

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

REPLY BRIEF OF THE APPELLANT

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PRELIMINARY STATEMENT

Mr. Smiley will rely on the arguments and citations of law in Issues III in response to the Answer Brief. Mr. Smiley submits the following additional responses to the arguments presented in the State's Answer Brief:

ISSUE I

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

In this Issue, Mr. Smiley argued that when the trial court was advised of a discovery violation by the State on the fifth and final day of the State's case, the trial court failed to conduct an adequate *Richardson* hearing and erred in permitting the State to introduce an undisclosed photograph taken from Mr. Smiley's Facebook page. The State's argument that no discovery violation occurred is meritless. One of the detectives in the case, Sgt. Wallace, testified he had viewed the photo in 2015, but did nothing with it. The State has presented no authority contradicting Mr. Smiley's position that the prosecutor is charged with the knowledge possessed by law enforcement, regardless of whether there is actual possession of the item. See *Laidler v. State*, 10 So.3d 1136, 1139 (Fla. 1st DCA 2009). The State's reliance on *Street v. Florida*, 636 So.2d 1297, 1302 (Fla. 1994) is misplaced. In *Street*, there was a testimonial

discrepancy between an officer's testimony in deposition and trial. The defense claimed a discovery violation, but this Court held otherwise because the officer had not been asked the contested question in deposition. This Court further noted there is a vast difference between testimonial variation and the State's failure to disclose a witness. What occurred in this case is a violation commiserate with the latter- the failure to disclose a highly prejudicial piece of evidence.

The State's argument that presence of the photograph on Mr. Smiley's Facebook page exempted the photograph from the duty to disclose is unsupported by the law. Citing to *Goldsmith v. State*, 182 So.3d 824, 828 (Fla. 4th DCA 2016), the State argues that only written statements appearing on a defendant's Facebook page must be disclosed but photographs do not. *Goldsmith* did not draw a distinction between a photograph on Facebook and a written statement. In *Goldsmith* the State claimed no discovery violation occurred when a statement appearing on the defendant's Facebook page was admitted in rebuttal by the State without prior disclosure because the Facebook page was publicly available. The Fourth District rejected this argument, finding the possible discovery violation of the Facebook page mandated a *Richardson* hearing. The *Goldsmith* rationale applies equally to photographs, contrary to the State's argument only statements on Facebook must be disclosed. Under Fla. R. Crim. P. 3.222(b)(F),

the prosecutor must disclose all tangible papers or objects belonging to a defendant. Further, any writing on Exhibit 161 would qualify as a statement subject to disclosure. The Facebook page of Mr. Smiley and the photographs on that page fall under the rule. The prosecutor was under a continuing duty to disclose and failed to do so. The State's argument that Mr. Smiley's knowledge of the Facebook photos existence on his Facebook page absolved the State of its obligation to disclose that photograph is for the same reason, likewise meritless.

The trial court's failure to conduct a full *Richardson* hearing cannot be excused. Even a possible violation triggers the trial court's duty to conduct a full *Richardson* inquiry. *Goldsmith v. State*, 182 So. 3d at 827-28. If the trial court improperly finds no discovery violation or fails to consider each of the three prongs, the hearing is inadequate and discretion cannot be afforded to the trial court's decision. *Id.* The appellate court must then determine whether the error is harmless. The error can only be harmless if the appellate court can determine, beyond a reasonable doubt, that the defense was not procedurally prejudiced. Procedural prejudice occurs if the defense trial preparation or strategy would have been materially different had the violation not occurred. *Id.*

There is a very high bar for excusing the State's discovery violation on appeal. *Wilson v. State*, 261 So.3d 723 (Fla. 1st DCA

