No. _____

IN THE

Supreme Court of the United States

BENJAMIN SMILEY

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Florida

PETITION FOR A WRIT OF CERTIORARI
CAPITAL CASE

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CAPITAL CASE

QUESTIONS PRESENTED

1. Does the decision of the Florida Supreme Court in *Smiley v. State*, 295 So.3d 156 (2020), violate the Eighth Amendment ban on cruel and unusual punishment and the Fourteenth Amendment guarantee of Equal Protection where the method of calculating the number of aggravating circumstances by the jury and trial court and consideration of those aggravating factors by the jury and trial court and the method of determining and weighing the mitigating circumstances was a substantial deviation from decades of precedent and resulted in a sentencing process that was arbitrary, capricious, and a process that was unfair, inconsistent, and unreliable?

2. Does the decision of the Florida Supreme Court in *Smiley v* State, 295 So.3d l56 (Fla. 2020), violate the Sixth Amendment right to a fair trial by an impartial jury and the Fourteenth Amendment guarantee of equal protection where the Prosecutor was permitted to inform the jury in voir dire that, of sixty pending first-degree murder cases in the office, this case was among only eight or nine in which the State of Florida was seeking the death penalty thereby denying Petitioner a fair trial by an impartial jury?

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PARTIES TO THE PROCEEDINGS

Petitioner, Benjamin Smiley, a death-sentenced Florida prisoner, was the appellant in the Florida Supreme Court.

Respondent, the State of Florida, was the appellee in the Florida Supreme Court.

DECISION BELOW

The decision of the Florida Supreme Court is reported at *Smiley v. State*, 295 So.3d 156 (Fla. May 14, 2020), and is reprinted in the Appendix (App.) at A1.

JURISDICTION

The judgment of the Florida Supreme Court was entered on May 14, 2020 (App. A1). This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment provides, in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law; and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defense.

The Eighth Amendment provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

The Fourteenth Amendment provides, in relevant part:

> No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

I. Introduction

Petitioner Benjamin Smiley's death sentence was obtained in violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. The penalty phase and sentencing practices used in this case and approved by the

Florida Supreme Court are inconsistent with the framework of the Eighth Amendment's ban on cruel and unusual punishment and the Fourteenth Amendment's guarantee of equal protection. As a result of the Florida Supreme Court decision, Petitioner is the only individual to have been sentenced to death in the State of Florida since the inception of Florida's death penalty statues post-*Furman* after a shocking deviation from forty-seven years of precedent setting forth how aggravating factors are considered by both the jury and judge.

The Florida Supreme Court's decision is inconsistent with the Eighth Amendment's ban on cruel and usual punishment, and the Fourteenth Amendment's guarantee of equal protection when it approved the jury's finding of non-statutory mitigation from a list provided on the verdict form and absolved the trial court's failure to consider and weigh each non-statutory mitigating circumstance instead of improperly lumping them all together.

The Florida Supreme Court decision which upheld improper comments by the State during voir dire which informed the jury that of sixty pending first-degree murder prosecutions this case was one of only eight or nine that was death penalty eligible unconstitutionally tainted the jury recommendation by informing the jury that a vote to impose a death sentence has the imprimatur of the State's greater wisdom and higher authority and is inconsistent with the Sixth Amendment's guarantee of a fair trial and the Fourteenth Amendment's guarantee of due process.

This Court should consider the constitutionality of the Florida Supreme Court's deviation from decades of capital sentencing jurisprudence.

II. Factual and Procedural Background

A. Conviction, and Death Sentence

On October 6, 2016, a jury found Petitioner guilty of the first-degree felony murder of Clifford Drake, robbery with a firearm of Mark Wilkerson, aggravated assault with a firearm of Mark Wilkerson, and burglary of a dwelling with an assault or battery while armed with a firearm, as charged in the Indictment brought by the State of Florida on July 15, 2015.

Guilt Phase

The facts, as reflected in the opinion of the Florida Supreme Court, *Smiley v.* State, 295 So.3d 156 (Fla. May 14, 2020), established that Mark Wilkerson resided in a home located in Lakeland, Polk County, Florida with his brother, Mario Wilkerson, their mother, and stepfather, Clifford Drake. Late at night on April 15, 2013, Mark Wilkerson was approached in his yard by two men he did not recognize, both wearing dark sweatshirts. The smaller of the men, later identified as the Petitioner, pointed a gun at Mark Wilkerson. The men climbed a fence and the Petitioner ordered Mark Wilkerson to disrobe and get on the ground. The Petitioner demanded Mark Wilkerson tell him where his stepfather, Clifford Drake, kept his safe. The Petitioner went through Mark Wilkerson's clothing, taking a cell phone, a small amount of cash, and a key to the house. Petitioner forced Mark Wilkerson to enter the home at gun point. The three men entered the home and Mark Wilkerson led them to Clifford Drake's bedroom. Petitioner entered the dark bedroom, but was unable to find the safe. Petitioner then ordered Mark Wilkerson

to enter the bedroom and turn on the light. Petitioner then struck the still-sleeping Clifford Drake in the head with the gun. Clifford Drake woke up and scooted on the bed while Petitioner shouted at him to disclose the location where he kept his money. Clifford Drake denied having any money and Petitioner shot him in the hip. Seconds later Petitioner shot Clifford Drake in the head. Petitioner then ransacked the bedroom with Mark Wilkerson's help until the second, taller man alerted Petitioner that someone was coming. Petitioner then ordered Mark Wilkerson to the ground and the men fled from the house. A backpack was left at the home and a sweatshirt was found in a dumpster nearby.

The bullets recovered from the scene were forensically matched to bullets recovered from the scene of another nearby shooting that occurred less than a month earlier. The case remained cold for two years.

In 2015, police learned that DNA recovered from the backpack and the sweatshirt matched Petitioner's DNA.

Police then revisited phone records and determined that minutes after the Drake murder, Mark Wilkerson's cell phone had been used in a three-way call between Petitioner, his cousin, John McDonald, and his aunt, Samantha Lee.

McDonald testified at trial that he learned during a card game that Clifford Drake kept money in a safe in the house. McDonald, Lee, and Petitioner hatched a plan to rob Drake. On the night of the murder McDonald picked up Petitioner and "Big Jit" from Lee's house. The plan called for Petitioner and now Big Jit to carry out the robbery, then McDonald would pick them up afterward. McDonald testified

he dropped the two men off and watched them walk to the Drake home, but left when he saw Mark Wilkerson ride by on a bicycle. McDonald eventually got a call from Lee, who patched in Petitioner on a three-way call so McDonald and Petitioner could find each other. McDonald testified that when Petitioner got into the car he was angry because it was a "blank mission" and that "the dude that was asleep looked like he was reaching for something and he [Petitioner] shot him."

Petitioner testified at trial. He acknowledged the relationship with McDonald and Lee and admitted to being friends with "Big Jit" (whose real name was Casey Bisbee). He denied participating in or being part of any plan to rob Clifford Drake. He denied being present in Lakeland on the night of the murder.

Penalty Phase

Penalty phase was conducted in April 2017 with a different jury. The State presented testimony of Petitioner's participation in the March 2013 murder of Carmen Riley. John McDonald testified he, Samantha Lee, and Petitioner planned to rob Riley after McDonald targeted her. Petitioner's role was to carry out the robbery and McDonald was the driver. After the robbery Petitioner told McDonald that he shot Riley because she refused to cooperate. Samantha Lee testified that after leaving the Riley residence she heard Petitioner say that he had to shoot Riley because she was a fighter. The same revolver used in the Riley murder was used two weeks later in the Drake murder.

Because a different jury was impaneled, the State also presented evidence from the investigating police officers, Samantha Lee, and John McDonald relevant

to the Drake murder.

The defense case for mitigation focused on the sharp contrast between Petitioner's behavior and mental state after he suffered two brain aneurysms in September 2012, less than a year before the murders of Drake and Riley. Medical records documented the severity of these aneurysms. Dr. Alan Waldman, a neuropsychiatrist, testified Petitioner suffered severe damage to the part of his brain that affect behavior and impulse control as a result of the rupture. In particular, after the rupture, Petitioner had problems with rage control. A second expert, Dr. Hartig, hired by the defense but called by the State, similarly testified the ruptured aneurysms constituted a severe brain trauma. She testified Petitioner performed well on personality tests and had an IQ score of 114.

The expert witness testimony was corroborated by testimony from Petitioner's family and friends. Mr. Smiley's mother and Samantha Lee testified that Petitioner developed a bad temper, had severe mood swings, and would rant on social media about insignificant things after the ruptures- all of which were out of character. Lee described Petitioner after the ruptures as "just wild".

Petitioner's mother, Mrs. Grandberry, testified Petitioner did not receive the necessary follow-up treatment after he was released from the hospital. He moved in with Samantha Lee after his release because the Grandberry's would not allow his girlfriend to live with them. Mrs. Grandberry was very concerned about Lee. She

did felt Lee was a bad influence because she dealt drugs and did things that were illegal to support herself.

Petitioner's childhood was not without difficulty. He did not have a relationship with his biological father until age 18. Petitioner was raised by his mother and stepfather, who married when he was an infant. The family was devoutly religious and strict rules were enforced. The children were not allowed cell phones, to spend the night with friends, or go to parties. Corporal punishment was used to enforce discipline. Petitioner attended a private, Christian school until just before graduation. He then transferred to public school, but was unable to graduate due to problems with the transfer of credits. Petitioner was able to obtain his GED. Petitioner participated in school sports, wrote the school newsletter, had good grades, was involved with community service projects through church, and participated in a mentorship program. Due to the rigid rules of the household, Petitioner moved out at age 16. From that time forward he lived different places, including with Samantha Lee.

Michael Clayton, a former NFL football player and founder of *Generation Next*, an organization created to support young black men, mentored Petitioner through that organization. Mr. Clayton testified that Petitioner changed significantly after the ruptures. He was very different after, a person Mr. Clayton could no longer mentor and guide. Petitioner became challenging and prone to provocation. Petitioner would rant and rage over minor things.

The State argued, in a significant departure from established Florida law, that the jury could consider one separate aggravating factor for each of the prior or contemporaneous felony convictions instead of single aggravating factor of a prior capital conviction or prior violent felony conviction. The State argued there were eight aggravators- five premised on prior convictions, instead of one aggravating factor of prior violent felony conviction- that Petitioner had been convicted of another capital felony; the murder occurred during the course of a felony (burglary and robbery), and that the murder was committed for pecuniary gain. The jury was instructed they were to consider each prior conviction as a separate aggravator and the penalty phase verdict form required the jury to make a finding on each separate prior conviction. Defense counsel did not object to the State's argument, the instructions, or the verdict form.

The jury unanimously found the following aggravators were proven beyond a reasonable doubt on a verdict form which deviated from the form approved by the Florida Supreme Court: (1) Petitioner was previously convicted of another capital murder, the murder of Carmen Riley; (2) Petitioner was previously convicted of a felony involving use of threat or violence, robbery with a firearm of Riley; (3) Petitioner was previously convicted of a prior violent felony, robbery with a firearm of Mark Wilkerson; (4) Petitioner was previously convicted of a prior violent felony, aggravated assault of Mark Wilkerson; (5) Petitioner was previously convicted of a prior violent felony, robbery of Mark Wilkerson; (6) Petitioner committed the Drake murder while involved in the commission of a robbery regarding Mark Wilkerson;

(7) Petitioner committed the Drake murder while engaged in the commission of a burglary with an assault or battery while armed with a firearm regarding Clifford Drake and Mark Wilkerson; and (8) Petitioner committed the murder for pecuniary gain.

The jury was also required to make specific findings on Petitioner's proposed statutory and non-statutory mitigating circumstances, a deviation from the standard verdict form approved by the Florida Supreme Court: no significant history of prior criminal activity 5 yes to 7 no; the capital felon was committed while the defendant was under the influence of extreme mental of emotional disturbance, 0 to 12; 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, 0 to 12; age at the time of the crime, 0 to 12; mitigation relevant to the defendant's character, 7 to 5; mitigation relevant to defendant's background, 0 to 12; mitigation relevant to the life of the defendant, 0 to 12; and mitigation related to the circumstances of the offenses, 1 to 11.

The jury unanimously recommended a death sentence.

A *Spencer* hearing was conducted on November 13, 2017. The State presented no additional evidence. Petitioner called Dr. Hartig. Dr. Hartig testified to evidence related to mitigation. She discussed: (1) Petitioner's lack of a relationship with his biological father; (2) lack of relationship with his stepfather; (3) Petitioner being subjected to corporal punishment; (4) Petitioner running away from home and being essentially homeless; (5) Petitioner's persistence in pursuing

his high school education despite his circumstances; (6) Petitioner's employment and work ethic; (7) Petitioner's aneurysms; (8) lack of juvenile criminal history; (9) remorse for victims. Dr. Hartig also testified Petitioner seemed to lack problem solving abilities due to the traumatic brain event.

The judge found eight aggravating circumstances had been proven beyond a reasonable doubt during Petitioner's penalty phase. The trial court merged one and two and gave that aggravator great weight. The trial court merged five and seven, giving the second aggravator moderate weight; then merged three and six, giving this aggravator great weight. The trial court gave four no weight and gave eight substantial weight. [1] Based on his fact-finding, the judge sentenced Petitioner to death.

B. Direct Appeal-Decision Below

On May 14, 2020, the Florida Supreme Court issued an opinion affirming the conviction and sentence. App. A1-20, *Smiley v. State*, 295 So.3d 156 (Fla. 2020). The Florida Supreme Court's opinion held Petitioner was not entitled to relief on

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[1] The aggravating circumstances found by the judge were: (1) a previous conviction for a capital felony; (2)-(6) the defendant was previously convicted of a prior violent felony [one prior convictions related to Riley four related to the Drake murder]; (7) the crime was committed during the commission of a burglary of a dwelling with an assault or battery while armed; and (8) the first-degree murder was committed for pecuniary gain.

The mitigating circumstance found by the judge was: (1) no significant history of criminal activity (moderate weight); (2) the defendant was under the influence of an extreme mental or emotional disturbance at the time of the crime (little weight); (3) capacity to appreciate the criminality of conduct and conform conduct to the requirements of the law was substantially impaired (little weight); (4) age at time of crime (little weight); (5) existence of any other factors in defendant's character, background, life, or the circumstances of the offense that would mitigate against the imposition of the death penalty (moderate weight).

the four guilt phase issues and five penalty phase issues raised. The appellate issues and the Florida Supreme Court's basis for denial are summarized as follows:

Issue I: The trial court erred in finding the State did not commit a discovery violation and failed to make adequate findings under Richardson v. State, 246 So.2d 771 (Fla. 1971).

