IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

STATE OF FLORIDA,

Appellant,

v. Case No. 5D19-1592

JUAN ROSARIO,

Appellee.

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Opinion filed

Appeal from the Circuit Court for Orange County, Leticia J. Marques, Judge.

Ashley Moody, Attorney General, Tallahassee, and Christina Z. Pacheco, Assistant Attorney General, Tampa, for Appellant.

Marc J. Burnham, Orlando, for Appellee.

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HARRIS, J.

The State of Florida appeals the trial court's order granting Juan Rosario a new penalty phase trial after a jury found him guilty of first-degree murder and arson of an occupied structure, finding that Rosario had received ineffective assistance of counsel. On appeal, the State argues that the trial court erred in granting Rosario's motion without providing it notice or an opportunity to be heard, and in failing to hold an evidentiary hearing to establish factual support for the allegations of ineffective assistance of counsel.

The State further argues that the trial court failed to conduct a proper prejudice analysis under Strickland v. Washington, 466 U.S. 668 (1984), and that the court erred by considering the motion for new trial prior to sentencing Rosario. We agree and reverse.

A brief factual and procedural history of this case is necessary to properly understand the issues presented in this appeal. On September 8, 2013, Rosario entered the home of eighty-five-year-old Elena Ortega. He severely and brutally beat her with a heavy object and then stole many of her belongings. Later that evening, Rosario returned to Ms. Ortega's house and intentionally set multiple fires. Ms. Ortega, who was likely unconscious but still alive at the time, ultimately died from the blunt-impact injuries to her head and skull as well as the effects of smoke inhalation. Rosario was subsequently indicted for first-degree murder and arson of an occupied structure, and the State filed its notice of intent to seek the death penalty. In April 2017, Rosario was tried and found guilty on both counts and a penalty phase trial occurred the following month. After hearing all the evidence of aggravation and mitigation, the jury unanimously determined that Rosario should be sentenced to death.

Soon after the jury's recommendation, Rosario's counsel withdrew from representation and a new attorney was appointed. Several months later, Rosario's new counsel filed a motion requesting a new penalty phase trial. In that motion, Rosario attacked, in great detail, the performance of his penalty phase counsel, arguing that it was so deficient as to render the jury's findings unreliable. Prior to any hearing, that motion was withdrawn, only to be replaced a week later by a motion for new trial. The sole basis alleged by Rosario in his motion for new trial was that his trial counsel was not

legally qualified to be lead counsel in a death penalty case. See Fla. R. Crim. P. 3.112. There were no allegations of deficient performance.

Without holding a hearing, the trial court entered an order granting in part and denying in part the motion for new trial. The trial court denied the relief requested by Rosario, i.e., a new guilt phase trial, and instead granted him a new penalty phase hearing, basing its ruling on several findings of deficient performance by Rosario's lawyers. The trial court granted Rosario's motion for new penalty phase, even though that motion had been expressly withdrawn, and denied the only motion actually pending—Rosario's motion for new guilt phase trial.

Initially, we do not accept Rosario's argument that the court somehow acted on its own motion. Rosario mentions briefly that under Florida Rule of Criminal Procedure 3.580, a trial court has the authority to grant a new trial on its own initiative, and that by its ruling, that is "essentially" what the court did. However, such an argument is clearly contradicted by the record and by the order itself. In the trial court's order, the judge specifically stated that she was ruling on Rosario's motion for new trial, and even referenced the date on which that motion was filed. The order acknowledged that it was entered without providing an evidentiary hearing to the parties, it referenced the only argument made in the motion, and then impliedly bifurcated the motion for new trial, first denying Rosario's motion for new trial as to the guilt phase and then granting his motion for new trial as to the penalty phase. There simply is no support for Rosario's contention that the trial court was "necessarily" or "essentially" acting on its own motion, or the conclusion in Judge Sasso's dissenting opinion that the order was "errantly couched in terms of granting Rosario's motion." Therefore, whether a trial court has the authority

under rule 3.580 to grant a new penalty phase on the court's own motion is simply not an issue presented in this appeal.

Rosario also argues that the trial court could have granted a new penalty phase for any of the reasons included in Florida Rule of Criminal Procedure 3.600(b). This position is untenable as it is neither supported by the record nor by the findings that are required in order to grant a new trial. First, the trial court failed to make any findings that would justify granting a new trial under rule 3.600(b), which provides very specific and limited circumstances under which a new trial can be granted. Arguably, the only applicable circumstance in this case is subsection (8), which provides that "[t]he court shall grant a new trial if substantial rights of the defendant were prejudiced . . . [such that] for any other cause not due to the defendant's own fault, the defendant did not receive a fair and impartial trial." Fla. R. Crim. P. 3.600(b)(8). Here, the motion that was granted argued only that Rosario's lead counsel was not qualified to handle death penalty cases and then simply concluded that Rosario did not receive a fair trial as a result. Significantly, the trial court made no finding that Rosario did not receive a fair penalty phase, nor did the court find that Rosario's penalty phase was not impartial. In order to grant a new penalty phase, both findings are required. Additionally, the reason for the new trial must not be due to the defendant's own fault. Again, no such finding was made here.

Because the court granted Rosario's written motion, we next consider whether that motion complied with the applicable rules of criminal procedure. The time and method for filing motions for new trial in capital cases where the death penalty is an issue is set forth in Florida Rule of Criminal Procedure 3.590(b). It its entirety, rule 3.590(b) reads as follows:

> **(b) Time for Filing in Capital Cases Where the Death Penalty Is an Issue.** A motion for new trial or a motion in arrest of judgment, or both, or for a new penalty phase hearing may be made within 10 days after written final judgment of conviction and sentence of life imprisonment or death is filed. The motion may address grounds which arose in the guilt phase and the penalty phase of the trial. Separate motions for the guilt phase and the penalty phase may be filed. The motion or motions may be amended without leave of court prior to the expiration of the 10-day period, and in the discretion of the court, at any other time before the motion is determined.

Fla. R. Crim. P. 3.590.

Prior to its most recent amendment, rule 3.590 provided that a motion for new penalty phase hearing may be made within ten days after the rendition of the verdict, the same time-frame imposed for moving for a new trial in non-capital cases. However, in 2006, the rule was amended in response to a case where a motion for new trial was filed within ten days after the penalty phase but not within ten days following the verdict in the guilt phase. In order to remedy similar situations, the court added a subsection which pertains exclusively to post-trial motions filed in capital cases. In re Amendments to Fla. Rules of Criminal Procedure 3.851 & 3.590, 945 So. 2d 1124, 1125 (Fla. 2006). The amendment provided "time limitations and procedures" for moving for a new penalty phase in capital cases in which the death penalty was an issue. See Fla. R. Crim. P. 3.590 (Comm. Notes, 2006 Amend.). In its current version, rule 3.590(b) requires that any motion for new trial be made "within ten days *after* final judgment of conviction *and* sentence of life imprisonment or death is filed." (Emphasis supplied).

Tying the filing of a motion for new trial to the filing date of a conviction and sentence is a requirement that applies only in cases where the death penalty is an issue, and, in our interpretation, rule 3.590(b) necessarily presupposes the imposition of a

sentence prior to any decision on whether to grant a motion for new trial (or new penalty phase). Here, Rosario filed, and the court granted, the motion for new trial prior to a final judgment of conviction and sentence being filed. To date, Rosario has not been sentenced in this case. Because Rosario has not yet been sentenced, we agree with the State that it was premature for the court to entertain any motion for a new penalty phase or motion for new trial.