2018); *Millette v. State*, 223 So.3d 466 (Fla. 1st DCA 2017); *Dabbs v. State*, 229 So.3d 359 (Fla. 4th DCA 2017). The State has not met its burden in this case. Defense counsel articulated multiple reasons why the defense was prejudiced in their trial preparation by the failure of the State to disclose Exhibit 161. A central theme of the defense case was the physical variations between Mr. Smiley and Bisbee; and the State conceded those differences were minimized in Exhibit 161 when compared to the previously disclosed Exhibit 162. Exhibit 161 was clearly more favorable to the State and more prejudicial to the defense. The defense was deprived of the opportunity to challenge or rebut Exhibit 161 and may well have chosen a different strategy had Exhibit 161 been disclosed. The State's failure to disclose Exhibit 161 materially hindered the defense preparation for trial warranting appellate relief. See *Scipio v. State*, 928 So.2d 1138 (Fla. 2006).

ISSUE II

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

Mr. Smiley argued in his Initial Brief that Exhibits 161 and 162 should not have been admitted into evidence because Exhibit 161 was not properly authenticated and, in the case of both photos, the prejudicial impact outweighed the probative value.

Mr. Smiley's position that the State had not properly authenticated the Facebook photo prior to admitting it into evidence is supported by *Dolan v. State*, 187 So.3d 262, 266 (Fla. 2d DCA 2016). In *Dolan*, the prosecutor sought to introduce a booking photo of the defendant that appeared on the sheriff's website. The trial court permitted a copy of the webpage to be admitted without any further testimony as to who took the photograph. The State then argued to the jury they could look at the booking photo and compare that to the defendant to determine if the defendant was the same person in the booking photo. The Second District reversed, finding the absence of a predicate precluded admission even for a photo taken from a government website, with the caveat that to seek admission without proper predicate bordered on the "frivolous". 187 So.3d at 266.

The Fourth District, in *Lamb v. Sate*, 246 So.3d 400, 409 (Fla. 4th DCA 2018), which is relied upon by the State, further supports Mr. Smiley's position. The State sought to introduce several portions of live video from the defendant's Facebook page that depicted the defendant in the victim's car and contained identifying data as to the date and time the video was made and posted, including the defendant stating "we live". The court in *Lamb* found that authentication was necessary for admission of on-line information obtained from social-media

accounts of a defendant. The State presented evidence from a digital forensic examiner who testified he examined the defendant's Facebook page for video posted around the time of the carjacking, extracted the video, compared it to an original video seen on the codefendant's phone that was still present on the phone at the time of trial, and noted the defendant stated "we live" in the video. This testimony provided the necessary authentication.

By contrast, in this case, the State presented no testimony about how or when the photograph was extracted from the Facebook page, who extracted the picture, or who extracted it. Neither was there anything on the picture that provided authentication by Mr. Smiley.

The State relies on *Dolan v. State*, 743 So.2d 544,545 (Fla. 4th DCA 1999), to support its argument that the photographs in this case did not need to be admitted under the "silent witness" theory but could be admitted under the "pictorial testimony" method. However, the enhanced still images at issue in *Dolan* were admitted under the "silent witness" theory after testimony from the shop owner that the video accurately reflected the store and after testimony about how the security camera operated. *Id.*, at 546. In this case no one testified who had knowledge of how, when, or where the photo was taken, how, when, or who placed it on Facebook, and how, when, or by whom it was

copied and given to the State. This type of testimony is necessary for admission under the pictorial theory; the absence of such testimony renders the photo inadmissible due to a lack of authentication. See *Lerner v. Halegua*, 154 So.3d 445, 447 (Fla. 3d DCA 2014)

Mr. Smiley will continue to rely on his arguments in the Initial Brief as to the prejudicial impact of the photos.[Initial Brief, pp. 48-50]

ISSUE IV

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

The State responds to this issue by arguing there was no contemporaneous objection. This argument is without merit. First, a contemporaneous objection is not required where the court has made a definitive ruling on a motion in limine. The motion and definitive ruling are sufficient to preserve the issue for appeal. See §90.401(1)(C), Fla. Stat. ("If the court has made a definitive ruling on the record admitting or excluding evidence either at or before trial, a party need not renew an objection or offer to proof to preserve a claim of error for appeal.") See *Powell v. State*, 79 So.3d 921,923 (Fla. 5th DCA 2012). In any event, defense counsel's objection more than satisfies the contemporaneous objection rule.