In Issue I Petitioner argued the State's disclosure for the first time on the fifth and final day of trial of a photo (State's Exhibit 161) seen by a detective a year before trial from Petitioner's Facebook page was a discovery violation. Exhibit 161 was not downloaded or identified as evidence until after Samantha Lee testified. The State alleged Lee gave the state attorney the photo after her testimony. Defense counsel objected and argued the defense was prejudiced by the late disclosure because Exhibit 161 was different than previously disclosed Exhibit 162 in that it highlighted differences in Petitioner's height, weight, and skin complexion with that of the co-perpetrator, Casey Bisbee, *aka* "Big Jit". The State acknowledged Exhibit 161 better supported the State's case than the previously disclosed Exhibit 162. Defense counsel argued that detective's knowledge of the photo on the Facebook page was imputed to the State. The defense theory of the case was that Bisbee was the shooter and that Petitioner was not involved in the murder of Mr. Drake. Defense counsel did not make a specific reference to the rule of criminal procedure governing the State's discovery obligation, Fla. R. Crim. P. 3.220. On appeal Petitioner argued the State committed a discovery violation as the viewing of the photo by the detective a year previous was charged to the State and that the State was required to disclose even items obtained from the a defendant

under Rule 3.22(b)(1)(F). Petitioner argued he was procedurally prejudiced because to the extent the physical dissimilarities between Petitioner and Big Jit were a material issue at trial and had the defense known the State intended to use Exhibit 161, trial preparation and strategy would have been different.

The Florida Supreme Court held there was no discovery violation because trial counsel failed to make a specific objection that the prosecutor had a continuing duty to disclose any tangible objects that were obtained from or belonged to the defendant under Fla. R. Crim. P. 3.220(b)(1)(F). The Florida Supreme Court ruled defense counsel's general objection had been under Rule 3.22(b)(1)(K) or (J). The Florida Supreme Court further found that even if the State had committed a discovery violation, it would conclude beyond a reasonable doubt that Petitioner suffered no procedural prejudice. The Florida Supreme Court held that Petitioner should have been aware that the State had possession of Exhibit 161 and that the State had viewed Petitioner's Facebook page. The Florida Supreme Court held Petitioner should have anticipated the State would potentially use other means besides Exhibit 162 to present evidence of the differences between Petitioner and Big Jit and should have prepared accordingly. The Florida Supreme Court found no abuse of discretion by the trial court's ruling no discovery violation had occurred.

Issue II: Exhibits 161 and 162 were erroneously admitted without proper authentication and where the prejudicial impact outweighed the probative value.

Petitioner argued the State failed to properly authenticate Exhibits 161 and 162 because there was no testimony about who took the pictures, when the photos were taken, where the photos were taken, and how the photos was generated to

Petitioner's Facebook page or maintained there. Exhibit 161 was not removed from Facebook by the testifying witness and that witness had no idea where the copy of the photograph given to the State came from. The Florida Supreme Court found no error in the authentication of the photos because the testifying witness could identify both individuals in the photos and he had seen both photos on Petitioner's Facebook page. Additionally, Petitioner did not dispute that he and Bisbee were depicted in the photos when cross-examined by the State.

Petitioner argued the prejudicial impact of the photos outweighed their probative value because in Exhibit 161 Petitioner was holding a liquor bottle and Bisbee is gesturing as if he had a gun. In Exhibit 162 Petitioner is making a similar gun gesture and Bisbee is holding what appears to be a blunt.

The Florida Supreme Court found there was no error in the admission of the two photos because the photos supported the State's theory of the case that Petitioner and Bisbee were friends and the identity and appearance of Petitioner's accomplice to the crimes were material issues in the case. Further, the photos may have been unflattering, but were not inflammatory or improperly directed at the jury's emotions.

Issue III: Reversible error occurred when co-perpetrator John McDonald testified on cross-examination that he knew Petitioner had gloves with him in the Drake murder because "…we normally operate like that, we normally use gloves."

Petitioner argued defense counsel's motion for mistrial after McDonald's improper comments should have been granted because the comments were indicative of a pattern of uncharged criminal conduct, resulting in undue prejudice.

The Florida Supreme Court denied relief, finding defense counsel invited the response and declined a curative instruction. Further, the Florida Supreme Court found the reference was vague, lacked details about other crimes, and did not rise to the high legal standard which justifies a mistrial.

Issue IV: Reversible error occurred when John McDonald testified Petitioner was facing the death penalty as a reason that he considered changing his testimony to deny any involvement in the Drake murder.

Petitioner argued it was reversible error for McDonald to have informed the jury the State was seeking the death penalty in this case when the parties had agreed that the impaneled jury for guilt phase would not be informed of the possible penalty and had not been death qualified as required under Florida statutes and rules governing capital cases. The Florida Supreme Court held the "fleeting isolated comment" did not meet the high standard for a mistrial.

Issue V: The prosecutor's statements during voir dire that her office had 60 pending first-degree murder cases and only nine of them were death eligible and that meant that even if you were charged with first-degree murder your case would not automatically qualify as one in which the death penalty would be sought was reversible error.

Petitioner argued that the prosecutor's statements in voir dire were sufficiently prejudicial to have required the striking of the venire panel, as defense counsel ultimately requested. The Florida Supreme Court stated it did not condone the comments, cautioning prosecutors to discuss the concept that not every case is death eligible without telling the jury that the government seeks death in only a subset of first-degree murder cases. However, the Florida Supreme Court concluded the context in which the comments were made was not to direct an appeal to the

jury give weight to the decision made by the State to seek death and fell short of what would be required to justify striking the venire.

Issue VI: Reversible error occurred when the penalty phase jury heard testimony that Petitioner possessed and discharged a firearm after the guilt phase jury failed to make those special findings present on the verdict form as to Counts 2, 4, and 5 of the Indictment.

Petitioner argued that because the jury failed to make specific findings delineated on the guilt phase verdict form that Petitioner possessed or discharged a firearm precluded presentation of evidence in the penalty phase that Petitioner actually possessed and discharged a firearm. The guilt phase jury, after determining what level of offense had been committed, was asked to find specifically whether or not Petitioner had actual possession of a firearm by checking that finding and was instructed on the verdict form that if none applied, to leave the special findings blank on counts 2, 4,and 5. The jury left each of the special findings blank, but convicted Petitioner "as charged" as to each count, including Count 1. Petitioner argued in the trial court that the jury verdict was consistent with the defense position that Bisbee, not Petitioner, was the actual shooter and that, if anything, Petitioner was the second man since the victim could not identify the actual shooter. On appeal Petitioner argued that criminal jury verdicts are required to be certain and devoid of ambiguity. The guilt phase jury's failure to make specific findings as required on the guilt phase jury verdict form and by leaving them blank was either unclear or consistent with the verdict form that if none applied, no boxes on the special findings were to be checked.

The Florida Supreme Court concluded the argument was without merit because the jury's verdict was "as charged in the Indictment" and Count 1 of the Indictment alleged Mr. Drake was killed by shooting with a firearm. The Florida Supreme Court concluded that by finding Petitioner guilty on Count 1, the guilt phase jury made the requisite finding. The Florida Supreme Court acknowledged the failure of the guilt phase jury to make special findings on the remaining counts, noting it was not clear why the guilt phase jury failed to do so. The Florida Supreme Court speculated the failure may have been viewed as redundant by the guilt phase jury, or that the guilt phase jury may have believed the special findings related to only one victim.

Issue VII: The closing arguments of both the prosecutor and defense counsel were so fraught with error as to deny Petitioner a fair trial under the 5th, 6th, and 8th Amendments to the United States Constitution.

State Closing Argument: Petitioner argued the State improperly commented on Petitioner's exercise of his right to trial; argued for an uncharged aggravating factor; likened this case to Jeffery Dahmer; identified deterrence as a rationale for the death penalty, made improper Golden Rule arguments; and told the jury sympathy could play no role in their determination of whether death was appropriate. Petitioner also argued the State improperly misstated the law on mitigation, denigrated his mitigation evidence, and sought to treat the mitigating evidence as nonstatutory aggravation. The Florida Supreme Court held these statements were not error when taken in context.

Petitioner also argued the State's argument this case had eight aggravating factors was error under existing Florida law. The Florida Supreme Court found this argument was not objected to and did not fatally skew the jury's weighing of aggravators and mitigators.

Defense Closing Argument: Petitioner argued defense counsel rendered ineffective assistance of counsel during his closing argument when he conceded eight or nine aggravators had been proven and told the jury to vote for the death penalty; stated Petitioner was part of a continuing criminal enterprise; and conceded portions of the State's argument that brain aneurysms are not mitigation. The Florida Supreme Court did not address this claim, instead deferring these questions to post-conviction.

VIII: Reversible error occurred when the verdict form and trial court's jury instructions allowed the jury to treat each of Petitioner's five prior violent felony convictions as separate aggravators instead of a single aggravator. Petitioner further argued the verdict form should not have required the jury to vote on each mitigating circumstance individually.

Petitioner argued the penalty phase verdict form and jury instructions in this case deviated from those approved by the Florida Supreme Court just prior to his trial in *In re Standard Jury Instructions in Criminal Cases*, 214 So.3d 1236 (Fla. 2017). Petitioner argued that Florida law permitted a single aggravating factor, that the defendant has prior violent felony convictions, irrespective of the number of actual convictions. Thus, Petitioner's five prior violent felony convictions stemming from the Riley and Drake cases would count as a single aggravating factor instead of six separate and distinct aggravating factors. The number of prior convictions

could be considered in the weight assigned to this single aggravating factor. Petitioner argued that instructing the penalty phase jury to consider each prior conviction as a separate and distinct aggravating factor was contrary to established Florida law and precedent, prejudiced him by overstating the number of aggravating factors actually present in this case, and resulted in a failure to properly narrow the class of cases in which death was appropriate and was arbitrary and capricious. Petitioner argued this was fundamental error because defense counsel did not object to the deviation from the established practices of forty-seven years.

The Florida Supreme Court found no error in this process, finding a separate voting on each underlying conviction could add clarity to the jury's findings and could be helpful if any of the prior convictions were subsequently invalidated.

The Florida Supreme Court rejected Petitioner's argument that the presentation of this case as having eight aggravating factors instead of two aggravating factors that would apply under the law, holding that presumably the jury could find only a single aggravating circumstance, but could give it greater weight based on the existence of multiple convictions. The Florida Supreme Court concluded the jury instruction in this case that the jury could consider each prior conviction as a separate, distinct aggravating factor was error, but the error fell short of being fundamental error.

Petitioner argued the penalty phase verdict form erroneously required the jury to vote on each mitigating circumstance delineated on the verdict form.

Petitioner argued this was error because it impermissibly limited mitigation to only those circumstances enumerated on the verdict form and that this practice was contrary to the standard verdict form adopted after Petitioner's penalty phase in *In re Standard Criminal Jury Instructions in Capital Cases*, 244 So.3d 172 (Fla. 2018). The Florida Supreme Court found no merit to this claim.

Issue IX: Multiple deficiencies in the trial court's sentencing order required reversal.

Petitioner argued the trial court failed to perform an *Enmund/Tyson* analysis due to lack of clarity in the jury verdict as to which of the two men present at the time of the murder actually killed Mr. Drake. The Florida Supreme Court rejected this claim, finding the guilt phase verdict sufficiently established Petitioner was the actual shooter.

Petitioner argued the trial court improperly over counted the number of aggravating factors, finding there were five instead of the two permitted by statute. The Florida Supreme Court found "any error in the trial court's merger analysis was harmless" because the trial court found this to be a highly aggravated case. The Florida Supreme Court dismissed any concerns that the trial court overstated the number of aggravating factors because the facts supporting those aggravating factors would have added sufficient weight to support the trial court's findings if the number of aggravating factors were reduced.

Petitioner argued the trial court's sentencing order failed to consider each proposed nonstatutory mitigating circumstance. The Florida Supreme Court found the trial court's sentencing order did not address the nonstatutory mitigating

circumstances with the specificity required under decisional precedent because the nonstatutory mitigation was not so substantively similar that it could be grouped into catch-all categories the trial court used. The Florida Supreme Court considered this error to be harmless.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE FLORIDA SUPREME COURT IN *SMILEY V. STATE*, 295 So. 3d 156 (Fla. 2020), VIOLATES THE EIGHTH AMENDMENT BAN ON CRUEL AND UNUSUAL PUNISHMENT AND THE FOURTEENTH AMENDMENT GUARANTEE OF EQUAL PROTECTION WHERE THE SENTENCING PROCEDURES APPROVED BY THE FLORIDA SUPREME COURT RESULTED IN A PROCESS THAT UNCONSTITUIONALLY ENHANCED THE CONSIDERQATION AND CALCULATON OF THE AGGRAVATING FACTORS AND UNCONSTITUIONALLY MINIMZED THE CALCULATION AND WEIGHT OF THE MITIGATING CIRCUMSTANCES.

A. The Florida Supreme Court's Approval of a Process Where the Jury and Trial Court Considered and Weighed a Separate and Distinct Aggravating Factor For Each Individual Prior Violent Felony Conviction Instead of Considering a Single Aggravating Factor For the Aggregate Number of Prior Violent Felony Convictions Resulted in a Process That Vastly Enhanced the Aggravation in This Case Compared to Other Cases Which Resulted in a Death Sentence That Is Unreliable and Failed to Adequately Narrow the Class of Persons Subject to Capital Punishment

1. Historical application of the prior violent felony aggravator in Florida capital sentencing

Pre-*Hurst*

Florida's death penalty statute enacted subsequent to *Furman v. Georgia*, 408 U.S. 238 (1972), delineated the method by which death eligibility would be determined in order to satisfy *Furman's* constitutional mandate and was found to be constitutional in *Proffit v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). Florida Statute Section 921.141 identifies the statutory aggravators the

State may use to support a death sentence. The defendant's prior conviction of a violent felony is one of those enumerated statutory aggravators.

The Standard Jury Instruction for the prior violent felony aggravator read:

> The capital felony was committed by a person previously convicted of [another capital felony][a felony involving the [use][threat] of violence to the person].

The jury was then instructed by the trial court what prior convictions of the defendant qualified as a prior capital felony or prior violent felony.

