were collected and swabbed for DNA.[3872]

Mr. Bell Marsh called the police on the morning of April 16, 2013, after he found some items in the back of his pick-up truck that did not belong to him.[4282] Mr. Marsh found a black hoodie jacket and gloves in the truck bed. Those items had not been there when he parked the truck in his driveway on April

15.[4283;4287] Mr. Marsh knew about a murder and called the police because he was concerned the items could be connected.[4284] Mr. Marsh lived near the Drake residence. Officer Michael Robinson came to Mr. Marsh's house and collected the sweatshirt and gloves.[4373-76] The hoodie and gloves were processed for DNA.[3901-03]

FDLE DNA analyst Ashley Tilka swabbed the wrists, cuffs, and hood of the sweatshirt and the gloves found in Mr. Marsh's truck.[4308] A cutting was taken from the stain on the chest area that had tested presumptively for blood.[4306] FDLE DNA analyst Michelle Mullins performed DNA testing on the swabs and cutting from analyst Tilka in 2013.[4337-38;4350] Some items yielded DNA profiles or partial profiles: the cuffs swabs had a mixture of at least four individuals but the data was not interpretable[4342];swabs from the hood were from at least three individuals and the data was not interpretable[4343]; and the data from each swabbing of the gloves was not interpretable or could only be used to exclude the Drakes' and the Wilkersons' due to the number of individuals in the mixture.[4344-4348] The cutting from the chest of the hoodie had a complete DNA profile for a male and excluded the Wilkerson brothers and Mr. Drake.[4348] This DNA profile was unknown at the time, so it was entered into a database.[4349]

FDLE DNA analyst Mary Pachenco conducted DNA testing on the black backpack found in Mr. Drake's bedroom.[4532] She swabbed the zippers, handle, and strap.[4532] The data from the handle of the backpack was not interpretable because it was limited and could only be used to include or exclude.[4538] The Drakes' and Wilkersons' were excluded.[4538] The strap had a mixture of three people and she was able to pull out the major contributor.[4539] The strap was also suitable for exclusion and the Drakes' and Wilkersons' were excluded.[4539] Analyst Pachenco entered the DNA profile into a DNA database.[4540]

The database then found a match between the DNA from the hoodie and the DNA from the black backpack in February 2015.[4350;4541] The name of the person who matched the major profile in the backpack strap was Benjamin Smiley.[4542;4570]

Mr. Smiley's buccal swab for DNA testing purposes was obtained on October 2, 2015.[3878] Analyst Pacheco extracted Mr. Smiley's DNA and entered it into the database.[4351;4523-42] The database identified a match between Mr. Smiley and other samples.[4352] Ms. Mullins went back and compared the profiles of Mr. Smiley with those obtained from previously tested evidence.[4352] Mr. Smiley was excluded as a major contributor to the outside of Glove A and could not be excluded or included in the remaining swabs from Glove A or B.[4353] The DNA profile from the chest cutting of the hoodie was a single source profile

and matched that of Mr. Smiley with a frequency of occurrence of one in 700,000 billion.[4355;4360] No comparisons could be made to the hood and cuffs of the sweatshirt.[4365]

CST Patterson testified she was involved in the processing of another Lakeland residence located roughly two blocks from the Drake residence on March 23, 2013.[3919-20] A bullet was recovered from that incident.[Exhibit133,3920] This bullet, along with the two bullets from the Drake investigation were submitted to FDLE for testing and comparison.[3921]

FDLE ballistics examiner Kasi Lancaster made comparisons between the projectiles/bullets submitted to FDLE in this case. [4400-4405] In the murder of Mr. Drake, she examined a .25 Raven pistol, a detachable box magazine, and two fired .38 caliber class bullets.[4425] The .25 Raven pistol could not have fired the .38 bullets because the bullet would not fit in that gun.[4433] Ms. Lancaster also examined one fired .38 caliber bullet from the incident in Lakeland on March 23, 2013.[4428] Ms. Lancaster compared the three .38 caliber bullets to determine if they were fired from the same gun.[4429] Ms. Lancaster opined the three .38 caliber bullets were fired from the same gun.[4435-6]

Mark Wilkerson was interviewed by police and met with police forensic sketch artist Darlene Melius on April 16 after his interview with the police concluded.[4070;4384;4393;4837] He

did not think the sketch really looked like the gunman. [4071;4090] Sgt. Wallace confirmed Mark's description to Ms. Melius.[4859-61] Ms. Melius, when called as a defense witness, testified she utilized a fact sheet to assist in the drawing.[5002] She records the answers to questions she asks the witness such as race, sex, age, complexion, hair color, eye color.[5003] She also uses an identification book to help the witness select features.[5004] Mr. Wilkerson did not make any changes to the completed sketch.[5011]

Mark Wilkerson was shown a photopak [Exhibit 102] in early June of 2015 by Sgt. Wallace.[4024;4864-69] He selected one of the six photos and circled that photo as being the person who shot Mr. Drake.[4026;4090] Sgt. Wallace confirmed Mark selected Mr. Smiley's picture.[4869] Mark agreed only the photo of Mr. Smiley had fat cheeks, that some of the other photos did not have wide eyes, and it was difficult to distinguish skin tone in the black and white photos.[4078] Mark identified Mr. Smiley in court as the person who shot Mr. Drake.[4028;4091] Mark was unable to identify the second perpetrator.[4030]

Cell phone records testimony was presented.[4158] Mr. Ron Witt of Metro PCS testified Mark Wilkerson's cell phone's call detail records for the number ending in #8156 for April 15, 2013-April 17, 2013 were examined.[Exhibit 140;4164] The call detail records from April 1, 2013-April 19, 2013 for Samantha

Lee, #813-458-4997, were also examined.[Exhibits 137 & 141;4165] The last two calls made from Mark Wilkerson's phone, #8156, occurred first around midnight on April 16 and then at 16 minutes past midnight on April 16 to Samantha Lee's phone, #4997.[4185] There was one incoming call to #8156 from Lee's phone at 12:25 a.m. on April 16.[4187] This call was a three-way call to #8156 and #863-529-6343 and lasted for several minutes.[4186-87]

Jeff Hendrickson of AT&T testified #863-529-6343 was registered to Kenya Watkins at 818 Savannah Ave., Lakeland, FL.[Exhibit 138;4227] The call detail records for this number were admitted into evidence over objection.[Exhibit 146,4246] The cell towers used by this number on April 15-16 were also admitted.[Exhibit 152,4262] A call was made from this phone to his phone, #4997, at 12:24 a.m. on April 16, 2013.[4267] Eleven subsequent calls were made to the same number, with the last occurring at 12:44 a.m..[4268] The towers used by this phone went from Tampa to Lakeland then returned to Tampa.[4270-75]

No further calls were made from Mark Wilkerson's phone.[4190] All incoming calls went to voice mail.[4191]

Mr. Witt also identified four cell phone tower site locations in relation to calls made from both numbers and Mr. Drake's residence.[4177-4184] A cell phone will try to access the tower it is closest to when a call is made.[4210] Some of

the cell towers used in the calls between #8156 and #4997 were parallel with I-4.[4211]

Ms. Samantha Lee lives in Tampa.[4585] Her phone number in 2013 was #813-458-4997.[4592] She was a "Xanax junkie" in April 2013.[4604] This has affected her ability to accurately perceive and recall what was going on at that time.[4605] Lee had five or six prior felony convictions and about six misdemeanor crimes of dishonesty.[4633]

Ms. Lee is Mr. Smiley's aunt and is around 13 years older than him.[4585-86] From age 17 Mr. Smiley sometimes lived with Lee in Tampa.[4587] He sometimes also lived in north Tampa, quite far away from her.[4606] Mr. Smiley did not have a cell phone in 2013.[4594]

Lee claimed to be very close to Mr. Smiley. She knew some of his friends.[4589] Lee knew one of Mr. Smiley's friends named "Big Jit".[4589] Lee believed Mr. Smiley and Big Jit were close and hung around together a lot.[4589] Big Jit was tall and heavyset- about 6'3" or 6'4" and 240-250 lbs.- bigger than Mr. Smiley.[4590;4630] Lee believed Big Jit's name was "Casey".[4631]

John "Big Mike" McDonald is Ms. Lee's nephew, although they are both 37 years old.[4590-91] Lee and Big Mike were close in 2013, but not as close as she was with Mr. Smiley.[4591] Lee

babysat Big Mike's kids and they communicated by phone.[4592] In 2013 Lee made her living through contacts of McDonald.[4603]

Ms. Lee testified on April 16, 2013, she received a call from Mr. Smiley at 12:23 a.m. to her cell phone.[4595] She did not recognize the number.[4595] Mr. Smiley seemed a little bit panicked because he couldn't find McDonald and was lost in Lakeland.[4596;4636] Mr. Smiley asked her to get in touch with McDonald for him.[4596] Lee then did a three way call with McDonald,[4596] which enabled Mr. Smiley to speak with McDonald.[4598] Lee testified she did not remember the conversation.[4597;4604] Mr. Smiley did not come back to her house on April 16.[4597]

Ms. Lee testified she was with Mr. Smiley and McDonald on March 23, 2013 in Lakeland.[4598] She saw Mr. Smiley with a backpack but could not recall the color.[4598]

Ms. Lee was interviewed by Lakeland detectives and Sgt. Wallace in 2015.[4599;4871] Lee called McDonald in the officer's presence. She admitted to talking to McDonald several times afterwards.[4611] Lee felt threatened by McDonald.[4628] Lee admitted to lying to detectives until they confronted her with cell phone records because she did not want to get Mr. Smiley in trouble.[4600] As a result of lying to police she was charged with perjury and was placed on 12 months' probation.[4600] Lee claimed she had not received a "deal" for her testimony while

admitting she faced fifteen years' prison for the perjury charge.[4600;4613] Lee told the State what they wanted the truth to be and was told her statements would be considered in how the perjury charge was handled.[4614;4626;4629]

John "Big Mike" McDonald, age 37, has six prior felony and two prior misdemeanor crimes of dishonesty convictions.[4687] McDonald and Mr. Smiley are cousins.[4687] McDonald claimed to be close with both Lee and Mr. Smiley in April 2013.[4688]

McDonald lived in Lakeland with his wife, Kenya Watkins.[4689] McDonald's mother lived at 531 West 12th Street, very near the Drake residence.[4689-90] McDonald had a cell phone, registered to his wife, #863-529-6343.[4716] McDonald had been to the Drake residence and was friends with Mario Wilkerson.[4691] He played cards, smoked, and hung out with Mario.[4691]

McDonald claimed he heard Mario bragging about his stepfather having money in a safe.[4692] This interested McDonald because Samantha Lee needed money.[4692] McDonald told Lee about Clifford Drake having money a few days after Mario bragged.[4692;4695] A plan was then hatched between himself, Lee, and Mr. Smiley to rob Mr. Drake of the safe.[4693]

According to McDonald, Lee was going to come to Lakeland to supervise, he was the driver and would not enter the home, and Mr. Smiley was to go in the house and get the safe-Mr. Smiley

was the "enforcer".[4694] This was to avoid Mr. Drake recognizing who did it.[4695]

McDonald claimed he picked up Mr. Smiley from Lee's house in Tampa along with Mr. Smiley's friend, Big Jit.[4696] McDonald claimed he did not know Big Jit.[4697] Mr. Smiley referred to Big Jit as his "home boy" and said he was "straight".[4697] Lee told Mr. McDonald it "was cool" if Big Jit went.[4697]

The three men went to Lakeland and scoped out the Drake residence.[4696] They decided to go in from the back because the house looked deserted.[4698] McDonald parked at the Dakota Apartments behind the Drake residence.[4699] McDonald remained with his car while Mr. Smiley and Big Jit got out and jumped the fence into the Drake yard.[4699] Big Jit was tall, big, light skinned, and was wearing dark clothing.[4714;4746] Mr. Smiley was wearing dark pants and hoodie and carried a black backpack.[4701] McDonald thought Mr. Smiley had gloves in the hoodie pocket because McDonald probably gave him the gloves.[4701;4738] Mr. Smiley also had a black .38 revolver.[4702]

Mr. McDonald claimed he saw Mr. Smiley with this same gun on March 23, 2013 while wearing the same hoodie and carrying the same backpack.[R4702] Over objection, McDonald testified Mr. Smiley said he had discharged the gun at 702 West 14th Street.[4714]

McDonald then saw Mark Wilkerson riding in the apartment complex on his bike.[4700] McDonald knew Mark lived at the Drake residence and was probably headed there.[4700] McDonald had no way to contact Mr. Smiley or Big Jit.[4700] McDonald got scared after seeing Mark, so he left instead of staying there like he was supposed to.[4715]

McDonald got a call from Lee, who then three-wayed in Mr. Smiley.[4716] McDonald was then able to pick up Mr. Smiley and Big Jit.[4716;4719] When Mr. Smiley got in the car he said it "was a blank mission", meaning they came up empty handed.[4720] Mr. Smiley was mad.[4720] Mr. Smiley said he had looked in a window and saw someone asleep on the couch, and then someone rode up on a bike.[4721] Mr. Smiley made the bike rider get naked, then they went in the house.[4721] McDonald claimed Mr. Smiley told him someone was asleep in the bed and no one was co-operating, so he tore the house up.[4721] McDonald said Mr. Smiley told him it looked the man who had been sleeping was reaching for a gun so he shot him.[4721] Mr. Smiley said he got a cell phone from the guy on the bike and a small sack of marijuana.[4722] Mr. Smiley didn't have the hoodie or the backpack and didn't say what happened to those.[4722]

McDonald drove back to Tampa, dropping Mr. Smiley and Big Jit at Lee's house.[4723] The next morning McDonald went to his mother's house.[4723] He heard rumors that implicated him in the

Drake murder, so he went to the Drake residence.[4723] He approached Detective Wallace and told him he wanted to clear his name.[4724]

In 2015 the police called McDonald's mother.[4724] McDonald met with both the police and the State Attorney.[4725] At first he lied, not wanting to implicate himself, Lee, or Mr. Smiley.[4726] Eventually he gave a statement consistent with his testimony because it was in his best interest to cooperate.[4727;4732] McDonald claimed he was threatened with perjury if he lied, but was never told by police or the State he could get in trouble for the murder.[4734] He then admitted he had been given immunity if he cooperated and testified.[4735]

