IN THE SUPREME COURT OF FLORIDA

CASE NO. SC05-100

DERRICK TYRONE SMITH,

Petitioner,

v.

JAMES V. CROSBY, JR.,

Secretary, Florida Department of Corrections,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

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INTRODUCTION

Citations to the direct appeal record of Mr. Smith's retrial shall be as "R2. [page number]." Citations to the record of Mr. Smith's Rule 3.850 proceedings will be as "PC-R. [page number]." All other citations shall be self-explanatory.

JURISDICTION

A writ of habeas corpus is an original proceeding in this Court governed by Fla. R. App. P. 9.100. This Court has original jurisdiction under Fla. R. App. P. 9.030(a)(3) and Article V, § 3(b)(9), Fla. Const. The Constitution of the State of Florida guarantees that "[t]he writ of habeas corpus shall be grantable of right, freely and without cost." Art. I, § 13, Fla. Const.

REQUEST FOR ORAL ARGUMENT

Mr. Smith requests oral argument on this petition.

STATEMENT OF THE CASE

On May 24, 1983, Mr. Smith was charged by indictment with one count of first-degree murder (R2. 1-2). In November of 1983, Mr. Smith was convicted of that charge and sentenced to

death (R2. 3-8). On direct appeal, this Court vacated Mr. Smith's conviction and ordered a new trial. Smith v. State, 492 So. 2d 1063 (Fla. 1986).

Mr. Smith's retrial was held in 1990. The jury found Mr. Smith guilty of first-degree murder (R2. 131), and after a penalty phase, recommended a death sentence by a vote of eight to four (R2. 1493). The court imposed a death sentence, finding two aggravating circumstances: (1) the murder was committed while Mr. Smith was attempting to commit a robbery; (2) Mr. Smith had a previous conviction for a violent felony (R2. 230-35). The court found one statutory mitigating circumstance of no significant history of criminal activity and several nonstatutory mitigating circumstances (Id.). On direct appeal, this Court affirmed Mr. Smith's conviction and sentence. Smith v. State, 641 So. 2d 1319 (Fla. 1994).

Mr. Smith initiated proceedings under Rule 3.850, Fla. R. Crim. P., and filed an Amended Motion to Vacate on September 18, 2000. After hearing oral arguments, the circuit court issued an order on January 3, 2002, denying many of Mr. Smith's claims and granting a limited evidentiary hearing on several claims and/or portions of claims. The evidentiary hearing was conducted on July 23-26, 2002. Following the evidentiary hearing, the parties submitted written closing

arguments. On February 10, 2003, the circuit court entered its order denying Mr. Smith relief. Mr. Smith's appeal of that order is presently pending before this Court.[1]

STATEMENT OF THE FACTS

The facts relevant to Mr. Smith's claims for habeas corpus relief are set forth in the individual claims below.

GROUNDS FOR HABEAS CORPUS RELIEF

CLAIM I

THIS COURT'S DISPOSITION OF MR. SMITH'S DIRECT APPEAL CLAIM REGARDING HIS REQUEST FOR NEW TRIAL COUNSEL RESTS UPON AN ERROR OF FACT, WHICH THIS COURT SHOULD NOW CORRECT.

On direct appeal, Mr. Smith challenged the trial court's failure to conduct an adequate inquiry into Mr. Smith's request to discharge his trial counsel (Smith v. State, Fla. Sup. Ct. #76,491, Initial Brief of Appellant, Issue I, pp. 28-32). This Court addressed the issue as follows:

> The first issue is whether the trial court violated Smith's constitutional right to effective assistance of counsel . . . by failing to inquire into his letter expressing dissatisfaction with court-appointed counsel. Several months before trial

[1]The Initial Brief in that appeal provides a much more detailed account of the proceedings in the circuit court following the 1986 remand.

> Richard Sanders, Smith's court-appointed counsel, moved to withdraw because Smith wanted to present testimony that Sanders believed was false.[] After a hearing, the trial court denied the motion. Neither the trial judge nor Sanders questioned Smith at the hearing, and Smith did not address the court.
>
> On the same day the hearing concluded, however, Smith wrote the trial judge and asked her to "reconsider your decision to deny [Sanders'] motion to withdraw." Smith questioned Sanders' lack of experience in first-degree murder cases and wrote, "I don't want Richard Sanders representing me on this particular case." The trial judge responded by letter and told Smith that any communication with the court must be through his attorney. The record reflects that the trial judge communicated with Smith during the trial, but Smith never raised this issue again. Thus, Sanders continued to represent Smith.
>
> Nonetheless, Smith claims the trial court committed reversible error by not conducting a hearing to determine whether there was reasonable cause to believe that Sanders was not rendering effective counsel and, if not, appointing a substitute. . . . This claim is without merit.
>
> . . . . [W]e find the trial court was not required to conduct a hearing on Sanders' representation. Although Smith's letter raises concerns about Sanders, the letter was, in effect, a motion for rehearing. A trial court must conduct an inquiry only if a defendant questions an attorney's competence. Hardwick v. State, 521 So. 2d 1071, 1074-75 (Fla. [1988]). . . . Smith expressed dissatisfaction with Sanders, but did not question his competence.

Smith v. State, 641 So. 2d 1319, 1321 (Fla. 1994) (footnote omitted).[2] This Court's conclusion that Mr. Smith did not

[2]The issue raised on direct appeal also included a contention that the trial court should have advised Mr. Smith

question Mr. Sanders' competence was an error of fact.

The hearing described in the Court's opinion occurred on November 6, 1989 (R2. 351). The letter referenced in the Court's opinion is also dated November 6, 1989 (R2. 92). However, this is not the only letter which Mr. Smith wrote to the trial court regarding Mr. Sanders, as is evident from the November 6, 1989, letter itself. That letter states: "I wrote to you in March of this year explaining my discomfort with Richard Sanders representing me, that uneasiness has only greatened" (R2. 92).