Judge Eisnaugle's dissent ignores the most substantive amendment to rule 3.590, i.e., the added requirement that a judgment of conviction and sentence be filed, and instead focuses on *when* the motion should be filed.[1] By giving no meaning to the newly-added requirement in capital cases that a sentence first be imposed, the dissent would allow the same result as under the previous version of the rule where capital cases were treated the same as non-capital cases. If that was the intent of the Florida Supreme Court, there would have been no reason to amend rule 3.590 to include a separate and distinct requirement for use in cases where the death penalty is an option. We decline to ignore this requirement.

Judge Eisnaugle notes that the majority opinion fails to address whether there would be any "jurisdictional implications" relative to a prematurely-filed motion for new trial. We find that the trial court erred in ruling on the motion for new trial without first sentencing Rosario. The date on which the motion was filed does not bear great

[1] In fact, regardless of whether it is ultimately considered a window or a deadline, the ten-day period existed in the prior version of the rule where capital and non-capital cases were treated the same. The only difference with respect to the ten-day period is that in non-capital cases, it runs from rendition of the verdict and, as has been pointed out, in capital cases it runs from the filing of the judgment of conviction and sentence of life imprisonment or death.

significance to our holding, and the validity of an untimely motion was not an issue raised in this appeal. However, Judge Eisnaugle does accurately characterize this Court's interpretation of rule 3.590(b), i.e., that a motion for new trial in a capital case should be filed during the ten-day period following sentencing. This interpretation, we feel, reflects the plain meaning of the words adopted by our supreme court when amending the rule.

We read rule 3.590(b) to require what it clearly states—in a death penalty case, a motion for new penalty phase is to be filed after the filing of the sentence of life imprisonment or death. Judge Eisnaugle's conclusion in his dissenting opinion seems to be based, at least in part, on a hypothetical scenario where a judge could be forced to sentence a defendant prior to granting a new guilt phase trial. How another court might apply rule 3.590 to an entirely different set of facts has nothing to do with how this Court should resolve the instant case. Here, Rosario was unanimously found guilty of a crime for which the death penalty was a sentencing option. That same jury then unanimously recommended that Rosario be sentenced to death. Rosario's case then proceeded through a Spencer[2] hearing, where additional witnesses and evidence were presented. All that remained for the trial court to do was to impose a sentence, after which the parties could have filed, and the court could have considered, whatever post-trial motions were appropriate. That did not happen here, a result Judge Eisnaugle's dissent would allow based on its conclusion that rule 3.590's time requirement is "a deadline, not a window." We do not read rule 3.590 so broadly, as it does not reflect a plain reading of the rule, at least as it was amended in 2006.

[2] Spencer v. State, 691 So. 2d 1062 (Fla. 1996).

"The cardinal rule of statutory construction is that the courts will give a statute its plain and ordinary meaning." Weber v. Dobbins, 616 So. 2d 956, 958 (Fla. 1993); see also Brown v. State, 715 So. 2d 241, 243 (Fla. 1998) ("[T]he rules of construction applicable to statutes also apply to the construction of rules."). As our Court has previously stated, we should declare words that the Florida Supreme Court has chosen when establishing rules of procedure to mean exactly what those words usually mean and that plain or usual meaning can be derived from an "accepted dictionary." Williams v. State, 378 So. 2d 902, 903 (Fla. 5th DCA 1980). By concluding that the ten-day time frame set forth in rule 3.590 is "a deadline, not a window," the dissent fails to give the word "within" its plain and ordinary meaning—"in or into the interior; on the inside; internally." See Webster's New Collegiate Dictionary (4th ed. 1999).

Instead, Judge Eisnaugle necessarily interprets the phrase "within 10 days after" to mean "at any time before 10 days from . . . ." No other interpretation would lead to his conclusion, one which simply does not reflect the plain and ordinary meaning of the text. To support his position, Judge Eisnaugle relies on three Florida Supreme Court opinions, none of which we find controlling in this case.

First, the dissent cites to Chatlos v. Overstreet, 124 So. 2d 1, 2 (Fla. 1960), a sixty-year old opinion determining when a taxpayer may institute a suit to declare a tax assessment invalid. Chatlos dealt with a statute which provided that no assessment could be held invalid unless the suit challenging the assessment was filed "within 60 days from the time the assessment shall become final." Id. The plaintiff had properly and unsuccessfully exhausted all of his administrative remedies to challenge the assessment of his property. Id. He subsequently sued the tax collector but filed his lawsuit

approximately three weeks before the tax roll became final. Id. The trial court dismissed the lawsuit on jurisdictional grounds, as it was filed prior to the start of the sixty-day period. Id.

On direct appeal, the Florida Supreme Court reversed, finding that a construction of section 192.21, Florida Statutes, which would limit the time within which a taxpayer who has already exhausted his administrative remedies can initiate a suit, "creates an unconstitutional burden on the right of an appellant to litigate his cause." Id. at 3. In so holding, the court accepted Chatlos' argument that the legislature could not close the door of the courts on him until the tax collector completed the ministerial function of finalizing the tax roll. Id.

The Chatlos decision is inapposite to the facts of this case. First, the opinion itself acknowledges that the administrative review undertaken by the court is not the same as normal judicial review. "The established rule with respect to initiation of judicial proceedings in contest of administrative acts is therefore easily distinguishable from that governing ordinary appellate review of judgments." Id. (citations omitted). Nonetheless, as the dissent correctly points out, the court interpreted the word "within" to mean not later than, setting a limit beyond which action may not be taken. However, to do otherwise, the court concluded, would have led to an unconstitutional result, thereby rendering the legislative act invalid. There is no argument in this case that the Florida Supreme Court's adoption of rule 3.590(b), or our interpretation thereof, would deprive Rosario of his ability to access the courts or would in any other way be constitutionally infirm. While the Chatlos court may have been compelled to stray from the plain meaning of the text of section 192.21 in order to preserve its constitutionality, we face no similar compunction here.

The second case relied upon in Judge Eisnaugle's dissent is Barco v. School Board of Pinellas County, 975 So. 2d 1116 (Fla. 2008). In Barco, the court discussed Florida Rule of Civil Procedure 1.525, which requires a motion for attorney's fees be served "within 30 days after filing of the judgment." Id. at 1119. The court concluded that the term "within" was ambiguous in the context of notice of an intent to seek attorney's fees and, in that limited context, found it to mean "no later than" thirty days after the final judgment. Id. at 1124. Thus, the thirty-day period referenced in the rule was found to establish a deadline, as opposed to a finite window, a position adopted by the dissent in this case. Id. As with Chatlos, we find Barco clearly distinguishable.

First, Barco dealt with the interpretation of a rule of civil procedure, the primary intent of which was to ensure that notice of an intent to seek attorney's fees was provided in a timely manner. Certainly, notice provided prior to a final judgment serves this same purpose. Second, the opinion relied on a subsequent amendment to the rule, where the court clarified that its intent was, in fact, to establish an outside deadline for the service of the motion.