Sergeant Brian Wallace testified after he interviewed Ms. Lee he looked through Mr. Smiley's Facebook page.[4872] He found pictures of Mr. Smiley and a person matching Big Jit's, aka Casey Bisbee, description.[4872] Sgt. Wallace met with Mr. Bisbee and confirmed he was the same person depicted in the Facebook pictures.[4873] Over objection, Exhibits 161 and 162 were entered into evidence.[4874-5] Sgt. Wallace estimated Mr. Bisbee was 6'4", very large in stature, with light to medium skin tone.[4878] Bisbee is taller, heavier, and lighter skinned than Mr. Smiley.[4876]

Mr. Bisbee's DNA was never collected or tested.[4903] Mr. Bisbee was never arrested or charged with anything related to this case.[4093]

Sgt. Wallace acknowledged Mr. Smiley has tattoos covering his hands.[4904]

Mr. Smiley testified he was 24 and grew up in Tampa.[5014;5062] He was related to both John McDonald and Samantha Lee.[5014-15] At one time he had been very close to Lee.[5061] Mr. Smiley did not see either one of them on a regular basis in 2013.[5025] He had three prior felony convictions.[5015]

In April 2013 Mr. Smiley was probably living in New Tampa with his girlfriend.[5016] In the past he had occasionally stayed with Ms. Lee, but he was not there in April 2013 because his girlfriend was pregnant.[5017]

Mr. Smiley was friends with Casey Bisbee, whom he called O.P. or KC.[5017;5066] Mr. Smiley is present in Exhibits 161 and 162, the Facebook pictures with Bisbee.[5017;5065] Mr. Smiley thought the pictures might have been taken between June and August 2012.[5066] Bisbee is not known as Big Jit.[5018;5066] Mr. Smiley was not hanging out with Bisbee in April 2013 because of the distance between where they lived.[5018;5067] Mr. Smiley testified he is darker and shorter than Bisbee and Bisbee is heavier.[5068;5070]

Mr. Smiley testified he has a dark mark in his right eye that he got in an accident when he was 14.[5018] Mr. Smiley has tatto's on his hands-the shape of Florida and a symbol for Tampa Bay on his right hand and an I-75 symbol on his left hand.[5020] He got them in 2011 while working in Colorado.[5020] The colors were brighter in 2013 after he had additional work done on them in Pennsylvania in 2012.[5021-22]

Mr. Smiley testified he has owned several dark-colored hoodies.[5024] He had no idea if the hoodie in this case was one he had owned.[5024] Mr. Smiley denied ever owning a black backpack.[5026] He could have come into contact with a backpack owned by John McDonald because McDonald used a backpack for his kids' things when the kids stayed with Lee.[5026]

Mr. Smiley denied knowing the Wilkersons or Mr. Drake. [5028] He never had any conversations with McDonald or Lee about robbing Mr. Drake at his house.[5028] He could not recall where he was on April 15-16, 2013 because nothing was out of the ordinary about those days.[5030] Mr. Smiley denied any involvement in the crimes.[5030;5078]

The jury asked a question about Count 4 of the verdict form. They asked if the Aggravated Assault was for Mr. Wilkerson or Mr. Drake.[5345] The Indictment alleged only Mr. Wilkerson as the Count 4 victim.[5347] The parties agreed, and the trial court instructed the jury, to disregard the second finding

applicable to Mr. Drake and instructed them Count 4 applied only to Mr. Wilkerson.[5354]

The jury returned the following verdicts:[5356-58]

Count 1: Guilty of First Degree Felony Murder.[1085]

Count 2: Guilty of Robbery With a Firearm as charged.[1086] The jury made no special findings on the verdict form.

Count 3: Not guilty of Tampering With Evidence.[1086]

Count 4: Guilty of Aggravated Assault With a Firearm. The jury made no special findings on the verdict form.[1087]

Count 5: Guilty of Burglary of a Dwelling With An Assault or Battery While Armed With a Firearm, as charged in the Indictment. The jury made no special findings on the verdict form as directed.[1088]

On October 14, 2016 this Court issued its decision in *Hurst v. State*, 202 So.3d 40 (Fla. 2016), finding Section 921, Florida Statutes to be unconstitutional.

The State filed an Amended Notice of Intent to Seek the Death Penalty and Disclosure of Aggravating Factors on April 11, 2017.[1154] The new Notice identified three aggravators: the defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person; the capital felony was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit any robbery or burglary; and the capital felony was committed for pecuniary gain.[1154] On April 13, 2017, the State added an

additional aggravator, the murder was especially heinous, atrocious or cruel [HAC].[1186] The trial court struck HAC after the State's presentation of evidence.[P2232]

Defense counsel moved to exclude any evidence of Count 3, Tampering with Physical Evidence from consideration by the penalty phase jury, to prohibit the State from presenting evidence or arguing Mr. Smiley possessed a weapon contrary to the guilt phase verdict of the jury, and to permit evidence of drug use and drug sales by the victim Riley to be admissible in the penalty phase.[1156-1163] A Motion to Arrest Verdict pursuant to Rule 3.610(c) was filed on April 12, 2017.[1166-1182] Mr. Smiley requested a new trial because the verdicts on Counts 1,2,4,and 5 were legally inconsistent.[1167]

Following a hearing on April 21, 2017, both motions were taken under advisement. The trial court later granted the defense motion in limine, excluding evidence of tampering, and found the issue of drugs related to Riley was moot.[1209] The trial court denied the defense request to exclude evidence of gun possession, ruling "either party may present evidence of the charges in the indictment or the verdicts form in this case to argue or explain the matters pertaining to the charges and the verdicts in counts 1,2,4 and 5."[1210] The trial court denied the Motion To Arrest Verdict, finding the verdicts were not 'true' inconsistent verdicts."[1211]

Summary of Penalty Phase Testimony

CST Tracy Grice recounted her work at the Drake residence collecting evidence; photographs of the crime scene were entered into evidence.[P1641-87]

CST Kimberley Patterson testified she processed the Riley crime scene on March 23, 2013.[P1691-1719] Ms. Riley was found inside her home by her son.[P1693] There was evidence of several gunshots having been fired inside the house.[P1696-99] Three autopsy photos of Ms. Riley were placed into evidence.[P1702] Detective Russell Hurley testified it appeared that the perpetrator was looking for specific things in the Riley residence due to the ransacked appearance.[P1743] Ms. Riley had operated a "store" from her home and generally only opened the door to people she recognized.[P1746] In the summer of 2015, FDLE linked the gun and ballistics used in the Riley case to the Drake case.[P1748;1750]

Sgt. Brian Wallace testified consistent with his trial testimony about the course and conduct of the investigation into the Drake homicide.[P1895-1943] Sgt. Wallace confirmed Mark Wilkerson testified Mr. Smiley was the gunman who stole his cell phone and that Mark identified Mr. Smiley as the person responsible for killing Mr. Drake.[P1902;1908;1910;1923-39] Sgt. Wallace testified Ms. Lee and Mr. McDonald both implicated Mr. Smiley as the person responsible for the death of Mr. Drake and

Ms. Riley.[P1914] Sgt. Wallace testified there was no information that anyone other than Mr. Smiley was armed at the time of the homicides.[P1914]

Samantha Lee essentially repeated her trial testimony. [P1760-73;1788;1798-1800] denied she had any prior knowledge or that she participated in any of the offenses. P1769;1786;1803;1810-11;1816] Lee claimed she learned from police in 2015 that Mr. Drake had been killed.[P1772;1797]

Lee testified she drove Mr. Smiley to Lakeland on March 23, 2013.[P1773] They went to John McDonald's house and McDonald drove them in his car to a location about five minutes away so they could get weed.[P1777;1809] McDonald pointed to a house and said, "That's it right there."[P1777] Mr. Smiley got out and went to the house.[P1778] McDonald drove around, then picked up Mr. Smiley.[P1779] They returned to McDonald's mother's house. Lee noticed Mr. Smiley had a black backpack that contained a pickle jar with some money in it and some weed.[P1781-82] Lee t heard Mr. Smiley tell McDonald, "She was a fighter," and he had to shoot her.[P1782] Lee saw Mr. Smiley had a black gun.[P1783] She was given $35 for gas.[P1785]

John McDonald testified consistent with his testimony in the guilt phase as to his knowledge of the Drake homicide.[P1988-2009] McDonald maintained Lee was very involved in the planning of both the Drake and Riley crimes.[P1994-

98;2010;2022-24;2035] McDonald testified Mr. Smiley was armed with a revolver, but he and Big Jit were not.[P1997] McDonald testified Mr. Smiley said he shot Mr. Drake.[P2008]

McDonald testified Ms. Riley ran a bootleg store from her home selling food, liquor, cigarettes, and weed.[P2009] McDonald, Lee, and Mr. Smiley planned a robbery of her home.[P2010] Lee was to receive half the proceeds.[P2011] McDonald claimed Mr. Smiley was armed with the same gun he would use later to shoot Mr. Drake.[P2011] McDonald described the events that led to the shooting of Ms. Riley.[P2012-2017;2023-35] McDonald testified after Mr. Smiley killed both Mr. Drake and Ms. Riley they stopped hanging out together.[P2018]

Medical Examiner Vera Volnick identified the cause of death as homicide for both Ms. Riley and Mr. Drake after describing the wounds to each body.[P1856]

Exhibits 206 and 207, certified copies of the judgments of conviction, were entered into evidence.[P1944]

Victim impact testimony was given by Temera Brooks, granddaughter of Mr. Drake.[P1984-85] and Mr. Drake's widow, Sheila Drake.[P1986-88]

Michael Clayton testified he hosts a daytime television show in Tampa and was a former player for the Tampa Bay Buccaneers.[P2153-54] He founded an organization called *Generation Next* to encourage and support young men.[P2153] Mr.

Clayton met Mr. Smiley through *Generation Next*.[P2154] Mr. Smiley attended Hope Ministries School and participated in a life skills program at Hope Ministries that was part of *Generation Next*.[P2154] Mr. Smiley was about 14, a bubbly young man who stood out and had potential.[P2155] Mr. Clayton began a personal mentoring relationship with Mr. Smiley.[P2156]

Mr. Clayton offered Mr. Smiley employment remodeling houses.[P2157] Mr. Clayton learned about difficulties Mr. Smiley had at home that led him to leave home prior to finishing high school.[P2157] Mr. Clayton tried to help Mr. Smiley with housing and to keep him focused on working and creating a better life as he bounced around after leaving home.[P2158]

Mr. Clayton thought Mr. Smiley was highly intelligent.[2158] Mr. Smiley traveled to Colorado for a welding job.[P2159] Mr. Smiley came back because his younger brother was having similar troubles in the family and had run away from home and could not be found.[P2160] Mr. Smiley also supported his sister despite Mr. Clayton's advice to only take care of himself.[2160] Mr. Clayton felt Mr. Smiley could be manipulated by others he wanted to help even if it was not in his best interest.[P2175]

Mr. Clayton knew Mr. Smiley had a son and there were some difficulties related to his girlfriend.[P2162]

Mr. Clayton was aware of some significant medical difficulties Mr. Smiley had from a brain aneurysm.[P2162] Mr. Clayton noticed a change in Mr. Smiley after the aneurysm.[P2164] Mr. Smiley was a different young man after the aneurysm, a person who Mr. Clayton could no longer guide and mentor.[P2164-5] Mr. Smiley became challenging and prone to provocation.[P2166] Mr. Clayton noted Mr. Smiley began to "rant" on social media and rage out over minor and "stupid" things.[P2167]

Samantha Lee testified she had known Mr. Smiley since he was a toddler and had a lot of interaction with him.[P1788] He was a good kid and did well in school.[P1789] Mr. Smiley's parents were very religious and very strict, leading him to leave home at age 17.[P2185] Mr. Smiley stayed with her at times.[P2185]

Ms. Lee noticed a change in Mr. Smiley after the brain aneurysm.[P2179] He became short-tempered and wild.[P2180] He was a loose cannon and more violent.[P2180] He was an easygoing person before, an angry and combative person after.[P2180-21] He had less self-control.[P2181]

Frankie Grandberry, Mr. Smiley's mother, testified he is the second born of her five children and her oldest son.[P2297] Mr. Smiley's biological father was absent from his childhood, he

was raised by his stepfather.[P2298-99] Mr. Smiley had no contact with his father until he was 17 or 18.[P2299]

Mr. Smiley and his stepfather, Emmanuel Grandberry, were very close.[P2299] Mr. Grandberry remodeled homes and taught Mr. Smiley those skills.[P2300]

Mrs. Grandberry described Mr. Smiley as a good boy, with a good personality, a "goof" who everyone loved him.[P2300] He had close relationships with his siblings.[P2301] He had good peer relationships.[P2308]

Mr. Smiley did well in school, first attending public school, then a private Christian school from second grade through high school.[P2301] Mr. Smiley returned to public school just before high school graduation and was not allowed to graduate due to credit problems between the private school and public school that were not his fault.[P2301] He obtained his GED, had good grades, and performed very well on the SAT and ACT.[P2302] He participated in chess club, wrote the school newsletter, and did track and field.[P2302;2305] Mr. Smiley was also involved in some mentorship programs with Mr. Clayton and Tyrone Keys.[P2304]

The family was very involved in church for sixteen or seventeen years.[P2306] As a result Mr. Smiley participated in community service projects in the Tampa area on a regular basis.[P2306-7]

The household was strict.[P2308] Mr. Smiley did not get in trouble.[P2309] Mr. Smiley left home at age 16 because of the strict household.[P2309] Mr. Smiley wanted a cell phone, to spend the night with friends, to go to parties, none of which were allowed.[P2309] Mr. Smiley stayed in school and stayed in contact with his family after he moved out.[P2311]

Mrs. Grandberry was somewhat familiar with the brain aneurysm Mr. Smiley suffered in 2012.[P2311] There were three-two had ruptured and one remained that could not be treated.[P2313-14] The surgery took a very long time, and the doctors did not know what would happen when he woke up or what he would be like.[P2313] Mr. Smiley went to live with Ms. Lee when he was released from the hospital because the Grandberrys would not permit his girlfriend to live with them.[P2317]

Mrs. Grandberry did not find Ms. Lee's lifestyle to be positive.[P2324] Lee dealt drugs and did things that were illegal to make her way in life.[P2325] Mrs. Grandberry had no relationship with Lee until her kids ended up there.[P2325] Mrs. Grandberry exhorted Lee to make sure Mr. Smiley did not get involved in those things.[P2326]

Mrs. Grandberry testified Mr. Smiley did not get the follow-up medical treatment he should have received after the aneurysm.[P2317] Mr. Smiley's behavior changed after he got out of the hospital.[P2317] His grandmother reported to her Mr.