Since the inception of Florida's death penalty in 1973, post-*Furman* juries, in their advisory role, considered a single aggravating factor of prior violent felony conviction irrespective of the number of prior violent felony convictions a defendant had. The jury could assign weight to the single aggravating factor to account for multiple prior violent felony convictions. Thus, a jury considering a sentencing recommendation for a defendant with three prior violent felony convictions was instructed and would have considered a single aggravating factor, not three separate and distinct aggravating factors. Then the jury determined what weight to give that single aggravating factor. Under Florida case law "[i]f a defendant has multiple convictions for prior violent felonies, the trial court can only find a single aggravating circumstance, but it may give that circumstance greater weight based on the existence of multiple convictions." *Bright v. State*, 90. So.3d 249, 261 (Fla. 2012)

Post-*Hurst*

In 2016, this Court invalidated Florida's death penalty sentencing scheme, holding the jury, not judge, is constitutionally required to find the facts necessary to support a death sentence and not serve in an advisory capacity to the trial court in *Hurst v. Florida*, 136 S.Ct. 616 (2016). In response, the Florida Supreme Court in *Hurst v. State*, 202 So.3d 40, 54 (Fla. 2017), held that in addition to finding the existence of any aggravating factor, the jury also had to unanimously find the aggravating factors are sufficient for the imposition of death and unanimously find that the aggravating factors outweigh the mitigation before a sentence of death can be considered by the judge.[2] The Florida legislature subsequently enacted Ch. 2017-1, Laws of Florida, which went into effect on March 13, 2017. Approximately 30 days later, the Florida Supreme Court approved criminal jury instructions for capital sentencing proceedings in *In Re Standard Jury Instructions in Capital Cases*, 214 So.3d 1236 (Fla. 2017). With regard to aggravating factors, the jury instruction states:

> An aggravating factor is a standard to guide the jury in making the choice between recommending life imprisonment without the possibility of parole or death. It is a statutorily enumerated circumstance that increases the gravity of a crime or the harm to a victim.

In the Final Instructions in Penalty Phase Proceedings- Capital Cases, the newly adopted standard jury instruction again told the jury an "aggravating factor is a circumstance that increases the gravity of a crime or the harm to a victim. No

[2] The Florida Supreme Court has subsequently overruled *Hurst v. State*, 202 So.3d 40 (Fla. 2017), in *State v. Poole*, 297 So.3d 487 (Fla. 2020), *cert. petition docketed*, (U.S. September 1, 2020). *Poole* reversed *Hurst's* requirement of jury unanimity in the jury recommendation of death and unanimous jury findings as to all the aggravating factors that were proven beyond a reasonable doubt, that the aggravating factors are sufficient to impose death, and that the aggravating factors outweigh the mitigating circumstances.

facts other than proven aggravating factors may be considered in support of a death sentence." Fla. Standard Jury Instruction 7.11(a).

The newly adopted jury instructions made no changes to the jury instruction defining the prior violent felony aggravator or to the trial judge's instruction to the jury delineating which of the defendant's prior convictions were classified as either a capital or prior violent felony.

Finally, the newly adopted instructions informed the jury that they would be required to weigh the aggravating factors and the mitigating circumstances. The jury instructions advised the jury that certain aggravating circumstances would merge with each other and that if this was done, the merged factor could only be considered as one aggravator in the weighing process. The jury is then instructed that they must weigh whether the aggravating factors have been found to exist are sufficient to justify the death penalty, whether the aggravating factors outweigh any mitigating circumstances found to exist, and, based on all of the considerations pursuant to these instructions, whether the defendant should be sentenced to life imprisonment. As to the weighing process, the jury was to be instructed:

> The process of weighing aggravating factors and mitigating circumstances is not a mechanical or mathematical process. In other words, you should not merely total the number of aggravating factors and compare that number to the total number of mitigating circumstances. The law contemplates that different factors or circumstances may be given different weight or values by different jurors. Therefore, in your decision-making process, each individual juror must decide what weight is to be given to a particular factor or circumstance. Regardless of the results of each juror's individual weighing process- even if you find that the sufficient aggravators outweigh the mitigators -the law neither compels nor requires you to determine that

the defendant should be sentenced to death.

These jury instructions were authorized for immediate use. Two weeks later Petitioner's penalty phase began.

2. The use of the prior violent felony aggravator in Petitioner's case

For inexplicable reasons, the prior violent felony aggravator was applied in Petitioner's case in a manner that appears never to have been done before in Florida. Instead of using the prior violent felony aggravator as is has been done for forty-seven years, in this case the State obtained a jury vote on six separate and distinct prior violent felony aggravators- one for each prior or contemporaneous prior violent felony conviction Petitioner had between this case and the Riley case.

Under the accepted method of calculating aggravating factors in the State of Florida, Petitioner's case was a two aggravator case. This case was a two aggravator case based on the applicability of the prior violent felony and/or prior capital felony convictions and the merger of two additional aggravating factors- the murder was committed for pecuniary gain and that the murder was committed while the defendant was engaged in the commission of a robbery-into a single aggravator consistent with Florida law. Instead, Petitioner's jury deliberated, considered, and weighed this case as an eight aggravator case.

The error began with opening statements, where the prosecutor told the jury they would be required to consider eight separate aggravating factors and continued as a theme of the State's closing argument, delineating each aggravating factor as follows

1. one prior capital felony for the death of Carmen Riley;
   one prior violent felony for the armed robbery of Riley;
2. one prior violent felony for the Robbery of Mark Wilkerson and Clifford Drake
3. one prior violent felony for the aggravated assault with a firearm of Mark Wilkerson;
4. one prior violent felony for the burglary of the Drake residence;
5. murder happened during the commission of a robbery;
6. murder happened during the commission of a burglary;
7. the murder was committed for pecuniary gain.

The State repeatedly highlighted the number of aggravating factors, emphasizing that this case was extremely aggravated.

Defense counsel conceded in his closing argument the State had proven seven or eight aggravating factors.

The Florida Supreme Court stated "… the trial court's jury instructions allowed the jury to treat each of Smiley's five prior violent felony convictions as a separate aggravator. Specifically, the verdict form identified and listed each prior violent felony individually and asked the jury to record its vote on each." *Smiley v. State*, 256 So.3d at 174. No objections were made to the jury instructions or verdict forms.

The trial court did not give the standard jury instructions recently adopted by the Florida Supreme Court or the jury instructions provided by the parties that the trial court appeared to approve. Instead, the trial court rejected the proposed instructions agreed to by the parties and used instructions and verdict forms he created. The jury was instructed that the "weighing process is not 'mechanical or mathematical' and that the jury therefore 'should not merely total the number of

aggravating factors and compare that number to the total number of mitigating circumstances.'" *Smiley v. State*, 295 So.3d at 175.

The Florida Supreme Court reviewed the claim of error under the fundamental error doctrine. The Florida Supreme Court found there was no fundamental error, stating: "There is nothing in the death penalty sentencing statute or in our case law that prohibits asking the jury to separately indicate its findings on a prior violent felony underlying the prior violent felony aggravator. Indeed, we have observed in evaluating the weight of the prior violent felony aggravator, "the facts upon which the aggravator is based are critical to our analysis." *Bevel v. State*, 983 So.2d 505, 514 (Fla. 2008). Voting separately on each underlying conviction also adds clarity to the jury's findings and could be helpful if any particular conviction is subsequently invalidated." *Ibid.*, at 175.

The same error of over-counting the aggravators extended to Petitioner's sentencing hearing by the trial court. Again, instead of considering this as a two aggravator case under Florida law, the trial court improperly grouped the two aggravators related to the Riley case on one aggravator; one combined aggravator for the prior convictions of assault and robbery of Mark Wilkerson and for the Drake murder committed during the robbery of Wilkerson; one combined aggravator for the contemporaneous conviction for burglary with an assault or battery during the commission of a burglary and the fact the Drake murder was committed during a burglary; and one aggravator for pecuniary gain, for a total of four aggravators. The Florida Supreme Court held the trial court's error in

considering double the number of permissible aggravators to be harmless error because the trial court found this to be a highly aggravated murder and each of the aggravators was proven by the facts. *Ibid., at175- 176.*

3. The decision of the Florida Supreme Court is error because it violates the Eighth Amendment's ban on cruel and usual punishment and the Fourteenth Amendments' guarantee of equal protection.

The Florida Supreme Court's glossing over the clear error in this case violates the Eighth Amendment's ban on cruel and usual punishment. The result of the decision is that Petitioner is the only person on Florida's death row to have the prior violent felony aggravator applied in the manner in which it was done in his case- to allow the jury and trial court to consider each prior violent felony conviction as a separate, stand-alone aggravating circumstance. As a consequence of this gross deviation from established law and practice, the sentencing result is unreliable. The grossly inflated number of aggravators in this case failed to properly ensure that the Eighth Amendment's requirement that death eligibility be reserved for only the most aggravated and least mitigated of cases and that a death sentence be imposed in a fair, consistent, and reliable manner. Instead, the sentencing process in this case resulted in a sentencing process that is not fair, consistent, or reliable, but was instead arbitrary and capricious and failed to properly narrow death eligibility.

In *Tuilaepa v. California*, 512 U.S. 967, 971, 114 S.Ct. 2630, 129 L.Ed.2d 750 (1994), identified two aspects of the capital decision making process- eligibility and selection. Because the death penalty is reserved for only a subset of those who

commit murder, the trier of fact must find at least one aggravating circumstance in order for a defendant to be eligible for the death penalty. This finding serves to narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder. *Zant v. Stephens*, 462 U.S. 862, 877, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983). The selection decision involves determining "whether a defendant eligible for the death penalty should in fact receive that sentence. *Tuilaepa*, 512 U.S. at 972, 114 S.Ct. 2630. The selection decision must be an individualized determination that assesses the defendant's culpability, taking into account the "relevant mitigating evidence of the character and record of the defendant and the circumstances of the crime." *Id.* The Florida Supreme Court's decision denied Petitioner a constitutional selection process by substantially increasing the number of aggravating factors to six instead of one. The consideration of six factors and the assignment of weight to six factors instead of one unduly emphasized the level of aggravation in this case.

The Fourteenth Amendment equal protection clause protects classes and individuals from being treated arbitrarily without a legitimate justification. *Clements v. Fashing*, 457 U.S. 957, 963, 102 S.Ct. 2836, 73 L.Ed.2d 508 (1982). Petitioner is the only inmate on Florida's death row to have had a penalty phase jury consider a separate and distinct aggravating factor of each prior violent felony conviction. Petitioner is the only inmate on Florida's death row to have what should have been a two aggravator case converted to an eight aggravator case by

exponentially increasing the number of aggravating factors in a manner never previously done. As a result of the grossly over-stated number of aggravating factors, it cannot be said that the death penalty in this case is fair, consistent or reliable and that Petitioner falls within the narrow subset of murders for which death is reserved.

B. The Florida Supreme Court's Approval of a Process Where the Jury Was Required to Consider and Make Findings of a List of Non- Statutory Mitigating Circumstances and the Trial Court's Failure to Consider and Weigh Each Non-Statutory Mitigating Circumstance Resulted in a Process That Undercounted and Weighed the Mitigation In This Case Resulting in a Death Sentence That is Unreliable

1. The treatment of mitigating circumstances on the jury verdict form and by the trial court at sentencing in this case.

The penalty phase verdict form in this case required the penalty phase jury to vote on each statutory and non-statutory mitigating circumstance and then to record their numerical vote on each. The verdict form listed four possible statutory mitigating circumstances and three broad categories of non-statutory mitigating circumstances. The non-statutory mitigation was listed as the defendant's character, background, or mitigation related to the life of the defendant. Trial counsel objected to this form, which had been created by the trial court. The penalty phase jury's recorded verdict suggested the jury rejected most of the mitigation presented.

The Florida Supreme Court found there was no error to the penalty phase jury instructions and penalty phase verdict form as they related to mitigating circumstances. The Florida Supreme Court found no error to the jury instructions,

despite the fact that the jury instruction ultimately approved by the Florida Supreme Court in *In re Standard Criminal Jury Instruction in Capital Cases*, 244 So.3d 172 (Fla. 2018), differed from the instructions given in this case. *Smiley v. State*, 295 So.3d at 175.

The trial court failed to properly consider the non-statutory mitigating circumstances in the sentencing order. The trial court took the non-statutory mitigating circumstances and stated it had "examined the evidence pertaining to the Defendant's life prior to the age or seventeen (when he left home), after he left his home, the reported brain aneurysms, and the Defendant's conduct after the brain injury." *Ibid*, at 176. When the trial court addressed and evaluated all the non-statutory mitigation in a single paragraph and concluded those circumstances warranted "moderate weight." *Ibid*.

Florida law has required the trial court to consider each non-statutory mitigating circumstance individually. The trial court must expressly evaluate each non-statutory mitigating circumstance to determine whether it is supported by the evidence and whether it is truly of a mitigating nature. Bundling of mitigating circumstances is permitted only if the non-statutory mitigating circumstances are grouped by related conduct. *Ibid*, at 176-177. The Florida Supreme Court found the trial court's sentencing order failed to address Petitioner's nonstatutory mitigating circumstances "with the specificity that *Campbell* and its progeny require." *Ibid*., 177. The Florida Supreme Court determined the trial court's bundling was

improper because the mitigation in Petitioner's case were "too substantively dissimilar from each other to be addressed as a whole." *Ibid*.

The Florida Supreme Court found the error to be harmless. The Court determined there was "no reasonable possibility that Smiley would have received a lesser sentence absent the trial court's error". *Ibid., at 178.*

2. The decision of the Florida Supreme Court is error because it violates the Eighth Amendment's ban on cruel and usual punishment and the Fourteenth Amendment guarantee of equal protection.

Under Florida law, penalty phase juries are not limited in their consideration of mitigation. All relevant circumstances may be considered in mitigation. The statutory factors merely indicate principal factors to be considered. *Songer v. State*, 365 So.2d 696 (Fla. 1978). Review must be expansive enough to accommodate all relevant mitigating circumstances. *Tuilaepa v. California*, 512 U.S. at 973. The finding of eligibility [an applicable aggravating factor] and selection [the assessment of mitigation not subject to a mathematical calculation] in the same process often creates tension. *Ibid.* The duty of the State is to create a process that is neutral and principled to guard against bias or caprice in the sentencing determination by the jury. *Ibid*. The use of a penalty phase verdict form that required to jury to choose from a finite list of statutory and non-statutory mitigating circumstances failed to meet that standard.

In Petitioner's case the requirement that the penalty phase jury vote on a restrictive list of mitigation, both statutory and non-statutory, on the verdict form and record their vote as to each of those items unconstitutionally limited the jury's

ability and duty to consider all relevant mitigating circumstances. Requiring the jury to vote on a catch-all of non-statutory mitigating circumstances necessarily excludes any non-statutory mitigating circumstance not itemized on the penalty phase verdict form from consideration by the jury. As a result, the selection function of the capital sentencing process is fatally flawed because it fails to meet the Eighth Amendment's requirement that death is restricted to only the most aggravated and least mitigated of cases and that the death penalty is administered in a fair, consistent and reliable manner.

In Petitioner's case the penalty phase jury's consideration of mitigation was implicitly limited by the verdict form and the trial judge failed to properly consider each circumstance by what was acknowledged by the Florida Supreme Court as an improper bundling of disparate mitigating circumstances. As a result, the Eighth Amendment's restriction on when a death sentence can be imposed was fatally compromised. The Florida Supreme Court's determination that the manner in which the mitigation in this case was considered and weighed is incorrect.

The compounding of these two errors, especially when coupled with the error in the excessive number of aggravators resulted in Petitioner being arbitrarily treated in a manner different from every other Florida death row inmate- a distinction without justification in violation of equal protection under the Fourteenth Amendment.

