IN THE SUPREME COURT OF FLORIDA

DONALD JAMES SMITH,

Appellant,

Case No.: SC18-822
L.T. No.: 16-2013-CF-005781

v.

STATE OF FLORIDA,

DEATH PENALTY—DIRECT APPEAL

Appellee.
_____/

APPELLANT'S REPLY BRIEF

On Appeal from the Circuit Court, Fourth Judicial Circuit, in and for Duval County, Florida
Honorable Mallory D. Cooper Presiding

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I. The Trial Court Abused Its Discretion by Denying Mr. Smith's Motion to Change Venue

Counsel respects and understands the precedent set in the *Dubose* case as to the five factors utilized in determining whether a motion for change of venue should be granted. Dubose v. State, 210 So.3d 641, 654 (Fla. 2017). This firm handled *Dubose* at the trial level and argued change of venue at the trial level. Because this instant case is a death penalty case, the rulings in *Ring*, *Apprendi*, and *Hurst* will apply. Ring v. Arizona, 536 U.S. 584 (2002). Apprendi v. New Jersey, 530 U.S. 446 (2000). Hurst v. State, 202 So. 3d 40 (Fla. 2016). There has been much controversy over the application of these three cases to Florida law, and the legislature has attempted to correct the laws regarding sentencing to be in line with the court rulings. This firm also handled the *Mosley* case, which was one of the first two cases reversed after the United States Supreme Court ruled Florida's Death Penalty scheme unconstitutional in *Hurst*. Mosley v. State, 209 So. 3d 1248, 1253 (Fla. 2016).

The *Apprendi* issue was preserved by this firm in *Mosley* and it was successful. Due to the nature of the Supreme Court's ability to make decision that change the law, it is mandatory that counsel preserve any and all legal arguments for future

appeal. Failure to preserve these issues will cause this Court to be listening to ineffective assistance of counsel claims years from now.

To the best of our knowledge, there has only been one case in the history of Duval County in which there has been a change of venue. In *State v. Phillips*, there was no defense motion to change the venue. Phillips v. State, 286 So. 3d 905, 906 (Fla. 1st DCA 2019). The Honorable Charles Arnold ordered it Sua Sponte with guidance from Richard Mantei, his law clerk at the time, and who is now with Statewide prosecution,

Appellate counsel does understand that the issue may not have been properly preserved by trial counsel. This was trial counsel's first death penalty trial. Therefore, the undersigned argues this was a fundamental error.

II. The Trial Court Abused Its Discretion by Denying Mr. Smith's Motion for Mistrial After the Medical Examiner Became Emotional During Her Testimony Before the Jury and Denying Mr. Smith's Motion to Exclude Autopsy Photographs of Cherish Perrywinkle

The State argues that the Chief Medical Examiner, Dr. Rao, did not begin to cry on the stand, but this is clearly refuted by the Record on Appeal on this case. R. Vol. II, p. 1291. Dr. Rao became overly emotional on the stand and then asked for a five-minute recess during her testimony while looking at photographs of the victim. This display of emotion by an expert who is routinely testifying regarding

the medical autopsies she performs as part of her occupation cannot be ignored. It is clear, based on Dr. Rao's reaction, how powerful and inflammatory the photographs she was viewing were. If a Chief Medical Examiner is so emotionally disturbed by these photographs, then it was clear that the photographs would be highly inflammatory to the average juror. No one is arguing that the crime committed in this case was not horrible, but the Appellant is still entitled to a fair trial under the Florida Rules of Criminal Procedure.

Further evidence that the Chief Medical Examiner should have been immune to such displays of emotion on the stand can be found in the sheer number of cases in which Dr. Rao has testified. Duval County, Florida, has had one of the highest violent crime rates in the United States for decades. There are more offenders on death row from the Fourth Judicial Circuit than there are from any other judicial circuit in the state of Florida. Dr. Rao has done thousands of autopsies, and has personally testified in hundreds of cases where the manner of death could be described as horrific and brutal. The fact that Dr. Rao broke down on the stand, in front of a jury, and needed to ask for a recess in order to regain control of her emotions should get this Court's attention and the Motion for Mistrial should have been granted as a direct result.