To the contrary, rule 3.590, as amended in 2006, makes clear the Florida Supreme Court's intent to establish a different procedure for handling new trial motions in death penalty cases. It is much more than a notice rule and reflects substantive changes that do not apply in non-capital cases, e.g., the filing of the written final judgment of conviction and sentence. In addition, rule 3.590 contains a clear and unambiguous reference to the period in question by authorizing amendments to the motion for new trial "prior to the expiration of *the ten-day period*." (Emphasis added). This reference to a specific window of time, which is not included in rule 1.525, provides further evidence of the court's intent

to establish a specific window of time within which a motion for new trial must be made. If the intent of the rule was to establish a deadline before which the motion is to be filed, as the court found in Barco, there would be no reason to reference a specific ten-day period.

Finally, Judge Eisnaugle in his dissent relies upon League of Women Voters v. Scott, 257 So. 3d 900 (Fla. 2018), as another case holding that the term "within" establishes a deadline as opposed to a window, an argument that misconstrues the court's holding. In League of Women Voters, the court held that a judicial nominating commission was not prohibited from acting towards filling a judicial vacancy before the vacancy actually occurs. Id. This holding is entirely consistent with the language of article V, section 11(c) of the Florida Constitution, which provides that nominations of judicial candidates shall be made "within thirty days *from* the occurrence of the vacancy." (Emphasis added). A thirty-day period *from* a fixed date could logically be read to include a period of time both before and after that date. This is consistent with the holding in League of Women Voters that the nominating commission could take action prior to the judicial vacancy, so long as the nominations were submitted to the governor "no later than thirty days after the occurrence of the vacancy." Id.

The language used by the supreme court when it adopted rule 3.590(b) is admittedly similar to the language in article V, section 11(c) of the Florida Constitution, but it is materially different in one important respect. Rule 3.590(b) references a period of time that commences *after* a set event, as opposed to thirty days *from* that event. Use of the term "after" in this context has to mean something, not only implying a starting date, i.e., a window, but actually requiring the occurrence of the event—in this case the filing of

a written final judgment of conviction and sentence of death or life imprisonment, before that time period starts.

To illustrate this point, one need only look to the second sentence of article V, section 11(c), of the Florida Constitution, which provides that the governor "shall make the appointment within sixty days *after* the nominations have been certified to the governor." (Emphasis added). It cannot be logically argued that the sixty-day window begins at any time other than the date the nominations are certified. The governor would not be authorized to appoint a judge prior to receiving a list of nominees from the commission. Yet, this is precisely what the dissent's analysis would permit. The word "after" would be rendered superfluous and the governor could make any judicial appointment regardless of when, or even if, the critical event ever occurred. As in this case, the window of time under article V, section 11(c) is specifically tied to the occurrence of a critical event—a judicial appointment can only occur within sixty days *after* receipt of certified nominees. Similarly, a motion for new trial in a capital case can only be made within ten days *after* the filing of the judgment and sentence.

We further note that neither Chatlos, Barco, nor League of Women Voters involved a criminal proceeding or the interpretation of a rule of criminal procedure and that none of those cases interpreted a rule or statute that contained a separate and distinct reference to the window of time at issue. We therefore find none of those cases to be controlling in this case, and we further find that, applying the plain and ordinary meaning of the words used in rule 3.590(b), a motion for new trial filed in a capital case where the death penalty is an issue must be made within ten days after the final judgment of conviction and sentence of life imprisonment or death is filed. Thus, we agree with the

State that it was error for the trial court to consider the motion for new trial prior to sentencing Rosario in this case.

It is also noteworthy that, on appeal, Rosario never argued that his motion for new trial was timely filed or that rule 3.590(b) somehow creates a filing deadline only. In its initial brief, the State argues that any motion for new trial must be filed during the ten-day window that begins with the filing of the sentence. In response, Rosario simply argues that the trial court "acted appropriately" because of its concerns regarding deficiencies in the penalty phase defense. Not only is Rosario's argument completely unsupported by any cited authority, it wholly ignores the State's argument that the motion was untimely. The dissent's conclusion regarding the timeliness of Rosario's motion for new trial is, thus, based on arguments that have not been briefed, much less raised, by Rosario.

In addition to its concerns about the timing of the filing of the motion for new trial and the trial court's ruling on that motion, the State also argues that the court erred by granting a new penalty phase based on *sua sponte* allegations of ineffective assistance of counsel without giving the State any opportunity to refute the court's findings. The State further argues that the court improperly found Rosario's counsel to be deficient based on pure speculation and that it failed to conduct a proper prejudice analysis under Strickland. We agree with the State in each of those arguments and would reverse the order granting in part Rosario's motion for new penalty phase trial on those grounds irrespective of the applicability of rule 3.590(b).

As previously stated, the only motion properly before the court when it granted Rosario a new penalty phase was the motion for new trial. This motion alleged, as its sole basis for relief, that Rosario's trial counsel was not qualified to serve as lead counsel in a

capital case. Nonetheless, in granting Rosario a new penalty phase, the court found numerous instances of what it perceived to be ineffective representation, and as pointed out several times in the State's brief, the State was deprived of any opportunity, by hearing or otherwise, to refute or even address the issues raised in Rosario's motion or subsequently found by the trial court. The State correctly notes that it was never given any notice that the court would be considering or ruling on Rosario's motion for new trial or that the court would be considering its own allegations of ineffective assistance of counsel.

Clearly the State would be considered an "interested party" in any criminal prosecution it brings on behalf of its citizens. As an interested party, the State (as any other party would be) is entitled to basic, fundamental fairness, including notice and an opportunity to be heard and to present any objections to matters pending before the court. Our court has previously reversed a trial court's *sua sponte* order dismissing criminal charges against a defendant simply because the state did not receive notice or an opportunity to be heard. See State v. Patsas, 60 So. 3d 1152 (Fla. 5th DCA 2011) ("The fundamental requisites of due process of law are notice and the opportunity to be heard." (citing Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950))). The Fourth District has similarly held that the granting of a motion to suppress is an extremely important matter having severe repercussions to the losing party, whether the state or the accused. State v. Reed, 421 So. 2d 754, 755 (Fla. 4th DCA 1982). "For that reason, it is imperative that both sides be given fair opportunity to be heard." Id. Here, it was error for the trial court to grant Rosario's motion for new trial without giving the State notice and an opportunity to be heard on that motion.

The State next argues that it was error for the trial court to find ineffective assistance of counsel in the absence of an evidentiary hearing. The State argues that the allegations of ineffective assistance of counsel contained in the motion for new penalty phase were entirely speculative and that the court could not have made findings supporting these allegations without an evidentiary hearing. The purely speculative nature of the ineffectiveness claims seems all but conceded by Rosario, who acknowledges in this appeal that his motion for new penalty phase was withdrawn before a hearing because it was, in fact, speculative. Nonetheless, these "speculative" allegations, which were never established by Rosario, formed the basis of the court's order granting a new penalty phase. As ineffective assistance of Rosario's penalty phase counsel is not apparent on the face of the record, it was error for the court to make such findings without conducting an evidentiary hearing.