Smiley was angry and violent, completely out of character for him.[P2318] She saw a video he posted where he was just acting crazy and trying to fight.[P2318]

Dr. Alan Waldman is a forensic psychiatrist, forensic neuropsychiatrist, and a cognitive neurologist.[P2343] He maintains a clinical practice.[P2343] Dr. Waldman has testified previously in criminal cases for both the State and defense.[P2345] He works roughly 60% of the time for the State and 40% for criminal defense.[P2346]

Dr. Waldman explained an aneurysm is a bubble in an artery, a weakness in the wall that can burst and bleed. It is often fatal because the brain has nowhere to go, which results in tissue death.[P2350-2] Dr. Waldman often treats people after they experience an aneurysm.[P2351] Aneurysms can lead to changes depending on where the bleed occurs and where brain tissue is killed.[P2354] Brain tissues do not recover or grow back.[P2363] Intensive rehabilitation is the only way to improve outcome after an aneurysm.[P2364]

Dr. Waldman performed a full neuropsychiatric evaluation of Mr. Smiley.[P2355] He reviewed 1,000 pages of medical records, police documentation, and some court documentation.[P2356] Dr. Waldman determined the two aneurysms that caused the bleed were located on the internal carotid artery deep inside the foramen of sylvius, behind the prefrontal cortex and temporal

lobe.[P2359] The area of Mr. Smiley's brain that was damaged controls judgement, insight, and prevents us from being impulsive.[P2363] It controls rage, anger response, and the ability to control anger and temper.[P2362-3]

Dr. Waldman diagnosed Mr. Smiley with major neurocognitive disorder, vascular type under the DSM 5, a very severe brain injury.[P2365] Mr. Smiley has frontal lobe syndrome leading, to problems with rage responses and knowing the right and wrong way to act.[P2370] Mr. Smiley cannot access prior memories of previous experiences to compare to his current situation. [P2370] He does not process the information that tells him how to react, how to be appropriate, how to avoid sanctions, how to be moral, and how to be legal.[P2370] A result of the injury, Dr. Waldman opined within a reasonable degree of medical certainty, that Mr. Smiley would have been under extreme mental duress or under the influence of extreme mental difficulties.[P2365]

Dr. Waldman further diagnosed Mr. Smiley with anosognosia, which is a disability that occurs when the brain does not correctly communicate how the rest of the body and brain are functioning.[P2368] This can inhibit treatment because the person does not recognize something is wrong.[P2368-9]

The third aneurysm is located near the eye and was not treated because treatment was deemed too dangerous at the time of admission.[P2360]

Psychologist Dr. Tracy Hartig evaluated Mr. Smiley.[P2446] She administered various psychological tests and assessments, interviewed Mr. Smiley and Mrs. Grandberry, and reviewed case materials and Mr. Smiley's medical records.[P2447-51]

Dr. Hartig scored Mr. Smiley's IQ at 114, with a 12th grade reading level.[P2457] Mr. Smiley's results on other testing indicated he was more cold and calculating than warm and neutral; was not particularly temperamental, had average frustration tolerance, was more shy and introverted, and was less likely to be influenced by others.[P2461] Some testing designed for inmates indicated Mr. Smiley would be able to get along with peers.[P2462]

Mrs. Grandberry told Dr. Hartig she did not notice any significant changes to Mr. Smiley after the aneurysms, but others reported changes to her such, as Mr. Smiley's grandmother and aunt.[P2451] Those changes were forgetfulness, not acting himself, believing people were keeping things from him, and being violent.[P2452]

Mr. Smiley's girlfriend, Tamaya Johnson, told Dr. Hartig Mr. Smiley was not a fighter or aggressive after his

aneurysm.[P2453] Mr. Clayton also told Dr. Hartig Mr. Smiley was not aggressive.[P4254]

Mr. Smiley told Dr. Hartig he did not think he was different after the aneurysm, but family members did and told him.[P2471] Some changes were unhappiness and mood changes.[P2471]

Mrs. Grandberry reported Mr. Smiley was arrested once prior to the aneurysm for a minor offense that was dismissed or reduced.[P2451]

The Sentencing Verdict is found at pages 1240-1246. The jury made the following findings on aggravating circumstances: the jury unanimously found beyond a reasonable doubt Mr. Smiley was previously convicted of another capital felony, the murder of Carmen Riley.[1240] The jury then made four separate unanimous findings that a separate aggravator was established by each prior felony conviction-the robbery from the Riley case and three contemporaneous felony convictions.[P1240-42] The jury unanimously found two separate felony-murder aggravating circumstances, one for the burglary and one for the robbery. The jury unanimously found the murder was committed for pecuniary gain.[1242] The jury determined the aggravating factors, as found, were sufficient to warrant a possible death sentence.[1242]

The jury made the following findings as to mitigation:

1. The defendant has no significant history: 5 yes/7 no;[1243]

2. The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance: 12 no-0;[1243]

3. The capacity of the defendant to appreciate the criminality of his conduct or conform his conduct to the requirements of the law was substantially impaired: 12 no-0;[1243]

4. Age of the defendant: 12 no-0;[1243]

5. Mitigation related to the defendant's character was established by the greater weight of the evidence:7yes-5 no;[1244]

6. Mitigation related to the defendant's background was established by the greater weight of the evidence:12 no-0;[1244]

7. Mitigation related to the life of the defendant was established by the greater weight of the evidence:12 no-0;[1244]

8. Mitigation related to the circumstances of the offense:1 yes-11 no.[1245]

The jury unanimously found the aggravating factors that were proven beyond a reasonable doubt outweighed the mitigating circumstances.[1245] The jury then unanimously found at least one of the aggravating factors was sufficient to warrant a sentence of death, the aggravating factors outweighed the mitigating circumstances, and a sentence of death should be imposed.[1245]

The trial court held a *Spencer* hearing on November 13, 2017.[5598-5627] Dr. Tracey Hartig testified she administered a number of psychological tests and interviewed Mr. Smiley.[5616] She reviewed his medical records and interviewed family and

friends.[5618] Dr. Hartig testified to the contents of her report, highlighting certain aspects of Mr. Smiley's childhood, including substantial corporal punishment, strict discipline by his stepfather, and the absence of his biological father.[5619-20] Dr. Hartig noted Mr. Smiley left home as a minor to escape the rigidity of the household based on the religious beliefs of his stepfather and mother.[5620] Despite leaving home as a minor, Mr. Smiley obtained a GED and was able to find skilled labor jobs.[5621] Mr. Smiley was mentored by Mr. Mike Clayton, a former NFL player, who spoke very favorably about Mr. Smiley's work ethic and commitment to his family.[5621] Of particular note was the aneurysm Mr. Smiley suffered in 2012.[5622] Changes in his behavior were reported by friends and family members after the aneurysm.[5623] Mr. Smiley's problem-solving ability appeared to be impacted negatively after the aneurysm.[5624] He became more irritable and was just not himself after the aneurysm.[5625]

The trial court conducted a sentencing hearing and issued the Sentencing Order on February 23, 2018.[5379-5400;5445-61] The court declined to perform any proportionality analysis, including consideration of disparate treatment of co-defendants under an *Edmond/Tyson* analysis.[5393-94] In total, the trial court determined there were four aggravating factors that he gave great or substantial weight.[5396-7]

The trial court then found "all the evidence offered in mitigation has been established by the great weight of the evidence and the Court will accord it the appropriate weight it deserves." The trial court identified five mitigators: (1) no significant prior criminal history, moderate weight; (2) under the influence of extreme mental or emotional distress, little weight; (3)capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired, little weight; and (4)age of 21, little weight; and (5) anything else in background, moderate weight. [5397]

The trial court concluded the jury's findings deserved great weight. The trial court determined the weight of the aggravating factors and mitigating circumstances was considere,d and the nature and quality of the mitigation "pales in comparison to the proven aggravating factors". The trial court found the aggravating factors outweighed the mitigating circumstances.[5399]

The trial court sentenced Mr. Smiley to death on Count 1 [5421], to thirty [30] years' prison on Count 2, to fifteen [15] years' prison on Count 4, and to thirty [30] years' prison on Count 5, all sentences to run concurrent with each other.[5400] A ten year minimum/mandatory was imposed on Counts 2,4, and 5 "as per jury verdict."[5428]

A timely Notice of Appeal was filed on February 27, 2018.[5406;5414]

SUMMARY OF THE ARGUMENTS

ISSUE I: The trial court erred in finding no discovery violation by the State had occurred with Exhibit 161, a photograph of Mr. Smiley and Mr. Bisbee. The trial court further erred by failing to conduct an adequate *Richardson* hearing.

ISSUE II: The trial court erred in admitting two photographs of Mr. Smiley and Mr. Bisbee. The photos depicted both men making gestures consistent with pointing a gun and showed both liquor and marijuana present. The predicate necessary for admission was absent. The prejudicial impact of the photos outweighed the probative value.

ISSUE III: The trial court's denial of the defense motion for mistrial was an abuse of discretion after State witness John McDonald testified as to other uncharged offenses he committed with Mr. Smiley. The witness testified Mr. Smiley likely wore gloves in this case because that was the pattern they normally used when committing crimes.

ISSUE IV: The trial court's denial of the defense motion for mistrial was an abuse of discretion after State witness John McDonald testified Mr. Smiley was concerned about the outcome in this case because the State was seeking the death penalty. This

testimony came after the parties had agreed the jury, which was not death qualified, would not be told that the possible penalty was death if Mr. Smiley was convicted.

ISSUE V: The prosecutor made improper and highly prejudicial statements in the penalty phase voir dire that the State Attorney had sixty pending murder cases and was seeking a death sentence in only eight. These statements were reversible error when over half of the jurors who ultimately served on the penalty phase jury heard them.

ISSUE VI: The trial court erred when he permitted the State to present evidence and argue to the jury that Mr. Smiley possessed and discharged a firearm when the guilt phase jury verdict lacked the special findings or clarity to support evidence and argument Mr. Smiley possessed and discharged a firearm.

ISSUE VII: The closing arguments of both the prosecutor and defense counsel resulted in a violation of Mr. Smiley's constitutional rights, entitling him to a new penalty phase. Both the State and defense counsel misstated the facts and misstated the law on aggravating circumstances and the role of sympathy in penalty phase. The State made improper golden rule arguments, improperly denigrated mitigation testimony, and improperly turned mitigating testimony into aggravating circumstances.

ISSUE VIII: The penalty phase jury instructions and verdict forms created reversible error. The trial court improperly gave a special jury instruction instead of the approved standard jury instruction on the prior violent felony aggravator. This special instruction, coupled with the verdict form, improperly presented to the jury that the State had established five aggravators instead of one. The verdict form for the mitigating circumstances improperly asked the jury to find each individual mitigator and to record the jury vote as to each individual mitigator.

ISSUE IX: The trial court failed in the Sentencing Order to conduct the required *Enmund/Tyson* analysis, failed to merge the pecuniary gain aggravator, improperly found two prior violent felony aggravators instead of one, failed to expressly discuss and weigh the non-statutory mitigating circumstances, and improperly imposed the firearm minimum/mandatory as well as re-classified sentences for the three contemporaneous felonies, requiring remand for a new sentencing proceeding.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN FINDING NO DISCOVERY VIOLATION OCCURRED WITH EXHIBIT 161, A PHOTOGRAPH OF MR. SMILEY AND AND CASEY BISBEE, AND FAILED TO MAKE ADEQUATE *RICHARDSON* FINDINGS.

On the fifth day of trial testimony, defense counsel advised the trial court he had received an email from the State on Sunday, October 2, containing a photograph of Casey Bisbee Thomas, aka "Big Jit" and Mr. Smiley standing side-by-side that had not been previously disclosed.[4674;4679] The State intended to introduce the photo during the testimony of Sergeant Brian Wallace.[4674] Defense counsel objected, arguing the photograph had not been previously disclosed and constituted a significant discovery violation as it was not disclosed until the fifth and final day of trial.[4674;4677-80;4681-2;4810] Defense counsel did not believe the violation was intentional or done in bad faith, but still objected.[4684]

The State initially claimed the photograph had been given to them on Friday by Samantha Lee after she testified, three days before notifying defense counsel.[4675] The State then said Ms. Lee had given it to investigators or Sgt. Wallace, who had not turned it over to the prosecutors until after Lee testified.[4676]

The State noted another photograph of Bisbee and Mr. Smiley, Exhibit 162, had been disclosed to the defense in November 2015.[4683;4684;4814] Defense counsel argued Exhibit 161 was a "totally different photograph" and that the two photos "are different and distinct because of the circumstances."[4812] Defense counsel argued that despite differences between the

photographs, he would have structured much of his trial preparation and cross-examination of State witnesses differently had he known Exhibit 161 existed and that the State intended to use it at trial.[4810-13] Defense counsel argued certain aspects in Exhibit 161, that were not present in Exhibit 162 would have changed "our entire strategy relating to the ID. We would have confronted witnesses with this in depositions. We may have confronted them with this during the testimony of the case."[4812] The State acknowledged that in Exhibit 161 "you get a better understanding of the height comparison" between Mr. Smiley and Bisbee, which would support the State's case.[4818] Defense counsel noted that in Exhibit 162 Mr. Smiley and Bisbee appear to be the same height, same basic skin color and weight but in Exhibit 161 they look totally different.[4819]

Sergeant Wallace testified as a proffer to the trial court that during the investigation of the case he spoke with Ms. Lee, who attempted to help him identify Casey Bisbee.[4801] Sgt. Wallace researched Mr. Smiley's Facebook page and found several photographs of Mr. Smiley and an individual that fit the description of Casey Bisbee in 2015.[4802] Sgt. Wallace obtained additional photographs of Bisbee, including his Florida ID card.[4803] Sgt. Wallace interviewed Bisbee at the courthouse.[4804] Sgt. Wallace identified Bisbee in Exhibit 161, the disputed photograph.[4804] Sgt. Wallace admitted he

saw Exhibit 161 on Facebook well before the previous Friday when it was given to the State, probably over a year earlier.[4806] Sgt. Wallace gave the State one photo off the page, but not Exhibit 161 despite its presence there in 2015.[4807] Sgt. Wallace never provided the State with Exhibit 161.[4807] Sgt. Wallace had no idea who took the photo in Exhibit 161, where or when it was taken, if it had been edited, or how writing came to be on it.[4808]

The trial court determined there was no discovery violation despite the fact Sgt. Wallace had viewed Exhibit 161 at least year earlier and the photo was not given to defense counsel until the fifth day of trial.[4819] The trial court's determination this was not a discovery violation was error.