Unfortunately, Mr. Smith's previous letter was misfiled by the circuit court clerk and is not contained in the record of his first-degree murder trial. During post-conviction, Mr. Smith's counsel discovered the earlier letter in the record of another case which was pending against Mr. Smith in the same time period as the first-degree murder case. The letter is dated March 23, 1989, but its content makes clear that although Mr. Smith may have begun writing the letter on that date, he did not finish and mail the letter until May 1989 (Smith v. State, 2nd DCA #90-3188, Record On Appeal, page 11). The index to the record in the Second DCA case indicates that

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of his right to self-representation. That contention is not involved in this claim.

the letter was filed on May 30, 1989 (Id.). The letter is to Judge Luten, the judge in the first-degree murder case (Id.).[3] The letter states:

> Dear Judge Luten,
>
> I'm in despair over the events that are occurring in my case which is a capital offense on re-trial. The situation has me so distaught [sic] that I'm using my last resort in writing to you, the presiding judge, with the elated hope that your intervention will get those involved to realize that a life is at stake and the situation is very SERIOUS! Ma'am I'm not highly educated neither do I profess a profound knowledge of law's intricate workings. But I do have common sense and I know that something isn't quite right with the way my present attorney, Mr. Richard Sanders, is handling my defense. Personally, he's one of the best human beings I've ever encountered and will probably evolve into a splendid attorney but it bothers me that he's "cutting his teeth" on my case. By his admission he has not previously handled a murder case.
>
> Ma'am I'm scheduled to go to trial July 11, 1989 for my life. That's less than 2 months from now and I'm 300 miles plus away from those that are representing me. On or about March 15, 1989 my aunt contacted Mr. Sanders inquiring as to the lack of communication between us. I myself contacted Mr. Sanders by way of mail requesting that a motion be filed for a court order getting me transported to Pinellas County. Mr. Sanders visited me here at the prison on April 3, 1989 and assured me that he'd have me back in Pinellas as soon as possible. That was almost 2 months ago and I've still heard nothing. I wrote to Mr. Sanders again on May 14, 1989 to no avail. By not being able to communicate with my lawyer is in violation of the due process

[3]The judge in the other case was Mark R. McGarry, Jr. (Id.).

> clause in the Constitution. And any attorney who can't even get me back to the county jail can hardly represent me in a capital case. My correspondence goes unanswered and the state prison doesn't allow phone calls. This isn't the effective assistance of counsel the law entitles me to.
>
> Judge Luten, I don't mean to sound obnoxious and I certainly am not intentionally insulted anyone but anyone who accepts a capital case for a measely [sic] 3 or 4 thousand dollars (which is peanuts for a lawyer[)] isn't highly skilled nor very experienced if not both. I don't feel Mr. Sanders is being very diligently [sic] in matters concerning my case which is in essence my life. Economically I don't and can't fault Mr. Sanders for not giving his all in all in such a time consuming, tiresome, complicated capital case such as mine but I've been given the ultimate sentence once already for this same case and without adequate legal aid I'll be in the same position again. Thus I can not consciously just accept any kind of 2 dollar lawyer without voicing my objection. I was 20 years old when this nightmare first began, totally ignorant of law and too terrified to say anything, it almost cost me my life. I'm a little older and wiser now and being blunt, I refuse to be lead to slaughter like some meek little lamb. This letter is an objection to the representation I've had thus far in my legal battle. Incompetent legal aid isn't something I can accept, my very life is at stake. Thank you for your time and consideration!
>
> Sincerely,
>
> [signed]
>
> Derrick Tyrone Smith

(Id. At 11-12) (Attachment A).

Through no fault of Mr. Smith, this letter was not filed in the record of his capital case. The letter was addressed

to Judge Luten, the judge in the first-degree murder case, and its first sentence referred to "my case which is a capital offense on re-trial." At the top of the letter, next to Mr. Smith's notation of the date, a handwriting which is not Mr. Smith's wrote the case number of the non-capital case and then wrote, "To the Court, file[,] copy to R. Sanders" (Attachment A).

Mr. Smith's March 1989 letter clearly shows that Mr. Smith questioned his trial counsel's competence. This Court has explained the procedure a circuit court should follow when a criminal defendant questions his trial counsel's competence:

> Appellant also argues that his right to counsel was impaired by the incompetence of his court-appointed attorney. In this instance, the request was made before trial began and renewed by Hardwick during the trial. On this question, we approve the procedure adopted by the Fourth District:
>
> > If incompetency of counsel is assigned by the defendant as the reason, or a reason, the trial judge should make a sufficient inquiry of the defendant and his appointed counsel to determine whether or not there is reasonable cause to believe that the court appointed counsel is not rendering effective assistance to the defendant. If reasonable cause for such belief appears, the court should make a finding to that effect on the record and appoint a substitute attorney who should be allowed adequate time to prepare the defense. If no reasonable basis appears for a finding of ineffective representation, the trial court should so state on the record and advise the defendant that if he discharges his original counsel the State may not thereafter be required to appoint a substitute.

> Nelson v. State, 274 So. 2d 256, 258-59 (Fla. 4th DCA 1973) (citation omitted). In the present case, we find no error. The trial court made a proper inquiry, allowed the defendant to state his reasons for asserting his claims, and specifically found that defense counsel was competent as to those reasons. Since nothing in the record otherwise establishes defense counsel's incompetence as alleged by Hardwick in his motion, we therefore may not disturb the trial court's finding.

Hardwick v. State, 521 So. 2d 1071, 1074-75 (Fla. 1988). See also Jones v. State, 612 So. 2d 1370, 1372-73 (Fla. 1992); Bowden v. State, 588 So. 2d 225, 229-30 (Fla. 1991).

In Mr. Smith's case, the trial court did not follow the procedure approved in Hardwick. The court made no inquiry of Mr. Smith regarding his complaints about trial counsel and did not "determine whether or not there is reasonable cause to believe that the court appointed counsel is not rendering effective assistance to the defendant." Mr. Smith specifically alleged that he was receiving ineffective assistance of counsel: "This letter is an objection to the representation I've had thus far in my legal battle." Mr. Smith raised specific complaints regarding counsel's performance, complaining of a lack of communication with counsel, counsel's failure to have Mr. Smith brought to Pinellas County, counsel's failure to answer letters and counsel's lack of diligence. A Hardwick inquiry was clearly warranted based upon Mr. Smith's complaints.

Because the March 1989 letter was not filed in the record of Mr. Smith's first-degree murder case, this Court relied upon erroneous facts in deciding Mr. Smith's direct appeal claim. This Court should now correct this factual error. This Court has habeas corpus jurisdiction to correct failings in its review process. Article V, §§ 3(b)(1), (7) & (9), Florida Constitution; Parker v. State, 643 So. 2d 1032, 1033 (Fla. 1994).