As to issue three, the issue of the autopsy photo objections can and should be combined with the issue of Dr. Rao's testimony. It is clear the photos were

horrendous, enough to make a seasoned Chief Medical Examiner break down on the stand and require a recess. In this instant case, the State argued both at trial and in their Answer Brief that the amount of evidence in this case was voluminous and left little to no doubt that the Appellant was guilty. Given the amount of evidence in videos that showed the Appellant with the victim, leaving with the victim, and eyewitness testimony about the Appellant at the scene were the victim was found, there was no need to publish the autopsy photographs to the jury unless it was to inflame them. The State properly introduced the photographs to Dr. Rao through the standard questions: do you recognize this, does this refresh your recollection, would these assist you in your testimony. Understanding this line of questioning is both necessary and appropriate under the rules of evidence, the record makes it clear that Dr. Rao did not need these photographs to refresh her recollection of the case; however, but even if she did, there was no need to publish the photographs to the jury given the sheer amount of evidence already present in the case that established that this was a horrific, violent crime that was committed by the Appellant.

III. The State Violated Mr. Smith's Right to a Fair Trial by Making Improper Comments in Both the Opening Statements and Closing Arguments of the Guilt Phase of the Trial

In both the opening statement and closing arguments, the State made comments that deprived Mr. Smith of a fair trial. Both were intended to evoke an emotional

reaction rather than to explain the anticipated evidence in the case, or what evidence was offered by the State to prove its case. The State argues that the five factors in Darden v. Wainwright, 477 U.S. 168 (1986) applied to this case do not create reversible error, and the undersigned respectfully disagrees. As stated in *Darden*, there is prosecutorial error when the prosecution's argument includes improper remarks that can reflect an emotional reaction to the case. It is clear that the facts of this case illicit a guttural response, this has been conceded by both Trial and Appellate counsel. The statement made by the State in opening statements that "Every mother's darkest nightmare became Rayne Perrywinkle's reality" were designed to illicit a sympathetic response to the victim's mother. The statement made by the State in closing arguments about the victim "crying out from the grave for justice" were just as, if not more so, inflammatory and emotionally charged. Even though trial counsel did not preserve the issue of the closing arguments on appeal by failing to raise an issue at trial or attempt to correct the error via rebuttal closing argument available to them under *Darden*, the undersigned must raise the issue to prevent further miscarriage of justice.

IV. The Cumulative Effect of the Errors in this Case Deprived Mr. Smith of a Fair Trial and Require Reversal of his Convictions and Death Sentence

As stated in our Initial Brief, even if this Court concludes that none of the aforementioned errors support reversal on their own, the cumulative effect of the

errors undermined confidence in the outcome of Mr. Smith's trial. Reversal is warranted if, as a result of the cumulative effect of the errors, "the integrity of the judicial process [was] compromised and the resulting convictions . . . irreparably tainted" Ruiz v. State, 743 So. 2d 1, 8 (Fla. 1999), or "[the defendant] was denied the fundamental right to due process and the right to a fair trial." State v. Townsend, 635 So. 2d 949, 959–60 (Fla. 1994). Reversal should be granted where the trial was fundamentally unfair. *Id.* As such, this Court should reverse Mr. Smith's convictions and death sentence and remand the case for a new trial.

CONCLUSION

Appellant, DONALD JAMES SMITH, requests this Court reverse and remand his conviction and sentence of death, with directions for a new trial and penalty phase.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished, via electronic mail on this 4th day of September to Assistant Attorney General, Charmaine Millsaps at Charmaine.millsaps@myfloridalegal.com.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief has been prepared with Times New Roman, 14-point type and complies with the font requirements of Rule 9.210.

Respectfully submitted,

/s/ H. Kate Bedell, Esq.
H. Kate Bedell, Esq.