In *Castor v. State*, 365 So.2d 701,703 (Fla. 1978), this Court delineated the requirements for the contemporary objection rule. An objection must place the judge on notice of the error committed, provide the court an opportunity to correct the error, and must be specific. Defense counsel's objection satisfied these three criteria. See *J.B. v. State*, 705 So.2d 1376, 1378 (Fla. 1998). In addition, this Court in *F.B. v. State*, 852 So.2d 226, 229 (Fla. 2003), found the contemporaneous objection rule prohibits error from being used for a tactical advantage. The defense gained no tactical advantage by objecting at the bench several moments after the comment was made when to have objected earlier would have drawn unnecessary attention to the error.

Defense counsel's objection was timely and adequately preserved this issue for appellate review. Mr. Smiley will rely on the arguments addressing the harmfulness of the error made in the Initial Brief.

ISSUE V

THE TRIAL COURT ERRED IN DENYING THE MOTION FOR MISTRIAL AFTER THE PROSECUTOR'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

The State's argument that this issue is not preserved for appellate review is meritless. Defense counsel objected, moved to strike the panel, objected again during the selection of the

jury to those seven potential jurors who heard the statements, requested additional peremptory challenges to remove those seven jurors, and accepted the jury subject to these objections. The State provides no additional facts other than those above to support its claim there was not a contemporaneous objection.[Answer Brief, p.45-7] Defense counsel's second objection, made during trial after the Jeffery Dahmer comments, provided additional grounds for a mistrial. Defense counsel's challenge to these seven jurors prior to the swearing of the jury preserved this issue for appeal as to the improper composition of the jury, and the second objection renewed again the already-preserved issue.

The factual, statistical data the prosecutor divulged to the jury during voir dire, that with sixty pending first-degree cases in their office the State was seeking death in only nine and that this case fell into that elite category of those eligible for death, was more damaging than the comments made in *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), which were found to require reversal. That these egregious statements were made during voir dire as opposed to closing argument is meaningless and should not be a basis to deny relief. The damage caused by these types of statements is the possibility the jury will vote for death believing that

sentence has the imprimatur of the State's greater wisdom or higher authority. That damage occurred in this case. The comments made by the State in voir dire were factual assertions. The jurors are not given any instructions that they are to disregard statements of fact made by a prosecutor in voir dire. The jurors are told that a closing argument is not evidence and a closing argument is not a fact to be considered by jurors in reaching their decision. The seven jurors who heard the fact that the prosecutor had already determined that fifty-one murders did not merit a death sentence, but this one did, created the exact damage that occurred in *Pait, Brooks, and Ferrell*, where the jury was instructed that what the prosecutor says in closing is not evidence, not fact. When the damage occurs in the trial is not dispositive of the issue, contrary to the State's position.

A majority of the penalty phase jurors in this case were tainted by the State's improper and inflammatory voir dire. The trial court had the opportunity to cure the error by striking the panel as defense counsel requested. The trial court's refusal to do so was reversible error that is not harmless.

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 argues this issue has been waived under Florida Rule of Criminal Procedure 3.570 because Mr. Smiley did not object to the verdict prior to the discharge of the jury. This argument overlooks the question of what, exactly, defense counsel was supposed to object to.

The trial court viewed the verdict forms and announced "I have reviewed the verdict forms, finding **no omissions or deletions** in the completion of the forms." Trial counsel was entitled to rely on this affirmative representation by the trial court that the verdict forms had been completely filled out by the jury, that the verdict was complete, and that there were no omissions or deletions.. Based on the trial court's statement, there would be nothing to object to before the trial court discharged the jury. It is axiomatic that the defense and State must be able to rely on the integrity of those in the judicial system.