II. THE DECISION OF THE FLORIDA SUPREME COURT IN *SMILEY v. STATE*, 295 So. 3d 156 (FLA. 2020), VIOLATES THE SIXTH AMENDMENT'S GUARANTEE OF A FAIR TRIAL BY AN IMPARTIAL

JURY AND THE FOURTEENTH AMENDMENT'S GUARANTEE OF EQUAL PROTECTION BY UNCONSTITIONALLY PERMITTING THE SENTENCING JURY TO BE INFLUENCED BY KNOWLEDGE THAT THE OFFICE OF THE STATE ATTORNEY HAD SIXTY PENDING CASES, BUT WERE SEEKING THE DEATH PENALTY IN ROUGHLY 10% OF THOSE, OF WHICH THIS CASE WAS ONE.

A. Factual Basis

During the prosecution's penalty phase voir dire the venire was asked if anyone felt strongly that anyone convicted of first-degree murder should receive the death penalty. The prosecutor then directed her questions to one potential juror who had already indicated strong support for the death penalty, asking that juror if a conviction for first-degree murder should carry an automatic death sentence. The juror started to answer, but was then interrupted by the prosecutor, who stated "Do you understand that in Florida not every case meets the qualifications for a death penalty?" The prosecutor continued:

> 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 juror responded affirmatively when asked if he agreed with that. The prosecutor then noted the juror had indicated strong support of the death penalty and asked if the juror could follow the law and hold the State to its burden and consider and weigh both the aggravating factors and mitigating circumstances. No objection was made by defense counsel. *Smiley v. State*, 295 So.3d 156, 169-170 (Fla. 2020).

The prosecutor then continued voir dire, asking the next juror who was also a strong death penalty proponent, if that juror would automatically impose a death sentence. The juror said "No", and the prosecutor continued "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?" After the juror answered they understood that, the prosecutor continued "All right. So like I said, we have lots of cases but we don't- there are only cases that meet that –". At this point defense counsel objected. *Ibid.,* 170.

Defense counsel began by acknowledging he had not contemporaneously objected to the first question, but anticipated where this questioning was going. Defense counsel objected, stating the comments were very prejudicial and ultimately asked to strike the panel. The objection was upheld, but the request to strike was denied. *Ibid.*, 170.

Ultimately, seven of the twelve jurors who served on the penalty phase jury heard these inflammatory statements from the prosecutor.

B. Decision of the Florida Supreme Court

The Florida Supreme Court stated "We do not condone the prosecutor's comments. The State can and should explain the concepts of death eligibility, aggravation, and mitigation without telling the jury that the government seeks the death penalty in only a subset of first-degree murder cases. But the prosecutor's statements here fell far short of what would be required to justify striking the venire and starting over again, and the trial court did not abuse its discretion in

denying Smiley's request." *Ibid.*, 171. The Florida Supreme Court did not address any deficiencies in the objections made by trial counsel.

C. The decision of the Florida Supreme Court is erroneous where the actions of the prosecutor in this case violated the Sixth Amendment right to a fair trial and impartial jury and the Fourteenth Amendment's guarantee of equal protection.

The Florida Supreme Court properly recognized the prosecutor's comment erroneous and should never be used in voir dire. The Florida Supreme Court failed to correctly analyze the prejudicial implications of these comments on Petitioner's Sixth Amendment right to a fair trial and impartial jury.

Petitioner has a right to a fair and impartial jury. Comments such as these have been found to be objectionable in penalty phase proceedings because such comments constitute improper vouching by the prosecutor for a vote of death and encourage the jury to rely on the composite judgment of the prosecution instead of their own independent judgment when considering whether death is the appropriate punishment. Prior decisions of the Florida Supreme Court have resulted in new trials in capital proceedings for similar statements made in closing arguments. *See*, *Pait v. State*, 112 So.2d 380 (Fla. 1959); *Brooks v. State*, 762 So.2d 879 (Fla. 2000); *Ferrell v. State*, 29 So.3d 959, 988 (Fla. 2010).

In *Braddy v. State*, 111 So.3d 810 (Fla. 2012), the prosecutor made statements in several statements in closing argument which were objected to as error because the comments were improper vouching. The first line of comments advised the jury that not every case was a death case, and that determination as made by looking at each individual case and then taking that case to a jury of peers

to have that jury weight the evidence. The Florida Supreme Court found no error in these comments, as they appropriately advised the jury of the jury's role and the weighing process. The Florida Supreme Court distinguished between comments by the prosecutor about the jury's responsibility to weigh relevant factors, rather than a direct, unambiguous appeal for jurors to give weight to the fact that the State has decided to seek the death penalty. However, a second set of comments the Florida Supreme Court found "raised concern". In these comments the prosecutor stated "that the determination … that the State has to make in bringing a case like this to you as a death penalty case" were more similar to the type of impermissible comments previously rejected in *Pait, Brooks,* and *Ferrell*. However, the Florida Supreme Court found that context mitigated the damage and ultimately determined that issue was not properly preserved because defense counsel failed to obtain a ruling on his objection to the problematic comments.

Using *Braddy*, the Florida Supreme Court erroneously determined the prosecutor's comments in this case were not error due to context. The decision of the Florida Supreme Court ignores the full content of the prosecutor's comments in this case and ignores the Sixth Amendment implication these comments had on the penalty phase jury that was to be the sentencer in this case.

In this case the prosecutor clearly communicated to the jury that a weighing process had already occurred in this case and that it had been determined that this case was one in which death was appropriate. The prosecutor informed the venire that of 60 pending first-degree murder cases in the office, the prosecutor's office had

determined that only eight or nine (little more than 10%) met the criteria to move through the judicial process as death penalty cases. The impropriety of these comments was acknowledged by the Florida Supreme Court. However, the Florida Supreme Court unconstitutionally underestimated the impact of these comments on the jury and failed to consider the heightened prejudice these comments would have when the penalty phase jury is the sentencer.

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 she, or another higher authority, has already made the careful decision necessary in the penalty phase. Such comments impinged on a defendant's Sixth Amendment right to a fair trial and impartial jury. The comments in this case are no less significant than those in *Brooks*. In *Brooks* the prosecutor told the jury his office had sought the death penalty only six or eight times, less than a dozen times. *Ibid*. 1395. The court found this comments on prosecutorial expertise particularly troubling. *Ibid.*, 1410. There is nothing less troubling about the statistical data presented to the jury in Petitioner's case by the prosecutor than argument citing the same type of statistical data in *Brooks*. Petitioner's jury was told that the prosecutor had already determined that fifty-one other pending first-degree murder cases did not warrant a death penalty prosecutor, but his did.

The importance of the jury's determination in death cases has changed dramatically in Florida. At the time of *Brooks v. Kemp, Braddy, Pait, Ferrell, and*

Brooks v. State, the jury gave only a sentence recommendation to judge, who ultimately determined the sentence. However, since judge-determinant sentencing was struck down by this Court in *Hurst v. Florida*, 136 S.Ct. 616 (2016), the jury in Florida is now the sentencer. Any error that resulted in prejudice sufficient to warrant reversal when the penalty phase jury's duty was to provide only a sentencing recommendation is clearly greater error with equal or greater prejudice now that the penalty phase jury is the sentencer. The danger that the penalty phase jury will be improperly influenced by the imprimatur of the State's greater wisdom or higher authority in determining that death is appropriate is heightened with penalty phase jury sentencing. The Florida Supreme Court's failure to recognize the unconstitutional impact on Petitioner's Sixth Amendment right to a fair trial and impartial jury warrants review.

CONCLUSION

This Court should grant a writ of certiorari to review the decision below.

DATED this 6th day of October 2020.

Respectfully submitted,
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295 So.3d 156
Supreme Court of Florida.

Benjamin Davis SMILEY, Jr., Appellant,
v.
STATE of Florida, Appellee.

No. SC18-385
|
May 14, 2020

Synopsis

Background: Defendant was convicted in the Circuit Court, 10th Judicial Circuit, Polk County, Jalal Harb, J., first-degree felony murder, robbery with a firearm, aggravated assault with a firearm, and burglary of a dwelling with an assault or battery while armed with a firearm and was sentenced to death. Defendant appealed.

Holdings: The Supreme Court held that:

[1] the trial court's determination that the State did not commit a discovery violation when it failed to disclose one photograph of defendant and accomplice to the defense until after trial had started was not an abuse of discretion;

[2] the probative value of two photographs depicting defendant and accomplice together was not outweighed by the danger of unfair prejudice;

[3] defendant failed to establish he was entitled to a mistrial after the State's penalty phase voir dire comments referred to the frequency with which the state attorney's office seeks the death penalty;

[4] the jury's failure to mark spaces on the verdict form that would have allowed it to make special findings about defendant's possession or discharge of a firearm during the commission of the crimes of robbery with a firearm, aggravated assault with a firearm, and burglary of a dwelling with an assault or battery while armed with a firearm did not preclude the State from arguing to the penalty phase jury that defendant was the shooter in the murder;

[5] prosecutor's comments in closing argument in penalty phase of felony murder trial, that defendant suffered a brain aneurysm, and people suffered brain aneurysms all the time and managed to go on with life without murdering people, was not improper denigration of defendant's mitigation evidence;

[6] trial court error in instructing the jury during the penalty phase of felony murder trial that each of defendant's prior violent felony convictions constituted a separate aggravating factor did not amount to fundamental error; and

[7] any error by the trial court when merging aggravating factors was harmless.

Affirmed.

Labarga, J., concurred in the result.

West Headnotes (36)

[1] Criminal Law Failure to produce information

The trial court's determination that the State did not commit a discovery violation when it failed to disclose one photograph of defendant and accomplice to the defense until after trial had started was not an abuse of discretion, during prosecution for felony murder; the record showed that the State had no intention of using the disputed photo at trial until defendant's aunt provided it to the State's investigator after aunt finished testifying at trial, and in its presentation to the trial court, defense counsel acknowledged that the timing of the State's disclosure of the disputed photo reflected neither intentional misconduct nor bad faith. Fla. R. Crim. P. 3.220(b)(1)(K), 3.220(j).

[2] Criminal Law Preliminary proceedings

The Supreme Court applies the abuse of discretion standard to review a trial court's ruling on an alleged discovery violation.

[3] Criminal Law Preliminary proceedings

Appendix "A"

Defendant failed to preserve for appellate review his claim that the State violated the discovery rule requiring disclosure of any tangible papers or objects that were obtained from or belonged to the defendant when it failed to disclose one photograph of defendant and accomplice to the defense until after trial had started, even though the State had seen a copy of the photograph on defendant's social media account prior to trial, during prosecution for felony murder, where defendant made no argument that a photo posted on a publicly accessible social media page should be deemed an object that was "obtained from or belonged to the defendant" for purposes of the rule. Fla. R. Crim. P. 3.220(b)(1)(F).

[4] **Criminal Law** Photographs and videos

The State adequately authenticated photograph of defendant and accomplice, and thus the photograph was admissible during prosecution for felony murder, where police detective, based on his ability to personally to identify both the defendant and accomplice, testified that the photograph depicted those two men, and he further testified that he had seen the photograph on defendant's social media page.

[5] **Criminal Law** Photographs and videos

The proponent of photographic evidence bears the burden of establishing that the evidence is a fair and accurate representation of the events depicted.

[6] **Criminal Law** Photographs and videos

Any witness with knowledge that the photographic evidence is a fair and accurate representation may testify to the foundational facts; the photographer need not testify.

[7] **Criminal Law** Photographs and videos

Authentication of a photograph for the purpose of admission is a relatively low threshold that requires evidence sufficient to support a finding that the photograph in question is what the proponent claims.

[8] **Criminal Law** Evidence dependent on preliminary proofs

The Supreme Court reviews conclusions by the trial court regarding authentication of photographic evidence for abuse of discretion.

[9] **Criminal Law** Evidence calculated to create prejudice against or sympathy for accused

The probative value of two photographs depicting defendant and accomplice together was not outweighed by the danger of unfair prejudice, during prosecution for felony murder, even though photographs depicted defendant holding a liquor bottle and making a gun gesture and accomplice smoking what appeared to be a blunt; the photographs supported the State's theory that defendant and accomplice were close friends and that accomplice was involved in the victim's murder, and the identity and appearance of defendant's accomplice during the murder was a material issue in the case. Fla. Stat. Ann. § 90.403.

[10] **Criminal Law** Evidence calculated to create prejudice against or sympathy for accused

The weighing of probativeness versus unfair prejudice is best addressed by the trial court. Fla. Stat. Ann. § 90.403.

[11] **Criminal Law** Ambiguity; evidence subject to interpretation

Criminal Law Acts done or omitted by defense

The trial court's denial of defendant's motion for a mistrial after defendant's cousin testified that defendant had gloves with him at the time of the murder and stated "[w]hen we normally operate like that, we normally use gloves,"

which allegedly referred to defendant's prior crimes, was not an abuse of discretion, during prosecution for felony murder; defendant's cousin's vague reference to other crimes did not rise to the level of justifying a mistrial, and defense counsel invited the response through his questioning of defendant's cousin.

[12] **Criminal Law** Otherwise irreparable error or prejudice in general

Criminal Law Fairness and justice in general

A motion for mistrial should be granted only when it is necessary to ensure that the defendant receives a fair trial; in other words, a motion for a mistrial should only be granted when an error is so prejudicial as to vitiate the entire trial.

[13] **Criminal Law** Evidentiary Matters

Defendant failed to establish that he was entitled to a mistrial after defendant's cousin, during questioning as to why he considered changing his story to police about his involvement in the murder, testified that defendant faced the death penalty, during prosecution for felony murder; cousin's comment was fleeting and isolated.

[14] **Sentencing and Punishment** Matters Related to Jury

Defendant failed to establish he was entitled to a mistrial after the State's penalty phase voir dire comments referred to the frequency with which the state attorney's office seeks the death penalty, during which the prosecutor stated there were 60 first-degree murder cases pending in the circuit and likely none of them were death eligible; the prosecutor was conveying the point that the law did not permit jurors to vote for the death penalty as an "automatic" punishment for first-degree murder, the prosecutor in fact asked the jurors for assurance they could hold the State to its burden of proving an aggravating factor beyond a reasonable doubt, and the prosecutor did not ask the potential jurors to give weight to the State's decision to seek the death penalty.

[15] **Criminal Law** Issues related to jury trial

The Supreme Court reviews a decision of the trial court to deny a motion to strike the jury panel for abuse of discretion.

[16] **Sentencing and Punishment** Arguments and conduct of counsel

The jury's failure to mark spaces on the verdict form that would have allowed it to make special findings about defendant's possession or discharge of a firearm during the commission of the crimes of robbery with a firearm, aggravated assault with a firearm, and burglary of a dwelling with an assault or battery while armed with a firearm did not preclude the State from arguing to the penalty phase jury that defendant was the shooter in the murder; the jury found defendant guilty of first degree felony murder as charged in the indictment, and the indictment explicitly alleged that defendant killed the victim by shooting him with a firearm.