Sgt. Wallace testified he viewed Exhibit 161 at least a full year prior to trial and did not provide that photograph to the State. The State is charged with knowledge of any item of evidence known to or in the possession of the police regardless of whether the police actually turn the evidence over to the prosecutor. *Laidler v. State*, 10 So.3d 1136, 1139 (Fla. 1st DCA 2009). The failure of the State to disclose a second photograph they intended to introduce on the fifth day of the trial was a discovery violation mandating a full hearing pursuant to *Richardson v. State*, 246 So.2d 771 (Fla. 1971). The failure to conduct an adequate *Richardson* hearing may constitute *per se*

reversible error. *Stone v. State*, 547 So.2d 657, 659 (Fla. 2d DCA 1989).

The trial court was required to conduct a full *Richardson* hearing in this case and failed to do so. Whether a *Richardson* hearing regarding possible discovery violations is properly conducted is reviewed *de novo* on appeal. *Dabbs v. State*, 229 So.3d 359 (Fla. 4th DCA 2017). A full *Richardson* hearing requires the trial court to consider and make findings on four key points: (1) whether a discovery violation occurred; (2) whether the State's discovery violation was inadvertent or willful; (3) whether the violation was trivial or substantial; and (4) most importantly, what effect it had on the defendant's ability to prepare for trial. *Knight v. State*, 76 So.3d 879, 888(Fla. 2011). The rulings of the trial court on each of the required four prongs are reviewed for an abuse of discretion. *Chamberlain v. State*, --So.3d— 2018 WL4360833, 43 Fla. Law Weekly D2128 (Fla. 4th DCA September 12, 2018).

The trial court is required to determine whether the violation "had a prejudicial effect on the opposing party's trial preparation". Prejudice exists if "there is a reasonable probability that the defendant's trial preparation or strategy would have been materially affected." *Id.* Discovery that requires the defense to "back step" statements already made is prejudicial. *Brown v. State*, 640 So.2d 106, 108(Fla. 4th DCA

1994). That is exactly what defense counsel argued he would be required to do in this case and that it was impossible to do. Defense counsel termed the late disclosure of the photograph "devastating."[4681]

In this case the trial court made no rulings on prongs 2, 3 or 4. Defense counsel did not claim the violation was willful under (2), reducing the trial court's obligation under that prong. But the trial court was still required to rule on prongs 3 and 4 and utterly failed to do so. The trial court's handling of this matter was inadequate, a new trial is required. *Z.L. v. State*, 228 So.3d 600 (Fla. 2d DCA 2017).

ISSUE II

THE TRIAL COURT ERRED IN ADMITTING EXHIBITS 161 AND 162 WITHOUT SUFFICIENT PREDICATE AND WHERE THE PREJUDICIAL IMPACT OUTWEIGHED THE PROBATIVE VALUE

Trial counsel objected to the admission of Exhibit 161, citing the lack of a foundation and predicate.[4822-24] As to Exhibit 161, defense counsel argued he had no idea when it was taken, who took it, or where it was taken, how it was generated, or kept.[4672;4678;4680]

During his proffer Sgt. Wallace testified he did not remove Exhibit 161 from Mr. Smiley's Facebook page.[4807] He had no idea where the hard copy given to the State came from.[4807] Sgt. Wallace had no idea who took the photograph, where it was taken, when it was taken, what it was supposed to be depicting,

or the circumstances before and after the photo was taken, or if the photo had been edited in any way.[4808-09]

The trial court found the proper predicate had been established for the admission of both photographs.[4826]

The trial court erred in finding Sgt. Wallace was able to properly authenticate Exhibit 161 for admission into evidence. The appellate court reviews the trial court's determination that a proper predicate for admission of a photograph has been established under an abuse of discretion standard. *Wagner v. State*, 707 So.2d 827, 831 (Fla. 1st DCA 1998).

In *Wagner,* the appellate court delineated the criteria for the establishment of the proper predicate under the "silent witness" theory. In order to determine whether a photograph is admissible under the silent witness theory the trial court must consider (1) evidence establishing the time and date of the photograph; (2) any evidence of editing or tampering; (3) the operating condition and capability of the equipment producing the photographic evidence as it relates to the accuracy and reliability of the photographic product; (4) the procedure employed as it relates to the preparation, testing, operation, and security of the equipment used to produce the photographic product; and (5)testimony identifying the relevant participants in the photo. *Id., at* 831. There was no testimony from Sgt. Wallace on (1)-(4). The only evidence necessary to the

establishment of the predicate for admissibility was on (5), where Sgt. Wallace testified he had met Bisbee, and it was Bisbee and Mr. Smiley in the picture. The trial court did not make any specific findings on the predicate; he merely stated he found the predicate established.[4826] Absent any testimony about (1) through (4), let alone how or when the photograph was actually produced and given to law enforcement or specific findings by the trial court on each of the criteria, it was an abuse of discretion to find Exhibit 161 admissible through Sgt. Wallace.

The trial court found both photographs relevant to establish identity, friendship, or connection between the parties.[4826] Mr. Smiley had not denied he knew or was friends with Bisbee. Exhibits 161 and 162 were admitted into evidence and published to the jury during Sgt. Wallace's direct examination testimony.[4871-76] The admission of the photographs was error because the probative value was outweighed by the prejudicial impact.

An appellate court reviews the admission of photographic evidence under an abuse of discretion standard. *Armstrong v. State*, 73 So.3d 155 (Fla. 2011) The test for the admissibility of photographic evidence is relevance, not necessity, and an analysis of whether the probative value of a photograph is

outweighed by the prejudicial impact is required when admitting photographs. *Douglas v. State*, 878 So.2d 1246, 1255 (Fla. 2004).

Defense counsel objected to the admission of Exhibit 161, arguing the prejudicial impact outweighed any probative value.[4824] Defense counsel observed the photo showed Mr. Smiley holding a liquor bottle and Bisbee's gestures were consistent with someone holding a firearm.[4824] Referring to both photographs, counsel argued the prejudicial impact outweighed the probative value.[4824] The State countered that in Exhibit 162 Mr. Smiley was making the gun hand gestures and Bisbee appeared to have a blunt in his mouth.[4826]

It is error to admit photographs of a defendant when those photos have limited relevance and show poor character or propensity. *Little v. State*, 474 So.2d 331 (Fla. 1st DCA 1995); *Dorsey v. State*, 613 So.2d 1368 (Fla. 2d DCA 1993). The photographs in this case had no connection to the crimes. The depiction of Mr. Smiley in both photos was highly prejudicial. The photos portrayed Mr. Smiley in a unfavorable light-like a thug. The photos were of limited relevance since Mr. Smiley did not dispute that he knew and was friends with Bisbee. The photographs should not have been admitted into evidence.

When photographs are improperly admitted, the court employs a harmless error test to determine relief. *Jones v. Moore*, 794 So.2d 579, 585 (Fla. 2001). It is the State's burden to show an

error was harmless since the State is the beneficiary of the error. The focus is the effect of the error on the trier of fact. Harm results when there is a reasonable probability the error affected the verdict. *Rodriguez v. State*, 248 So.3d 1085 (Fla. 2018). A reasonable probability is present in this case. The jury could well have given McDonald and Lee's testimony more credibility after viewing Exhibits 161 and 162 as opposed to Mr. Smiley's testimony that he was not involved in these crimes. A new trial should be granted.

ISSUE III

THE TRIAL COURT ERRED IN DENYING THE REQUEST FOR A MISTRIAL AFTER TESTIMONY FROM STATE WITNESS JOHN MCDONALD THAT HE AND MR. SMILEY HAD COMMITTED OTHER OFFENSES

John McDonald testified he was involved with Mr. Smiley in the commission of this offense.[4737] McDonald testified on direct that Mr. Smiley wore gloves during the incident. On cross examination, McDonald was questioned about his knowledge of the gloves:

Q: You know Ben's details so much that you're saying he had gloves. Where did you see him with the gloves?

A: I probably gave him the gloves, if I'm not mistaken.

Q: When would you have given him the gloves?

A: In the car.

Q: So you provided the gloves?

A: I probably have.

Q: Okay. Well these gloves that you provided, what did Mr. Smiley do with them?

A: I don't know.

Q: But why do you think he had him with him then?

A: ***Well, when we normally operate like that, we normally use gloves.***

Defense counsel moved for a mistrial arguing McDonald's testimony alluding to "this being a pattern that these folks have" was unduly prejudicial. Defense counsel stated he did not believe the prejudice would be alleviated by a curative instruction.[4741] Defense counsel noted he had made his concerns about prior incidents known previously, and the witness' answer was unexpected.[4739] The State responded that they had instructed McDonald not to talk about other robberies or homicides and had also told him if he was not sure how to answer a question to stop.[4739] The trial court denied the motion for mistrial.[4742;4745]

The request for a curative instruction was taken under advisement. Trial counsel agreed to do it at a later time after time for reflection.[4744] The objection and motion for mistrial were renewed and denied after the State rested and again after the Defense rested.[4984-85;5097]

The parties agreed the jury would be given a modified instruction about disregarding other wrongs or acts based on

Standard Jury Instruction 2.14 in lieu of a curative instruction.[5100-01] The trial court's denial of the motion for mistrial was reversible error.

The appellate court reviews the denial of a motion for mistrial under an abuse of discretion standard. *Salazar v. State*, 991 So.2d 364, 371-72 (Fla. 2008). A motion for mistrial should be granted when necessary to ensure a fair trial and should be granted only when the error is so prejudicial it vitiates the entire trial. *Id., at 372*. A new trial is warranted when the improper statements deprive the defendant of a fair and impartial trial, materially contribute to the conviction, and are so harmful or fundamentally tainted as to require a new trial or be so inflammatory they may have influenced the jury to reach a more severe verdict than it would have otherwise. *Knight v. State*, 76 So.3d 879, 885 (Fla. 2011).

It is clear that McDonald's testimony was improper and indicative that Mr. Smiley and he regularly committed similar crimes. *Rogers v. State*, 89 So.3d 990 (Fla. 2d DCA 2012)[witnesses' testimony he and defendant committed other uncharged crimes was reversible error as such testimony was not relevant and improperly demonstrated propensity and bad character of the defendant]. The trial court recognized the error and sustained the objection, but denied the motion for mistrial. The denial of the motion for mistrial is now the

appropriate appellate focus. Mr. Smiley submits the mistrial should have be granted because the error deprived Mr. Smiley of a fair trial and may have contributed to the verdict or influenced the jury to reach a more severe verdict than it would have otherwise.

In this case both sides had taken efforts to ensure the jury was not aware of other crimes committed by Mr. Smiley, recognizing the inherent prejudice in such testimony. The trial court had prohibited any detailed testimony about the Riley offenses, let alone about other uncharged crimes that McDonald alluded to in his testimony. McDonald's gratuitous statement that "we normally operate like that" and that he believed Mr. Smiley had on gloves because wearing gloves was part of the "normal" pattern or criminal conduct was exactly the type of testimony that demonstrates propensity and bad character. Defense counsel could not cross-examine McDonald on these assertions without further adding to the prejudice. The defense theory at trial was that Mr. Smiley was not involved or without the gunman, but rather the gunman was the second uncharged person present who . Testimony from McDonald that he and Mr. Smiley engaged in burglaries and robberies as a "normal" pattern of conduct fatally undercut the defense. The only remedy for the erroneous admission of this testimony was a new trial. The

trial court abused his discretion when he denied the request for a mistrial. That error requires reversal for a new trial.

ISSUE IV

THE TRIAL COURT ERRED IN DENYING THE MOTION FOR MISTRIAL AFTER JOHN MCDONALD TESTIFIED THE STATE WAS SEEKING THE DEATH PENALTY AGANST MR. SMILEY IN CONTRAVENTION OF THE TRIAL COURT'S PRETRIAL ORDERS EXCLUDING EVIDENCE OF THE POTENTIAL PENALTY

John McDonald testified on cross-examination that he wrote a letter to Ms. Lee claiming his statements to police were coerced after an encounter with Mr. Smiley on a jail transport bus and at the courthouse.[4773-78] On redirect the State asked McDonald what his reasons were for writing that letter.[4782-84] McDonald testified he wrote the letter because he was trying to make Mr. Smiley happy and because Mr. Smiley was his cousin. The State then asked:

Q: Do you want to see him in trouble?

A: ***No. He said that it—they was trying to give him the death penalty.***

After the jury exited the courtroom moments later defense counsel objected and moved for mistrial.[4787-88]Defense counsel pointed out that the fact this was a capital case had intentionally been kept from the jury, and the jury had not been death qualified.[4788;5956] The State argued the testimony was only that Mr. Smiley believed the State was seeking the death penalty, and that would not lead the jury to believe that was

actually an option.[4788] Neither defense counsel nor the State were aware of what McDonald would say regarding the death penalty.[4789] The trial court found the testimony was a surprise to both sides and denied the motion for mistrial.[4790] The motion for mistrial was renewed and denied after the State rested and again after the Defense rested.[4984-85;5097]

On appeal the denial of a motion for mistrial is reviewed under the abuse of discretion standard. *Salazar v. State*, 991 So.2d 364, 371-71 (Fla. 2008); *Chamberlain v. State*, 881 So.2d 1087 (Fla. 2004). As argued in *Issue II*, a motion for mistrial should be granted and a new trial is warranted when the statements deprive the defendant of a fair and impartial trial, materially contribute to the conviction, and are so harmful or fundamentally tainted or so inflammatory they may have influenced the jury to reach a more severe verdict than it would have otherwise.

The jury in this case should not have been given any information about the possible penalty, let alone that the death penalty was being sought if Mr. Smiley were convicted. The parties agreed prior to this bifurcated trial that the guilt phase jury would not be death qualified or told in any manner that the State was seeking a death sentence. Since those jurors were not questioned on their position on capital punishment,

jurors who might be more likely to convict if death were an option should have been, but were not removed from this panel.