Finally, the State argues that the procedure employed by the trial court in finding prejudice under Strickland constitutes reversible error. We agree. To be entitled to relief under Strickland, a defendant must show that his attorney's performance was deficient and that the deficient performance prejudiced his defense. Strickland, 466 U.S. at 687. These claims, in capital cases, are usually presented in a Florida Rule of Criminal Procedure 3.851 motion. See Floyd v. State, 18 So. 3d 432 (Fla. 2009). Under the postconviction rule, the circuit court is specifically presented with the ineffective assistance of counsel claim, and it can "apply the Strickland standard with reference to the full record and any evidence it may receive in an evidentiary hearing, including trial counsel's testimony. Thus, ineffective assistance claims are not usually presented to the judge at trial." Smith v. State, 998 So. 2d 516, 522 (Fla. 2008).

The allegations of ineffective assistance in this case should have been raised and addressed by Rosario in a rule 3.851 proceeding. Unlike typical ineffective assistance of counsel postconviction proceedings, here, the court eliminated the burden Rosario should have had to establish the Strickland prongs, and as noted above, the State had no opportunity to be heard. The court's procedure of finding ineffective assistance of counsel based on its own observations without providing the State any opportunity to address the court's concerns clearly and severely prejudiced the State.

For these reasons, we reverse the trial court's order granting Rosario a new penalty phase trial and remand the case back to the trial court with instructions to sentence Rosario in this case.

REVERSED and REMANDED with instructions.

ORFINGER, WALLIS, and EDWARDS, JJ., concur.

COHEN, J., concurs and concurs specially, with opinion.

SASSO, J., concurs in part and dissents in part, with an opinion joined by EISNAUGLE and GROSSHANS, JJ.

EISNAUGLE, J., concurs in part and dissents in part, with an opinion joined by GROSSHANS and SASSO, JJ.

EVANDER, C.J., concurs in part and dissents in part, with opinion.

GROSSHANS, J., concurs in part and dissents in part, with an opinion joined by EISNAUGLE and SASSO, JJ.

LAMBERT and TRAVER, JJ., recused.

COHEN, J., concurring specially.

We have written a great deal on this case…appropriately so. The nature of the crime and punishment requires careful scrutiny. Having tried death penalty cases as a prosecutor, as a defense attorney, and as a trial court judge, I bring a certain perspective to this case. Given the evidence produced at trial, the goal of the defense in this case was to spare the client a sentence of death.

Two things occurred that allowed a window of opportunity to potentially aid in that goal. First, the United States Supreme Court in Hurst v. Florida, 136 S. Ct. 616 (2016), found the procedure utilized by Florida's death penalty statute unconstitutional. Subsequently, Florida's death penalty law has been in a state of flux with the statute amended and opinions written and then receded from at the highest level. In Perry v. State, 210 So. 2d 630 (Fla. 2016), the court held "that the [death penalty] Act cannot be applied constitutionally to pending prosecutions because the Act does not require unanimity in the jury's final recommendation as to whether the defendant should be sentenced to death." Id. at 634. Additionally, the elected State Attorney for the Ninth Circuit in which Rosario's case was pending announced she would not be seeking the death penalty in any cases.

Rosario no doubt attempted to push his case forward to take advantage of those events. Perhaps prophetically so, because, as has occurred, the Florida Supreme Court reversed its position on the proper application of Hurst, see State v. Poole, 297 So. 3d 487, 504 (Fla. 2020), and the Governor removed the elected State Attorney from all death penalty cases, ultimately forcing her to revamp her office's handling of such cases.

As Judge Eisnaugle acknowledged, there were potentially valid reasons for the path chosen by Rosario's lawyer and the trial judge had, on a number of occasions, specifically discussed with Rosario the risks involved in travelling that path.

That said, while I agree with the majority opinion, I write only to comment on Judge Grosshans' dissent. Initially, I disagree that the State has not presented a fundamental fairness argument on appeal. On a number of occasions, the State raised and objected to the trial court's actions that failed to allow the State notice and an opportunity to be heard. Despite Judge Grosshans' assertion to the contrary, no magic words need be used if a trial or appellate court is made aware of the basis of the argument. What can be clearer than the argument that the failure to allow a party to a lawsuit to be heard on a monumentally important decision such as the granting of a new sentencing hearing, is fundamentally unfair?[3] Judge Grosshans suggests otherwise. Our system of justice, indeed the formation of this country, was founded upon such principles. I fear the day that we abandon such a fundamental right.

Certainly Judge Grosshans must see the irony in her argument that the issue was not raised by the State since the arguments made in her dissent were not raised by Rosario. While the State's brief might not have raised the issue as clearly as Judge Grosshans might like, Rosario's brief made absolutely no attempt to raise these issues. One of the first issues examined by every appellee is whether the issue on appeal was properly preserved for appeal. Rosario made no argument that it was not.

[3] Judge Grosshans adopts an argument advanced by Judge Sasso that the trial court "errantly couched" its order as granting a motion filed by Rosario. Judges Sasso and Grosshans posture that the trial court was actually acting pursuant to Florida Rule of Criminal Procedure 3.580. That assertion is not only unsupported, but affirmatively contradicted by the record.

Judge Grosshans would require a statute or rule to explicitly provide the State, as the prosecuting authority, entitlement to notice and an opportunity to be heard.[4] Not only is there no authority for such a proposition, it defies the core principles that shape our system of justice, as nothing is more fundamental to our system of justice than the right of all parties to an action, including the State, to be heard.

[4] "You don't need a weatherman to know which way the wind blows." Bob Dylan, Subterranean Homesick Blues (Columbia Records 1965).

SASSO, J., concurring in part and dissenting in part with opinion.

I agree that the trial court erred in granting a new penalty phase, and therefore this Court should reverse the trial court's order. However, I disagree that each of the State's arguments on appeal justify reversal. Instead, I believe reversal is warranted because the trial court's finding as to ineffectiveness was not supported by competent, substantial evidence where (1) the trial court had insufficient evidence regarding conceivable tactical explanations that, even if unlikely, would have reasonably justified the perceived deficiencies in counsel's actions, and (2) the trial court was without evidence to establish whether Rosario himself instructed his penalty phase counsel to not present the evidence at issue. Consequently, I agree with the majority only that the order on review should be reversed and write to explain the applicability of the *Strickland*[5] standard in the context of motions for new trial and analyze the trial court's order in light of *Strickland*. Finally, I do not agree with the majority that the case must be remanded for sentencing and therefore dissent from the majority's remand instruction.

The trial court's order

The trial court's order was entered following Rosario's motion for new trial filed pursuant to Florida Rule of Criminal Procedure 3.600. As the majority observes, however, Rosario's motion presented a narrow issue that ultimately did not serve as the basis for the trial court's ruling. Instead, the trial court justified its decision to grant a new trial based on its determination that the performance of Rosario's penalty phase counsel was so deficient that Rosario was denied effective assistance of counsel pursuant to *Strickland*.

[5] *Strickland v. Washington*, 466 U.S. 668 (1984).