To the extent the Court believes this issue was not adequately presented on direct appeal, appellate counsel's performance was deficient, and Mr. Smith was prejudiced. Appellate counsel has the responsibility of ensuring that the record is complete. As this Court has stated, "our judicially neutral review of so many death cases, many with records running to the thousands of pages, is no substitute for the careful, partisan scrutiny of a zealous advocate." Wilson v. Wainwright, 474 So. 2d 1162, 1165 (Fla. 1985). Appellate counsel recognized the significant issue raised by trial counsel's motion to withdraw because appellate counsel presented the issue. Mr. Smith's November 1989 letter referred to the March 1989 letter, but appellate counsel made no effort to locate that letter. There can be no strategic reason for the deficiencies in counsel's presentation. Mr.

Smith was prejudiced by these deficiencies: the issue is clearly meritorious, and counsel's inadequate presentation therefore undermines confidence in the outcome of Mr. Smith's direct appeal. Wilson, 474 So. 2d at 1165.

CLAIM II

DURING THE DIRECT APPEAL, THE STATE OF FLORIDA FAILED TO DISCLOSE PERTINENT FACTS WHICH WERE NECESSARY TO THIS COURT'S CONSIDERATION OF THE ISSUES RAISED BY MR. SMITH, AND AS A RESULT, THE DIRECT APPEAL DID NOT COMPORT WITH THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

A. INTRODUCTION.

The State of Florida having given Mr. Smith a state law right to a direct appeal was obligated to afford Mr. Smith with an appeal that comported with due process and provided Mr. Smith with a fair opportunity to vindicate his constitutional rights. Hewitt v. Helms, 459 U.S. 460 (1983). As the United States Supreme Court has held: "A first appeal as of right [] is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney." Evitts v. Lucey, 469 U.S. 387, 396 (1985). Certainly, the same principle applies when the State withholds pertinent and exculpatory information regarding the factual circumstances underlying the issues raised in the appeal.

The United States Supreme Court has recognized that a prosecutor is:

> the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.

Berger v. United States, 295 U.S. 78, 88 (1935). As a result, the United States Supreme Court has forbidden "the prosecution to engage in 'a deliberate deception of court and jury.'" Gray v. Netherland, 518 U.S. 152, 165 (1996), quoting Mooney v. Holohan, 294 U.S. 103, 112 (1935). That principle applies even on appeal. "Truth is critical in the operation of our judicial system and we find such affirmative misrepresentations by any attorney, but especially one who represents the State of Florida, to be disturbing." The Florida Bar v. Feinberg, 760 So.2d 933, 939 (Fla. 2000).

B. DIRECT APPEAL CHALLENGES TO MR. SMITH'S CONVICTION.

1. Richardson violation.

In his second argument during the direct appeal, Mr. Smith alleged that the trial court erred in failing to conduct an adequate inquiry pursuant to Richardson v. State, 246 So. 2d 771 (Fla. 1971). Specifically, Mr. Smith argued that a discovery violation occurred when the State failed to disclose

felony judgments for Larry Martin, a defense witness, that the State intended to use.

This Court denied the claim saying that "the defense has the initial burden of trying to discover impeachment evidence, and the state is not required to prepare the defense's case." Smith v. State, 641 So. 2d at 1322, quoting Medina v. State, 466 So. 2d 1046, 1049 (Fla. 1985). However, the United States Supreme Court has since specifically rejected such a contention. "When police or prosecutors conceal significant exculpatory or impeaching material in the State's possession, it is ordinarily incumbent on the State to set the record straight." Banks v. Dretke, 124 S. Ct. 1256, 1263 (2004). Thus, a rule "declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process." Id. at 1275.

Moreover at the time of the direct appeal, the State was still sitting upon much more undisclosed evidence that was favorable to Mr. Smith. As explained in much more detail in Mr. Smith's appeal from the denial of 3.850 relief, the State had not disclosed that: 1) Melvin Jones had met with Derrick Johnson on July 11, 1983, and promised to help him at trial, contrary to the testimony of both Jones and Johnson; 2) Melvin Jones was an original suspect in the homicide; 3) police

visited the Jones' residence on two occasions during neighborhood canvassing, not once as Melvin and Mellow Jones had testified; 4) Melvin Jones had received a suspended sentence on his seventeen pending felonies after he came forward and gave evidence against Mr. Smith, contrary to his testimony that he served three years and didn't receive much of a deal; 5) at the time of Mr. Smith's retrial, Melvin Jones was afraid that he was going to be arrested on charges of sexually abusing his step-daughter; 6)David McGruder had been unable to identify a photograph of Derrick Smith as one of the two men that he saw get into a cab, contrary to his trial testimony; and, 7) McGruder's estimate of the weight of the individual (purported to be Mr. Smith) was 30 to 70 pounds less than Mr. Smith's weight. Without being apprised by the State of the significant favorable evidence that was still be withheld, this Court could not properly analyze, Mr. Smith's Richardson claim.

In essence, the State has been rewarded for its misconduct. The State kept from this Court the true scope of the discovery violations when Mr. Smith raised the matter. Had this Court known the true scope of the problem during Mr. Smith's direct appeal, a new trial would have been required.

2. Evidence of other robbery.

Mr. Smith raised on direct appeal before this Court the State's introduction of an unrelated robbery allegedly committed by Mr. Smith about twelve hours after the Songer homicide. The State called as a witness a Canadian tourist who was robbed at gunpoint in a motel room in St. Petersburg at noon on March 21, 1983. The Canadian tourist identified Mr. Smith as the sole robber. The description of the gun used in the robbery was similar to the one described by Melvin Jones.

Despite the dissimilarities between the Songer homicide and the robbery of the Canadian tourists, the State argued that evidence of the latter was admissible at the murder trial "to show that appellant intended to commit a robbery and, during a relatively short span, managed to accomplish his task." (Brief of Appellee, Case No. 76, 491, at 19). According to the State, this was not "merely to show appellant's propensity to commit an armed robbery." (Id.).[4] This Court accepted the State's argument saying that the evidence was "relevant in proving Smith's motive to obtain

[4]The distinction between evidence of "propensity to commit an armed robbery" and an "inten[tion] to commit a robbery" seems exceedingly thin. It is like saying: the evidence of one robbery is not offered to prove a second robbery, but the motive in committing the one robbery shows a motive to commit another robbery. If this is the law, when would evidence of one robbery not be admissible to prove a second robbery?

money and to proving that he possessed the same gun in both offenses." 641 So. 2d at 1322.

This Court in denying Mr. Smith's appeal did not know because the State withheld the fact that Jones' testimony regarding the description of the gun used to shoot the cab driver resulted after a meeting between Jones and Johnson in which Jones promised to help Johnson at the trial. The State withheld critical information from this Court in the course of the direct appeal which would have led to a reversal and a remand for a new trial.