ISSUE V

THE TRIAL COURT ERRED IN DENYING THE MOTION FOR MISTRIAL FOLLOWING THE PROSECTUOR'S STATEMENTS IN THE PENALTY PHASE VOIR DIRE THAT THE STATE WAS SEEKING THE DEATH PENALTY IN ONLY A FEW OF THE SIXTY PENDING FIRST-DEGREE MURDER CASES

During voir dire the State made the following statements to the prospective jurors:[P677-78]

State: Ms. Coatney, I'm going to ask you. Do you think that just because someone is convicted of first-degree murder it should be an automatic death sentence?

Ms. Coatney: I probably have to say yes or no? I have to know all the—

State: Well, yes or no are the only two options you have got, but you need to—I mean, do you understand that in Florida not every case meets the qualifications for a death penalty?

Ms. Coatney: Right.

State: Okay. **We have, you know 60 death—60 first-degree murder cases pending in our circuit. Okay? Probably nine of them are death eligible. So just because you're charged with first-degree murder does not mean that your case qualifies as a case that we would seek the death penalty in. Do you understand that?**

The State then began to question prospective juror Clark[P679]:

State: Okay. And do you understand that in the state of Florida that there are certain criteria that must be met before the State can even seek the death penalty?

Mr. Clark: I understand that now.

State: Okay. All right. **So like I said, we have lots of cases but we don't—there are only cases that meet that—**

Defense counsel objected, arguing the comments about the number of cases the State sought death in was very prejudicial and moved to strike the panel.[P679-81] The trial court sustained the objection, rejecting the State's argument the comments were not prejudicial.[P681-3]

The next morning the defense renewed the objection and again moved to strike the panel.[P757-65] The trial court denied the motion to strike the panel.[P771] The request to poll jurors individually was also denied.[P773-3]

At the conclusion of voir dire defense counsel exhausted their peremptory strikes and sought eight additional strikes.[P1471] The defense stated it was seeking additional peremptory challenges to remove the jurors from the original panel who had heard the State's statistical comments.[P1471-72] The request was denied.[P1473] The panel was accepted by the defense subject to the motion to strike.[P1475] The following selected jurors were present in the courtroom when the improper comments by the State were made: Barghausen, Trevino, and Brooks [in the box at the time of the comments]. Jurors Owens, Bishop, Smith, and Lockwood were in the panel at the time of the comments, and each answered affirmatively they had heard all the questions of the State.[P807,810,1000,1001]

A motion for mistrial made during the penalty phase referenced this error and its prejudicial impact in conjunction

with the State's comparison of this case with Jeffery Dahmer.[P2548-49]

The denial of the motion to strike the panel was properly preserved. *See Johnson v. State*, 141 So.3d 698 (Fla. 1st DCA 2014). The denial of a motion to strike the jury panel is reviewed under an abuse of discretion standard. *Dippolito v. State*, 143 So.3d 1080 (Fla. 4th DCA 2014).

Mr. Smiley has a right to a fair and impartial jury. *See Holt v. State*, 987 So.2d 237 (Fla. 1st DCA 2008). The prosecutor's statements to seven of the twelve seated jurors were clearly improper and highly prejudicial. Comments made by the prosecutor such as these have been found to be objectionable in penalty phase proceedings because such comments constitute improper vouching and encourage the jury to rely on the composite judgment of the prosecution instead of their own when considering whether death is the appropriate sentence. *See Pait v. State,* 112 So.2d 380 (Fla. 1959); *Brooks v. State,* 762 So.2d 879 (Fla. 2000); and *Ferrell v. State*, 29 So.3d 959, 988 (Fla. 2010). In *Brooks v. Kemp*, 762 F.2d 1383 (11th Cir. 1985), the Court found that because the jury is empowered to exercise its discretion in determining punishment the prosecutor cannot undermine that discretion by implying that he, or another higher authority, has already made the careful decision necessary in the penalty phase.

The trial court's denial of the motion to strike the panel and the subsequent motion for mistrial constituted an abuse of discretion. Reversal for a new penalty phase is necessary.

ISSUE VI

THE TRIAL COURT ERRED IN PERMITTING THE STATE TO PRESENT TESTIMONY AND ARGUMENT DURING THE PENALTY PHASE THAT MR. SMILEY POSSESSED AND DISCHARGED A FIREARM CONTRARY TO THE GUILT PHASE JURY VERDICT.

The State's case proceeded at trial based only on felony murder. Count I alleged that Mr. Smiley killed Mr. Drake by shooting him with a firearm and "during the commission of the said felony, BENJAMIN DAVIS SMILEY, JR., actually possessed and discharged a firearm, and as a result of the discharge, great bodily harm or death was inflicted on CLIFFORD DRAKE…".[1179] Count 2, Armed Robbery, alleged Mr. Smiley possessed and discharged a firearm, killing Clifford Drake during the robbery of Mark Wilkerson.[1179] Count 4 alleged Mr. Smiley was armed with a Firearm while committing an Aggravated Assault on Mark Wilkerson.[1180] Count 5, Burglary with Assault and Battery with a Firearm, alleged Mr. Smiley carried, displayed, used or threatened to use or attempted to use a firearm.[1181]

The jury was given Standard Jury Instruction 3.12(d)on Interlocking Counts and told to first consider Counts 2[Robbery] and 5[Burglary].[1046] The jury was instructed if they determined either of those counts were proven, then they were to

consider Count 1. The jury was further instructed that they should not reach a guilty verdict on Count 1 unless they found all the elements of that crime, including the essential elements from Counts 2 or 5.[1046]

The guilt phase verdict form directed the jury to make special findings as to Counts 2, 4, and 5 as follows:

Count 2: The jury was directed that if they found Mr. Smiley guilty of Robbery "as charged in the Indictment" they were to " …further find that the Defendant, during the commission of the offense (*check all that apply; only if you find the Defendant guilty of a or b. If none apply, leave blank).*"

The jury was asked to determine whether Mr. Smiley a."actually discharged a firearm" and separately, b."as a result of such discharge great bodily harm or death was inflicted on Clifford Drake."[1086] The jury did not check either special finding, which, according to the instruction, would mean the jury determined none applied.[1086]

Count 5: The jury was directed that if they selected (a) the Defendant is guilty of Burglary of a Dwelling with an Assault or Battery While Armed with A Firearm, as charged in the Indictment they were to make further special findings. The jury verdict form stated "We further find that the Defendant, during the commission of the offense *check all that apply, only if you find the Defendant guilty of a. If none apply, leave*

blank.)[1088] The jury was asked to pick either "actually possessed a weapon" or "did not actually possess a weapon". [1088] The jury selected (a), but left both special findings blank.

The jury also failed to make the requisite special findings on Count 4, aggravated assault, that Mr. Smiley actually discharged a firearm or that the discharge resulted in great bodily harm or death was inflicted on Mr. Drake.[1087]

Finally, as to Count I, felony murder, the verdict form gave the jury the choice of (a) Guilty of First Degree Felony Murder, as charged in the indictment or other lesser included offenses such as (b) guilty of Second Degree Murder.[1085] The jury was directed to make special findings regarding actual possession and discharge of a firearm only if they convicted of a lesser offense but not if they chose first-degree murder.[1085] The jury was not given the option to make the special findings of firearm possession and discharge if Mr. Smiley was found guilty of First-Degree Felony Murder.[1085]

When the jury returned the verdict the trial judge asked to be given the verdict forms. The trial court then stated "I have reviewed the verdict forms, finding no omissions or deletions in the completions of the forms."[5356] The trial judge directed the clerk to publish the verdict, which was done.[5356-58] The trial judge then immediately discharged the jury.[5358-60]

After the jurors left the court room defense counsel asked to see the verdict forms, advising the trial judge he had not heard the Clerk read the special findings and asked if any were selected on each count.[5360-61] The trial judge responded "No sir" each time.[5360-61]

Prior to the penalty phase defense counsel filed a Motion in Limine[P1156-63] and a Motion to Arrest Verdict.[P1166-73] Defense counsel sought to prohibit the State from introducing evidence that Mr. Smiley possessed or discharged a firearm as related to Counts 2 and 5.[P1156-63] The motion argued the inconsistency in the verdict could be the result of the jury determining Mr. Smiley was a principal as opposed to the shooter, which was consistent with the defense at trial.[P1157-8] Defense counsel argued the lack of findings regarding the possession and discharge of a firearm on Counts 2 and 5 was a truly inconsistent verdict with the Count 1 verdict of guilty as charged in the Indictment as related to the actual possession and discharge of a firearm.[P1158] The defense argued the lack of jury special findings, when directed to do so, was analogous to an acquittal given the existence of a co-perpetrator, Casey Bisbee.[P1158] Defense counsel argued the "as charged in the indictment" language was not a clear verdict because it could not be determined if the jury actually reviewed the indictment while determining their verdict.[P1161] Defense counsel then

expanded the request to exclude any allegation of firearm possession due to the inconsistencies in the verdict.[P1163]

The State insisted the general verdict, guilty as charged in the indictment, would permit the State to maintain the position that Mr. Smiley was the actual shooter and possessed and discharged the firearm as to Counts 1,2,4, and 5.[P1504-6;1553-4] The State objected to the penalty phase jury even seeing the guilt phase verdict form and the lack of findings as to the firearm and Mr. Smiley.[P1560;2109] The defense argued since this case had two potential perpetrators, cases cited by the State with a single assailant were inapplicable.[P1507]

Argument was conducted on the issue of interlocking verdicts in the Motion to Arrest Verdict, which defense counsel indicated would apply to the Motion in Limine as well.[P1529-40;1555] The State countered that the verdicts were not inconsistent and the general verdict would support the firearm possession/discharge even absent specific findings by the guilt phase jury.[P1540-43] The defense argued the defense theory of the case was that Bisbee, not Mr. Smiley, was the shooter and had argued Mark Wilkerson couldn't identify who possessed the firearm, thus providing a basis for the verdict.[P1543]

The trial court's written order permitted the parties to "present evidence of the charges in the indictment or the verdicts form in this case to argue or explain the matters

pertaining to the charges and the verdicts in Count 1,2,4, and 5."[1210;P1590;2252] The same language was repeated in the *Order Denying Motion to Arrest Verdict*.[P1211-12]

In her opening statement the prosecutor repeatedly referenced Mr. Smiley as the gunman- stating Mr. Smiley had the revolver [P1615]; pointed the gun at Mark Wilkerson [P1616-18]; struck Mr. Drake in the head with the gun [P1617]; and shot Mr. Drake in the hip and chest.[P1617-20]

The trial court reiterated the parties could present evidence to shed light on the verdict.[P1846-47] The trial court noted information was present in the charging documents and verdict forms about the possession and discharge of the firearm.[P1847]

Sgt. Wallace testified Mark Wilkerson identified the gunman as the person who stole his cell phone.[P1902] Sgt. Wallace repeated all of Mark Wilkerson's testimony identifying Mr. Smiley as being in possession of the gun and discharging the gun.[P1923-39] Sgt. Wallace testified there was no evidence the second man ever possessed or discharged a firearm.[P1939]

John McDonald identified Mr. Smiley as possessing the firearm and testified Big Jit did not have a firearm. McDonald repeatedly identified Mr. Smiley as the shooter and testified Mr. Smiley said he had shot Mr. Drake.[P1988-2207;2008;2011]

The State renewed their argument that the defense should be precluded from minimizing Mr. Smiley's culpability consistent with the verdict forms because no one knew why the jury did not make the findings.[P2251] The State argued it would be misleading to the penalty phase jury to argue anything other than Mr. Smiley was the shooter.[P2251]

The defense maintained the jury did not find he was convicted as charged and they did not select that Mr. Smiley was in possession of a firearm.[P2252] The trial court permitted the verdict form to be entered into evidence.[P2253]

The prosecutor's questions during her cross-examination of defense mental health expert Dr. Waldman repeatedly referred to Mr. Smiley as the shooter- Mr. Smiley was the only one armed [P218], Mr. Smiley shot Mr. Drake in the hip[P2418], Mr. Smiley shot Mr. Drake a second time when he didn't comply with demands [P2419], Mr. Smiley forced Mark Wilkerson to ransack the bedroom at gun point[P2419], and Mr. Smiley admitted to killing Mr. Drake after the fact.[P2420] The State's presentation of evidence and argument that Mr. Smiley possessed and discharged a weapon was reversible error.

The guilt phase jury verdict findings were not sufficiently clear on the issue of the possession and discharge of the firearm to permit the State to present evidence and argument to the penalty phase jury that their determinations should be based

on a prior jury finding that Mr. Smiley possessed and discharged the firearm. The appellate court reviews questions of law pertaining the sufficiency and legality of a jury verdict *de novo. Southern Baptist Hosp. of Fla. Inc., v. Welker*, 908 So.2d 317,319 (Fla. 2005).

Verdicts rendered in criminal cases are required to be certain and devoid of ambiguity. *Mantilla v. State*, 38 So.3d 196 (Fla. 2d DCA 2010). Jury verdict findings must be explicit- every fact necessary for conviction and sentence must be found by the jury beyond a reasonable doubt. *Penthel v. State*, 177 So.3d 631 (Fla. 2d DCA 2015); *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). It is Mr. Smiley's position, supported by the arguments of both the State and defense below, that the jury verdicts in this case were not sufficiently clear on the issue of firearm possession and discharge. However, contrary to the State's contention during the penalty phase, the lack of clarity does not hew to the advantage of the State. It was error for the State to present evidence and argument during the penalty phase that Mr. Smiley possessed and discharged a firearm in Counts 1,2,4, and 5.

The State's argument in the trial court that the general verdict was sufficient to permit evidence and argument that Mr. Smiley possessed and discharged the firearm is incorrect. In *State v. Iseley*, 944 So.2d 227,230 (Fla. 2006), this Court held

that clear jury findings must be present before a trial court can impose minimum/mandatory firearms sentencing sanctions. The requisite clear jury findings can be demonstrated by (1)a specific question or special verdict form [the preferred manner] ***or*** (2)the inclusion of a reference to a firearm in identifying the specific crime for which the defendant is found guilty. In *Iseley* the jury convicted the defendant of "aggravated assault with a firearm as charged in the Information", but was not asked to make separate, special findings regarding the firearm. Iseley had no co-defendants or co-perpetrators. This Court found the general verdict sufficient to impose the mandatory/minimum sentencing firearm sanctions.