In so ruling, the trial court indicated that it reviewed the motion and the entire file, including the trial and penalty phase transcript, and observed the performance of counsel in the case, including at the guilt phase, the penalty phase, and the *Spencer*[6] hearing. The trial court further noted it conducted extensive colloquies with Rosario during the course of the proceedings. Next, the trial court referenced the *Strickland* standard for ineffective assistance of counsel and found in relevant part as follows:

> Even though Mr. Weeden had represented Defendant since January 2015, he and Mr. Davila were patently unprepared for the trial's penalty phase. They failed to conduct even a basic mitigation investigation, such as retaining a doctor to examine Defendant. They requested no education records and retained no mitigation expert, even though the Court authorized this action more than a year before trial. Mr. Davila expressed his mistaken belief that the Defendant's investigator was a mitigation expert. This situation caused the Court to delay the trial's penalty phase for six weeks.
>
> At the penalty phase, defense counsel presented minimal and unsatisfactory mitigation. Dr. Earl Taitt testified that Defendant suffered from post-traumatic stress disorder because someone murdered his mother when he was 19 years old. Some family members testified to events in the defendant's background indicating a less-than-ideal childhood. The defense provided little details or supporting records, though. They neither retained nor called an early childhood trauma expert. This is common practice. Their overall presentation was disjoined, disorganized, and ineffective.

The trial court then noted its familiarity with the "quality of representation appropriate" to penalty phase proceedings. Thus, the trial court concluded that penalty phase counsel's[7] performance was deficient.

Having concluded Rosario's penalty phase counsel was deficient, the trial court then moved to a prejudice analysis. The trial court concluded that Rosario was prejudiced,

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[6] *Spencer v. State*, 691 So. 2d 1062 (Fla. 1996).

[7] Although Rosario was represented by two attorneys during the penalty phase, I refer to them in the singular for ease of reading.

based in large part on the trial court's conclusion that the *Spencer* counsels' performance was superior. The trial court held:

> At the *Spencer* hearing, Defendant's new lawyers presented a PET scan and expert to discuss the forensic evidence that Defendant's early childhood had resulted in permanent changes to his brain. Significantly, the expert testified that those changes would affect his responses and could explain - although not justify - Defendant's murder of Elena Ortega. If a jury found this evidence credible, it would constitute substantial mitigation.
>
> Defendant's new lawyers also indicated they had not been able to complete their investigation in the time allotted, and that given sufficient time, they could offer addition [sic] evidence of Mr. Rosario's intellectual and emotional limitations.

The trial court concluded that penalty phase counsel failed to present, or insufficiently presented, substantive evidence of Rosario's emotional and intellectual disabilities to the jury and that a "real possibility exist[ed]" that such evidence could have convinced "at least one juror that life in prison [was Rosario's] appropriate sentence."

Whether ineffective assistance of counsel can serve as a pre-sentence basis for a new trial

As a preliminary matter, it is important to make two observations. First, a finding of ineffective assistance of counsel may give rise to an order granting a new trial, and the State's argument to the contrary ignores the weight of authority. *See Robinson v. State*, 702 So. 2d 213, 217 (Fla. 1997) (granting new trial in part based on ineffective assistance of counsel); *Miller v. State*, 8 So. 3d 451, 453 (Fla. 1st DCA 2009) (noting trial court erred in treating motion for new trial based on ineffective assistance of counsel as filed pursuant to Florida Rule of Criminal Procedure 3.850 (citing *Skrandel v. State*, 830 So. 2d 109 (Fla. 4th DCA 2002))); *Lockwood v. State*, 608 So. 2d 133, 134 (Fla. 4th DCA 1992) ("[T]here is no procedural bar to appellant raising claims of ineffective assistan[ce] of counsel in a motion for new trial.") (citation omitted); *Jefferson v. State*, 440 So. 2d 20, 22 n.1 (Fla. 1st

DCA 1983) ("Under Florida Rule of Criminal Procedure 3.600(b)(8), ineffective assistance of counsel may properly be raised as a ground for new trial."); *see also Smith v. State*, 579 So. 2d 906 (Fla. 5th DCA 1991); *Wright v. State*, 428 So. 2d 746, 748–49 (Fla. 1st DCA 1983) (finding allegations of ineffective assistance of counsel are reviewable on direct appeal if sufficiently raised in motion for new trial), *approved*, 446 So. 2d 86 (Fla. 1984).

Second, trial courts have the authority to grant a new trial *sua sponte*, when justified. *See* Fla. R. Crim. P. 3.580 ("When a verdict has been rendered against the defendant or the defendant has been found guilty by the court, the court on motion of the defendant, or on its own motion, may grant a new trial or arrest judgment."). As such, the trial court's decision to grant a new trial based on ineffective assistance of counsel, even though errantly couched in terms of granting Rosario's motion, does not serve as a basis for reversible error alone. *Accord Kaufman v. Sweet et al. Corp.*, 144 So. 2d 515, 519 (Fla. 3d DCA 1962) (recognizing that when passing on timely motion for new trial, court may, in exercise of sound discretion, grant it on grounds not stated in motion).

Even so, and as I will explain below, I believe the circumstances in which a court would be legally justified in granting a new trial, *sua sponte*, based on a finding of ineffective assistance of counsel would be exceedingly rare, and this case is not among them.

Standard for granting a new trial based on ineffective assistance of counsel

Rule 3.600 dictates that a court "shall grant a new trial if substantial rights of the defendant were prejudiced." Fla. R. Crim. P. 3.600(b). Subsection (8) contemplates that this includes circumstances where "for any other cause not due to the defendant's own

fault, the defendant did not receive a fair and impartial trial." Thus, as the trial court observed, whether Rosario received a "fair" trial based on the performance of his counsel depends on whether his counsel was functioning as the "counsel" guaranteed him by the Sixth Amendment as interpreted by the United States Supreme Court's *Strickland* jurisprudence. *See Skrandel*, 830 So. 2d at 111 (applying *Strickland* standard to motion for new trial based on claim of ineffective assistance of counsel).

Whether penalty phase counsel's performance was deficient

Under the prevailing professional norms, counsel has an obligation to conduct a thorough investigation of the defendant's background to prepare for the penalty phase of a capital murder trial. *Salazar v. State*, 188 So. 3d 799, 814 (Fla. 2016). Even so, counsel is not ineffective for failing to present mitigation evidence based on a strategic decision made after a reasonable investigation. *See Occhicone v. State*, 768 So. 2d 1037, 1048 (Fla. 2000) ("[S]trategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct."). For that reason, a court's "principal concern in deciding whether [counsel] exercised 'reasonable professional judgmen[t]' is not whether counsel should have presented a mitigation case. Rather, the focus is on whether the investigation supporting counsel's decision not to introduce mitigation evidence . . . was itself reasonable." *Dufour v. State*, 905 So. 2d 42, 55 (Fla. 2005) (quoting *Wiggins v. Smith*, 539 U.S. 510, 522–23 (2003)). Courts, therefore, must conduct an objective review of counsel's performance, "measured for 'reasonableness under prevailing professional norms,' which requires a context-dependent consideration of the challenged conduct as seen 'from counsel's perspective at the time.'" *Id.* And in

conducting such an analysis, courts must indulge a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance, making every effort to eliminate the distorting effects of hindsight. *Durousseau v. State*, 218 So. 3d 405, 410 (Fla. 2017) (citation omitted).

Here, the State argues that the trial court's deficiency findings are unsupported by the record because there might have been strategic reasons for penalty phase counsel's actions that the trial court could not perceive. I agree.

