IN SUPREME COURT OF FLORIDA

RAYMOND M. AUSTIN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC14-2215

ON DISCRETIONARY REVIEW FROM THE
DISTRICT COURT OF APPEAL, FIRST DISTRICT

RESPONDENT'S ANSWER BRIEF

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PRELIMINARY STATEMENT

Respondent, the State of Florida, Appellee in the District Court of Appeal (DCA) and the prosecuting authority in the trial court, will be referenced in this brief as Respondent, the prosecution, or the State. Petitioner, Raymond M. Austin, the Appellant in the DCA and the defendant in the trial court, will be referenced in this brief as Petitioner or by proper name.

"IB" will designate Petitioner's Initial Brief. Each symbol will be followed by the appropriate page number in parentheses.

All emphasis through bold lettering is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

The State adopts the statement of the case and facts from Austin v. State, 158 So. 3d 648, 648-651 (Fla. 1st DCA 2014).

"Approximately two months before his eighteenth birthday, Raymond Austin abducted, *649 robbed, and murdered eighty-three-year-old Charles Soukup. Less than twenty-four hours later, Austin fired a gun at another unarmed person, attempting murder again but this time not succeeding. Austin was sentenced to concurrent terms of ninety years in prison for each offense against Mr. Soukup, all to run consecutively to a forty-five-year sentence imposed earlier in a separate case for the subsequent criminal act.

The judgment and sentences for the first criminal episode, involving armed kidnapping, armed robbery, and first-degree premeditated murder, are at issue in this case. We affirm. We reject Austin's evidentiary challenge in the trial proceedings without further comment and affirm his sentences due to the failure to comply with the specific rules of preservation pertaining to his arguments.

I. Evidence Established at Trial

Early one morning, Mr. Soukup was dropped off at the Jacksonville Airport by his son-in-law to catch an outgoing flight to see his daughter. His son-in-law watched him enter the airport, and none of his family ever saw or heard from him again.

Records indicate that a few hours after Mr. Soukup arrived at the airport, he rented a silver Jeep Patriot at the airport rental counter, without a reservation. Meanwhile, Shanda Merritt, the mother of Austin's girlfriend, had

been driven to the airport for the purpose of renting a car. Merritt was accompanied by a driver and three male teenagers, including Austin. Merritt directed them not to leave until she got a rental car. When she returned to the group about thirty minutes later, she was driving a silver Jeep with Mr. Soukup in the front passenger seat. Merritt's three companions got in the back seat, with Austin sitting directly behind Mr. Soukup, and Merritt drove away.

As they were driving, Merritt placed her hand on her neck, signaling to Austin to choke Mr. Soukup. Austin complied. He first used his shirt and then his arm to choke the elderly man. Mr. Soukup tried to fight off the attack, but he was 'gagging,' and bleeding from the mouth. The other two boys took his money and cell phone. Eventually, Merritt stopped at a cell phone tower in a wooded area. Austin dragged Mr. Soukup, still alive, by the ankles to an area behind a fence surrounding the cell phone tower. Then he shot Mr. Soukup once in the center of his forehead at close range.

Merritt and the boys drove off, leaving Mr. Soukup's body in the woods. Later that day, Austin's girlfriend joined her mother and Austin on a trip to Family Dollar, where they bought sponges, bleach, and gloves, and proceeded to clean the inside of the car. Austin sold the gun the next day.

After being notified by Mr. Soukup's family that he was missing, the Jacksonville Sheriff's Office initiated an investigation that ultimately led to the arrest of those involved in these horrific crimes. Mr. Soukup's badly decomposed body was discovered where it had been abandoned approximately five days earlier. His autopsy revealed that he had suffered a fatal front-entrance gunshot wound to his forehead and an injury to his neck, consistent with

strangulation. Austin later confessed to strangling and shooting Mr. Soukup.

The jury found Austin guilty of first-degree premeditated murder, armed kidnapping with intent to facilitate a felony, and armed robbery. The jury also found that he discharged a firearm causing death or great bodily harm.

II. Sentencing

Austin's sentencing hearing was originally scheduled to take place with that of Merritt. After ascertaining that the State was requesting that Austin be sentenced to life without parole, the trial court granted *650 the defense's request for a continuance for the purpose securing evidence in support of mitigation. In this discussion, the court noted its familiarity with Miller v. Alabama, --- U.S. ----, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012), and its Florida progeny. The court pointed out in particular, and consistent with Miller's holding, that it could not impose the sentence the State requested without conducting 'an individualized sentencing hearing.'