[17] **Criminal Law** Arguments and conduct in general

Criminal Law Statements as to Facts, Comments, and Arguments

Objected-to closing argument comments are reviewed for harmless error, and unobjected-to comments for fundamental error.

[18] **Sentencing and Punishment** Presentation and reservation in lower court of grounds of review

"Fundamental error" in penalty phase closing arguments is error that reaches down into the validity of the trial itself to the extent that the jury's recommendation of death could not have been obtained without the assistance of the alleged error.

[19] **Sentencing and Punishment** Scope of review

The Supreme Court does not review challenged closing argument comments only in isolation; rather, it considers the closing argument as a whole and determines whether the cumulative effect of any errors deprived the defendant of a fair penalty phase hearing.

[20] **Criminal Law** Scope of and Effect of Summing up

Attorneys are generally afforded wide latitude while presenting closing statements to the jury.

[21] **Sentencing and Punishment** Instructions

The State did not make an impermissible golden rule argument during the penalty phase by saying defendant "has an utter disregard not only [for] the security of your home, of [murder victim's] home, of [prior murder victim's] home, but also he has an utter disregard for the sanctity of human life," during sentencing for felony murder; prohibited golden rule arguments asked the jurors to put themselves in the victim's position and to imagine the victim's pain and terror.

[22] **Sentencing and Punishment** Arguments and conduct of counsel

The State's penalty phase jury argument providing that the their decision to impose the death penalty could not be based on sympathy for the defendant was a correct statements of law, during sentencing for felony murder; caselaw established that it was permissible to tell the jury that it should not base its decision on sympathy for defendant.

[23] **Sentencing and Punishment** Arguments and conduct of counsel

Prosecutor's comments in closing argument in penalty phase of felony murder trial, that defendant suffered a brain aneurysm, and people suffered brain aneurysms all the time and managed to go on with life without murdering people, was not improper denigration of defendant's mitigation evidence regarding his brain aneurysm; the comments were proper arguments going to the weight that the jury should assign to the asserted mitigation evidence.

[24] **Criminal Law** Arguments and comments

Defense counsel's closing argument did not constitute deficient performance, during prosecution for felony murder, where the alleged inadequacies of counsel's closing argument were not indisputable based on the face of the record. U.S. Const. Amend. 6.

[25] **Criminal Law** Conduct of Trial in General

Ineffective assistance of counsel claims usually are not cognizable on direct appeal; the Supreme Court is willing to depart from this general rule in the rare situation where ineffectiveness, both performance and prejudice, is indisputable from the face of the record before it. U.S. Const. Amend. 6.

[26] **Sentencing and Punishment** Instructions

Sentencing and Punishment Presentation and reservation in lower court of grounds of review

Trial court error in instructing the jury during the penalty phase of felony murder trial that each of defendant's prior violent felony convictions constituted a separate aggravating factor did not amount to fundamental error, and thus was harmless; the aggravating factors included defendant's prior conviction for murder and the fact that the current felony murder conviction involved crimes against a separate victim, the verdict form showed the jury found very little mitigation and suggested the jury rejected defendant's mitigation argument that his ruptured aneurysms and resulting brain damage lessened his culpability, and the trial court instructed the jury that the weighing process was not mathematical.

[27] **Sentencing and Punishment** Presentation and reservation in lower court of grounds of review

To constitute fundamental error, an alleged error in penalty phase jury instructions must reach down into the validity of the sentencing proceeding itself such that the sentence could not have been obtained without the assistance of the alleged error.

[28] **Sentencing and Punishment** Nature, degree, or seriousness of other offense

In evaluating the weight of the prior violent felony sentencing aggravator, during the penalty phase of trial, the facts upon which the aggravator is based are critical to the Court's analysis.

[29] **Sentencing and Punishment** Nature, degree, or seriousness of other offense

If a capital defendant has multiple convictions for prior violent felonies, the trial court can find only a single aggravating circumstance, but it may give that circumstance greater weight based upon the existence of multiple convictions.

[30] **Sentencing and Punishment** Extent of offender's personal participation

The trial court was not required to conduct an analysis under *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, and *Tison v. Arizona*, 481 U.S. 137, 107 S.Ct. 1676, where the Court stated that the death penalty was disproportional punishment for the crime of felony murder where the defendant was merely a minor participant in the crime and the state's evidence of mental state did not prove beyond a reasonable doubt that the defendant actually killed, intended to kill, or attempted to kill, during sentencing following conviction for felony murder, where the jury found defendant killed the victim, and that finding was supported by evidence in the record.

[31] **Sentencing and Punishment** Harmless and reversible error

Any error by the trial court when merging aggravating factors was harmless, during sentencing for felony murder; the trial court found the case involved a highly aggravated murder and that defendant had previously committed murder, regardless of the grouping of aggravating factors, the jury was required to consider all of the aggravating factors, and the court found very few mitigation factors.

[32] **Sentencing and Punishment** Harmless and reversible error

The trial court's error in failing to adequately consider each proposed nonstatutory mitigating circumstance during sentencing was harmless, during prosecution for felony murder, where there was no reasonable possibility that defendant would have received a lesser sentence than death as he had previously been convicted of murder, the sentencing order indicated the court was aware of and considered the nonstatutory mitigating circumstances, and the court found defendant had established the statutory mitigators for extreme mental or emotional disturbance and for substantially impaired ability to conform to the law, but the court still assigned each of these mitigators only little weight. Fla. Stat. Ann. § 921.141(4).

[33] **Criminal Law** Sentencing proceedings in general

The Supreme Court reviews alleged deficiencies in a sentencing order for harmless error.

[34] **Homicide** Commission of or Participation in Act by Accused; Identity

Evidence was sufficient to support conviction for first-degree felony murder; eyewitness testified that defendant shot and killed the victim and that defendant stole eyewitness's cell phone and forced his way into the victim's house, looking

for a safe, defendant's cousin testified that the criminal episode had the goal of stealing money from a safe in the victim's residence and that defendant confessed to murdering the victim, and DNA evidence linked defendant to a backpack found at the crime scene and by cellphone records showing eyewitness's stolen phone was used in a three-way call with defendant's cousin and defendant's aunt shortly after the murder.

[35] **Sentencing and Punishment** Killing while committing other offense or in course of criminal conduct

Sentencing and Punishment Nature, degree, or seriousness of other offense

Sentence of death following defendant's conviction for felony murder, robbery, aggravated assault, and burglary was a proportionate punishment; defendant's felony murder conviction was highly aggravated, particularly because of his prior conviction for murder, and was only lightly mitigated.

[36] **Sentencing and Punishment** Proportionality

When conducting proportionality review of a death sentence the review is qualitative, not quantitative, as the Supreme Court does not simply tally the number of aggravating factors and mitigating circumstances.

***161** An Appeal from the Circuit Court in and for Polk County, Jalal A. Harb, Judge - Case No. 532015CF004903A000 XX

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Opinion

PER CURIAM.

Benjamin Davis Smiley, Jr. appeals a circuit court judgment sentencing him to death.[1] As we explain, we affirm the conviction and sentence.

FACTS AND PROCEDURAL HISTORY

I. Guilt Phase

Mark Wilkerson lived in Lakeland with his brother Mario, his mother, and his 58-year-old stepfather, Clifford Drake. Late at night on April 15, 2013, as he was putting away his bicycle, Wilkerson heard rattling coming from the chain link fence at the rear of his home. Wilkerson saw two men, both wearing dark sweatshirts, standing on the other side of the fence. Wilkerson recognized neither man. He called out to them, asking what they were doing. The shorter of the two —we now know it was the defendant, Smiley—pointed a gun at Wilkerson and commanded that he come toward them. Smiley and the other man jumped the fence, and Smiley ordered Wilkerson to take off his clothes and get on the ground. Smiley pointed his gun at Wilkerson and yelled at him, demanding to know where Wilkerson's stepfather kept a safe with money. Wilkerson denied knowing about any safe or money, and he begged for his life. Smiley went through the pockets of Wilkerson's pants and took Wilkerson's cellphone, a small amount of cash, and a key to the home.

Smiley told Wilkerson to put his pants back on. Keeping the gun trained on Wilkerson, Smiley marched him to the front door of the home, all the while threatening to kill Wilkerson if he made any noise. Wilkerson, Smiley, and the other man entered the home, and Wilkerson led them to Drake's bedroom, where Drake lay asleep. At first, Smiley entered the dark bedroom alone, but he was unable to find the safe. Smiley ordered Wilkerson to go into the room and turn on the light. Smiley then struck the still-sleeping Drake on the head with the gun. Startled, Drake scooted around on the bed while Smiley shouted at him, pointing the gun in Drake's face and demanding to know where Drake kept his money. Drake denied having any. Smiley then shot Drake in the hip and continued to ask about the money. Seconds later, Smiley fatally shot Drake in the chest.

Smiley returned his focus to Wilkerson, ordering him at gunpoint to help find Drake's money. Smiley watched while Wilkerson ransacked the bedroom, to no ***162** avail. Eventually the taller man, who had been mostly silent throughout this episode, warned Smiley that someone was coming. Smiley commanded Wilkerson to get on the ground, and he complied. Smiley and his accomplice then ran from the home, leaving behind a backpack.

The police immediately began an investigation. Though the murder weapon was never found, analysis of bullets recovered at the scene showed that the gun from the Drake murder had also been used less than a month earlier in a nearby shooting. Otherwise the case went cold for nearly two years. Then, in February 2015, the police learned that DNA recovered from the backpack and from a sweatshirt found near the crime scene matched Smiley's DNA. The police showed Mark Wilkerson a photo lineup, and he identified Smiley as the shooter.

The police also revisited phone records showing that, minutes after the Drake murder, Mark Wilkerson's stolen cell phone had been used in a three-way phone call. That in turn led the police to two of the participants in that call, John McDonald and Samantha Lee. McDonald, whose mother lived across the street from the Drake home, is Smiley's cousin. Lee is Smiley's aunt.

McDonald testified at trial that, during a card game, Mario Wilkerson had bragged that his stepfather (Drake) kept money in a safe. Within a few days, McDonald, Lee, and Smiley hatched a plan to rob Drake. The night of the murder, McDonald picked up Smiley and "Big Jit" from Lee's house in Tampa and drove them to the parking lot of an apartment complex behind the Drake residence in Lakeland. McDonald had not met Big Jit before and was surprised by his participation, but Lee vouched for him. The plan was for Smiley and Big Jit to carry out the robbery and for McDonald to pick them up afterward. McDonald waited for a while after watching Smiley and Big Jit walk toward the Drake home, but he drove off after seeing Mark Wilkerson ride by on his bicycle. Eventually McDonald got a call from Lee, who patched Smiley into a three-way call so that McDonald and Smiley could find each other.

When Smiley got in the car he angrily told McDonald that it had been a "blank mission"—the only proceeds of the robbery were Wilkerson's cell phone and a small bag of marijuana. Smiley had been unable to find the safe. And Smiley told McDonald that "the dude that was asleep looked like he was reaching for something and he [Smiley] shot him."

Smiley testified in his own defense at trial. He acknowledged his familial relationship with McDonald and Lee and his friendship with "Big Jit" (whose actual name is Casey Bisbee), but he denied having been part of any plan to rob Drake. He further denied even being in Lakeland on the night of the murder.

On October 6, 2016, the jury found Smiley guilty of the first-degree felony murder of Clifford Drake, robbery with a firearm of Mark Wilkerson, aggravated assault with a firearm of Mark Wilkerson, and burglary of a dwelling with an assault or battery while armed with a firearm, all as charged in the indictment. John McDonald, Samantha Lee, and Casey Bisbee were not charged with crimes for their roles in the Drake murder.

II. Penalty Phase

The penalty phase began in April 2017 and was conducted before a different jury. As to the State's case, the most significant difference from the guilt phase is that the prosecution was able to present evidence about Smiley's prior conviction for the March 2013 first-degree murder of Carmen Riley. John McDonald described circumstances ***163** similar to those surrounding the Drake murder. Riley lived in the same neighborhood as Drake and McDonald's mother. McDonald selected her as a target and planned the robbery with Smiley and Samantha Lee. Smiley's role was to carry out the robbery, McDonald was the driver. After the robbery and murder, Smiley told McDonald that he shot Riley because she refused to cooperate. Smiley shot Riley with the same revolver he would use weeks later to kill Drake.

The defense case for mitigation focused largely on the effects of two ruptured brain aneurysms that Smiley suffered in September 2012, less than a year before he murdered Drake and Riley. Dr. Alan Waldman, a neuropsychiatrist, testified that bleeding from the ruptured aneurysms had caused severe damage to the parts of Smiley's brain that affect behavior and impulse control. In particular, according to Waldman, the brain damage resulted in Smiley having problems with rage control. Dr. Hartig, a psychologist hired by the defense but whom the State called as a rebuttal witness, similarly testified that Smiley's ruptured aneurysms constituted a severe brain trauma. (Hartig also testified that Smiley generally performed

well on the personality tests she administered, and that Smiley scored 114 on an IQ test.)

The defense complemented the experts' testimony with testimony from Smiley's mother, from Michael Clayton (a former pro football player who had mentored Smiley for years), and from Samantha Lee, all of whom testified that Smiley's personality changed significantly after the ruptured aneurysms. According to these witnesses, Smiley developed a bad temper and mood swings, and he would rant on social media over relatively insignificant matters—all of which was out of character for him. Lee acknowledged that Smiley had a temper and got in fights before the aneurysms, but she testified that post-aneurysm Smiley was "just wild." Smiley's mother acknowledged that she had not personally observed Smiley's personality changes, but she trusted what she had heard about Smiley's behavior from her own mother and from Lee.

The defense witnesses testified that, while Smiley's childhood had not been without its difficulties, his post-aneurysm behavior was very inconsistent with his past. Smiley did not have a relationship with his biological father until age 18, but he was close with his stepfather, who was married to Smiley's mother from Smiley's infancy and treated him as his own child. Smiley attended a private Christian school and did well academically and in extracurricular activities. Smiley's mother and stepfather were devoutly religious and strict, and the stepfather disciplined Smiley with corporal punishment —Smiley told Dr. Hartig that it did not rise to the level of abuse, but Smiley thought it was overly harsh compared to how his siblings were treated. Smiley learned construction from his stepfather, which enabled Smiley to work home renovation jobs for his mentor. At age 16, Smiley moved out of his parents' house because he no longer wanted to live under their strict rules. From then on he lived intermittently with Samantha Lee, with his girlfriend, with friends and other relatives, or in houses that he was working on. Smiley drank and smoked marijuana, but he did not have a history of significant violence before the aneurysms.