The factual basis in *Iseley* that supported the decision is absent in this case. First, in this case, the guilt phase jury heard testimony and argument that a second, co-perpetrator was present. The guilt phase jury could have determined the co-perpetrator possessed and discharged the firearm, whereas in *Iseley* there was no evidence to support a different determination. Second, the guilt phase jury in this case was instructed and directed to make special findings regarding firearm possession and discharge. The guilt phase jury was specifically told if none of the special findings applied, to leave that portion of the verdict form blank. The guilt phase jury read this instruction three times and left the special

findings blank three times. The jury in *Iseley* was not directed to make special findings at all. Third, as pointed out by trial counsel, there is no information in the record to demonstrate the guilt phase jury actually read or referred to the indictment during deliberations. The jury's failure to find Mr. Smiley possessed a firearm on any of the special verdict findings could be explained as the exercise of lenity or a decision to pardon. *Eaton v. State*, 438 So.2d 822 (Fla. 1983); *State v. Powell*, 674 So.2d 317,319 (Fla. 2005); *Zelaya v. State,* _So.3d_ WL5044628 (Fla. 4th DCA October 17, 2018); *Proctor v. State*, 205 So.3d 784 (Fla. 2d DCA 2016).

The clear jury findings *Iseley* requires are absent in this case. The general verdict referencing the indictment and the special verdict, either independently or taken together, do not establish the requisite clear findings because the lack of findings required under the special verdict contradicts the general verdict on the issue of firearm possession and discharge. It is impermissible to infer, assume, or to guess as to the jury's interpretation of the general verdict to negate the lack of special findings as to the firearm. *Hill v. State*, 994 So.2d 412, 413 (Fla. 3d DCA 2008).

State v. Woodall, 216 So.3d 30 (Fla. 5th DCA 2017), does not support the position taken by the State in the lower court that the general verdict and special verdict, when taken together,

would permit the State to introduce evidence and to argue Mr. Smiley was in possession and discharged a firearm. In *Woodall* the defendant was convicted of aggravated battery with a firearm. There were no co-defendants or co-perpetrators. The general verdict referenced the information that alleged a firearm. The jury also selected a special verdict finding the defendant had discharged a firearm. Woodall claimed the jury instructions were erroneous because the jury was not told they had to find firearm possession beyond a reasonable doubt. The issue in *Woodall* differs from the issue in this case. The jury in *Woodall* made the very specific findings in the special verdict that the guilt phase jury in this case did not make.

The admission of evidence in the penalty phase that contradicted the guilt phase jury verdict was reversible error. The determinations of a guilt phase jury verdict are binding on both the penalty phase jury and the trial court at sentencing. In *Lebron v. State*, 799 So.2d 997, 1021 (Fla. 2001), the trial court's sentencing order made factual findings that the defendant was the shooter as opposed to one of the co-defendants in direct contravention to the guilt phase jury's finding in a special verdict form that the defendant was not the shooter. In reversing, this Court held the trial court was precluded from making findings contrary to the jury's express findings and could not sentence Lebron contrary to the special verdict form.

It was reversible error for the jury, as the sentencer, to hear and consider evidence contrary to the guilt phase verdict.

ISSUE VII

THE PENALTY PHASE CLOSING ARGUMENTS OF THE STATE AND OF DEFENSE COUNSEL DEPRIVED MR. SMILEY OF HIS CONSTITUTIONAL RIGHTS UNDER FIFTH, SIXTH, AND EIGHTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITIUTION

Mr. Smiley is guaranteed the right to a fair trial and the right to effective assistance of counsel who serves as an advocate on his behalf. The closing arguments of both the State and defense counsel deprived Mr. Smiley of his constitutional rights under both the federal and Florida Constitutions.

The standard of review in this case differs depending upon which error is being reviewed. *Evans v.* State, 177 So.3d 1219, 1234 (Fla. 2015), *rec'd on other grounds,* 212 So.3d 1114 (Fla. 2018). The harmless error test applies to objected-to comments. The fundamental error test applies to un-objected-to comments. The motion for mistrial is reviewed under an abuse of discretion standard. The appellate court must review the entire closing argument with specific attention to the objected-to arguments and the un-objected to arguments. *Card v. State*, 803 So.2d 613,622 (Fla. 2011). The appellate court must review the closing arguments as a whole to determine whether discretion was abused. In this case, the closing arguments of the prosecutor and

defense counsel, when viewed as a whole, resulted in reversible error.

OBJECTED TO ARGUMENTS OF THE PROSECUTOR

During the State's closing arguments the following objections were made by defense counsel to the following clearly impermissible arguments by the prosecutor:

A. Improper comments on Mr. Smiley's exercise of his right to a penalty phase jury trial.

"One thing I want to say is that it should not be lost on you that Mr. Smiley is the reason why you are here today. Mr. Smiley is the one that made the decisions that put you in the position you are in today." [P2508]

After defense counsel's objection, the State said "I apologize. Strike that."[P2508

The State went on to repeat the same improper argument at the end of her closing argument:

"In closing I want to go back to one of my original statements, and that is that this defendant and this defendant alone made the decisions that put you in the position you are here today. No one else.[P2550]

It is improper to denigrate a defendant's right to a jury trial. In *Bell v. State*, 723 So.2d 896,897 (Fla. 2d DCA 1998), the court held that telling the jury the only reason they are here is because of the defendant is an improper denigration of the right to a jury trial. *See also Evans v. State*, 177 So.3d at 1236.

B. Uncharged or disclosed aggravator

Defense counsel objected to the prosecutor twice referring to Mr. Smiley's actions as planned, calculated, premeditated.[P2535-6] Defense counsel noted the State had not sought the cold, calculated, and premeditated aggravating factor. The prosecutor may not imply additional aggravating factors apply.

C. Misstatements of facts

The prosecutor completely disregarded the testimony from the guilt phase trial as well as the jury verdict in the following argument:

"Finally, just to address this issue, there was not a scintilla of evidence presented during the guilt phase trial, nor was a scintilla of evidence presented during this trial that anybody—[P2545]

Defense counsel objected, arguing the State could not make argument there was no evidence that anyone but Mr. Smiley had the gun.[P2546] The State responded this was why they had objected to the verdict form being entered into evidence because they expected the defense to argue Big Jit did it.[P2546] The trial court sustained the objection and the State made the following argument:

"There was not a scintilla of evidence presented during this penalty phase that anybody other than this defendant is responsible for the murder of Clifford Drake, the aggravated assault with a firearm of Mark Wilkerson, the armed robbery of Mark Wilkerson, the armed burglary of Mark Wilkerson and Clifford Drake."[P2547]

In *Garcia v. State*, 622 So.2d 1325 (Fla. 1991), this court held a prosecutor may not subvert the truth-seeking function of the trial by obtaining a conviction or sentence based on an obfuscation of relevant facts. The prosecutor's argument ignored relevant facts at trial about the role of co-perpetrator Bisbee.

D. Comparing Mr. Smiley to and referencing Jeffry Dahmer

"I'm certain you will hear from the defense that the death penalty should be reserved for the most egregious murders, people maybe like Jeffery Dahmer. The law puts in place what murders warrant the death penalty, and the law will be read to you. And I can assure you that the law will not tell you that the death should be reserved for people only like Jeffrey Dahmer.[2548]

The trial court sustained defense counsel's objection, reminding the prosecutor he previously shut down similar comments during voir dire and that her argument was "very improper."[P2548] Defense counsel then moved for mistrial, referencing the previous statements made during voir dire about the percentage of cases in which this prosecutor's office sought the death penalty.[P2549] The motion was denied.[2549] It is improper to mention notorious defendants by name. *Hess v. State*, 794 So.2d 1249 (Fla. 2001) The prosecutor's previous statements in jury selection regarding prosecutorial determination of death eligibility was improper. *See Brooks v. State*, 762 So.2d 879 (Fla. 2000). The result of these two incidents of prosecutorial misconduct was reversible error.

UNOBJECTED TO ARGUMENTS OF THE PROSECUTOR

A. Identifying Mr. Smiley being in possession of and discharging a firearm

The prosecutor summarized Sgt. Wallace's narrative of Mark Wilkerson's trial testimony, continually referring to Mr. Smiley as being in possession of the firearm, pointing the gun at Mark Wilkerson, pointing the gun and Mr. Drake, and shooting Mr. Drake, causing his death.[P2515;2519;2520;2521]

The prosecutor summarized the testimony of Mr. McDonald that Mr. Smiley was armed with a firearm.[P2518]

The prosecutor characterized Mr. Smiley as the one with the gun, the gun belonged to Mr. Smiley, he shot Clifford Drake twice, he didn't just shoot him and kill him, he shot him in the hip to get him to cooperate, he killed Mr. Drake by shooting him a second time, he held Mr. Wilkerson at gunpoint, he led Mr. Wilkerson with a gun pointed at this head, he forced he Mr. Wilkerson to enter the house at gunpoint, and chose not to murder Mark Wilkerson.[P2538-41]

These arguments constitute a misstatement of both the law and the facts as argued in *Issue V* of this brief.

B. Claiming the State Had Established Eight (8) Aggravating Factors by Counting Each Prior Conviction as a Separate Aggravating Factor

Prior to the penalty phase the State disclosed it would seek three aggravating factors: (1) The defendant was previously

convicted of another capital felony or of a felony involving the use of threat or violence; (2) the capital felony was committed while the defendant was engaged in the commission of a robbery or burglary; and (3) the murder was done for pecuniary gain.[1154] Mr. Smiley had two prior convictions in Case CF-15-5388, the Riley case, and three convictions besides the first-degree murder in this case. The third aggravator, pecuniary gain, merged into the second aggravating factor, the capital offense was committed while the defendant was engaged in the commission of a robbery. Thus, the State had two aggravating factors: one aggravating factor of prior violent felonies and one aggravating factor of the felony-murder aggravator, in the commission of a robbery or burglary.

The State Attorney argued to the jury that the State had established eight(8) separate aggravating factors. The State identified the Riley murder conviction for the first aggravator, each of the four prior felony convictions as the second through fifth aggravators, the robbery and burglary felony murder as two separate aggravators for the sixth and seventh aggravators, and the pecuniary gain as the eighth aggravator. The State claimed they had established ***eight(8)*** **aggravating factors** instead of two

"Now, the first aggravator is that Benjamin Smiley was previously convicted of another capital felony. The crime of first-degree murder is a capital felony. And I'm referring to the murder of Carmen Riley in Case Number Cf-15-5388"[P2509]

"There is no question that the defendant has already been convicted of not only the murder of Carmen Riley, but many of the other aggravators I'm about to mention and go into."[P2511]

Now the *second aggravator is that Benjamin Smiley was previously convicted of a felony involving the use or threat of violence to a person. And again, this relates to Carmen Riley on the CF15-5388 case. And, specifically, Mr. Smiley was charged and convicted, ultimately, of robbery with a firearm.*

***The State has met its burden in proving this aggravator."*[P2512]**

"The third aggravator is Benjamin Smiley was previously convicted of a felony involving the use or threat of violence to the person. And this is also another conviction for robbery with a firearm, however, this relates to the death of Clifford Drake and, more specifically, the robbery of Mark Wilkerson."[P2514]

"Finally—and I'm going to sound redundant, but I just want to make sure, it's my job to make sure that it's clear that the State has proven each of these aggravators, so please bear with me… The fourth aggravator is that Benjamin Smiley was previously convicted of a felony involving the use or threat of violence to a person. The crime of aggravated assault with a firearm is a felony… And I'm referring to the aggravated assault of Mark Wilkerson…."[P2519]

"The fifth aggravator is the same thing: Benjamin Smiley was previously convicted of a felony involving the use or threat of violence to a person… I'm referring to the burglary of Clifford Drake's house. The State has met its burden proving this aggravator."[P2520]

"The sixth aggravator is that the first-degree murder was committed while the defendant was engaged in the commission of a robbery. And I'm referring to the armed robbery of Mark Wilkerson, the CF15-4903 case. I'm not going to go through all those facts again. You heard them. I just argued them to you in the *first five aggravators.*"[P2521]

"The seventh aggravator is that the first-degree murder was committed while the defendant was engaged in the commission of a burglary. Same concept."[P2522]

"Finally, the first-degree murder was committed for pecuniary gain, and this applies to the Clifford Drake case…. The defense—or, the State has met its burden in proving that eighth aggravator beyond a reasonable doubt."[P2523]

"And you are going to be asked to check yes or no. And the State would submit that we have proven beyond a reasonable doubt ***all eight aggravating factors*."[P2524]**

The State's closing argument addressing how the aggravators were to be weighed was also erroneous. The State argued that the aggravator of whether the defendant had previously been convicted of a burglary and whether the murder was committed while the defendant was engaged in the commission of a burglary would "merge" in the sense that the jury must find each one, but could only consider those as "one aggravator during the weighing process."[P2525] The State told the jury:

"The same applies to the robbery count or the aggravator related to the robbery of Mark Wilkerson and the aggravator that the defendant committed the homicide for pecuniary gain. Those two aggravators merge as well. You still make the finding whether the State has proven beyond a reasonable doubt that the aggravator exists, but they merge for the purposes of the weighing process, okay?"[P2525-26]

The State consistently erroneously emphasized there were multiple aggravating factors for each prior felony- "the aggravating factors surrounding Carmen Riley's homicide. Think about all of those factors and facts…"[P2529] This is a gross misstatement of the law. *See Wilds v. State*, 698 So.2d 817, 822 (Fla. 1997). The State did not have six, seven, or eight aggravating factors. The State had three, but with the merger of pecuniary gain, the State established two aggravators-prior violent felony commission and murder committed in the course of

a robbery or burglary. The number of prior felony convictions goes to the weight of the single aggravator of prior violent felony conviction. The number of prior convictions does not increase the number of aggravators.

C. Golden Rule Argument

"It's clear in listening to the facts and circumstances surrounding both of the homicides, the defendant has an utter disregard for not only the sanctity of the safety of—the security of your home, of Mr. Drake's home, of Ms. Riley's home, but also he has an utter disregard for the sanctity of human life."[P2530]

Defense counsel did acknowledge his mistake in failing to object to this comment when made.[P2552-53] The prosecutor's reference to Mr. Smiley violating the sanctity of the juror's homes by the commission of these offense violated the prohibition on Golden Rule arguments. The prosecutor may not place the jurors in the position of the victims, as was done by this statement, because such statements induce fear and self-interest in the jury. *Jackson v. State,* 250 So.3d 844 (Fla. 3d DCA 2018); *Panchoo v. State*, 185 So.3d 562 (Fla. 5th DCA 2016).