For example, in *Mungin v. State*, 79 So.3d 726, 738 (Fla. 2011) and *Waterhouse v. State*, 82 So.3d 84, 102 n.4 (Fla. 2012), this Court reiterated that defense counsel should be able to rely on the integrity of the police when police reports make assertions about witnesses. The same principles apply to the court. Attorneys simply must be able to rely on statements made by the judge.

What's more, trial court understandably made these proclamations based on his belief that the verdict was complete, with no omissions or deletions. If, in fact, there were no omissions or deletions, there would be nothing for defense counsel to object to. Since Counts 2 and 5 instructed the jury to leave the special findings blank if none applied, the fact the jury left the findings blank is their finding that none applied. The lack of special findings on Count 4 would lead to the same conclusion- the jury believed none applied. This appears to be the trial court's reasonable interpretation of the verdict form as well.

The trial court's determination that the jury did not find Mr. Smiley possessed or discharged a firearm during these crimes is revealed by the trial court's sentencing determination that the sentencing minimum/mandatory applicable to firearms could not be imposed "per the jury verdict." [5426,5454] The guilt phase jury's finding that none of the special firearm enhancements applied not only precluded sentencing minimum/mandatories, it precluded the presentation of evidence in the penalty phase that was contrary to this finding. The trial court's reversible error was in failing to give effect to the jury's acquittal of the firearm enhancements in the presentation of evidence to the penalty phase jury.

Rule 3.570 is intended to address problems in the rendition of the verdict, such as the lack of a signature or the failure to reach a verdict on a particular count. This type of omission can and should be corrected prior to the discharge of the jury. For example, in *James v. State*, 150 So.3d 864 (Fla. 4th DCA 2014), *rehearing denied*, 192 So.3d 38, *cert. denied*, 137 S.Ct. 185 (2016), the trial court noticed an irregularity in the verdict forms because the jury had crossed out the word "firearm", which effectively convicted the defendant of a lesser charge not before the jury. The trial court brought the problem to the attention of the parties. Defense counsel did not object to the trial court's resolution of the irregularity. When Mr. James challenged the verdict irregularity on appeal, relief was denied because no objection was made prior to the discharge of the jury.

The critical distinction between this case and *James* is that *James* had an irregular verdict; this case does not. See also *Proctor v. State*, 205 So.3d 784, 788 (Fla. 2d DCA 2016).

The trial judge here did just the opposite of what was done in *James*. The judge here advised the parties this verdict had no omissions or deletions. Defense counsel justifiably relied on that statement. At that point in time there was no need, under Rule 3.570, for defense counsel to object. Further, it can be presumed the jury followed the instruction they were given to

leave the special findings blank if they found none applied, leading to the conclusion there was no irregularity that should have been corrected before discharge of the jury.

The State further argues it is disingenuous for Mr. Smiley to argue inconsistent verdicts on appeal on the basis that interrogatories were not completed.[Answer Brief, p. 50] That is not what Mr. Smiley has argued in this issue. Mr. Smiley argued that since the jury failed to make the findings on the interrogatories on the guilt phase verdict form, the State could not present evidence that was inconsistent with that failure.[Initial Brief, p.65-69] The jury verdict form directed the jury to leave the special findings/interrogatories blank if they found none applied. It must be presumed the jury followed the instruction and left the special findings blank because the jury found the special findings did not apply.

The State's cite to *Brown v. State*, 959 So.2d 218, 223 (Fla. 2007), is not only inapplicable; it is misleading. [Answer Brief, p.50] In *Brown*, this Court addressed whether the verdicts were truly inconsistent, which is not the question presented here. This Court reversed in *Brown*, finding the verdicts were truly inconsistent. The State had argued on appeal that even if the verdicts were inconsistent, the error could not be reversible because defense counsel had agreed with a jury instruction that contributed to the error. Despite defense's

counsel's agreement with the problematic jury instruction, this Court reversed Brown's case.