The defense's penalty phase closing argument had two principal themes. First, that Smiley's brain damage and its effects on his temper and impulse control had led to behavior that was inconsistent with his essential character. And second, that the jury should take into account that John McDonald and Samantha Lee had escaped responsibility for their role in the Drake ***164** and Riley murders, even though (according to the defense) they had taken advantage of Smiley and led him to commit those crimes. Defense counsel summed up his argument saying: "There's simply this: Are these mitigating factors that he has brain damage from something outside of his control enough to offset his actions?"

The jury unanimously found the following aggravating factors proven beyond a reasonable doubt: (1) Smiley was previously convicted of another capital felony, the murder of Carmen Riley; (2) Smiley was previously convicted of a felony involving the use or threat of violence to the person, robbery with a firearm regarding Carmen Riley; (3) Smiley was previously convicted of a felony involving the use or threat of violence to the person, robbery with a firearm regarding Mark Wilkerson; (4) Smiley was previously convicted of a felony involving the use or threat of violence to the person, aggravated assault regarding Mark Wilkerson; (5) Smiley was previously convicted of a felony involving the use or threat of violence to the person, burglary with an assault or battery while armed regarding Clifford Drake and Mark Wilkerson; (6) Smiley committed the Drake murder while engaged in the commission of robbery regarding Mark Wilkerson; (7) Smiley committed the Drake murder while engaged in the commission of burglary with an assault or battery while armed with a firearm regarding Clifford Drake and Mark Wilkerson; and (8) Smiley committed the murder for pecuniary gain regarding Clifford Drake.

The jury's votes on Smiley's proposed mitigating circumstances were as follows: no significant history of prior criminal activity, 5 yes to 7 no; the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance, 0 to 12; the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired, 0 to 12; the age of the defendant at the time of the crime, 0 to 12; mitigation related to the defendant's character, 7 to 5; mitigation related to the defendant's background, 0 to 12; mitigation related to the life of the defendant, 0 to 12; and mitigation related to the circumstances of the offense, 1 to 11.

After performing the statutorily required assessment and weighing of aggravating factors and mitigating circumstances, the jury unanimously recommended that the trial court sentence Smiley to death.

III. Spencer Hearing

The court held a *Spencer*[2] hearing on November 13, 2017. The State did not put on any evidence at the hearing. Smiley called one witness, Dr. Hartig.

Dr. Hartig's testimony was similar to her testimony at the penalty phase. Dr. Hartig explained information from Smiley's background that assertedly related to mitigation. She discussed (1) Smiley's lack of relationship with his biological father; (2) Smiley's lack of relationship with his stepfather; (3) Smiley being the subject of corporal punishment; (4) Smiley running away from home and essentially being homeless; (5) Smiley's persistence in pursuing his education despite his circumstances; (6) Smiley's various paying jobs and good work ethic; (7) Smiley's aneurysms; (8) Smiley's lack of juvenile criminal history; and (9) Smiley's remorse for the victims. Dr. Hartig also testified that Smiley seemed to lack problem-solving abilities, which she linked to his traumatic brain event.

***165 IV. Sentencing**

The court held a sentencing hearing on February 23, 2018. As to the count of first-degree murder, the lower court sentenced Smiley to death. The trial court found that the State proved eight aggravating factors beyond a reasonable doubt[3] and the defense established five mitigating circumstances by the greater weight of the evidence.[4] The court gave the jury's recommendation "great weight" and concluded that "the mitigation pales in comparison to the proven aggravating factors." The trial court sentenced Smiley to death, his sentences for the other convictions to run concurrently with this sentence. This direct appeal followed.

ANALYSIS

Smiley raises the following claims on appeal: (1) the trial court erred in finding that the State did not commit a discovery violation and in failing to make adequate findings under *Richardson v. State*, 246 So. 2d 771 (Fla. 1971), regarding a photograph of Smiley and Casey Bisbee; (2) the trial court erred in admitting two photographs over an objection for lack of proper predicate and prejudicial impact; (3) the trial court abused its discretion in denying a defense motion for mistrial after the testimony of John McDonald about Smiley's other crimes; (4) the trial court abused its discretion in denying a defense motion for mistrial after John McDonald's testimony about Smiley's interest in the outcome of his case; (5) the trial court erred in denying a motion for mistrial following the State's comment in penalty phase voir dire regarding the frequency with which the state attorney's office seeks the death penalty; (6) the trial court erred in allowing the State to argue during the penalty phase that Smiley possessed and discharged a firearm; (7) the penalty phase closing arguments violated Smiley's constitutional rights, entitling him to a new trial; (8) the penalty phase jury instructions and verdict form were improper and reversible error; and (9) the trial court's sentencing order was legally deficient and incorrect as a matter of law. We will also consider whether there is sufficient evidence to sustain ***166** the conviction and whether Smiley's death sentence is proportionate.

I. Discovery Violation

[1] During the trial, the State introduced into evidence two photographs depicting Smiley with Casey Bisbee. The State disclosed one of the photos (photographic exhibit 162) in pretrial discovery well in advance of trial. Detective Wallace had viewed the photo on Smiley's publicly accessible Facebook page, downloaded the photo, and given it to the prosecutor. The second photo (photographic exhibit 161) is one that Detective Wallace had also seen on Smiley's Facebook page more than a year before trial, but he did not download it. Several days into the trial, after her testimony on the Friday of a holiday weekend, Samantha Lee gave the State's investigator a copy of that same photo. Two days later, on Sunday, the prosecution e-mailed the photo to the defense. When the trial commenced again on Tuesday, the defense objected to the introduction of the photo, arguing that the State had committed a discovery violation by not disclosing the photo earlier. The defense argued that its trial preparation had been prejudiced because, compared to the photo that the State had disclosed in discovery, the second photo more starkly depicted the differences between Smiley and Bisbee in height, weight, and skin complexion. The trial court heard argument from both sides and concluded that there had been no discovery violation.

[2] When, as here, a criminal defendant properly elects to participate in the discovery process, that process is governed by Florida Rule of Criminal Procedure 3.220. We apply the abuse of discretion standard to review a trial court's ruling on an alleged discovery violation. *Andres v. State*, 254 So. 3d 283, 293 (Fla. 2018).

We find no abuse of discretion in the trial court's conclusion that the State did not commit a discovery violation. Rule 3.220(b)(1)(K) requires the State to timely disclose to the defense "any tangible papers or objects that the prosecuting attorney intends to use in the hearing or trial and that were not obtained from or that did not belong to the defendant." After the State's initial disclosure, rule 3.220(j) imposes a continuing discovery obligation when "a party discovers additional witnesses or material that the party would have been under a duty to disclose or produce at the time of the previous compliance." Here, the record shows that the State had no intention of using the disputed photo at trial until Samantha Lee provided it to the State's investigator after Lee finished testifying. In its presentation to the trial court, defense counsel acknowledged that the timing of the State's disclosure of the disputed photo reflected neither intentional misconduct nor bad faith. Under these circumstances, we see no violation of rule 3.220 subdivisions (b)(1)(K) or (j).

[3] In his reply brief, Smiley for the first time invokes rule 3.220(b)(1)(F) in support of his argument that the State committed a discovery violation. That rule requires disclosure of "any tangible papers or objects that were obtained from or belonged to the defendant." Smiley did not make an argument based on rule 3.220(b)(1)(F) either before the trial court or in his initial brief in this appeal. Smiley did attempt to persuade the trial court that Detective Wallace's initial viewing of the photo on Smiley's Facebook page meant that the State had possession or control of the photo from that moment on. But Smiley made no argument that a photo posted on a publicly accessible Facebook page (and viewed by an agent of the State) should be deemed an object that was "obtained from or belonged to the defendant" for purposes of the rule. Smiley ***167** has not preserved this argument for our review.

In any event, even if the State had committed a discovery violation by untimely disclosing the disputed photo, we would conclude beyond a reasonable doubt that Smiley suffered no procedural prejudice from any such violation. *See Smith v. State*, 7 So. 3d 473, 507 (Fla. 2009) (in the context of discovery rule violations, harmless error inquiry asks whether the violation materially hindered defendant's trial preparation or strategy). To the extent that any physical differences between Smiley and Bisbee were a material issue at trial, that was entirely foreseeable by both the prosecution and the defense. The defense knew through the State's discovery disclosures that the State had in its possession another photo of Smiley and Bisbee together and that the State had viewed Smiley's Facebook page. Even if there are differences between the two photos, Smiley surely anticipated that the State would have many ways to elicit testimony and to present evidence about Smiley's and Bisbee's appearances, and Smiley knew to prepare accordingly. Under these circumstances, we see no procedural prejudice to the defense from the trial court's decision to allow the State's introduction of photographic exhibit 161.

II. Admission of Photographic Evidence

A. Authentication

[4] Smiley contends that the trial court improperly admitted photographic exhibit 161 (the disputed photo just discussed) because the State failed to properly authenticate the photo. The State introduced the photo through the testimony of Detective Wallace. Wallace testified that, from his interview of Samantha Lee, he had developed a lead as to the person who was with Smiley during the Drake murder. Lee had provided Wallace the person's first name and nickname (Casey, "Big Jit") and a physical description. After the interview, Wallace looked at Smiley's publicly accessible Facebook page and saw photos of Smiley with a person matching the name and appearance Lee had described. Wallace later learned Bisbee's full name and met both Smiley and Bisbee in person. To establish the foundation for admission of photographic exhibits 161 and 162, Wallace testified that he was personally familiar with Smiley and Bisbee, that he had seen the photos on Smiley's Facebook page, and that the photos depicted Smiley and Bisbee together. Smiley now claims that this was insufficient, because Wallace did not himself download photographic exhibit 161 from Smiley's Facebook page and did not know when or by whom the photo was taken.

[5] **[6]** **[7]** **[8]** The proponent of photographic evidence bears the burden of establishing that the evidence is a fair and accurate representation of the events depicted. *Mullens v. State*, 197 So. 3d 16, 25 (Fla. 2016). "Any witness with knowledge that it is a fair and accurate representation may testify to the foundational facts; the photographer need not testify." Charles W. Ehrhardt, *Ehrhardt's Florida Evidence* § 401.2, at 176 (2019 ed.). Authentication for the purpose of admission is a relatively low threshold that requires evidence sufficient to support a finding that the photograph in question is what the proponent claims. *See Mullens*, 197 So. 3d at 25. We review conclusions by the trial court regarding authentication for abuse of discretion. *Id.*

Here the State authenticated photographic exhibit 161 through the testimony of Detective Wallace. Based on his ability personally to identify both the defendant and Bisbee, Wallace testified that the photograph depicted those two men, and ***168** he further testified that he had seen the photograph on Smiley's Facebook page. Wallace did not testify about any matter beyond his personal knowledge. For example, he did not address the date of the photograph, the identity of the photographer, or the circumstances under which the photo was taken. Wallace's testimony was sufficient to establish that the photo is what the State claimed it to be: a photo depicting Smiley and Bisbee, one Wallace had seen on Smiley's Facebook page. We find no merit in Smiley's argument that the photo was improperly authenticated.

Notably, Smiley does not challenge the photo's authenticity. In fact, when asked about Photographic Exhibit 161 on cross-examination, Smiley admitted that the photo depicted Bisbee and him, and he gave an approximate date that the picture was taken. Smiley also explicitly acknowledged the photo's accuracy. We deny relief on this claim.

B. Probative Value vs. Prejudicial Impact

[9] Smiley further contends that the court improperly admitted photographic exhibits 161 and 162 on the ground that the photographs' prejudicial effect substantially outweighed their probative value. Defense counsel objected to the admission of photographic exhibit 161 because it showed Smiley holding a liquor bottle and Bisbee gesturing as if he had a gun. Photographic exhibit 162 showed Smiley making the gun gesture and Bisbee smoking what appeared to be a blunt. We apply an abuse of discretion standard to a trial court's application of the unfair prejudice test of section 90.403, Florida Statutes (2019). *Floyd v. State*, 913 So. 2d 564, 574 (Fla. 2005).

Combining aspects of testimony given by John McDonald, by Samantha Lee, by Mark Wilkerson, and by the defendant himself, the photographs supported the State's theory that Smiley and Bisbee were close friends and that Bisbee was Smiley's accomplice during the Drake murder. Smiley argues that this probative value was substantially outweighed by the danger of unfair prejudice caused by the photos. According to Smiley, the photos had only limited relevance and were unfairly prejudicial because they portrayed the defendant "like a thug."

[10] We disagree that the danger of unfair prejudice from the photos substantially outweighed their probative value. The identity and appearance of Smiley's accomplice during the murder were material issues in the case. And while the photos may have shown Smiley in an unfavorable light, they were not inflammatory or improperly directed at the jury's emotions. *See McDuffie v. State*, 970 So. 2d 312, 327 (Fla. 2007) (exclusionary rule of unfair prejudice "is directed at evidence which inflames the jury or appeals improperly to the jury's emotions" (quoting *Steverson v. State*, 695 So. 2d 687, 688-89 (Fla. 1997))). "The weighing of probativeness versus unfair prejudice is best addressed by the trial court," *Floyd*, 913 So. 2d at 575, and the trial court did not abuse its discretion in admitting these photos. We deny relief on this claim.

III. Testimony About Smiley's Prior Crimes or Bad Acts

[11] On direct examination, the State elicited testimony from John McDonald that Smiley had gloves with him at the time of the Drake murder. On cross-examination, defense counsel asked McDonald why he thought that Smiley had gloves with him. McDonald responded: "Well, when we normally operate like that, we normally use gloves." The trial court denied Smiley's subsequent motion for a mistrial, and Smiley now argues that this was an error that requires reversal for a new ***169** trial. We review the denial of a motion for a mistrial for abuse of discretion.

[12] " 'A motion for mistrial should be granted only when it is necessary to ensure that the defendant receives a fair trial.' In other words, '[a] motion for a mistrial should only be granted when an error is so prejudicial as to vitiate the entire trial.' " *Morris v. State*, 219 So. 3d 33, 44 (Fla. 2017) (first quoting *Salazar v. State*, 991 So. 2d 364, 372 (Fla. 2008), and then quoting *England v. State*, 940 So. 2d 389, 401-02 (Fla. 2006)). McDonald's vague reference to "when we normally operate like that" lacked any detail about other crimes and does not come close to meeting the high standard that justifies a mistrial. Moreover, the defense itself invited the response through its open-ended question: "But why do you think he had [gloves] with him then?" Finally, defense counsel declined the trial court's offer of a contemporaneous curative instruction. This claim lacks merit.

IV. Testimony About Smiley's Interest in the Outcome of His Case

[13] John McDonald initially denied to law enforcement that he had been involved in the Drake murder. And even after he had told investigators about his involvement in the crime, he considered changing his story again. On redirect, the State asked McDonald if that was "because Benjamin Smiley is your cousin?" Following up, the State asked: "Do you want to see him in trouble?" McDonald responded: "No. He said that it—they was trying to give him the death penalty."