When sentencing resumed, the defense presented expert testimony concerning the differences between the brains of adults and seventeen-year-olds as it relates to the maturity, impulsivity, analytical-thinking ability, and susceptibility to pressure. The expert explained that, although a seventeen-year-old is capable of knowing right from wrong, the developmental stage of the brain of a seventeen-year-old male renders him less capable of self-control than a male in his early twenties. The expert, who had evaluated Austin for competency, also shared information Austin had reported about his background, including that he had a childhood free of any significant trauma, was not exposed to domestic violence, and lived with his brother in a good

home environment before his arrest. According to the expert, Austin also reported that he generally has difficulty with anger and violence. He also testified that Austin's IQ is 75, which indicates very limited intellectual functioning and an inability to analyze and process information as well as a 'normal' person. He also found that Austin malingered during the competency evaluations.

The expert further testified that Austin's commission of an attempted murder fourteen hours after the instant offenses did not necessarily indicate that he lacks a conscience, emphasizing that his brain is not fully developed and 'does not think and analyze the same way that an adult does.' The expert noted that, according to Austin's self-reporting, he was 'very high on drugs' at the time. In light of Austin's age and the 'substance abuse issue,' the expert concluded that it 'would not be necessarily appropriate' to diagnose him as a sociopath. The expert noted that drugs and alcohol affect an adolescent brain more severely than an adult brain.

After this testimony, the State introduced thirteen disciplinary reports from the jail. Some reports involve physical altercations, and one involves an allegation that Austin pretended to point a rifle at a staff member.

The defense began its argument to the court by emphasizing that Miller suggests that 'sentencing juveniles to life without the possibility of parole ... should be uncommon' due to the difficulty in distinguishing between a juvenile who is immature and capable of rehabilitation and one who is irreparably corrupt. Defense counsel went on to note favorable aspects of the expert's testimony and discuss and apply the concurring opinion in Walling v.

State, 105 So. 3d 660 (Fla. 1st DCA 2013), where Associate Judge Wright suggested factors sentencing courts should consider when deciding whether a juvenile should be sentenced to life without parole. Defense counsel highlighted the expert's testimony and noted Austin's prior history of crime and delinquency, indicating that it was relatively minor.

In addition, defense counsel asked the court to consider the following facts, as indicated in the pre-sentence investigation report obtained for the other case: Austin did not complete the ninth grade; his prior offenses include unarmed burglary, criminal mischief, simple battery, and 'a no valid driver's license'; he successfully completed a diversion program; and he had previously been placed in a low-risk juvenile facility. Based on the evidence presented at trial, defense counsel argued *651 that Austin showed remorse in his interview with police and confessed the same day he was arrested. She also noted that Austin was under the influence of drugs and Merritt at the time of the offense. Finally, defense counsel stated that she had personally been met with hostility from Austin's family, who could not be bothered to attend the sentencing hearing, thus indicating that Austin had no family support or positive role models.

Regarding the available sentencing options, defense counsel stated that Partlow v. State, 134 So. 3d 1027, 1031–39 (Fla. 1st DCA 2013) (Makar, J., concurring in part and dissenting in part), discusses the possibility of statutory revival; that Walling 'kind of says something a little bit different'; and that Miller gave the court the authority to 'do anything,' including deviate below the twenty-five-year mandatory minimum required due to

the use of a firearm.

Concerning the nonhomicide offenses, defense counsel noted that the court was prohibited, under Graham v. Florida, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010), from imposing a life sentence without parole for those convictions. The court suggested that it was not restricted by a particular cap on the number of years it could impose and that it could impose 'up to 99 years per count.' Austin's counsel agreed with the court's suggestion but noted that the law 'has been very muddled as far as what would be constitutional and what would not be.' Defense counsel requested that the sentences for the instant case be the twenty-five-year mandatory minimum terms, noting that these sentences would place Austin in prison for seventy years 'day for day' when combined with the forty-five year mandatory minimum sentence that had already been imposed in the separate case.

Focusing on the facts of the crime, the victim's vulnerability, Austin's prior and contemporaneous offenses, Austin's lack of any disability or childhood trauma, Austin's disciplinary infractions at the jail, his closeness to the age of eighteen at the time of the offense, and the aggravating factors that would apply in a death-penalty hearing, the State asked the court to find Austin to be an 'uncommon' juvenile defendant and sentence him to life without parole for count one. The State requested concurrent sentences of fifty years in prison on the nonhomicide counts. The court declined both parties' requests, imposing concurrent terms of ninety years in prison on all three counts, all to run consecutively to the forty-five year sentence previously imposed in the separate case."