The primary thrust of the court's finding of ineffective assistance was the failure by penalty phase counsel to call an early childhood trauma expert and otherwise present sufficient evidence regarding Rosario's background. The trial court's conclusion was informed by the court's observations of the mitigation evidence presented at the *Spencer* hearing by different counsel, such as the testimony of Dr. Wu, an expert witness in neurocognitive imaging. However, as a byproduct of granting a motion for new trial based on ineffective assistance of counsel without an evidentiary hearing, the trial court did not have the benefit of evidence from either Rosario or his penalty phase counsel explaining counsel's performance.

This is problematic because, as the Florida Supreme Court has observed, "the defendant, not the attorney, is the captain of the ship," *Nixon v. Singletary*, 758 So. 2d 618, 625 (Fla. 2000), and the "defendant has the right to choose what evidence, if any, the defense will present during the penalty phase." *Boyd v. State*, 910 So. 2d 167, 189–90 (Fla. 2005). Accordingly, counsel need not investigate mitigation of a type which has been categorically rejected by the defendant after the defendant has been advised by counsel of the significance of such mitigation. *See, e.g.*, *Ferrell v. State*, 29 So. 3d 959,

990 (Fla. 2010) (Canady, J., concurring in part and dissenting in part) (noting counsel's failure to consult with defendant's family concerning mitigation is not itself sufficient to invalidate defendant's waiver of mitigation; it must also be shown that counsel failed to adequately advise defendant about significance of mitigation evidence that might be forthcoming from defendant's family); *Burkhalter v. State*, 279 So. 3d 314, 316 (Fla. 1st DCA 2019) (noting there is no merit to ineffective assistance of counsel claim if defendant consented to counsel's strategy).

Here, without the benefit of testimony presented via an evidentiary hearing, the trial court lacked a few key pieces of the puzzle that might otherwise explain the actions of Rosario's penalty phase counsel. Notably, the trial court did not have the benefit of any evidence concerning what instructions Rosario might have given to penalty phase counsel. Likewise, I can conceive of tactical reasons on this record, which would be unknown to the trial court, for why counsel did not offer, for example, a childhood trauma expert. And while I acknowledge that the trial court had the ability to perceive counsel's performance in person and in real time, it is simply impossible for a trial court to perceive all of counsel's mental impressions and the existence or non-existence of conversations between Rosario and his counsel to which the trial court was not privy. Given the strong presumption that counsel was effective, we must presume, therefore, that defense counsel performed effectively.

In so concluding, I do not mean to suggest that a trial court can never *sua sponte* grant a new trial based on ineffective assistance of counsel without an evidentiary hearing. While I can also conjure extreme examples that might give rise to such an order, I believe such circumstances would be exceedingly rare and limited to those situations

when the prejudice caused by the conduct is indisputable and a tactical explanation of the conduct is inconceivable. But that is not the case here. *Accord Hoskins v. State*, 75 So. 3d 250, 256 (Fla. 2011) (concluding failure to retain mitigation expert does not constitute per se ineffective assistance of counsel).

Whether the error in finding deficient performance based on the failure to submit sufficient mitigation evidence is reversible

The trial court also found that penalty phase counsel was ineffective based, in part, upon its finding that counsel was "disjoined, disorganized, and ineffective" as to the mitigation evidence they did present. However, it is unclear from the record whether the trial court would have granted a new penalty phase based upon this ground alone. Therefore, I would remand to the trial court for reconsideration. *Accord Van v. Schmidt*, 122 So. 3d 243, 260 (Fla. 2013) (explaining that when appellate court concludes trial court's grant of new trial was at least partly premised on legal error, proper remedy is to remand case to trial court for reconsideration in light of correct legal principles if appellate court is unable to determine whether trial court would have granted new trial but for legal error).

Finally, given this disposition, I would decline to address the trial court's finding regarding prejudice. *See State v. Bush*, 292 So. 3d 18, 21–22 (Fla. 5th DCA 2020) (reiterating that because defendant is required to establish both deficient performance and prejudice to show trial counsel provided ineffective assistance under *Strickland*, when defendant fails to make showing as to one prong, it is not necessary to determine whether defendant has established other prong).

Conclusion

In sum, the trial court's findings that penalty phase counsel was ineffective for failing to present sufficient mitigation evidence lack evidentiary support. Consequently, the trial court abused its discretion in granting a new trial on those grounds. *See McDuffie v. State*, 970 So. 2d 312, 326 (Fla. 2007) (holding that trial court "abuses its discretion if its ruling is based on an erroneous view of the law or on a clearly erroneous assessment of the evidence"). I would conclude, therefore, that the trial court's order should be reversed and remanded for reconsideration in light of this opinion.

EISNAUGLE, J., concurring in part and dissenting in part. Case No. 5D19-1592

I agree with Judge Sasso that, while the trial court had an immense amount of information before it, I can conceive of at least a few reasons for counsel's actions. Therefore, even if those conceivable reasons were unlikely, I agree that a hearing is required to determine if counsel was ineffective for failing to present additional mitigation evidence.

However, I write to address the majority's interpretation of Florida Rule of Criminal Procedure 3.590(b), requiring the trial court to sentence a capital defendant before ruling on a motion for new trial. That rule provides:

> **(b) Time for Filing in Capital Cases Where the Death Penalty Is an Issue.** A motion for new trial or a motion in arrest of judgment, or both, or for a new penalty phase hearing may be made within 10 days after written final judgment of conviction and sentence of life imprisonment or death is filed. The motion may address grounds which arose in the guilt phase and the penalty phase of the trial. Separate motions for the guilt phase and the penalty phase may be filed. The motion or motions may be amended without leave of court prior to the expiration of the 10-day period, and in the discretion of the court, at any other time before the motion is determined.

Fla. R. Crim. P. 3.590(b). We review the interpretation of a procedural rule de novo and construe it "in accordance with the principles of statutory construction." Barco v. Sch. Bd. of Pinellas Cty., 975 So. 2d 1116, 1121 (Fla. 2008) (citation omitted).

I disagree with the majority's conclusion that rule 3.590 creates a narrow ten-day window within which a defendant may file a motion for new trial. Importantly, our supreme court has reached a contrary conclusion on at least three occasions based upon the same

or equivalent language in Chatlos v. Overstreet, 124 So. 2d 1 (Fla. 1960), Barco, and League of Women Voters of Florida v. Scott, 257 So. 3d 900 (Fla. 2018).

In Chatlos, the supreme court interpreted a statute providing that "no assessment shall be held invalid unless suit be instituted within sixty days from the time the assessment shall become final." 124 So. 2d at 2. The court held that the statute set "only a terminal limitation upon the right to institute suit." Id. at 3. In so doing, the court reasoned that the term "'[w]ithin' does not fix the first point of time, but the limit beyond which action may not be taken." Id. (citations omitted).

Later in Barco, the supreme court again considered whether the word "within," this time as used in Florida Rule of Civil Procedure 1.525, created a deadline or a window. 975 So. 2d at 1117–19. After reference to dictionary definitions and its prior decision in Chatlos, the supreme court concluded that "within" has more than one potential meaning, but held that:

> because procedural rules are to be construed to effect a speedy and just determination of the cause on the merits, we construe the word "within" in accord with those courts that have found it to mean "not later than" thirty days after the filing of the judgment, as the current rule now provides.