3. Limitation of cross-examination of Jones.

In his direct appeal, Mr. Smith challenged the trial court's limitation of his cross-examination of Melvin Jones.[5]

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[5]Jones was arrested on unrelated charges on June 13, 1983, nearly three months after the shooting of Mr. Songer, the cab driver. Jones faced seventeen felony charges (R2. 998). Four days later, he met with the State to bargain for a deal in exchange for his testimony against Mr. Smith. At the meeting, Jones gave what he later claimed was a false account of what he had said he witnessed at Fairfield and 30th St. the night Mr. Songer was shot. Weeks after the June 17th meeting, Jones wrote an undated letter to the attention of Tom Hogan at the State Attorney's Office, giving a new account that was now generally consistent with Johnson's version of the shooting. Included with this letter was a map of the crime scene.

Following his testimony against Mr. Smith in 1983, Jones was sentenced in his pending cases to concurrent three-year suspended sentences followed by two years probation (D-Ex. 16, 12/1/83 Sentence). However, Mr. Smith's jury never learned that Jones had received a suspended three-year sentence. Instead, the prosecutor represented and Jones testified that he received three years incarceration after testifying against

In his initial brief, Mr. Smith argued:

> On cross-examination, Jones testified that after his arrest on the outstanding warrants, he wrote a letter to the State Attorney's Office and the Public Defender telling them what he had seen. (R991-992) Jones denied that the purpose of the letter was to "cut a deal" for himself. His purpose was to inform the State Attorney and Public Defender "who actually done it." He was not expecting any personal benefit. (R992) Jones denied that he tried to bargain with the State for a reduction in his own sentence in return for his testimony. (R992-993) Yet Jones admitted that he was facing 17 to 18 felony charges for which he "did" only three years. (R998) When defense counsel attempted to ask how much time he actually served, the court sustained the State's objection. Jones then admitted that the prosecutor testified on his behalf at sentencing, but he persisted in denying that he got a break on his sentence. (R1000)
>
> Defense counsel next asked whether Jones had testified for the State in another murder case. (R1000) When the prosecutor object, defense counsel explained that Jones had in fact testified as an important State witness in another murder case about a year later and that he had more pending charges at that time. Counsel argued that this information was relevant to Jones' credibility. (R1000-1001) The prosecutor responded, "Your Honor, he was sentenced after he testified in Smith and Clinton Jackson. So whatever deal he got was based on both." (R1001) This constituted an admission by the State that Jones had in fact received some sort of deal in exchange for his testimony against Appellant at his original trial and for his testimony against Clinton Jackson in another murder trial. Yet the court refused to permit defense counsel's inquiry and directed him to proffer the testimony (R1001)
>
> Defense counsel resumed his cross-examination of Jones before the jury and elicited his admission that he told Det. San Marco an inaccurate account of what he had seen when Songer was shot. (R1002-1004)

Mr. Smith and against Clinton Jackson.

This occurred after he tried to make a deal with San Marco, but the only thing he was offered was to serve his sentence in a prison for convicted police officers (R1003-1005)

On redirect examination, the prosecutor elicited Jones' testimony that he wrote the letter to the State Attorney because he had heard a rumor that Appellant was trying to put all the blame on Johnson, and he thought that was "totally wrong." (R1008) Thus, the prosecutor not only failed to reveal the specifics of Jones' deal with the State, he deliberately reinforced Jones' claim that he was motivated to testify by his own sense of justice and fair play rather than by any deals he made for a reduced sentence.

Defense counsel later proffered Jones' testimony about his role as a witness in the other murder case. In that proffer, Jones testified that in 1984 he was a State witness in the trial of Clinton Jackson for the robbery and murder of the owner of a hardware store. Jones and Jackson were working together when Jackson told him he was going to rob the store. Jones also saw Jackson going toward the store and then coming away from it at the time of the shooting. (R1053-1056) Jones claimed he could not remember whether he had any charges or violations of probation pending when he testified against Jackson, but he agreed that it was possible. (R1056) After Jackson's conviction was reversed on appeal, Jones refused to respond to a subpoena to testify at Jackson's retrial in 1987. (R1057) Jones claimed that he did not know whether there were any pending charges or warrants against him at that time. (R1057-1058)

Defense counsel argued that this testimony was relevant to Jones' credibility and his claim that he did not expect any benefit from testifying against Appellant. (R1058-1059) The prosecutor responded that no promises had been made to Jones for his testimony at Appellant's retrial and that Jones had already testified that he got a deal or a break after Appellant's first trial: "He's gotten out the point that is appropriate. He got a deal for his testimony and that's before the jury." (R1060) The court did not allow defense counsel to present the proffered testimony to the jury. (R1061)

> Despite the prosecutor's admissions that Jones had in fact received a deal for his testimony, he never revealed the specific terms of the deal. Instead, he did his best to prevent the jury from learning about Jones' past dealings with the State and to bolster Jones' claim that he was motivated by a desire to reveal the truth in Appellant's case without regard to any personal benefit. The prosecutor's conduct in this case came perilously close to the knowing use or concealment of perjured testimony condemned in Napue v. Illinois, 360 U.S. 264, 268, 79 S.Ct. 1173, 3 L.Ed.2d 1217, 1221 (1959); and Alcorta v. Texas, 355 U.S. 23, 31-32, 78 S.Ct. 103, 2 L.Ed.2d 9, 11-12 (1957).

(Initial Brief of Appellant, Case No. 76,491, at 43-46.