SUMMARY OF ARGUMENT

The First District did not commit error, in Austin v. State, 158 So. 3d 648 (Fla. 1st DCA 2014), by determining that it could not consider Petitioner's challenges to his sentence on direct appeal. The First District relied on precedent from this Court, which reflects that sentencing errors must be preserved in the trial court before they can be considered on direct appeal. This Court has indicated that its reason for promulgating Florida Rule of Criminal Procedure 3.800(b) was to conserve scarce resources, to relieve the unnecessary workload of the appellate courts, and to have trial judges investigate defendants' challenges to their sentences because the trial judges were in the best position to do so.

Petitioner requests that this court change its policy and follow the decision in Lightsey v. State, 112 So. 3d 616 (Fla. 3d DCA 2013), which held that sentencing errors can be considered on direct appeal if the errors are clear and defense counsel's failure to preserve the argument(s) constitutes ineffective assistance of counsel. The decision in Lightsey is incorrectly decided based on the precedent and policy of this Court. It is also noteworthy that the Third District Court of Appeal has since indicated that sentencing errors cannot be considered on direct appeal.

Furthermore, the State argues that if this Court adopts the request of Petitioner, defense attorneys will no longer have to put the trial court on notice of their claims regarding "clear" sentencing errors and this will result in the sentencing claims getting raised in the direct appeal, along with the other issues, so that the attorneys can avoid the extra work of

filing the rule 3.800(b) motions. Therefore, this Court's effort to conserve resources, to reduce the unnecessary workload of appellate courts, and to have trial judges investigate the errors will be seriously undercut. For all these reasons, the State respectfully requests that this Court approve the First District's decision in Austin and quash the Third District's decision in Lightsey.

ARGUMENT

ISSUE I: WHETHER UNPRESERVED SENTENCING ERRORS CAN BE CONSIDERED ON DIRECT APPEAL? (RESTATED)

Standard of Review

The standard of review is de novo.

Preservation

Petitioner did not preserve any of his claims regarding the challenges to his sentence in the trial court.

Jurisdiction

The State reiterates that since the Third District, in its latest opinion, has stated that sentencing errors cannot be addressed on direct appeal unless they are preserved, there is not really an interdistrict conflict, but more of an intradistrict conflict. The State will discuss this issue more in the merits section.

Merits

Petitioner argues that the First District Court of Appeal erred by determining that it could not consider the challenges to his sentence on direct appeal because he did not preserve any of his claims at the trial level. Petitioner further argues that this Court should quash the decision of the First District and approve the decision of the Third District, which held that errors that are "so obvious" can be considered on direct appeal because failing to raise them clearly constitutes ineffective assistance of counsel. (IB-5). The State respectfully disagrees. The State asserts that the First

District correctly determined that it could not consider the unpreserved sentencing errors based on precedent from this Court. The State further argues that Petitioner's request is inconsistent with this Court's policy to reduce the workload of the appellate courts and to have the trial judges, who are in the best position to investigate the claims of the defendants, correct the sentencing errors.

In Austin, the First District determined that Appellant's challenges to his sentence could not be considered on direct appeal because he failed to preserve them in the trial court. 158 So. 3d at 649. The First District expressly relied on Jackson v. State, 983 So. 2d 562 (Fla. 2008) in its holding. The First District stated as follows in Austin:

> "However, our supreme court has dictated in no uncertain terms that such an error is not to be considered on direct appeal from a judgment and sentence, **even if it is fundamental**, unless it has been preserved by either a contemporaneous objection or a motion under Florida Rule of Criminal Procedure 3.800(b). Jackson, 983 So. 2d at 569. As explained by Justice Raoul Cantero, writing for a **unanimous Court**:
>
> 'Thus, rule 3.800(b) creates a two-edged sword for defendants who do not object to sentencing errors before the sentence is rendered: on the one hand, it allows defendants to raise such errors for the first time after the sentence; **on the other hand, it also requires defendants to do so if the appellate court is to consider the issue**.'"

(emphasis added). Id. at 651-652.