Smiley contends that, because this was a bifurcated trial and the guilt-phase jury was not death-qualified, this comment improperly alerted the jury to the possibility that Smiley would be eligible for and receive the death penalty if found guilty. Smiley argues that the trial court's denial of his request for a mistrial based on McDonald's statement is error that warrants a new trial.

We disagree. A fleeting, isolated comment like McDonald's here does not meet the high standard required for a mistrial. *See Fletcher v. State*, 168 So. 3d 186, 207 (Fla. 2015) ("A comment that is brief, isolated, and inadvertent may not warrant a mistrial."). We deny relief on this claim.

V. Vouching for the Death Penalty

[14] Smiley's next argument is about certain comments made by the prosecutor during the penalty phase voir dire. Because context is important for evaluating claims of this nature, we present the relevant exchange in some detail.

The prosecutor prefaced the comments at issue by observing that there are some people who feel "so strongly about first-degree murder that if someone commits first-degree murder there should be no question" that the death penalty should be imposed. Then, addressing a potential juror who earlier had described himself as a strong proponent of the death penalty, the prosecutor asked: "Do you think that just because someone is convicted of first-degree murder it should be an automatic death sentence?" The juror started to answer the question, but the prosecutor interrupted, asking: "[D]o you understand that in Florida not every case meets the qualifications for a death penalty?" The prosecutor continued:

> 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?

In response, the juror indicated that he understood and answered "yes" when the ***170** prosecutor asked if he "agree[d] with that." The prosecutor then wrapped up by noting that the juror had said that he was a "strong proponent of the death penalty" and by asking: "In this case can you assure us you are going to listen to the law and hold the State to the burden that we have proved at least one aggravating factor beyond a reasonable doubt, you consider the mitigating circumstances before you would make a sentence of death?"

Defense counsel did not immediately object. The prosecutor then moved on to question the next potential juror, who also had earlier described herself as a strong death penalty proponent. Once again, the prosecutor began by asking if the juror believed in the automatic imposition of the death penalty as punishment for first-degree murder. The juror answered "no." Then the prosecutor continued: "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?" After the juror answered, "I understand that now," the prosecutor said: "All right. So like I said, we have lots of cases but we don't—there are only cases that meet that—" At that point, defense counsel objected and asked to approach the bench.

Defense counsel explained that he anticipated that the prosecutor was going to repeat her comments about the number of pending murder cases in the circuit that are eligible for the death penalty. Defense counsel acknowledged: "I fear that I did not make a contemporaneous objection at that time." But counsel went on to argue that the prosecutor's comment was "very prejudicial" and counsel ultimately asked the trial court to strike the venire. The trial court sustained the objection to the prosecutor's comments but denied the request to strike the panel.

[15] Smiley now argues that the denial of his motion to strike the venire was reversible error and that a new penalty phase is required. We review a decision of the trial court to deny a motion to strike the jury panel for abuse of discretion. *See Guzman v. State*, 238 So. 3d 146, 155 (Fla. 2018).

To support his argument, Smiley relies on *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 (Fla. 2010). We discussed these same decisions in *Braddy v. State*, 111 So. 3d 810 (Fla. 2012). In *Braddy*, we described the earlier cases as ones where prosecutors had violated the principle that "the State may not add legitimacy to its case by vouching for the death penalty during its closing argument." *Id.* at 847. We were careful to observe that, in *Pait*, *Brooks*, and *Ferrell*, "the prosecutors clearly appealed to the jurors to give weight to the fact that the State had decided to seek the death penalty." *Id.* We emphasized that the prosecutors' comments in those cases involved "a direct, unambiguous appeal" to the jury to give weight to the State's decision. *Id.*

Even assuming that precedents involving prosecutors' *closing arguments* apply in assessing comments made during voir dire, the comments at issue here do not violate the principle we described in *Braddy*. Viewing the prosecutor's statements in context, she was conveying the point that the law does not permit jurors to vote for the death penalty as an "automatic" punishment for first-degree murder. Just after making the disputed comment, the prosecutor in fact asked the juror for assurance that he could hold the State to its burden of proving an aggravating factor beyond a reasonable doubt. The prosecutor did not make an argument of any kind, much less a "direct, unambiguous appeal" for the potential ***171** jurors to give weight to the State's decision to seek the death penalty.

We do not condone the prosecutor's comments. The State can and should explain the concepts of death eligibility, aggravation, and mitigation without telling the jury that the government seeks the death penalty only in a subset of first-degree murder cases. But the prosecutor's statements here fall far short of what would be required to justify striking the venire and starting over again, and the trial court did not abuse its discretion in denying Smiley's request. (In light of our resolution of this issue, we need not address the State's argument that Smiley did not lodge a contemporaneous objection and therefore waived this claim.) We deny this claim.

VI. Firearm Arguments During the Penalty Phase

[16] Smiley next argues that the penalty phase jury heard evidence contrary to the guilt phase verdict and that this constitutes reversible error. Specifically, Smiley argues that the trial court should not have allowed the State to argue to the penalty phase jury that Smiley was the shooter in the Drake murder. Smiley bases this claim on the fact that, in counts 2 ("Robbery with a Firearm"), 4 ("Aggravated Assault with a Firearm"), and 5 ("Burglary of a Dwelling with an Assault or Battery While Armed with a Firearm"), the jury failed to mark spaces on the verdict form that would have allowed it to make special findings about Smiley's possession or discharge of a firearm during the commission of the crime charged in each of those counts. (Count 3, "Tampering with Physical Evidence," is not at issue because the jury found Smiley not guilty as to that count.)

This argument has no merit. The jury found Smiley guilty on count 1, "First Degree Felony Murder, as charged in the indictment." Count 1 of the indictment explicitly alleged that Smiley killed Drake by shooting him with a firearm. Moreover, the trial court instructed the jury that, in order to convict Smiley on count 1, it would have to find proven beyond a reasonable doubt that Smiley "was the person who actually killed Clifford Drake." The jury's guilty verdict on this count thus reflects a clear finding that Smiley shot and killed Drake.

The jury's verdicts on counts 2, 4, and 5 also reflect findings that Smiley had a firearm during the Drake murder. In count 2, the jury found Smiley guilty of "Robbery with a Firearm, as charged in the indictment." In count 4, the jury found Smiley guilty of "Aggravated Assault with a Firearm, as charged in the indictment." And in count 5, the jury found Smiley guilty of "Burglary of a Dwelling with an Assault or Battery While Armed with a Firearm, as charged in the indictment."

Smiley invokes *Lebron v. State*, 894 So. 2d 849 (Fla. 2005), but that case does not help him. In *Lebron*, the jury found the defendant guilty of felony murder, but also "determined" that the murder victim was "actually shot by someone other than" the defendant. *Id.* at 852. We held that, at sentencing, the State could not present a police officer's testimony that "the investigation proved that Lebron shot the victim." *Id.* at 855. Such testimony would be impermissible, we held, because it would be "directly and precisely to the contrary of a specific factual finding by a prior jury." *Id.* at 854-55.

By contrast, the guilt phase jury in this case did not make a specific factual finding that someone other than Smiley shot Drake. On the contrary, by finding Smiley guilty on count 1, the jury found the opposite—that Smiley killed the victim. It is not clear why the jury chose not to make the special findings in counts 2, 4, and 5 as ***172** to Smiley's possession

or discharge of a firearm. A question from the jury during its deliberations raises the possibility that the jury believed that the special findings on those other counts related only to Mark Wilkerson—not Clifford Drake—as a victim. The jury might have thought the special finding questions were redundant, since the guilty verdicts on counts 2, 4, and 5 explicitly included language to the effect that Smiley committed each offense "with a firearm." But we need not speculate about the jury's thinking. In contrast to the facts of *Lebron*, the verdict form in this case does not reflect any specific factual finding by the jury that Smiley was not the shooter. Therefore, we deny this claim.

VII. Penalty Phase Closing Arguments

A. The State's Comments

[17] **[18]** **[19]** **[20]** Smiley challenges a raft of statements by the prosecutor during the penalty phase closing argument, some of which were objected to but many of which were not. Objected-to comments are reviewed for harmless error, and unobjected-to comments for fundamental error. Fundamental error is error that reaches down into the validity of the trial itself to the extent that the jury's recommendation of death could not have been obtained without the assistance of the alleged error. *Card v. State*, 803 So. 2d 613, 622 (Fla. 2001). In *Card*, another case involving a defendant's challenge to a mix of objected-to and unobjected-to statements from closing argument, we observed that we do not review challenged comments only in isolation. Rather, we consider the closing argument as a whole and determine whether the cumulative effect of any errors deprived the defendant of a fair penalty phase hearing. *Id*. Our review is framed by the background principle that "attorneys are generally afforded wide latitude while presenting closing statements to the jury." *Fletcher v. State*, 168 So. 3d 186, 213 (Fla. 2015).

Some aspects of this claim merely rehash arguments that we consider and reject elsewhere in this opinion. For example, there is no merit to Smiley's arguments that it was improper for the State to argue that Smiley was the shooter or, relatedly, that the State invited the jury to "rethink or ignore the determinations of the guilt phase jury." Nor, as we explain later, did the State's unobjected-to treatment of the prior violent felony aggravating factor fatally skew the jury's weighing of aggravators and mitigators.

Some of Smiley's arguments mischaracterize the prosecutor's statements or the law. For example, based on our review of the State's closing argument, there is no merit to Smiley's assertions that the State: denigrated Smiley's exercise of his right to a penalty phase jury trial; argued for an uncharged aggravating factor; "obfuscated" relevant facts; or likened Smiley's actions to Jeffrey Dahmer's (the prosecution mentioned Dahmer only to make the point that the death penalty is not limited only to the most horrible murderers). Nor do we find any unfair prejudice in the prosecutor's unobjected-to statement that: "The death penalty, like any punishment, is a deterrent."

[21] We also reject Smiley's claim that the State made an impermissible "golden rule" argument by saying that Smiley "has an utter disregard for not only ... the security of your home, of Drake's home, of Ms. Riley's home, but also he has an utter disregard for the sanctity of human life." In contrast to the State's comment, prohibited golden rule arguments are ones that ask the jurors to put themselves in the victim's position and to imagine the victim's ***173** pain and terror. *See Allen v. State*, 261 So. 3d 1255, 1278 (Fla. 2019). The prosecutor here did not do that.

[22] Similarly unavailing is Smiley's argument that the State erred by telling the jury that their decision "to impose the death penalty on Mr. Smiley cannot be based on sympathy for Mr. Smiley. And the law says so. ... 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." Our precedent establishes that it is permissible to tell the jury that it should not base its decision on sympathy for the defendant. *See Zack v. State*, 753 So. 2d 9, 23-24 (Fla. 2000).

[23] Finally, we also are unpersuaded by Smiley's claim that the prosecution impermissibly misstated the law on mitigation, denigrated his mitigation evidence, or sought to treat Smiley's mitigating evidence as a nonstatutory aggravating factor. This claim centers on the State's attempt to anticipate Smiley's arguments about the effects of the brain aneurysms that Smiley suffered as a twenty-year-old, the year before the Drake and Riley murders. Among other things, the State said: "There's no dispute this defendant suffered a brain aneurysm. So what? People suffer brain aneurysms all the time ... and they manage to go on with life without murdering people." The State rhetorically asked whether Smiley "should not be put to death simply because he suffered a brain aneurysm? I would submit to you that one has nothing to do with the other." And the State argued to the jury that, even

prior to the aneurysm, Smiley had engaged in bad behavior: "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."

We rejected nearly identical arguments in *Fletcher v. State*, 168 So. 3d 186 (Fla. 2015). The defendant in that case faulted the prosecution for saying: "[T]he defendant has suffered from a chronic addiction to drugs in the past. I submit to you a lot of people have drug addictions. Most of them do not murder other people." *Id.* at 214. The prosecution in *Fletcher* also had said: "Now there's a lot of people who come from tough circumstances, abusive families, but they, too, most of them, do not go and murder other people." *Id.* This Court found the comments permissible, reasoning that they were proper arguments going to the weight that the jury should assign to the asserted mitigation. *Id.* at 215. The Court contrasted statements like these with ones that simply characterized mitigation evidence as "invalid or excuses." *Id.* The logic of *Fletcher* defeats Smiley's claim that he was unfairly prejudiced by the comments at issue here.

Nor did the State improperly convert mitigation into an uncharged aggravating factor. Viewing the prosecution's comments in context, the State did not argue that the jury should punish Smiley for any pre-aneurysm misbehavior or treat Smiley's intelligence as an aggravating factor. Rather, the prosecution was making a valid argument—the persuasiveness of which was for the jury to decide—that the aneurysm could not explain Smiley's actions during the Drake murder and that, instead, Smiley's actions were knowing and deliberate.

In sum, we have carefully reviewed the State's entire closing argument in light of the allegedly improper comments identified by Smiley, and we find no error or collection of errors that warrants reversal for a new penalty phase.

B. Defense Comments

[24] Smiley next argues that defense counsel's own closing argument was so deficient ***174** that it constituted fundamental error or ineffective assistance of counsel. We have reviewed defense counsel's argument, both on its own and together with the State 's closing argument, and we find no fundamental error.

[25] Ineffective assistance of counsel claims usually are not cognizable on direct appeal. We have been willing to depart from this general rule in the rare situation where ineffectiveness (both performance and prejudice) is "indisputable from the face of the record before us." *Monroe v. State*, 191 So. 3d 395, 404 (Fla. 2016). The alleged inadequacies in defense counsel's argument in this case do not meet that demanding standard. Accordingly, we will not take up the merits of Smiley's ineffective assistance of counsel claim here.

VIII. Penalty Phase Jury Instructions and Verdict Form

[26] **[27]** Smiley contends that reversible error occurred because the verdict form and the trial court's jury instructions allowed the jury to treat each of Smiley's five prior violent felony convictions as a separate aggravator. Specifically, the verdict form identified and listed each prior violent felony individually and asked the jury to record its vote on each. Smiley claims that this deviated from the verdict form and jury instructions that we approved in *In re Standard Jury Instructions in Capital Cases*, 214 So. 3d 1236 (Fla. 2017). Smiley further argues that this caused him prejudice by overstating the number of aggravators proven in his case. Because Smiley did not object to the verdict form or jury instructions, we evaluate this claim under the fundamental error standard. To constitute fundamental error, an alleged error must reach down into the validity of the sentencing proceeding itself such that the sentence could not have been obtained without the assistance of the alleged error. *See, e.g.*, *Archer v. State*, 673 So. 2d 17, 20 (Fla. 1996).

[28] There is nothing in the death penalty sentencing statute or in our case law that prohibits asking the jury to separately indicate its findings on any prior violent felony underlying the prior violent felony aggravator. Indeed, we have observed that in evaluating the weight of the prior violent felony aggravator, "the facts upon which the aggravator is based are critical to our analysis." *Bevel v. State*, 983 So. 2d 505, 524 (Fla. 2008). Voting separately on each underlying conviction also adds clarity to the jury's findings and could be helpful if any particular conviction is subsequently invalidated. We find no error in this regard.