In the State's answer brief, the State asserted:

> The gist of appellant's complaint revolves around the incorrect notion that defense counsel was unable to adequately cross examine Melvin Jones concerning the "deal" he had with the state vis-a-vis his testimony in the instant case. * * * Thus, the record reveals that the only "deal" which Mr. Jones obtained that the state attorney was to speak in his behalf at his sentencing subsequent to the testimony rendered in the first Derrick Tyrone Smith case. Indeed, **the record reflects that no "deal" was given to Melvin Jones for his testimony at the trial which is the subject of the instant appeal**, and he would not appear without benefit of a subpoena (R 1060).
>
> In the instant case, the record reveals the "deal" and there is simply no evidence to show that any other "deal" existed. Appellant on appeal is merely speculating that there must have been some other "deal" which simply has not been revealed. Yet, **the record reflects no attempt to obtain disclosure of that deal** because, indeed, defense counsel was well aware of the facts surrounding the testimony of Melvin Jones. The record also reveals that although the state attorney spoke in his behalf, Melvin Jones did not believe that he got a deal. Thus, from the witness' perspective, he was undoubtedly disappointed at the result of his

> sentencing, but this in no way indicates that any further consideration was given to Mr. Jones in exchange for his testimony.
>
> * * *
>
> Nor is the fact that the trial judge prevented cross examination concerning Melvin Jones' testimony in the Clinton Lamar Jackson case cause for reversal of the instant conviction. **Defense counsel was attempting to engage in a "fishing expedition"** merely because Melvin Jones happened to offer testimony in another capital case. During the proffered examination, defense counsel questioned Mr. Jones on facts of which defense counsel was certainly aware (Mr. Sanders did the appeal for Clinton Jackson; R 1059) and Melvin Jones was an eyewitness in that case. **As the prosecutor noted in the instant case, Melvin Jones was sentenced after his testimony in both the first Smith and the Clarence [sic] Jackson trial** and the state attorney did, in fact, appear on behalf of Mr. Jones. **This is the only "deal" which was made and it was presented for the jury's consideration with respect to the credibility of Melvin Jones**. Appellate reversal cannot be predicated upon speculation of a more inclusive deal where there is no evidence to indicate that one ever existed. [Citation].
>
> Your appellee respectfully submits that the facts as adduced at trial do not support appellant's claim. The "deal" received by Melvin Jones was heard by the jury and they were able to adequately evaluate the credibility of the witness.

(Answer Brief of Appellee, Case No. 76,491, 20-23)(emphasis added).[6]

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[6]The State engaged in obvious wordplay in its use of the word "deal" throughout its argument. The Sixth Amendment right of cross-examination extends well beyond inquiry into "deals" a witness may have with the State. In Davis v. Alaska, 415 U.S. 308 (1974), a case Mr. Smith relied upon in making his argument (Initial Brief at 41, 46, 48) the Supreme Court explained that a criminal defendant had a right to cross-examine a witness called by the State regarding any matter that went towards either the witness's motive or bias

In this argument, the State presented to this Court a number falsehoods as fact and deceived this Court. First, the State incongruously argued both that Mr. Smith's counsel made "no attempt to obtain disclosure of that deal" and that Mr. Smith's counsel "was attempting to engage in a 'fishing expedition.'" However, the burden is upon the State to affirmatively disclose evidence in its possession which could be used to impeach a State's witness; the burden is not upon the defense to find that which the State has hidden.[7] Second, the State falsely asserted, "Melvin Jones was sentenced after his testimony in both the first Smith and the Clarence [sic] Jackson trial."[8] In fact as evidence introduced during the

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in testifying for the State. This included matters demonstrating a reason to curry favor with the State. Davis was not limited to cross-examination regarding proven "deals." Thus, the presence or absence of a specific "deal" is irrelevant to whether the Sixth Amendment right was erroneously infringed upon. The issue raised by Mr. Smith in his direct appeal was whether the limitation of his right confront Melvin Jones precluded exploration of possible biases, prejudices, or ulterior motives.

[7]"When police or prosecutors conceal significant exculpatory or impeaching material in the State's possession, it is ordinarily incumbent on the State to set the record straight." Banks v. Dretke, 124 S. Ct. 1256, 1263 (2004). A rule "declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process." Id. at 1275.

[8]Following his testimony against Mr. Smith in 1983, Jones was sentenced in his pending cases to concurrent three-year suspended sentences followed by two years probation (D-Ex. 16,

3.850 hearing demonstrates, Melvin Jones was sentenced after he testified against Mr. Smith - he was given a suspended sentence and released from incarceration.[9] Third, the State deceptively argued to this Court that Jones received "no deal"

12/1/83 Sentence). On January 17, 1984, Jones was not in custody and claimed to have witnessed Clinton and Nathaniel Jackson on their way to rob a hardware store. Jackson v. State, 575 So. 2d 181 (Fla. 1991). By December 19, 1984, Jones was back in custody in the same case numbers seeking a bond reduction (D-Ex. 16, 12/19/84 Motion for Bond Reduction). His bond was revoked and he was arrested on a capias on April 23, 1985 (D-Ex. 16). On August 25, 1985, Jones was sentenced to three years of incarceration followed by two years of probation (D-Ex. 16, 8/25/85 Order).

In his 1990 testimony, Jones was asked during cross how much time he got on all the seventeen felony charges he was facing in 1983. Jones replied, "I did three years" (R2. 998). When defense counsel tried to pursue the matter the State objected. At side bar, counsel explained, "I think it's a reasonable inference that can be drawn from the evidence that he's facing seventeen or eighteen years and he only gets three years that he did, in fact, get a break in exchange for his testimony (R2. 999). The prosecutor, Martin, responded, "after the Smith trial he has got four and a half to five and a half, and he was sentenced to three plus two, one below the guidelines" (R2. 999). The judge then permitted additional questioning. Jones then was asked "you did, in fact, get a break on your sentence", and he replied, "I don't think so, but you can say so" (R2. 1000).

However, defense counsel was precluded from asking Jones about testifying for the State as an eyewitness in the murder case against Clinton Jackson in 1984. The prosecutor, Martin, argued that "he was sentenced after he testified in Smith and Clinton Jackson. So whatever deal he got was based on both" (R2. 1001).

[9]It was only because he had been given a suspended sentence and released from custody that Jones could claim that in January of 1984 he was at work with Clinton Jackson and was told of Jackson's plan to commit a robbery.

other than that the prosecutor would testify at the sentencing that occurred after his testimony against Jackson. This deceived this Court in regards to Jones' suspended sentence in December of 1983 after his testimony at Mr. Smith's first trial, and as to Jones' fear expressed to the State in 1989 that he was going to be arrested on sexual abuse charges arising from allegations made by his step-daughter.

This Court accepted the State's false representations and concluded:

> It is clear from the proffer that testimony about the Jackson trial was not relevant to Smith's trial. The trial court correctly sustained objection to the testimony. The record also clearly reflects that defense counsel had adequate opportunity and did cross-examine Jones about any negotiations with the State as to his testimony in Smith's trial

Smith v. State, 641 So. 2d at 1322. However, the State's deception prejudiced Mr. Smith's right to a full and fair direct appeal before this Court. Had the true facts been revealed by the State and been known to this Court, undoubtedly this Court would have recognized the merits of Mr. Smith's argument. The limitation on Mr. Smith's ability to cross-examine Melvin Jones precluded the defense from discovering, the jury from knowing and this Court from understnading that Jones' testimony and the prosecutor's representations were false as to the sentence Jones received

in December of 1983 after his testimony against Mr. Smith.