Id. at 1123–24. In so doing, the court relied on Florida Rule of Civil Procedure 1.010's requirement that the rules "shall be construed to secure the just, speedy, and inexpensive determination of every action." Id. at 1123.

Finally, in League of Women Voters, our supreme court determined once again that similar language established a deadline rather than a window. In that case, the supreme court held that the Florida Constitution's requirement that a JNC make its nominations "within thirty days from the occurrence of a vacancy" sets only a deadline for

the nominations, and that a JNC may therefore act even before a vacancy occurs. 257 So. 3d at 900.

Turning to the case at hand, I find Chatlos, Barco, and League of Women Voters binding, and those cases lead me to conclude that rule 3.590 sets a deadline rather than a narrow ten-day window. Applying the Barco framework, I note the purpose of the criminal rules of procedure is "to secure simplicity in procedure and fairness in administration." Fla. R. Crim. P. 3.020. Yet the majority's interpretation of rule 3.590 will, at least in some cases, unnecessarily complicate and delay the proceedings. Indeed, today's holding will inevitably require a trial judge to ignore meritorious grounds for a new *guilt* phase trial until such time as the penalty phase and Spencer hearing are concluded and a sentence is filed. As the procedural history of this very case illustrates, that could result in weeks or months of delay—not to mention complicating the case with superfluous proceedings.[8] Therefore, as in Barco, I conclude that the majority's interpretation is inconsistent with the purpose of the rule.[9]

[8] The plain language of rule 3.590(b) does not separate the timing of motions for a new guilt phase and new penalty phase. Therefore, despite the majority's suggestion to the contrary, today's holding will necessarily control the timing of all motions for new trial under that rule.

[9] Today's decision creates the potential for a new jurisdictional question in capital cases because the majority seems to conclude that an early filed motion is untimely, but does not address whether such a motion would have jurisdictional implications similar to a motion that is untimely because it is late filed. See Dessa v. State, 89 So. 3d 1067, 1068 (Fla. 3d DCA 2012) (recognizing rule 3.590(a)'s ten-day period "is jurisdictional in nature" (citation omitted)); State v. Pablo-Ramirez, 61 So. 3d 488, 491 (Fla. 2d DCA 2011) ("We are mindful that the time period for filing a motion for new trial is jurisdictional and that the trial court does not have the power to hear an untimely motion for new trial." (citation omitted)). Although the majority also emphasizes the timing of the trial court's ruling, I observe that rule 3.590(b) sets forth only a time for filing a motion and says nothing about the timing of a trial court's ruling.

Moreover, in League of Women Voters, Justice Lawson wrote separately, joined by Justices Canady and Labarga, to observe that the majority's holding was not only consistent with the unanimous decision in Barco, but was also "the most reasonable reading of the language." Id. at 901 (Lawson, J., concurring specially). Reading rule 3.590 in its entirety, I believe Justice Lawson's analysis applies here.

The majority's attempt to distinguish Chatlos, Barco, and League of Women Voters is unpersuasive. The majority would read Chatlos narrowly; however, our supreme court did not do so when it expressly relied on Chatlos to reach its decision in Barco. I will not read Chatlos more narrowly than our supreme court.

As for Barco, the majority observes that case dealt with a rule of civil procedure, but makes no effort to explain why Barco's framework does not apply to the rules of criminal procedure. Moreover, in my view, the majority places far too much significance on rule 3.590's reference to the "10-day period." As I read it, the rule uses the phrase "10-day period" only because that is the simplest and most efficient way to describe the deadline.

The majority's effort to distinguish League of Women Voters is even less persuasive. The majority reasons that "within thirty days from the occurrence of a vacancy" could create a sixty-day window—thirty days before or thirty days after the vacancy—but this reasoning finds no support in the opinion itself. In League of Women Voters, our supreme court held, without limitation, that the JNC was authorized "to make its nominations *no later than* thirty days after the occurrence of a vacancy, and does not prohibit the JNC from acting before a vacancy occurs." 257 So. 3d at 900 (emphasis added). There is simply no indication in League of Women Voters that the supreme court

established a window for the JNC, sixty days or otherwise. Instead, by its express terms, the opinion indicates the JNC is subject to a deadline.[10]

Finally, the majority seems to misinterpret the purpose of the 2006 amendment to rule 3.590. Prior to the 2006 amendment, the deadline for filing a motion for new trial was ten days after rendition of the verdict. Thus, before the amendment, a capital defendant's deadline for filing a motion for new penalty phase could expire before the penalty phase even commenced. That is exactly what would have happened in this case (pre-2006 amendment) given its procedural history.

To address this problem, the Committee recommended the 2006 amendment. At the time, the supreme court explained:

> The Committee proposed the amendment in response to a capital case, which arose in Seminole County, wherein the motion for a new trial was filed within ten days after the penalty phase was completed but not within ten days after the guilt-phase verdict was rendered. Existing rule 3.590(a) fails to address this situation, and the Committee concluded that a new provision was necessary to address the bifurcated trials that take place in capital cases. New subdivision (b) addresses this situation.

In re Amendments to Fla. Rules of Criminal Procedure 3.851 & 3.590, 945 So. 2d 1124, 1125 (Fla. 2006). Therefore, the purpose of the 2006 amendment was to (quite logically) extend the deadline for new trial motions in capital cases. I can find no indication in the

[10] Contrary to the majority's argument, there is no interpretation of the term "within" that would allow the governor to make a judicial appointment before first receiving a list of nominees from the JNC. Article V, section 11, when read in its entirety as we are obliged to do, clearly provides that the governor must make appointments from a list of "not fewer than three persons nor more than six persons nominated by the appropriate judicial nominating commission." Art. V, § 11(a)-(b), Fla. Const.

amendment or its explanation to suggest that the amendment also fashioned a narrow ten-day window for such motions.

In short, I read the term "within" consistent with our supreme court's long-standing and binding decisions in Chatlos, Barco, and League of Women Voters, and conclude that rule 3.590's time requirement is a deadline, not a window.

EVANDER, C.J., concurring in part and dissenting in part.

I agree with the majority opinion except as to its interpretation of Florida Rule of Criminal Procedure 3.590(b). As to that issue, I agree with Judge Eisnaugle that the rule creates a deadline rather than a window.

GROSSHANS, J., concurring in part and dissenting in part with opinion.

I fully concur with the opinions of Judges Sasso and Eisnaugle. However, I write to address one holding on which the majority opinion is predicated. Specifically, in reversing the trial court's decision to grant a new penalty phase, the majority states that, as an interested party, the State is entitled to basic, fundamental fairness including notice and an opportunity to present any objections. I do not join this portion of the majority opinion for two reasons.

First, in its briefs, the State has not presented a fundamental-fairness argument, never once mentioning the terms "interested party," "due process," or "fundamental fairness." Nor, for that matter, has the State cited to any authority that would support its broad entitlement to fundamental fairness.[11] While the State does suggest that the trial court should have provided it with notice and the opportunity to be heard, that argument is presented within the State's broader argument that an evidentiary hearing is required to establish ineffective assistance of counsel.[12] Thus, I believe any generic fundamental-fairness issue has not been sufficiently briefed, and, as a consequence, I would decline to reach this issue. See Bainter v. League of Women Voters of Fla., 150 So. 3d 1115, 1126 (Fla. 2014) (holding that courts "ought not consider arguments outside the scope of

[11] In fact, the State's briefs do not even mention State v. Patsas, 60 So. 3d 1152 (Fla. 5th DCA 2011), or State v. Reed, 421 So. 2d 754 (Fla. 4th DCA 1982)—the two cases on which the majority relies to support its fundamental-fairness holding. And, as for the cases cited by the State, they do not explore the subjects of due process and fundamental fairness.