[29] But Smiley makes a separate argument that the presentation of Smiley's prior violent felonies in this case skewed the jury's weighing of aggravating factors and mitigating circumstances. Under our case law, "[i]f a

defendant has multiple convictions for prior violent felonies, the trial court can find only a single aggravating circumstance, but it may give that circumstance greater weight based upon the existence of multiple convictions." *Bright v. State*, 90 So. 3d 249, 261 (Fla. 2012). Presumably this applies to the jury's findings and weighing calculus as well. Thus, even though a jury is entitled to weigh multiple prior violent felonies more heavily than a single violent felony, the jury instructions here were erroneous to the extent they suggested that each prior violent felony conviction constituted a separate aggravating factor. Nonetheless, any error falls far short of the high bar for establishing fundamental error.

The aggravating factors here included Smiley's prior conviction for the Carmen Riley murder (a capital felony), a particularly weighty aggravator. The Drake episode ***175** involved contemporaneous felony convictions involving crimes against a separate victim. The verdict form shows that the jury found this to be a case involving very little mitigation. Indeed, the verdict form suggests that the jury unanimously rejected Smiley's principal argument in mitigation, that his ruptured aneurysms and resulting brain damage lessened his culpability. Finally, the trial court properly instructed the jury that the weighing process is not "mechanical or mathematical" and that the jury therefore "should not merely total the number of aggravating factors and compare that number to the total number of mitigating circumstances." Under these circumstances, we find no fundamental error.

We also see no merit in Smiley's challenge to the jury instructions and verdict form as they related to mitigating circumstances. Smiley bases this claim on alleged deviations from standard jury instructions approved *after* his sentencing proceeding,[5] and he points to no independent authority to support his argument that the trial court committed reversible error. We therefore deny this claim as well.

IX. Sentencing Order Deficiencies

[30] Smiley argues that the trial court's sentencing order was deficient in several ways. First, Smiley faults the trial court for not conducting an analysis under *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), and *Tison v. Arizona*, 481 U.S. 137, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987). Relatedly, Smiley claims that the trial court improperly relied on a finding that Smiley was the shooter. As we explained in *Jackson v. State*, 575 So. 2d 181 (Fla. 1991), the Supreme Court's decisions in *Enmund* and *Tison* addressed the constitutionality, in multi-participant felony murder cases, of imposing a death sentence on someone other than the person who actually killed the victim. We summarized those cases as standing for the proposition that "the death penalty may be proportional punishment if the evidence shows both that the defendant was a major participant in the crime, and that the defendant's state of mind amounted to reckless indifference to human life." *Id*. at 191. The *Enmund/Tison* rule has no bearing on this case. As we have explained, the guilt phase jury found that Smiley killed Drake, and that finding is supported by competent, substantial evidence in the record. Therefore, there was no error in the trial court's failure to perform an *Enmund/Tison* analysis or in the trial court's finding that Smiley was the shooter in the Drake murder.

[31] Smiley next contends that the trial court overcounted the number of aggravating factors proven in Smiley's case. Smiley argues that, after performing the requisite merger analysis, the various aggravating factors should have been treated as two: the prior capital or violent felony aggravator, and the felony murder aggravator (murder "in the commission of" an enumerated felony). In its sentencing order, the trial court instead grouped the aggravating factors in the following way: one combined aggravator for the two prior convictions involving the Riley murder; one combined aggravator for the prior convictions involving the robbery and assault of Mark Wilkerson and for the fact that the Drake murder was committed during the robbery of Wilkerson; one combined aggravator for the contemporaneous conviction for burglary with an assault or battery while armed and for the fact that the Drake murder was committed during a ***176** burglary; and one aggravator for the fact that the murder was committed for pecuniary gain.

We find that any error in the trial court's merger analysis was harmless. As the trial court found, this was a highly aggravated murder, given both the contemporaneous crimes committed against Mark Wilkerson and, most importantly, Smiley's previous conviction for the Riley murder. All of the facts underlying the aggravating factors proven in this case —regardless of how those factors are grouped for merger purposes—were properly subject to consideration by the trial court. All of those facts would have added weight to whatever subset of aggravating factors remained at the conclusion of any different merger analysis. And balanced against this aggravation, the trial court found very little mitigation.

Indeed, the trial court explicitly acknowledged that its balancing of aggravation and mitigation was qualitative not quantitative, and it found that "the nature and quality of the mitigation pales in comparison to the proven aggravating factors." Under these circumstances, we conclude that there is no reasonable possibility that, absent any error in the trial court's merger analysis, the court would have imposed a lesser sentence. *See, e.g.*, *Lukehart v. State*, 776 So. 2d 906, 925 (Fla. 2000) (applying harmless error analysis to claim of improper doubling of aggravating factors).

[32] **[33]** Finally, Smiley claims that the trial court failed to properly consider each proposed nonstatutory mitigating circumstance and that this requires resentencing. Smiley does not identify any particular nonstatutory mitigating circumstance that the trial court failed to consider. Instead, the claimed error goes to the form of the trial court's sentencing order. Smiley claims that the sentencing order is inadequate under the standards this Court established in *Campbell v. State*, 571 So. 2d 415 (Fla. 1990), *receded from in part by Trease v. State*, 768 So. 2d 1050, 1055 (Fla. 2000). We review alleged deficiencies in a sentencing order for harmless error. *See Mullens v. State*, 197 So. 3d 16, 30 (Fla. 2016).

The trial court's sentencing order introduces its analysis of Smiley's proposed mitigating circumstances saying: "The Court examined the evidence pertaining to the Defendant's life prior to the age of seventeen (when he left home), after he left his home, the reported brain aneurysm(s), and the Defendant's conduct after the brain injury." The Court then evaluated each of Smiley's proposed statutory mitigating circumstances in turn. However, when it got to the catch-all nonstatutory mitigating circumstances, the trial court addressed all of them in a single paragraph. The court wrote that it "examined the evidence presented through the testimony" of Smiley's mitigation witnesses, evaluated that testimony to consider "the matters related to the Defendant's character, background, life, and the circumstances of the offense," and "concluded that this circumstance should be accorded moderate weight." Earlier in its order, the trial court had summarized the testimony offered by each of Smiley's witnesses.

This Court has long reaffirmed *Campbell*'s requirement that the trial court's sentencing order must expressly evaluate each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and, in the case of nonstatutory factors, whether it is truly of a mitigating nature.[6] A trial court may ***177** comply with this requirement by bundling proposed mitigating circumstances into categories of related conduct or issues and addressing them accordingly. In fact, we have encouraged trial courts to do so. *See Mullens*, 197 So. 3d at 30. And we allow trial courts to exercise their discretion to avoid repeatedly addressing proposed mitigating circumstances that are redundant. *See Foster v. State*, 778 So. 2d 906, 920 (Fla. 2000). Finally, in *Rogers v. State*, 285 So. 3d 872, 890 (Fla. 2019), we clarified that a trial court's written sentencing order need not "expressly articulate why the evidence presented warranted the allocation of a certain weight to a mitigating circumstance." Our precedents have aimed to avoid imposing on trial courts overly formalistic requirements, while at the same time ensuring that sentencing orders comply with the dictates of section 921.141(4), Florida Statutes (2019),[7] and contain enough specificity to enable meaningful appellate review.

In this case, the trial court's sentencing order does not address Smiley's proposed nonstatutory mitigating circumstances with the specificity that *Campbell* and its progeny require. As we have suggested, the problem is not that the order fails to address the nonstatutory mitigators in exactly the format or order that Smiley proposed in his sentencing memorandum. Instead, the problem is that Smiley's proposed nonstatutory mitigators are not so substantively similar that they could be dealt with in a single, catch-all fashion. To give just a few examples: Smiley argued that his stepfather subjected him to overly harsh (though not abusive) corporal punishment; that Smiley himself has been a good father to his own son; that he persevered in his education and worked hard at his jobs; and that he has conducted himself well since his incarceration. None of this is to say that the trial court *had* to treat any of these circumstances as mitigating in Smiley's case or to assign them any particular weight. But Smiley's proposed mitigators are too substantively dissimilar from each other to be addressed as an undifferentiated whole.

Nonetheless, because there is no reasonable possibility that Smiley would have received a lesser sentence absent the trial court's error, we conclude that the error was harmless. Smiley's previous conviction for the Riley capital felony and for the contemporaneous violent felonies committed against Mark Wilkerson made this a highly aggravated case. Moreover, the sentencing order leaves no doubt that the trial court was aware of and considered the nonstatutory mitigating circumstances that Smiley proposed. Significantly, the sentencing order shows that the trial court—like the penalty phase jury—was unpersuaded that Smiley's

aneurysms and resulting brain injury constituted significant mitigation. The trial court found that Smiley had established the statutory mitigators for extreme mental or emotional disturbance and for substantially impaired ***178** ability to conform to the law, but the court still assigned each of these mitigators only "little weight." This was the heart of Smiley's case for mitigation, and the trial court was largely unmoved by it. On this record, there is no reasonable possibility that disaggregating Smiley's proposed nonstatutory mitigation—which the trial court assigned "moderate weight" in the aggregate—could have changed the trial court's weighing calculus and resulted in a life sentence.

X. Sufficiency of the Evidence

[34] Although Smiley does not challenge the sufficiency of the evidence to sustain his conviction for first-degree felony murder, we must independently review the record to determine whether competent, substantial evidence supports the conviction. *Kirkman v. State*, 233 So. 3d 456, 469 (Fla. 2018); Fla. R. App. P. 9.142(a)(5). That standard is easily satisfied here. The predicate felonies underlying the felony murder charge were robbery and burglary. Mark Wilkerson testified that Smiley shot and killed Drake and that Smiley stole Wilkerson's cell phone and forced his way into the Drake home. John McDonald testified that the criminal episode had the goal of stealing money from a safe in the Drake home and that Smiley confessed to the Drake murder. This testimony was corroborated by DNA evidence linking Smiley to the backpack found at the crime scene and by the cell phone records showing that Wilkerson's stolen phone was used in a three-way call with McDonald and Samantha Lee shortly after the murder. Competent, substantial evidence supports Smiley's first-degree felony murder conviction.

XI. Proportionality of Smiley's Death Sentence

[35] **[36]** It has been this Court's practice in death sentence direct appeals to conduct a proportionality review to ensure that the defendant's crime falls within the most aggravated and least mitigated of murders. This review is qualitative, not quantitative—we do not simply tally the number of aggravating factors and mitigating circumstances. We accept the weight that the trial court has given to those factors and circumstances. And we consider the totality of the circumstances and compare the case with other capital cases.

Elsewhere in this opinion we have detailed the trial court's findings on aggravation and mitigation. Suffice it to say that the trial court gave great weight to Smiley's prior capital felony conviction for the Riley murder and to Smiley's contemporaneous convictions for the felonies Smiley committed against Mark Wilkerson. Moreover, though the trial court credited the fact that Smiley had suffered a severe brain trauma as a result of his ruptured aneurysms, the court gave little weight to Smiley's proposed mitigators for extreme emotional disturbance and inability to conform his conduct to the requirements of the law. Smiley's nonstatutory mitigating circumstances, which the trial court assigned moderate weight, were far from compelling. All in all, Smiley's felony murder conviction was highly aggravated—particularly because of his prior conviction for the Riley murder—and only lightly mitigated.

Recently, in *Newberry v. State*, 288 So. 3d 1040 (Fla. 2019), we upheld a death sentence imposed on a defendant who committed a robbery/murder and whose aggravators and mitigators were qualitatively similar to Smiley's. Our decision in *Newberry* cited multiple similar cases in which we upheld the imposition of a death sentence. *See id.* at 1049-50. Death is a proportionate punishment in Smiley's case.

***179** In light of the foregoing, we affirm Smiley's conviction for first-degree felony murder and his sentence of death.

It is so ordered.

CANADY, C.J., and POLSTON, LAWSON, and MUÑIZ, JJ., concur.

LABARGA, J., concurs in result.

All Citations

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Footnotes

1 We have jurisdiction. *See* art. V, § 3(b)(1), Fla. Const.

2 *Spencer v. State*, 615 So. 2d 688 (Fla. 1993).

3 The trial court assigned the following weights to the aggravating factors: (1) Smiley was previously convicted of another capital felony (the murder of Carmen Riley) and (2) Smiley was previously convicted of a felony involving the use or threat of violence to the person (robbery with a firearm involving Carmen Riley) (merged, great weight); (3) Smiley was previously convicted of a felony involving the use or threat of violence to the person (robbery with a firearm involving Mark Wilkerson) and (6) Smiley committed the first-degree murder while engaged in a robbery (of Mark Wilkerson) (merged, great weight); (4) Smiley was previously convicted of a felony involving the use or threat of violence to the person (aggravated assault of Mark Wilkerson) (no weight); (5) Smiley was previously convicted of a felony involving the use or threat of violence to the person (burglary with an assault or battery while armed involving Clifford Drake and Mark Wilkerson) and (7) Smiley committed the first-degree murder while engaged in a burglary of a dwelling with an assault or battery while armed with a firearm (involving Clifford Drake and Mark Wilkerson) (merged, moderate weight); (8) the first-degree murder was committed for pecuniary gain (substantial weight).

4 The trial court assigned the following weights to the mitigating circumstances: (1) Smiley has no significant history of prior criminal activity (moderate weight); (2) Smiley committed the first-degree murder while under the influence of extreme mental or emotional disturbance (little weight); (3) the capacity of Smiley to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired (little weight); (4) Smiley's age at the time of the crime (little weight); (5) the existence of any other factor(s) in Smiley's character, background, life, or the circumstances of the offense that would mitigate against the imposition of the death penalty (moderate weight).

5 Smiley cites the verdict form approved by this Court in 2018 in *In re Standard Criminal Jury Instructions in Capital Cases*, 244 So. 3d 172 (Fla. 2018).

6 *Campbell* also requires the trial court's order to: "(2) assign a weight to each aggravating factor and mitigating factor properly established; (3) weigh the established aggravating circumstances against the established mitigating circumstances; and (4) provide a detailed explanation of the result of the weighing process." *Rogers v. State*, 285 So. 3d 872, 889 (Fla. 2019) (quoting *Orme v. State*, 25 So. 3d 536, 547-48 (Fla. 2009)).

7 Section 921.141(4) requires the following:

> In each case in which the court imposes a sentence of death, the court shall, considering the records of the trial and the sentencing proceedings, enter a written order addressing the aggravating factors set forth in subsection (6) found to exist, the mitigating circumstances in subsection (7) reasonably established by the evidence, whether there are sufficient aggravating factors to warrant the death penalty, and whether the aggravating factors outweigh the mitigating circumstances reasonably established by the evidence.

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