Had Mr. Smith been permitted to fully cross-examine Melvin Jones perhaps he would have had a chance to discover the State's deception. Exploring Jones' testimony against Clinton Jackson would have forced Jones to acknowledged that in January of 1984 he had been released from jail because he had received a suspended sentence on his 17 pending felony charges after he testified against Mr. Smith. The State was aware of the sentence Jones had received and when he had received it. But, the prosecutor in circuit court and the assistant attorney general before this Court affirmatively misled the defense, the courts, and the jury regarding Jones' suspended sentence. It just simply disappeared; according to the State, it did not happen - Jones was not sentenced until after his testimony against Clinton Jackson.

Similarly, the limitation of cross-examination and the State's deception precluded the jury from learning of Jones' fear that he was going to be charged with sexual abuse. Such a fear is precisely the kind of motivator (the need to curry favor with the State) that a criminal defendant is entitled to explore in cross-examination. Davis v. Alaska. Only by deceiving this Court during the direct appeal did the State preclude this Court from recognizing the merit to Mr. Smith's

Sixth Amendment challenge to the limitations upon his ability to cross-examine Melvin Jones.

C. CONCLUSION.

This Court has stated, "Truth is critical in the operation of our judicial system and we find such affirmative misrepresentations by any attorney, but especially one who represents the State of Florida, to be disturbing." The Florida Bar v. Feinberg, 760 So.2d 933, 939 (Fla. 2000). Here, the State affirmatively misrepresented the record. As a result, this Court was deceived regarding matters necessary to resolution of the issues raised by Mr. Smith. This Court was unaware of the scope of the discovery violations which addressing Mr. Smith's Richardson claim. This Court was precluded from knowing what could have been discovered in the course of cross-examination that would have constituted impeachment of Melvin Jones - revealing his reasons for currying favor with the State and his deception in his answers regarding his sentencing in December of 1983.

This Court has recognized that this Court's independent review of the record in a capital appeal cannot be considered a cure to counsel's failure to perform their duties in preparing briefs and arguing before this Court. Wilson v. Wainwright, 474 So.2d 1162, 1165 (Fla. 1985)("However, we will

be the first to agree that our judicially neutral of so many death cases, many with records running to the thousands of pages, is no substitute for the careful, partisan scrutiny of a zealous advocate."). Similarly, this Court's review in the course of a direct appeal cannot reach the correct result when this Court is deceived by the State.

As a result of the State's deception of this Court regarding the issues raised by Mr. Smith in his direct appeal, he was deprived of due process. Had this Court been made aware of the facts withheld by the State, Mr. Smith's conviction and sentence of death would have been reversed and a new trial ordered.

CLAIM III

APPELLATE COUNSEL FAILED TO RAISE ON APPEAL NUMEROUS MERITORIOUS ISSUES WHICH WARRANT REVERSAL OF MR. SMITH'S CONVICTION AND SENTENCE OF DEATH.

Mr. Smith had the constitutional right to the effective assistance of counsel for purposes of presenting his direct appeal to this Court. Strickland v. Washington, 466 U.S. 668 (1984). "A first appeal as of right [] is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney." Evitts v. Lucey, 469 U.S. 387, 396 (1985). The Strickland test applies equally

to ineffectiveness allegations of trial counsel and appellate counsel. See Orazio v. Dugger, 876 F.2d 1508 (11th Cir. 1989).

Numerous constitutional deprivations which occurred at trial were not raised in Mr. Smith's direct appeal. Because these constitutional violations were "obvious on the record" and "leaped out upon even a casual reading of transcript," it cannot be said that the "adversarial testing process worked in [Mr. Smith's] direct appeal." Matire v. Wainwright, 811 F.2d 1430, 1438 (11th Cir. 1987). The lack of appellate advocacy on Mr. Smith's behalf is identical to the lack of advocacy present in other cases in which this Court has granted habeas corpus relief. Wilson v. Wainwright, 474 So.2d 1162 (Fla. 1985). Appellate counsel's failure to present the meritorious issues discussed in this petition demonstrates that his representation of Mr. Smith involved "serious and substantial deficiencies." Fitzpatrick v. Wainwright, 490 So.2d 938, 940 (Fla. 1986). Individually and "cumulatively," Barclay v. Wainwright, 444 So.2d 956, 959 (Fla. 1984), the claims omitted by appellate counsel establish that "confidence in the correctness and fairness of the result has been undermined." Wilson v. Wainwright, 474 So.2d 1162, 1165 (Fla. 1985) (emphasis in original). In light of the serious reversible

errors which appellate counsel never raised, there is more than a reasonable probability that the outcome of the appeal would have been different, and a new direct appeal must be ordered.

A. PRESENTATION OF UNRELIABLE SCIENTIFIC EVIDENCE

In its attempts to link Mr. Smith to a gun, the State presented testimony from three FBI experts. Defense counsel objected to this testimony, challenging the experts' qualifications, the reliability of their testing and instruments, and the acceptance of the testing within the scientific community. Despite these numerous objections, appellate counsel raised no issue regarding the FBI experts' testimony, depriving Mr. Smith of the effective assistance of direct appeal counsel.

The first of these witnesses was Robert Sibert, an FBI expert on firearms identification. Sibert testified that if bullets were placed in the pocket of someone's clothing, lead from the bullets could rub off on the clothing and later be detected (R2. 935). Sibert testified that he had conducted chemical tests on the pockets of Mr. Smith's jeans to determine whether lead was present on the jeans(R2. 935-36).

When the State asked Sibert to explain the results of these tests, defense counsel objected: "[H]e's been qualified

as a firearms identification expert. There's been no showing he's a chemist, no showing he's qualified to perform these tests. There's been no showing these tests are reliable to measure what it is he's supposed to be measuring" (R2. 936). The State argued, "[W]hen he was initially tendered as an expert, he explained the firearm identification, including other things, to determine the presence of lead gunpowder dealing with components qualifications" (R2. 936). The court overruled the objection and allowed the defense a continuing objection to the testimony (R2. 936).