[12] Neither the majority nor the dissenting opinions agree with the State that the postconviction procedural requirements of Florida Rule of Criminal Procedure 3.851 apply to a motion for new trial.

the briefing process" (quoting Powell v. State, 120 So. 3d 577, 591 (Fla. 1st DCA 2013))); Duest v. Dugger, 555 So. 2d 849, 851–52 (Fla. 1990) (finding waived in a postconviction appeal any claims not fully argued in the appellant's initial brief); Redditt v. State, 84 So. 2d 317, 320 (Fla. 1955) ("The function of an assignment of error is to point [to] the specific error claimed to have been committed by the court below, in order that the reviewing court and opposing counsel may see on what point the appellant seeks reversal and to limit argument and review to such point.").

Second, the cases relied on by the majority do not support a broad entitlement of the State to fundamental fairness untethered to specific protections recognized by statute, procedural rule, or other authority.[13]

In State v. Patsas, a one-paragraph opinion reversing an order of dismissal, this court cited Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950), for the proposition that "[t]he fundamental prerequisites of due process of law are notice and the opportunity to be heard." Patsas, 60 So. 3d 1152, 1152 (Fla. 5th DCA 2011). However, Mullane did not involve a government entity who had been denied a hearing. Rather, in

[13] In his concurring opinion, Judge Cohen suggests that this opinion is ironic because it addresses matters not "raised by" Rosario. I disagree. First, since the State did not present a fundamental-fairness or due process argument in its briefs, Rosario likely would not have anticipated a majority opinion reversing on this ground. Thus, it is understandable why he would not have briefed this issue. Second, Judge Cohen's suggestion overlooks two long-standing principles of appellate law: namely, that the burden to show error rests with the appellant, see E & I, Inc. v. Excavators, Inc., 697 So. 2d 545, 547 (Fla. 4th DCA 1997), and that the appellate court has the authority to affirm on a ground not raised by the appellee. See Rosier v. State, 276 So. 3d 403, 411 n.5 (Fla. 1st DCA 2019) (Winokur, J., concurring) ("It is . . . a fundamental rule of appellate law that the court may affirm (in fact must affirm) a ruling on any argument supported by the record, even if not raised by the appellee."); State v. Pitts, 936 So. 2d 1111, 1133 (Fla. 2d DCA 2006) (explaining that appellate courts should affirm "even if the specific basis for affirmance has not been articulated by the appellee").

Mullane, the Supreme Court discussed due process rights afforded to individuals by the Fourteenth Amendment of the U.S. Constitution. By its plain terms, the Fourteenth Amendment protects people, not States.[14] Thus, the concept of due process under the Fourteenth Amendment does not support the majority's broad-stroke holding that the State is entitled to fundamental fairness solely due to its status as an interested party. See Dep't of Cmty. Affairs v. Holmes Cty., 668 So. 2d 1096, 1102 (Fla. 1st DCA 1996) ("[T]he Fourteenth Amendment to the federal constitution and article I, section 9, of the Florida Constitution provide that no 'person' shall be deprived of life, liberty, or property without due process of law. Being political subdivisions of the State of Florida, the Plaintiff Counties are not a 'person' entitled to protection under the due process clause of the federal or state constitution.").

Next, the majority points to State v. Reed, which observed that the granting of a motion to suppress is an "extremely important matter" that required both sides be given a fair opportunity to be heard. 421 So. 2d 754, 755 (Fla. 4th DCA 1982). Based on this observation, the Fourth District found an abuse of discretion in the trial court's refusal to grant the State a continuance to obtain its witnesses. Id.

The results reached in Patsas and Reed are arguably consistent with my view that procedural rules, statutes, and other authorities are the sources of the State's right to notice and the opportunity to be heard—not an amorphous, free-standing concept of fundamental fairness applied to an interested party. Patsas and Reed involved rulings which are governed by Florida Rule of Criminal Procedure 3.190. For example, Florida

[14] See Amend. XIV, § 1, U.S. Const. ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

Rule of Criminal Procedure 3.190(d) provides the State with the right to file a traverse in response to a motion to dismiss. In the suppression context, rule 3.190(g) provides the State with the right to present evidence at the suppression hearing. And, rule 3.190(f) requires the trial court to exercise discretion in ruling on motions to continue after providing the adverse party an opportunity to respond.

Here, rule 3.190 did not govern the trial court's decision to grant a new penalty phase. Rather, the trial court in this case was operating under the rules of procedure governing a decision to grant a new trial. See Fla. R. Crim. P. 3.580, 3.590, 3.600. These rules do not specifically address the parties' rights to notice and the opportunity to be heard; nor does the State argue that it is entitled to a hearing under those rules. Thus, neither Patsas nor Reed—involving a different procedural posture and governed by a different procedural rule—support the majority's holding, which grants the State a sweeping right to notice and the opportunity to be heard grounded on the general concept of fundamental fairness.

To be clear, courts should exercise caution when deciding matters sua sponte—even when authorized to do so pursuant to a rule of procedure or precedent.[15] Moreover,

[15] This court, on occasion, renders sua sponte decisions without providing an "interested party" notice or the right to be heard as to the grounds for the ruling. See, e.g., Spence v. State, 283 So. 3d 828, 828 (Fla. 5th DCA 2019) (affirming on tipsy coachman grounds); Berben v. State, 268 So. 3d 235, 238 (Fla. 5th DCA 2019) (raising sua sponte the issue of fundamental error as a basis for reversal); Rayburn v. Bright, 163 So. 3d 735, 736–37 (Fla. 5th DCA 2015) (raising the issue of jurisdiction sua sponte and dismissing the appeal for lack of jurisdiction); Schwades v. Am. Wholesale Lender, 146 So. 3d 150, 150–51 (Fla. 5th DCA 2014) (awarding attorney fees for frivolous appeal even though the fees had not been requested by the appellee); McMullen v. McMullen, 710 So. 2d 1045, 1046 (Fla. 5th DCA 1998) (reversing on grounds not briefed); Inclima v. State, 625 So. 2d 978, 978–79 (Fla. 5th DCA 1993) (withdrawing opinion sua sponte).

courts must honor the protections afforded to the State by rules of procedure, statutes, and our constitution.

In sum, the State has not advanced a fundamental-fairness argument in its briefs, and any authority supporting a free-standing concept of fundamental fairness is notably absent from the State's briefs and the majority opinion.[16] Accordingly, I do not join the majority's fundamental-fairness holding.

[16] I do not suggest that there is no rule of procedure, statute, or constitutional provision to support the State's entitlement to notice and a hearing under the circumstances of this case. In fact, as noted above, I join Judge Sasso's concurring opinion observing that some of the trial judge's findings lacked evidentiary support, thereby warranting an evidentiary hearing pursuant to the Strickland standard. I merely observe that the State has failed to make the fundamental-fairness argument upon which the majority's holding rests.