Defense counsel argued in this case the jury's verdict could be a reflection of the defense theory of the case- that it was Casey Bisbee who was armed with the firearm rather than the second man or Mr. Smiley since Mr. Smiley's defense was that he was not one of the two perpetrators.[P1543] Mr. Smiley could be found guilty of each of the charged offenses if the jury believed Bisbee possessed the firearm and Mr. Smiley was the second perpetrator, but that is not a sufficient basis to sentence Mr. Smiley based on actual possession absent a specific finding of actual possession. *Feeney v. State*, 621 So.2d 505 (Fla. 5th DCA 1993). Likewise, a sentencing determination by the penalty phase jury could not be premised on facts supporting actual possession of the firearm by Mr. Smiley absent that specific finding that he possessed and discharged a firearm. The jury in this case did not make that finding with sufficient clarity to permit evidence that Mr. Smiley actually possessed and discharged the firearm to have been admitted in penalty phase. Mr. Smiley is entitled to a new penalty phase.

ISSUE VII

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

CONSTITUTION

This reply will address the State's rebuttal to several specific instances of inappropriate statements made by defense counsel in closing argument. Mr. Smiley will rely on the arguments made in the Initial Brief for all other instances of reversible error by the State in closing argument and the improper closing argument statements by defense counsel.

A. Improper Concession to the Death Penalty

The State argues defense counsel's concession to the appropriateness of the death penalty was not ineffective under *Gamble v. State*, 877 So.2d 706 (Fla. 2004) and *Schwab v. State*, 814 So.2d 402 (Fla. 2002). This argument overlooks a critical factual distinction between this case and those two cases.

In *Gamble* and *Schwab*, this Court determined it was not ineffective for defense counsel to concede the existence of an aggravating factor that had been established by the State, particularly when the factual basis for the aggravating factor has been proven by the jury's verdict of guilt. That is not what occurred in this case. Defense counsel did not just concede the presence of the two established aggravating factors; defense counsel's comments far exceeded a mere acknowledgment that Mr. Smiley had prior felony convictions or that the murder occurred in the commission of a felony. Defense counsel's argument breached the boundaries of conceding an aggravating

circumstance by minimizing mitigation and denigrating Mr. Smiley as "sitting right there in front of you, eating candy like an eight-year old the day after Halloween." [P2599]

B. Improper Concessions Mr. Smiley possessed and discharged a firearm. [Initial Brief p. 87; Answer Brief p.77]

In the Initial Brief Mr. Smiley argued it was improper for defense counsel to concede to the penalty phase jury that Mr. Smiley both possessed and discharged a weapon when the guilt phase jury did not make that determination on the verdict form. The State argues this concession was not error because the facts of the case supported Mr. Smiley's possession and discharge of the firearm. The State is incorrect.

The guilt phase jury was the trier of fact. It is the responsibility of the jury to hear the evidence, determine the facts, and render a verdict. *Williams v. State*, 145 So.3d 997 (Fla. 1st DCA 2014). Critically, the guilt phase jury did not find as a fact, as reflected in the jury verdict, that Mr. Smiley possessed or discharged a firearm. While there was *testimony/evidence* that Mr. Smiley possessed or discharged a firearm, the jury did not determine that evidence to be the facts, as reflected in the jury verdict that failed to make the special findings of firearm possession and discharge. The guilt phase jury verdict controls- not testimony rejected by the guilt phase jury as fact.

In *Gamble*, which the State relies upon, the defendant argued defense counsel was ineffective when he conceded the pecuniary gain aggravator in penalty phase closing argument after the defendant had been convicted of robbery. This Court found no error because the defendant had been found guilty of the crimes that served as the factual basis for the concessions made. That is not what occurred in this case. In this case, defense counsel conceded to facts not found by the guilt phase jury. The guilt phase jury did not find beyond a reasonable doubt the facts which defense counsel conceded had occurred—that Mr. Smiley possessed and discharged the firearm.

C. Misstatements of Fact [Initial Brief, p. 88]

D. Misstatements of Law [Initial Brief, p.88-90]

The State responds to Mr. Smiley's arguments in these two sub-sections by claiming the issues are waived by lack of appellate argument.[Answer Brief, p. 77-78] This is incorrect.