This Court also indicated in Jackson that there were many different options available for a defendant to raise a sentencing error. This Court stated as follows in Jackson:

> **First, when preserved for review, the error may be raised on direct appeal. Second, even if not originally preserved,** "to provide defendants with a mechanism to correct sentencing errors in the trial court at the earliest opportunity" and to "give defendants a means to preserve these

> errors for appellate review," we amended **Florida Rule of Criminal Procedure 3.800(b)** to allow defendants to file a motion to correct sentencing error even while an appeal is pending (but before the initial brief). This rule also authorizes the trial court to hold an evidentiary hearing. **Third, under rule 3.850,** a defendant may raise a sentencing error within two years after the sentence becomes final....
>
> ....
>
> **Rule 3.800(a) provides yet a fourth** avenue for asserting sentencing error.... Under this rule, a defendant may allege (1) that the sentence imposed is illegal; (2) that insufficient credit was awarded for time served; or (3) that the sentencing scoresheet was incorrectly calculated.

Jackson, 983 So. 2d at 568.

This Court further explained the history of rule 3.800(b). This Court indicated that because "scarce resources were being unnecessarily expended in appeals from guilty pleas and appeals relating to sentencing errors," it promulgated rule 3.800(b) as an "emergency amendment" to provide defendants with a mechanism to correct sentencing errors in the trial court at the **earliest opportunity** and to give defendants a means to preserve the errors for appellate review. (emphasis added). Id. at 570-571. This Court stated that, "[a]t the same time, we adopted rule 9.140(d), Florida Rules of Appellate Procedure (now rule 9.140(e)), requiring that sentencing errors be preserved either through a contemporaneous objection or by motion under rule 3.800(b)." Id. at 571. This Court then stated that the statutory and rule changes embodied a policy decision, which was intended to relive the workload of the appellate courts and to place correction of the alleged errors in the hands of trial judges, who would be best able to investigate and/or correct any error. Id.

In addition, this Court has repeatedly recognized that a claim that a sentence is unconstitutionally cruel and unusual must be properly preserved. See, e.g., Gore v. State, 964 So. 2d 1257, 1276 (Fla. 2007) (finding argument that the death penalty is unconstitutional under the Eighth Amendment to be procedurally barred as unpreserved); Perez v. State, 919 So. 2d 347, 377 (Fla. 2005) (assertion that Florida's death penalty scheme is unconstitutional under the Eighth Amendment not preserved for review); Floyd v. State, 913 So. 2d 564, 578 (Fla. 2005) (claim that in a capital case the Eighth Amendment requires the homicide be proven to a "virtual certainty" was unpreserved); Fotopoulus v. State, 608 So. 2d 784, 794 & n.7 (Fla. 1992) (holding that the argument that "Florida law unconstitutionally creates a presumption of death" was not properly preserved at the trial level); Bello v. State, 547 So. 2d 914, 918 (Fla. 1989) (claim that death sentence resulting from a bare majority vote of the jury violated the Eighth Amendment was unpreserved).

Therefore, based on this Court's precedent about preserving sentencing errors, along with its precedent of requiring claims that a sentence is unconstitutionally cruel and unusual to be preserved, the First District did not commit error by determining that it could not consider Petitioner's challenges to his sentence on direct appeal. Petitioner's claim that an appellate court should consider challenges to his sentences, even though he did not preserve them *at all*, is inconsistent with the unanimous policy as set forth by this Court in Jackson. The Lightsey case, which reflects that an unpreserved error, such as a Graham error, could be considered on direct appeal because the error was clear and defense counsel's failure to preserve

the argument constituted ineffective assistance of counsel, is contrary to the precedent from this Court. Lightsey, 112 So. 3d at 618.

Furthermore, Petitioner's argument that this Court should adopt the view presented in Lightsey, only considers the advantages to defense counsel and not to any of the other parties. Petitioner discussed how rule 3.800(b) was "good law" because it provided the *defense attorneys* with an additional opportunity to correct and/or preserve sentencing errors without the delay of the appeal or the embarrassment of an ineffective assistance of counsel hearing. (IB-6). However, Petitioner overlooks that this Court considered other reasons for its policy besides helping defense attorneys. As noted above, this Court was concerned about scarce resources being used unnecessarily for appeals, the workload of the appellate courts, and the importance of having errors corrected by the trial judges, who were in the best position to investigate and/or correct the errors. Jackson, 983 So. 2d at 570-571.

Essentially, Petitioner's request would only benefit defense attorneys because they would no longer be required to preserve their challenges to their clients' sentences in the trial court. If this Court adopts Petitioner's view, then there would no longer be an incentive for defense attorneys to do the extra work of filing a rule 3.800(b) motion in the trial court. The State notes that appellate defense attorneys are generally the ones that file the rule 3.800(b) motions. Even the Lightsey court noted that while it could be possible that trial attorneys were not aware of certain appellate decisions, appellate attorneys, who raised the claims in the direct appeals, were

obviously aware of the issues and could have filed a motion to correct the sentencing errors in the trial court. Lightsey, 112 So. 3d at 617.