D. Misstatements of the Law

1."One thing I that I will caution you is that your decision whether to impose the death penalty on Mr. Smiley cannot be based on sympathy for Mr. Smiley. And the law says so. And Judge Harb will read you that law. It must be based on the evidence that was presented to you. It's a tough decision, but you have to take your emotions out of it. It's a legal decision that must be made by you all. To base your decision on sympathy for this defendant would be to forget the person who lost his life innocently at the hands of this defendant.[P2543]

This is an absolute misstatement of the law. The jury is always permitted to extend mercy. *Brooks v. State*, 762 So.2d 879 (Fla. 2000) This type of argument has been deemed by this Court to be "blatantly impermissible". *Brooks v. State*, 762 So.2d 879 (Fla. 2000); *Urbin v. State*, 714 So.2d 411 (Fla. 1998); *Kearse v. State*, 770 So.2d 1119 (Fla. 2000); *Doorbal v. State*, 837 So.2d 940 (Fla. 2003).

2."Does the fact that Mr. Smiley suffered a brain aneurysm mean that somebody who has committed the most egregious crime, murder, should not be put to death simply because he suffered a brain aneurysm? I would submit to you one has nothing to do with the other."[P2533]

This is a misstatement of the law because the testimony of Dr. Waldman and Dr. Hartig was that the brain aneurysm supported not only the two statutory mental health mitigators, but also non-statutory mitigation. This comment also impermissibly denigrates the mitigation.

3."Now, as far as why the defense chose to introduce the verdict form for the Clifford Drake homicide and trial, I can only assume that they're going to try to convince you somehow that the defendant is less culpable because the jurors didn't find certain findings on the verdict form. And if I can find it and show you what I mean by that – and this is what I was referring to when I said that there's some very confusing verdict forms at times. If you look at the verdict form you can see that there are some additional findings that the jurors can make, and they didn't make any of those additional findings. And I assume that the defense will get up here and argue that the defendant is somehow less culpable because the jurors did not make these findings. Well, you all know that neither the State nor the defense nor anybody can be in those deliberations—deliberations room with you. We have no idea why the guilt phase jurors did not make those findings. I would submit to you that it's simply because the verdict form itself is very confusing.

And that's why the State wanted to introduce and did introduce the indictment, because what you will see on this verdict form is that the guilt phase jurors found the defendant guilty, as charged in the indictment. Look at that indictment. Because the indictment contains all the language that they did not check. They found him guilty as charged. There's no question about that.[P2545]

This is a misstatement of the law because it directs the penalty phase jury to rethink or ignore the determinations of the guilt phase jury. The prosecutor's statements are a misstatement of the law regarding the culpability of co-perpetrators under *Edmund-Tyson*.

4."The defense may argue to you that the law favors life over death for reasons such as the fact that the State has the higher burden or that your verdict must be unanimous. If the law favored life over death, the law would put in place to sentence people like Benjamin Smiley to death would not be in existence; yet we sit here today."[P2550]

In each of these instances the prosecutor misstated the law. It is error for the prosecutor to misstate the law in closing arguments.

E. Denigration of Mitigation

1."I'm sure that the defense will stand before you and argue that death is not appropriate in this case because the defendant suffered a brain aneurysm. There's no dispute that this defendant suffered a brain aneurysm. So what? People suffer brain aneurysms all the time, every day, across the world, and the manage to go on with life without murdering people.[P2532]

"Does the fact that Mr. Smiley suffered a brain aneurysm mean that somebody who has committed the most egregious crime, murder, should not be put to death simply because he suffered a brain aneurysm? I would submit to you one has nothing to do with the other."[P2533]

This type of denigration of a defendant's medical conditions is improper. *Hawk v. State*, 718 So.2d 159 (Fla. 1998).

2."The other thing I would point out, and that it's very clear from the evidence submitted not only from the State, but from the Defense, is that this is not your average defendant. He's no dummy. He's very smart. IQ of 114. He knew exactly what he was doing when he committed each and every one of those aggravators.[P2533]

3.The State repeatedly mocked and criticized defense experts Dr. Waldman and Dr. Hartig for speaking to Mr. Smiley and Mrs. Grandberry as part of their work in the case.[P2534;2540;2542] These comments improperly disparaged the defense witnesses. *See*, *Urbin v. State*, 714 So.2d 411 (Fla. 1998).

4.The State further turned mitigating circumstances such as Mr. Smiley's minor prior record, the circumstances under which he left his home at age 17, and non-criminal behavior such as drinking alcohol or smoking as a teenager into non-statutory aggravating circumstances:

"…**the defendant's own family testified that the defendant, even prior to the aneurysm, had a temper, was easily agitated, got involved in fights, drank, smoked weed, and was in trouble with the law, got kicked out of the house at the age of 18 because he couldn't follow the rules. The State would submit that the defendant is the same person as he sits here today as he was before the aneurysm, a temperamental man incapable of following the rules of society."[P2541]**

"**We know from the evidence he had these personality traits prior to the aneurysm. And I'm going back to all of those things that we know he did prior: the fights, the being kicked out of**

his home for not following the rules, the run-ins with the law, the smoking, the drinking, all of those things."[P2543]

The State's characterization of the testimony of Mr. Clayton and Mrs. Grandberry is grossly inaccurate, if not outright false. Turning a mitigating circumstance into an aggravating factor is improper. *Hamilton v. State*, 703 So.2d 1038 (Fla. 1997); *James v. State*, 695 So.2d 1229 (Fla. 1997).

5. "The defense showed you numerous photographs of the defendant as a child, and I would submit to you that this is an attempt to appeal to your sympathies for the defendant. But in looking at the photographs of that cute kid, let's not forget what that cute kid turned into. And I'm referring to State's Exhibit 162 and 161. There's that cute kid. Not so cute anymore.[P2543]

This not only denigrates the mitigation under *James*, it is also improper in a misstatement of the law regarding the penalty phase jury's right to exercise and consider mercy and sympathy.

F. Death sentence is a Deterrent

"Now I'm certain you will hear from the defense that nothing is to be gained by imposing the death penalty and that life in prison would have the same effect, and that is not true. The death penalty, like any punishment, is a deterrent. It punishes Mr. Smiley for what he has done, and it deters others from making the same decisions that Mr. Smiley made."[P2550]

This argument is improper because there was no evidence to support it. *Garron v. State*, 528 So.2d 353 (Fla. 1988). The argument further implied Mr. Smiley would commit additional crimes if not sentenced to death as a deterrent to future dangerousness. This argument is also error because it appealed to the jurors to send a message to other members of the

community who may commit crimes. The use of this type of argument violates the prosecutor's duty to seek justice. *Campbell v. State*, 679 So.2d 720 (Fla. 1996)

At the conclusion of the State's closing the trial court made the following comments:

> "Just a couple of things for the record. And it's not a bad idea, but there's something called you cannot turn a mitigator into an aggravator. There's plenty of case law on that. These great folks have got to read that, number one.
>
> Number two, I do not understand why the State thinks it cannot—can start talking about Jeffrey Dahmer when in jury selection when Mr. Kohl went there to start talking about Hitler, it was the Court who interrupted him and stopped him.
>
> What makes you think you can go there? It's— There's case law on that issue. It's improper. Be careful folks. [P2551]

The State then apologized to the trial court, saying she had reviewed past closings and "there was always mention, you know, of things like that, and that's –that's why—and I shouldn't have.[P2552]

Under the standard set by *Evans*,the cumulative effect of the objected-to and un-objected-to arguments by the prosecutor is more than sufficient to reach reversible error. The trial court's comments certainly demonstrate the depth of the prejudice and harm. The trial court's refusal to grant a mistrial further constitutes an abuse of discretion.

The gravity of the reversible error committed by the prosecutor was compounded by statements made by defense counsel Carmichael during his penalty phase closing argument. Mr. Smiley submits that the following arguments of his own attorney constituted ineffective assistance of counsel on the face of the record. There would be no legitimate strategic or tactical reason for defense counsel to have made these arguments to the jury.

IMPROPER ARGUMENTS OF DEFENSE COUNSEL

Mr. Smiley's constitutional rights fared no better in the hands of defense counsel. Fundamental error is defined as "error that reaches down into the validity of the trial itself to the extent that a verdict of guilt would not have been obtained without the assistance of the alleged error." *Mendoza v. State*, 964 So.2d 121, 131 (Fla. 2007),(*quoting Kilgore v. State*, 688 So.2d 895, 898 (Fla. 2008)(*quoting State v. Davis*, 575 So.2d 644 (Fla. 1991)).

Ineffective assistance of counsel claims are generally not raised on direct appeal. There are rare exceptions, however, when it is appropriate to do so. Ineffective assistance of counsel may be raised on direct appeal where the incompetence and ineffectiveness of trial counsel is apparent on the face of the record and the prejudice to the defendant is obvious to the appellate court. *See Robinson v. State*, 141 So.3d 656 (Fla. 4th

DCA 2014). Obvious deficiencies in representation may be address by an appellate court, *sua sponte*, on direct appeal. *Massaro v. U.S.*, 538 U.S. 500, 508-09;123 S.Ct. 1690, 1695 (2002). It is appropriate for an appellate court to address ineffective assistance of counsel when apparent on the face of the record and when it would be a waste of judicial resources to return the issue to the trial court. *Sims v. State*, 998 So.2d 494 (Fla. 2008).

Ineffective assistance of counsel claims are reviewed in accordance with *Strickland v. Washington*, 466 U.S. 668 (1984), which requires the establishment of two prongs: counsel's performance was deficient, and the deficient performance prejudiced the defendant. Deficient performance is performance that falls below the standard guaranteed by the Sixth Amendment to the United States Constitution and is established when counsel's actions or inactions are shown to be outside the broad range of reasonably competent performance under prevailing professional norms. Deference is given to counsel's performance. *Walker v. State*, 88 So.3d 128, 132 (Fla. 2012). Prejudice is established where there is a reasonable probability that, but for counsel's deficient performance, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the proceedings. *Bradley v. State*, 33 So.3d 664, 671-

72(Fla. 2010); *Kimmelman v. Morrison*, 477 U.S. 365,374 (1986). The following arguments of trial counsel rendered the penalty phase unfair and upset the requisite adversarial balance necessary in these proceedings:

A. Improper Concession to the Death Penalty

On multiple occasions defense counsel told the jury that Mr. Smiley was qualified for the death penalty:

"Mitigating factors, as you know, only get considered if you found that aggravating factors exist and you, as individuals, have decided unanimously—I'm an individual; we take a group vote; we're unanimous; let's move on to the next stage to see if he's qualified for the death penalty. **I believe you are going to find that.** There's seven or eight aggravating factors that I basically just admitted to."[P2558]

"The mitigators state, as the judge will tell you, you, should you find sufficient aggravating factors do exist—and I think you will because of these certified convictions—to justify recommending the imposition of the death penalty—and I think you won't based upon what we've talked about so far—It will then be your duty to determine whether the aggravating factors that you unanimously find have been proven beyond a reasonable doubt..[P2583]

"You must weigh all of the following: Whether the aggravating factors found to exist are sufficient to justify the death penalty. **I think you will find that.**

Whether the aggravating factors outweigh any mitigating circumstances found to exist. **Some of you might find that;** some of you might not."[P2594]

"And if you conclude at the end of that that you believe that Benjamin Smiley should receive the death penalty, **then vote for the death penalty.** He's right here. You've watched him. I watched every one of you at different times kind of steal that glance and look over there and say—hey it's human nature—that's the guy. He's a killer. He's murdered people. He's a robber. He's done it for money. He's been involved with drugs. And he's sitting right there in front of you, eating candy like an eight-year-old the day after Halloween."[P2599]

"Now, I'm going to ask you to follow your conscience and the law. There's no room here for sympathy, the State's right. There's no room for anger or frustration or messages. There's simply this: Are these mitigating factors that he has brain damage from something outside of his control enough to offset his actions. That's really what it comes down to.

I mean, he was nice to his brother and sisters. He was a good student. He played a lot of chess. He had a lot of promise. But he's sitting there as a two-time convicted murderer.[P2600]

Defense counsel, in essence, asked the jury for a death sentence:

"***Maybe the place for Benjamin Smiley to go is someplace where he won't get disciplinary referrals, doesn't have problems with other inmates, and he's going to spend the very rest of his life never being released from jail to think about what he did and how it happened. And maybe there's some good that can come from that.*** [P2600]

B. Improper Concessions Mr. Smiley possessed and discharged a firearm.

Defense counsel conceded that Mr. Smiley possessed and discharged the firearm:

"That's impulsive. That's somebody who pulls a trigger on Clifford Drake, but doesn't pull the trigger on Mark Wilkerson, the eyewitness, despite standing beside him the entire time? I agree with the State."[P2570]

"Man, Ben will go in there and commit these crimes and pull the trigger and all. That doesn't bother us. Is he trigger happy? We don't care."[P2587]

"I shot this man because he wouldn't cooperate." [P2572(referring to Mr. Smiley)]

"John McDonald and Samantha Lee planned this homicide—or planned this as a robbery, and it turned into a homicide because of the impulsivity of Ben. Casey Bisbee—apparently identified by photographs, identified by the testimony of Samantha Lee, identified by the testimony of John McDonald—never got charged."[P2585]

When directing the penalty phase jury to the guilt phase verdict form, which lacked findings by the jury that Mr. Smiley possessed or discharged a firearm, defense counsel stated:

"We further find that the defendant, during the commission of the offense—check all that apply only if you find the defendant guilty of A—there's A. There's a check. None apply, leave blank- find as follows: he actually possessed a firearm—which **of course, *he is armed with a firearm;*** or he did not actually possess a firearm."[P2596]

The record does not contain any colloquy where Mr. Smiley consented to the concessions made by defense counsel that he was in possession of and discharged the firearm in contravention of the defense theory at trial and the guilt phase verdicts. Defense counsel's arguments denigrate and undermine the guilt phase jury verdict.

C. Misstatements of Fact

"Ben Smiley is never leaving jail alive. The question is, is he going to be there for life without any possibility of parole? Because he's not getting out in that case. Or is he getting the death penalty? The results are the same. The only difference is time."[P2563-64]

"In that three week period, the facts of these cases are inextricably intertwined, though. This is basically for all intents and purposes, a continuing criminal enterprise. It's the same people, doing the same MO, committing the same type of robbery, having it go bad the same way."[P2598]

D. Misstatements of the Law

"All 12 of you might feel the same way—all 15,14, however many people there are. I am miscalculating."[P2593]

The penalty phase jury is comprised of 12 individuals.