Sibert then testified that the test he performed on Mr. Smith's jeans was accepted as reliable in the scientific community and that he was trained on how to perform it (R2. 937). Sibert found "indication of the presence of lead in the two front pockets, and there was a stronger concentration in the left front pocket" (R2. 937). The State showed Sibert Exhibit 17, which contained two bullets from a box of bullets taken from Roy Cone, Mr. Smith's uncle (R2. 937). Sibert testified that it was possible that lead from those bullets could have left the lead residue he found in Mr. Smith's pockets because "[a]ny source of lead could have been transferred by rubbing, physical contact with the interior of those pockets" (R2. 937-38). Sibert also testified that the

positive reaction for lead he found in the pockets would be consistent with those bullets being placed in the pockets (R2. 938). On cross-examination, Sibert testified that his test did not show how long lead had been present in Mr. Smith's pockets or where the lead came from (R2. 940-41).

The second FBI witness was Roger Asbery, an expert in neutron activation analysis (R2. 1033-34). Asbery used neutron activation analysis to compare the chemical composition of State Exhibit 11, which was a fragment of lead found on the victim, with the chemical composition of State Exhibit 17, the two bullets from Mr. Cone's box of bullets (R2. 1040-41). Asbery testified that the instrument he used to make the comparison was in good working order, that he used the instrument properly and that he used the proper procedures to perform the test (R2. 1042).

Defense counsel objected that the State had not laid a predicate showing that the instruments Asbery used "were in proper working order or properly maintained" because Asbery had simply stated a conclusion that the instruments were working properly without providing any basis for that conclusion (R2. 1042-43). The court overruled the objection (R2. 1043).

Asbery testified that he examined Exhibits 11 and 17 to

determine the amounts of copper, arsenic and antimony they contained (R2. 1043). Asbery "found that they matched in composition. In other words, the amounts of all three of these characterizing elements were so close that I could not distinguish between them" (R2. 1044). Asbery concluded that this "close compositional association" would be consistent with bullets coming out of the same box (R2. 1045).

On cross-examination, Asbery testified that part of his analysis required using a nuclear reactor located in Gaithersburg, Maryland (R2. 1047). Asbery had no personal knowledge that the nuclear reactor was working properly and was not the person who maintained that machine (R2. 1048). Defense counsel renewed his objection to Asbery's testimony and moved to strike the testimony because the State had not shown that the nuclear reactor was in working order (R2. 1052). The court overruled the objection, saying, "since the agent is not knowing at this point, I will assume that the reactor was working" (R2. 1052).

The State's final FBI witness was Donald Havekost, assigned to the FBI's elemental composition unit (R2. 1062). Havekost testified that he was trained to analyze the chemical composition of materials using neutron activation analysis and using another procedure called inductively coupled plasma

atomic emissions spectrometry (ICP) (R2. 1062-63). When the State tendered Havekost as an expert, defense counsel objected that the State had not sufficiently established Havekost's expertise (R2. 1065).

Havekost analyzed the same samples Asbery had examined (R2. 1067). Havekost repeated the neutron activation analysis and then conducted the ICP analysis, which detects additional chemical elements (R2. 1068). Havekost testified that the ICP analysis is generally accepted within the scientific community, that the instruments used in ICP analysis are reliable, that the machine he used was working properly and that he followed the correct procedure in conducting the analysis (R2. 1070). Havekost testified he was unable to distinguish between any of the samples he analyzed, meaning there was no difference in the chemical composition of the samples (R2. 1071). Havekost concluded that the samples "originated from a common source" (R2. 1071). After explaining how bullets are manufactured, Havekost opined that the matching chemical compositions of the lead fragment in State Exhibit 11 and the bullets in State Exhibit 17 could not have occurred by chance:

> The more elements you're able to characterize in bullet lead, the better you've characterized that particular composition. In other words, it becomes more and more unlikely that you have two things that

> match just out of chance. And if you're able to -- well, in the early days, we felt if we could characterize three elements that the possibility of there being a mistake was very remote. If you can quantitate four elements, five elements, in my opinion, you've reduced the chance to essentially nothing -- that they just match by chance.

(R2. 1083).

This Court adopted the Frye test for novel scientific evidence in Bundy v. State, 471 So. 2d 9, 18 (Fla. 1995), and Stokes v. State, 548 So. 2d 188, 195 (Fla. 1989). The Frye test requires that the proponent of scientific evidence prove that the underlying principle, theory, or methodology is generally accepted in the relevant scientific community. Frye v. United States, 293 F. 1013, 1015 (D.C. Cir. 1923). The proponent of the evidence must prove the general acceptance of both the underlying principle and the testing procedures used to apply the principle to the facts at issue. Ramirez v. State, 651 So. 2d 1164, 1168 (Fla. 1995). The Frye test of general acceptance requires that a "clear majority" of the relevant community support the methodology or theory. Brim v. State, 695 So. 2d 268, 272 (Fla. 1997)(citing People v. Guerra, 690 So. 2d 635, 656 (Cal. 1984)). Courts using the Frye test have identified three sources to establish the general acceptance of novel scientific evidence: expert testimony; scientific and legal writings; and judicial

opinions. See, e.g., Flanagan v. State, 586 So. 2d 1085, 1112 (Fla. 1st DCA 1991).

This Court has expressly stated that the expert offering an opinion based on a novel scientific theory cannot also testify to its reliability. In Ramirez v. State, 542 So. 2d 352, 354-55 (Fla. 1989), this Court remanded for an evidentiary hearing noting that "no scientific predicate was established from independent sources." In Hadden v. State, 690 So. 2d 573, 578 (Fla. 1997), this Court analogized to the admission of hearsay which is "predicated on a showing of reliability by reason of something other than the hearsay itself. . . . Novel scientific evidence must also be shown to be reliable on some basis other than simply that it is the opinion of the witness who seeks to offer the opinion." In Ramirez v. State, 542 So. 2d at 345-55, this Court noted that "no scientific predicate was established from independent evidence to show that a specific knife can be identified from the marks made on cartilage. The only evidence received was the expert's self-serving statement supporting this procedure." Id. at 345-55 (emphasis added). In Ramos v. State, 496 So. 2d 121, 123 (Fla. 1986), this Court similarly held that a proper predicate had not been established for the admission of dog scent-discrimination lineups because the only

testimony regarding this new technique was that of the dog handler and a police officer. In both cases, this Court required the proponent of new scientific evidence to establish its reliability through sources independent of the expert's testimony itself.[10] In Murray v. State, 692 So. 2d 157, 164 (Fla. 1997), this Court held that a DNA expert could not offer statistical calculations based on a database about which he had no information. This Court stated: "[t]he expert in this case explicitly stated that he possessed no knowledge as to the manner in which the relevant database was created . . . this expert must, at the very least, demonstrate a sufficient knowledge of the database grounded in the study of authoritative sources."