Therefore, if this Court adopts Petitioner's view, defense attorneys could simply raise the sentencing claims in the direct appeal, along with the other issues they wanted to raise, and minimize their workload by cutting out the task of filing the rule 3.800(b) motion in the trial court. This would totally undermine the policy set forth in Jackson, which emphasized the conservation of scarce resources, the reduction of the unnecessary workload of appellate courts, and the desire to have the trial judges, who were the most knowledgeable about the circumstances of each defendant, address the alleged errors.

Moreover, despite what the Third District Court of Appeal stated in Lightsey, a later opinion from that court reflected that unpreserved sentencing errors could not be considered on direct appeal based on older precedent from the Third District, as well as from this Court. In Sanders-Bashui v. State, 124 So. 3d 1041 (Fla. 3d 2013), which was decided after Lightsey, the Third District corrected its position on the issue by indicating that it would not address the legality of Sanders-Bashui's sentence on direct appeal. The Sanders-Bashui court stated as follows:

> The State concedes that Sanders–Bashui raises a meritorious claim in this regard. **The State contends, however, that this court should not address Sanders–Bashui's claim on direct appeal because she did not challenge the legality of her sentence in the trial court. Under Supreme Court precedent, and as provided by the governing rules, the State notes that Sanders–Bashui should have preserved the issue by objection or by a motion to correct an illegal sentence prior to filing her initial brief.** Because she failed to do so, the State argues that this court should affirm without prejudice to her filing

> a legally sufficient Florida Rule of Criminal Procedure 3.800(a) motion in the trial court. **Brannon v. State, 850 So. 2d 452, 458 (Fla. 2003); Bannister v. State, 990 So. 2d 595, 596 (Fla. 3d DCA 2008); Santiago v. State, 870 So. 2d 198, 200 (Fla. 3d DCA 2004); but see Lightsey v. State, 112 So. 3d 616, 618 (Fla. 3d DCA 2013). We agree with the State.**

(emphasis added). Sanders-Bashui v. State 124 So. 3d at 1042. The opinion reflects that, not only was the error clear, the State **agreed there was error**. Id.

The State interprets the Third District's action of disregarding Lightsey and then citing to cases out of the Third District that **predate it**, such as Bannister and Santiago, as indicating that Lightsey was not controlling precedent in the Third District. The State notes that both Bannister and Santiago declined to address a defendant's claim regarding his illegal sentence on direct appeal because it was not preserved. See Bannister v. State, 990 So. 2d. at 596 ("Because Bannister failed to raise this claim with the trial court, we will not address it on appeal. Bannister is, however, free to file a legally sufficient rule 3.800(a) motion asserting this claim in the circuit court. See Brannon v. State, 850 So. 2d 452, 458 (Fla. 2003). We express no opinion on the merits of such a motion.") See also, Santiago v. State, 870 So. 2d at 200 ("The defendant also argues that the trial court erred by classifying the defendant as both a habitual violent felony offender and a violent career criminal. We decline to reach this issue because it was not raised in the trial court at sentencing or by a motion to correct sentence under Florida Rule of Criminal Procedure 3.800(b). See Brannon v. State, 850 So. 2d 452, 458 (Fla. 2003). This ruling is without prejudice to the defendant to file an appropriate postconviction motion.")

In addition, the State asserts that the Third District correctly refused to recognize Lightsey as controlling precedent as to whether clear errors could be considered on direct appeal. In Carr v. Carr, 569 So. 2d 903, 903 (Fla. 4th DCA 1990), the Fourth District noted that "we must follow the law of our own cases until we are overruled or until we recede from them." Also, in Sturdivant v. State, 84 So. 3d 1044, 1047 (Fla. 1st DCA 2012), which has since been quashed, the First District indicated that a panel's decision was binding on them unless it was overruled by the court, sitting en banc, or a higher court. Based on this reasoning, since the Lightsey court was not an en banc decision, the Third District was still bound to follow Bannister and Santiago, which have never been receded from by en banc court or overruled by a higher court. Therefore, not only was Lightsey incorrectly decided, it is unclear as to whether it is controlling in the Third District.

CONCLUSION

Based on the foregoing, the State respectfully asserts that this Court quash the Third District's decision in Lightsey and approve the First District's decision in Austin.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to the following: Christopher J. Anderson, Esquire, at CHRISTOPHERANDERSON@CLEARWIRE.NET, on this 22nd day of April, 2015.

CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Courier New 12 point font.

Respectfully submitted and certified,
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