"Verdict forms that undermine your confidence in the outcome of the case—they're still being used as aggravators here. But did he have a firearm or did he not? Please go through these verdict forms very carefully."[P2597]

"Are these mitigating factors that he has brain damage from something outside of his control enough to offset his actions? That's really what it comes down to. I mean, he was nice to his brother and sisters. He was a good student. He played a lot of chess. He had a lot of promise. But he's sitting there as a two-times convicted murderer.[P2600]

Trial counsel essentially told the jury to disregard non-statutory mitigation when making this argument.

"So suppose the State offered eight aggravators. And suppose-one, two, three, four—let's say seven aggravators. And suppose they are proven by these two documents."(referring to Exhibits 206 & 207-the verdict forms in this and the Riley case)[P2557]

"**There's seven or eight aggravating factors that I basically just admitted to."[P2558]**

Later, defense counsel told the jury that four of the aggravators would be "molded and melded and blended together", so there would only be two to consider from those four.[P2581] Defense counsel summed it up as "**So instead of eight, you might be asked to consider only six, okay?".[P2592]**

The State did not have six, seven, or eight aggravators. Two aggravators are present in this case after the merging of the pecuniary gain aggravator.

"**No one can control their damaged brains. Now, the State said "So what? Mr. Drake is dead. And I can't argue with that. But the "so what" fits right here. People walk around with aneurysms all the time, and they don't go killing people, says the State. I don't know."[P2574]**

Defense counsel denigrated the mitigation he had just presented.

> "***Now, I'm going to ask you to follow your conscience, to follow the law. There's no room here for sympathy, the State's right.***"[P2600]

This is a shocking misstatement of the law. The penalty phase jury may always consider mercy and sympathy.

Perhaps defense counsels' most astute observation to the jury was: "I'm losing credibility by the second here."[P2578]

The record establishes the closing arguments by both the prosecutor and defense counsel in this case mandate a new penalty phase. Each of the errors, both by defense counsel and the State, was significant in its own right. The cumulative prejudicial effect of the errors cannot be underestimated. The State, as the beneficiary of the error, cannot demonstrate prejudice did not result. *See Rodriguez v. State*, 248 So.3d 1085 (Fla. 2018). The cumulative effect of the closing arguments was to deny Mr. Smiley a fair trial.

ISSUE VIII

THE PENALTY PHASE JURY INSTRUCTIONS ON AGGRAVATING FACTORS AND MITIGATING CIRCUMSTANCES AND THE PENALTY PHASE VERDICT FORM RESULTED IN REVERSIBLE ERROR

Mr. Smiley submits the penalty phase jury instructions and verdict form given to the penalty phase jury was so fraught with error that reversal is required.

A. Error in the Jury Instructions and Verdict Form- Aggravating Factors

The jury should not have considered a separate aggravating factor for each prior violent felony conviction. *Wilds v. State*, 698 So.2d 817, 822 (Fla. 1997);*Issue VI Un-objected to Improper Closing Arguments of Prosecutor, Section (B).*

During her closing argument the State addressed the penalty phase verdict form. The State told the jury they had to make a finding on each of the eight (8) aggravating factors the State had just identified.[P2524] [See, *Issue VI]* Defense counsel in his closing told the jury "There's basically seven or eight aggravating factors I just admitted to."[P2558]

The trial court instructed the jury the State was alleging eight aggravating factors- that Mr. Smiley had been previously convicted of (1)another capital felony, (2-5) four additional prior violent felony aggravators, (6-7) the murder was committed during the course of a felony, burglary and robbery and (8) the murder was committed for pecuniary gain.[P1229-30]

The jury was then given a six page verdict form, which directed them to find as a separate and independent aggravating circumstance each of the prior violent felonies the State was utilizing. The jury was required to make separate findings on the two convictions from the Riley case and the three

contemporaneous felonies in this case and two felony-murder aggravators.[P1240-42]

The jury sent a question asking "when considering aggravating factors #1 regarding prior criminal history, should we consider the murder of Carmen Riley?"[1239]. The jury was instructed they "had all the laws that are applicable to this case", the effect of which was to reinforce the previous erroneous instructions.[P1239]

After the *Hurst* decisions and subsequent legislative action, this Court approved interim penalty phase jury instructions and verdict forms. *See In re: Standard Criminal Jury Instructions in Capital Cases,* 214 So.3d 1236 (Fla. April 13, 2017). The approved jury instruction for the prior violent felony aggravator was:

> 2. (Defendant) was previously convicted of [another capital felony [a felony involving the [use][threat] of violence to another person.
>
> *Give 2a or 2b as applicable.*
>
> a. The crime of (previous crime) is a capital felony.
>
> b. The crime of (previous crime)is a felony involving the [use][threat]of violence to another person.

The jury instruction the trial court read, telling the jury they were to consider five aggravating factors, one for each of the prior violent felony convictions and the prior capital felony was a special jury instruction as it deviated from the standard jury instruction. The propriety of giving a special jury instruction is reviewed *de novo* by the appellate court.

Rockmore v. State, 140 So.3d 979 (Fla. 2014). In this case the trial court's giving a special jury instruction was reversible error.

A special jury instruction should only be given if it is supported by the evidence, the standard jury instruction is inadequate, and the special instruction is a correct statement of the law and is not misleading or confusing to the jury. Standard jury instructions are presumed correct and are preferred over special instructions. *Stephens v. State*, 787 So.2d 747 (Fla. 2001). The instruction given by the trial court in this case satisfies none of these requirements. The standard jury instruction was not inadequate. The standard jury instruction was a correct statement of the law. The instruction given by the trial court was a misstatement of the law. The standard instruction was not confusing or misleading. The special instruction read by the trial court was both confusing and misleading. The special instruction misled the jury into believing each prior conviction counted as a separate and distinct aggravating factor, thus grossly inflating the number of aggravating factors by four on this aggravator and doubling the felony murder aggravator. This error was incredibly prejudicial.

The verdict form approved by this Court in 2017 and appended to the opinion, 3.12(c), did not require a numerical

vote from the jury and did not require specific findings by the jury as to each prior felony conviction submitted to the jury for the prior capital and prior violent felony aggravator. The jury verdict form and instructions in this case were not given until May 2, 2017, two weeks after the promulgation of the approved verdict form and instructions.

The continual misstatements by both lawyers, the jury instructions, and the verdict form including that there were four prior violent felony aggravators instead of one and two felony murder aggravators instead of one resulted in severe prejudice to Mr. Smiley. The penalty phase jury was led to believe from the inception of the penalty phase through the arguments of counsel, the jury instructions, and the verdict form that the State had proven eight aggravating factors in this case instead of two. The jury was improperly instructed to consider and then find this case was more aggravated than the law permits. The jury was not told the correct statement of the law-that only one aggravator was established no matter how many prior violent felony convictions existed and that there was only one felony murder aggravator.

B. Error in the Jury Instructions and Verdict Form: Mitigating Circumstances

Defense counsel objected to the portion of the penalty phase verdict form the trial court created for the mitigating

circumstances.[PP2278,2436,2438] The verdict form the trial court approved required the jury to vote on each mitigating circumstance separately and to record the numerical vote for each statutory and non-statutory mitigating circumstance. The verdict form in this case listed four possible statutory mitigating circumstance and three broad categories of non-statutory mitigating circumstances identifying the defendant's character, background, or mitigation related to the life of the defendant.[P1243-44]

This verdict form does not comport with the penalty phase jury verdict form approved by this Court in *In re: Standard Criminal Jury Instructions in Capital Cases*, 244 So.3d 172 (Fla. 2018). The approved jury instructions and verdict form does not require the jury to determine each individual mitigating circumstance and does not require the jury to record the numerical vote as to each. The verdict form selected by the trial court over the objection of the defense should not have been used.

ISSUE IX

THE TRIAL COURT'S SENTENCING ORDER IS LEGALLY DEFICIENT AND INCORRECT AS A MATTER OF LAW

The trial court's sentencing order is found at 5379-5400. The appellate court reviews the sentencing order to determine whether the trial court applied the correct rule of law and

whether the findings are supported by substantial, competent evidence. *Alston v. State,* 723 So.2d 148 (Fla. 1998); *Pearce v. State*, 880 So.2d 561, 575 (Fla. 2004). The trial court's sentencing order is deficient for the following reasons:

[A] *Failure to Conduct* ***Enmund/Tyson*** *Analysis*

The trial court acknowledged that an analysis pursuant to *Enmund/Tyson* is required in this case because more than one participant was involved. In this case, Samantha Lee, John McDonald, and Casey Bisbee were all co-perpetrators. However, none of those individuals were charged with any offenses related to this case or the Riley case. McDonald and Lee received immunity and Bisbee was simply never charged at all. Instead of conducting the required analysis of whether disparate treatment of co-defendants/co-perpetrators was warranted, the trial court deferred that examination to this Court.[5394] That is improper. The trial court is required to conduct the *Enmund/Tyson* analysis. *See Pearce v. State*, 880 So.2d 561,575 (Fla. 2004); *Lebron v. State*, 799 So.2d 997, 1021 (Fla. 2001). The fact that this Court also reviews the issue of disparate treatment does not excuse the trial court from doing so as well. The trial court did not apply the correct rule of law, requiring reversal for the trial court to properly conduct the *Enmund/Tyson* analysis.

[B] *Considering the State Had Established Eight Aggravators Instead of Two Based on the Jury Verdict Form, then Finding Five Separate Aggravators Exist Instead of Two.*

The trial court noted the jury found eight aggravating factors were proven by the State.[5394] In his analysis of the aggravating factors, the trial court weighed and considered the prior violent felonies stemming from the Riley case, the homicide of Ms. Riley and the robbery, as the first aggravating factor and assigned it great weight.[5396] The trial court then considered and found as two additional aggravating factors the robbery of Mark Wilkerson and that the murder occurred in the commission of the felony of robbery.[5396] The trial court then determined because two victims were involved this would count as two aggravators, for a total of three aggravators.[5396] The trial court gave these two factors great weight.[5396] The trial court then found another prior violent felony aggravator for the conviction of burglary with an assault and the contemporaneous felony of burglary as a single aggravator with moderate weight, a fourth aggravator.[5397] The trial court then considered and gave the aggravating factor of pecuniary gain substantial weight, the fifth aggravator.[5397] In total, the trial court found five aggravating factors: Four based on prior violent felony convictions and the fact the murder was committed while in commission of a felony and was one of pecuniary gain. The

trial court erred in considering and weighing the aggravating factors in this manner.

The finding of the pecuniary gain aggravator and the "during the course of a felony" is improper doubling. The trial court could not consider pecuniary gain as an aggravator in this case due to the "during the course of" convictions for robbery and burglary. *Provence v. State*, 337 So.2d 783 (Fla. 1976) [robbery]; *Castro v. State*, 597 So.2d 261 (Fla. 1992) [robbery]; *Rodriquez v. State*, 753 So.2d 29 (Fla. 2000)[burglary and theft].

Neither can the trial court consider a separate aggravating factor for each "set" of prior violent felony convictions as argued in *Issue VI*. There is only one aggravator established-prior capital felony and/or prior violent felony convictions. The assignment of weight may take into consideration the number of prior felonies, but each prior conviction may not constitute a separate aggravator. *Wilds v. State*, 698 So.2d 817, 822 (Fla. 1997). The trial court did not apply the correct rule of law, and the findings are not supported by competent, substantial evidence that there were five aggravators instead of two.

[C]*Trial Court's Improper Reliance on Finding Mr. Smiley Was the Shooter*

Throughout his Sentencing Order the trial court continually made factual findings that Mr. Smiley possessed and discharged

the firearm, repeatedly referring to him as the shooter.[5384,5385,5386,5394,5397] This is improper as it conflicts with the guilt phase jury verdict. *See Lebron v. State*, 799 So.2d 997, 1020 (Fla. 2001) and *Issue V*. The trial court failed to apply the correct rule of law, and the findings are not supported by competent substantial evidence, thus requiring reconsideration of the sentence.

[D]*The Trial Court Failed to Properly Consider Each Mitigating Circumstance*

The trial court's evaluation of the mitigating circumstances fails to comply with the dictates of *Campbell v. State*, 571 So.2d 415, 419 (Fla. 1990). *Campbell* requires the trial court to expressly evaluate in the written order each mitigating circumstance that is established. The trial court did not do this when weighing the mitigating circumstances, but instead lumped them all together when considering the non-statutory mitigating evidence of Mr. Clayton, Mrs. Grandberry, Dr. Waldman, and Dr. Hartig.[5399] The trial court gave no indication what he actually considered mitigators from their testimony. This does not satisfy the *Campbell* requirement and requires resentencing.

[E]*Imposition of Firearm Minimum/Mandatory Sentence of Ten Years, Re-classification of Counts 2, 4, and 5 with the Firearm, and Imposition of Sentence for Aggravated Assault.*

The trial court imposed a ten-year minimum/mandatory on Counts 2, 4, and 5 "as per jury verdict".[5426] As argued previously in *Issue V*, the guilt phase jury verdict form is not sufficiently clear to support the imposition of the firearm minimum mandatory sentences. Resentencing is required with a new scoresheet that does not subject Mr. Smiley to the upward reclassification of Counts 2, 4, and 5 due to the firearm. For example, the removal of the firearm would reduce the offense of Count 2 from a first-degree felony punishable by life to a second degree felony. Count 5 would be reduced to a first-degree felony instead of a first-degree felony punishable by life.

Further, the removal of the firearm designation would prohibit convictions and sentences for both assault and robbery of Mark Wilkerson on double jeopardy grounds. *See Delgado v. State*, 174 So.3d 1071 (Fla. 5th DCA 2015); *Bell v. State*, 114 So.3d 229 (Fla. 5th DCA 2013); *Denmark v. State*, 538 So.2d 68 (Fla. 1st DCA 1989). Resentencing with a new scoresheet is required on the non-capital felonies.

CONCLUSION

Based on the arguments, citations of law, and other authorities, Mr. Smiley is entitled to new guilt and penalty phase trials. Resentencing is required on the non-capital felonies as well.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the forgoing Initial Brief was electronically filed with the Clerk of the Court by using the E-portal filing system which will send an electronic notice of filing to the Office of the Attorney General, 3507 E. Frontage Road, Suite 200, Tampa, FL 33607, capapp@myflorialegal.com and lisa.martin@myfloridalegal.com this **1st** day of January 2019.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY the size and style font used in the preparation of this Initial Brief is Courier New 12 point in compliance with Fla. R. App. P. 9.210.

Respectfully submitted,

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