The Initial Brief outlined the comments of defense counsel in these two sub-categories which constitute ineffective assistance of counsel, immediately followed by argument that the cumulative effect of all the identified instances of improper and inflammatory arguments by both the State and defense counsel mandated a new penalty phase in this case. The cumulative effect of multiple errors in closing argument often merits a new proceeding. *Brinson v. State*, 153 So.3d 972 (Fla. 5th DCA 2015);

Crew v. State, 146 So.3d 101 (Fla. 5th DCA 2014); *Wicklow v. State*, 43 So.3d 85 (Fla. 4th DCA 2010); *Johns v. State*, 832 So.2d 959 (Fla. 2d DCA 2002) This legal argument, coupled with the previous arguments that each instance of improper argument from defense counsel was ineffective assistance of counsel, is more than sufficient to defeat a claim of waiver.

The two instances identified as misstatements of fact were clearly prejudicial. The first statement, that there is no difference between a death sentence and a life sentence "except time" diminishes the jury's responsibility and dilutes the gravity of a death sentencing proceeding. This statement overlooks distinct differences in how those on death row are confined as opposed to those in the general population serving a life sentence. The courts have consistently recognized that death is different and that the horrific confinement conditions of death row are often tortuous in a way that confinement in general population is not. See *Lackey v. Texas*, 514 U.S. 1045 (1995); *Elledge v. Florida*, 525 U.S. 944 (1998); *Valle v. Florida*, 132 S.Ct. 1 (2011). Such comments invite the jury to minimize the decision to impose death.

The second statement was that Mr. Smiley's actions constituted a continuing criminal enterprise. Defense counsel's argument to the jury that Mr. Smiley was a criminal enterprise is wholly unsubstantiated. The State did not charge Mr. Smiley

with RICO or any similar criminal enterprise offense. Defense counsel's statements directed the jury to consider Mr. Smiley guilty of a serious crime he was not charged with and enhanced the offenses he had been convicted of. These comments invited the jury to consider Mr. Smiley in a harsher light, akin to organized crime.

Defense counsel's misstatements of the law made him appear foolish and undermined his credibility with the jury. Defense counsel did not appear to know how many people were on the jury despite the fact he had just spent weeks with the same twelve jurors each day.

Defense counsel's inexplicable and inexcusable lack of knowledge on how aggravating factors are counted and applied was an argument certain to make this case appear far more aggravated and deserving of a death sentence.

Lastly, defense counsel's denigration of the mitigation he had presented all but ensured a death sentence. Instead of emphasizing the severity of Mr. Smiley's medical condition and brain damage defense counsel invited the jury to look at it and say "So what." [P2574] When reading this record it is sometimes necessary to refer back to the start of the argument to make sure what is being said by defense counsel is not the State's rebuttal argument.

The breadth, depth, and sheer volume of improper, prejudicial, and absolutely shocking arguments that permeated the closings in this case warrant reversal. This type of closing argument has been condemned by this Court for decades—most recently in *Cardona v. State*, 185 So.3d 514 (Fla. 2016). As in *Cardona*, the State, and most shockingly defense counsel, gave closing arguments that were inflammatory, egregious, and legally improper. Reversal is mandated.

ISSUE VIII

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

In this issue, Mr. Smiley argued defense counsel's failure to object to the penalty phase jury instructions and verdict form for the aggravating factors was fundamental error. The parties had agreed and submitted jury instructions and verdict forms to the trial court, which the trial court appeared to approve. Shortly thereafter, the trial court presented the parties with jury instructions and verdict forms he created, which he insisted on using in lieu of those submitted by the parties.

The State argues this issue has been waived as invited error doctrine because trial counsel did not further object to

the trial court's version of instructions and verdict forms on aggravating factors. [State's Answer Brief, p.80]

Mr. Smiley disagrees. This issue was not waived by defense counsel's acquiescence to the trial court's version of jury instructions and verdict form.

The issue of when counsel's failure to object to jury instructions constitutes a waiver is pending before this Court in two cases: *Knight v. State*, __ So.3d __, 43 Fla. Law Weekly D404, 2018 WL 944663 (Fla. 1st DCA February 19, 2018), *rev. granted*, No.SC18-309 2018 WL 3097727 (Fla. June 25, 2018); and *Sams v. State*, __ So.3d__, 2019 WL 1575332 (Fla. 2d DCA April 12, 2019). Defense counsel's failure to object would not constitute a waiver under either of those cases.

In *Knight*, the First District Court of Appeal found defense counsel had waived the giving of an erroneous jury instruction where there was (1) a tactical reason to have requested an incomplete instruction that might be construed to (2) incentivize error and (3) where defense counsel affirmatively sought, agreed to, and had substantial involvement in the drafting of the incomplete instruction. In *Sams*, the Second District Court of Appeal focused on a distinction between whether defense counsel affirmatively chose the problematic incomplete instruction or acquiesced to the incomplete instruction.

Under either *Knight* or *Sams*, defense counsel's actions in this case do not constitute a waiver. Defense counsel had no tactical or strategic reason to seek a jury instruction and verdict form that increased the aggravating factors the jury could consider from two to eight. To do so would clearly constitute ineffective assistance of counsel. There is no sound tactical or strategic reason for a defense attorney in a capital penalty phase to want to have more aggravating factors presented to the jury than are legally permissible. There is simply no reason for defense counsel to incentivize this error. Neither did defense counsel have substantial involvement in the drafting of the instruction and verdict form as given- they were largely the product of the trial court. It is apparent on this record the instructions and verdict form were the product of acquiescence, not affirmation.

The State argues on appeal the individual listing of aggravating factors was due to confusion after *Hurst v. State*, 202 So.3d 40 (Fla. 2016). [State's Answer Brief, p.80-81] While there may have been general confusion in the trial courts stemming from *Hurst*, in this case, the trial court and the parties did not ever reference *Hurst*. There was absolutely no discussion in this record about whether *Hurst* would require such a shocking deviation from the decades-long accepted method of calculating the number of aggravators that apply in a capital

case. There is no authority under *Hurst* for a change from the prior violent felony aggravator method of counting only one aggravator no matter the number of prior violent felonies to counting a separate aggravator for each prior felony. What was done in this case was not merely “unconventional”, as the State suggests. It was wrong. Shockingly wrong. The State’s argument is pure speculation, unsupported by the record, and made for the first time on appeal.

The State’s *Hurst* argument is spurious for another reason. Two weeks before the penalty phase this Court approved the Standard Criminal Jury Instructions in Capital Cass which resolved any uncertainty about what *Hurst* required.

The trial court’s use of special jury instructions and a special verdict form for the aggravating factors was reversible error where there was no valid basis to deviate from the recently promulgated standard instructions and verdict form.

ISSUE IX

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

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

The trial court is required to conduct an *Enmund/Tyson* analysis when there are co-perpetrators, even if, as here, there is testimony the defendant is the shooter. *Perez v. State*, 919 So.2d 347, 366 (Fla. 2005). Although there was testimony in

this case to that effect, the jury rejected that testimony as reflected in the guilt phase verdict regarding the discharge and possession of the firearm by Mr. Smiley. Unlike *Perez*, where this Court found there was competent, substantial evidence based on the jury's guilt phase verdict that the defendant was both a major participant and acted with reckless disregard for human life, the jury's verdict here does not provide that same level of confidence or proof. In the absence of sufficient certainty, the *Enmund/Tyson* analysis is required.

In any event, *Perez* was a pre-*Hurst* case, which rejected the requirement that the jury perform the *Enmund/Tyson* analysis. *Id.*, at 367. Since the *Enmund/Tyson* analysis would be a critical component in death eligibility, it would appear that *Perez* is no longer good law. To the extent that the penalty phase jury in this case failed to make specific, unanimous findings pursuant to *Edmund/Tyson*, fundamental error occurred, which requires a new penalty phase.

B. Considering the State Had Established Eight Aggravators Instead of Two based on the Jury Verdict Form, then Finding Five Aggravators Existed Instead of Two.

The trial court's finding on the aggravators was wrong. There is no way to avoid this conclusion. The State established two aggravators, not eight, not five. Two. It was wholly improper for the trial court to consider, weigh, and sentence

Mr. Smiley to death on the basis there were five aggravators instead of two.

The State's argument, premised on *Brown v. State*, 473 So.2d 1260 (Fla. 1985), that the pecuniary gain aggravator should not merge into the "during the course of "convictions for robbery and burglary is meritless. The sole motivation for the crimes in this case was financial gain. Samantha Lee and John McDonald testified the motivation was pecuniary gain. Mark Wilkerson's testimony established the sole motivation was pecuniary gain. In *Brown*, this Court upheld both the pecuniary gain aggravator and that the murder was committed in the course of a burglary aggravator where the evidence established a much broader basis for the burglary than the theft of the victim's television. The victim was beaten, raped, and strangled. The burglary factor and pecuniary gain factor were separate characteristics of the crime. In this case the robbery and burglary offenses were committed solely for pecuniary gain, they refer to the same aspect of the crimes. The burglary and robbery provided the opportunity for theft.

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

The trial court improperly and continually referred to Mr. Smiley as the shooter. However, if the State's Amended Answer Brief is correct, the trial court later determined it could not

impose the firearm minimum/mandatories due to the jury's verdict. [Answer Brief, p.90] The trial court cannot refer to, consider, and sentence Mr. Smiley as the shooter when the jury verdict finds otherwise. *Lebron v. State*, 799 So.2d 997, 1020 (Fla. 2001), and *Issue VI* in the Initial and Reply Briefs.

D. The Trial Court Failed to Properly Consider Each Mitigating Circumstance

Mr. Smiley will rely on his previous argument that the trial court's sentencing order fails to comply with the dictates of *Campbell v. State*, 571 So.2d 415, 419 (Fla. 1990). The trial court's order fails to contain sufficient consideration of the mitigation even when considered as broad categories.

E. Firearm minimum mandatory terms [re-stated by the Appellee]

Based upon the sentencing documents in this appeal, Mr. Smiley argued the trial court improperly imposed minimum/mandatory terms for the firearm. After reviewing the same sentencing documents in the *Riley* case, the State believes the trial court did not impose the minimum/mandatory and what undersigned counsel believed said "10" is actually "no". If the trial court did not impose the minimum/mandatory "per the jury verdict", that is the correct sentence and it should not be altered.

STATEMENT REGARDING SUFFICIENCY OF THE EVIDENCE

Mr. Smiley does not contest the sufficiency of the evidence, taken in the light most favorable to the State. See *Johnson v. State*, 267 So.3d 16 (Fla. 4th DCA 2019).

STATEMENT REGARDING PROPORTIONALITY

Mr. Smiley submits this Court cannot conduct the required proportionality analysis until the errors in the penalty phase are corrected. The number of aggravators and mitigators must be properly found and properly weighed. The trial court must conduct the required *Enmund/Tyson* analysis. Only when these errors are corrected and Mr. Smiley is resentenced would it be appropriate for this Court to consider proportionality if a death sentence was again imposed.

CONCLUSION

Based on the arguments, citations of law, and other authorities in both the Initial and Reply Briefs, Mr. Smiley requests this Court vacate the judgment of conviction and sentence and remand for further proceedings.

Respectfully submitted,

/s/Andrea M. Norgard
Andrea M. Norgard

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 10, 2019, a true and correct copy of the forgoing Reply Brief has been served electronically via the Florida Courts e-portal Filing System, which will send a

notice of electronic filing to: Lisa Martin,
capapp@myfloridalegal.com .

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY the size and style font used in the preparation of this Reply Brief is Courier New, 12 point, in compliance with Fla. R. App. P. 9.210(a)(2).

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