The failings identified in these cases are evident in the testimony of the State's experts. As to all of defense counsel's objections to the experts' qualifications, the reliability of their testing and instruments, and the acceptance of the testing within the scientific community, the State presented only the experts' self-serving testimony that

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[10]See also, Copeland v. State, 566 So. 2d 856, 858 (Fla. 1st DCA 1990)(holding that testimony by the crime analyst is insufficient to establish reliability); Crawford v. State, 474 So. 2d 873, 876 n. 4 (Fla. 1st DCA 1985)(holding that expert's "bald assertion" that the methodology was generally accepted in the community is insufficient to prove the technique is reliable).

they were qualified, that the testing and instruments were reliable and that their procedures were accepted within the scientific community. The trial court erred in not conducting adequate Frye inquiries and in admitting the experts' testimony.

The erroneous admission of this testimony was not harmless. The harmless error test "places the burden on the State, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the [outcome]." State v. DiGuilio, 491 So. 2d 1129, 1138 (Fla. 1986). This Court has explained:

> The test is not a sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test. Harmless error is not a device for the appellate court to substitute itself for the trier-or-fact by simply weighing the evidence. The focus is on the effect of the error on the trier-or-fact. The question is whether there is a reasonable possibility that the error affected the verdict. The burden to show the error was harmless must remain on the State. If the appellate court cannot say beyond a reasonable doubt that the error did not affect the verdict, then the error is by definition harmful.

Id. at 1139.

The State's case against Mr. Smith had one big hole: the investigation turned up no gun or spent bullet which could be directly connected to Mr. Smith. The State presented two

witnesses who testified they had seen Mr. Smith with a gun in March of 1983 (R2. 896-97; R2. 913-14), and another witness who testified Mr. Smith had shown her some bullets (R2. 919-20). Mr. Smith's co-defendant, Derrick Johnson, testified that Mr. Smith had a .38 caliber handgun on the evening of the murder (R2. 1119-21). The State also presented the testimony of Roy Cone, Mr. Smith's uncle, who testified that he had bought a .38 Smith and Wesson handgun and a box of bullets in 1972 (R2. 891). Mr. Cone stored the gun under his mattress(R2. 893-94). Mr. Cone thought he discovered the gun was missing some time in March of 1983 and believed he had last seen it the night of December 31, 1982 (R2. 1230, 1231-32). Mr. Cone testified that he had never shown Mr. Smith where the gun was hidden, that Mr. Smith never went into Mr. Cone's bedroom and that Mr. Cone kept the bedroom door locked (R2. 1229). The victim of a robbery which occurred the evening after the murder testified that Mr. Smith had a handgun during the robbery (R2. 1195).

The only way for the State to connect Mr. Cone's gun to Mr. Smith was through the expert testimony on lead analysis. The prosecutor relied upon this testimony in closing, arguing, "And what did the FBI tell you? That the bullets from the box of Roy Cone's box and this lead fragment found on the victim,

Jeffrey Songer, is materially indistinguishable. They're the same" (R2. 1304). The prosecutor continued, "[The FBI witnesses] went into great detail to explain to you how bullets are made. It's a product that's used up all the time and the chances are, ten years later, finding a box that has the same material composition as a box made ten years ago just boggles the mind" (R2. 1304-05). To answer the question of whether Mr. Smith shot the victim, the prosecutor directed the jury to consider the testimony of several witnesses, including the FBI witnesses (R2. 1305). The prosecutor argued that Sibert's testimony about finding lead residue in Mr. Smith's pockets corroborated Derrick Johnson's testimony (R2. 1305-06). In rebuttal closing, the prosecutor returned to the lead analysis evidence, arguing, "the chances, as the FBI agent told you, . . . of that piece of lead [found on the victim] matching those bullets [from Mr. Cone's box] is just one believable 'it can't be done.' Infinitesimal [sic]" (R2. 1348). In the circumstances of Mr. Smith's case, the State cannot establish beyond a reasonable doubt that the erroneously admitted expert testimony had no effect on the jury's verdict. Appellate counsel was ineffective in failing to raise this issue. This Court should order a new direct appeal.

B. PRECLUSION ON PRESENTING DEFENSE WITNESSES

Mr. Smith wanted to present two witnesses on his behalf, but defense counsel did not believe the witnesses were telling the truth. The witnesses did not testify.[11] Appellate counsel failed to raise this issue on direct appeal, depriving Mr. Smith of the effective assistance of direct appeal counsel.

Before trial, defense counsel moved to withdraw because Mr. Smith wanted him to present some witnesses who counsel believed might not be telling the truth (R2. 353). Counsel's belief was based in part on his recollection of conversations with Mr. Smith and in part on "my basic belief that I don't think they are very credible witnesses" (R2. 353). Counsel informed the court that his and Mr. Smith's recollections of their conversations differed, and if Mr. Smith's recollection was correct, counsel's only basis for disbelieving the witnesses was his own assessment of their credibility (R2. 353-54). Counsel acknowledged that his own assessment of the witnesses' credibility should not prevent him from calling

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[11]These two witness would have testified that they saw Mr. Smith at Norm's Bar when they arrived there around 11:00 PM. Norm's Bar was across the street from the Hoggley-Woggley. There was another witness, Dina Watkins, who had testified in 1983 that she was at Norm's Bar that night and saw Mr. Smith outside of the bar around midnight (R1. 1959-79). Inexplicably, Mr. Sanders neither called her, nor sought to introduce her prior testimony.

them, particularly since he believed Mr. Smith would be acquitted if the jury believed the witnesses, who would provide Mr. Smith with an alibi (R2. 354). Thus, counsel based his motion to withdraw upon the fact that his and Mr. Smith's recollections of their conversations differed and counsel could not reveal the substance of those conversations (R2. 354-55).

The State argued that defense counsel should not be allowed to withdraw (R2. 358). The State contended that under the Rules of Professional Conduct, defense counsel was required to make the decisions regarding which witnesses to call regardless of Mr. Smith's wishes (R2. 357-58). The court denied the motion to withdraw and told defense counsel he would have to make a decision about calling the witnesses (R2. 358-60).

The issue came up again during trial. Defense counsel reiterated that he could not call the witnesses and asked that they be called as court witnesses or that the court allow Mr. Smith to call them himself (R2. 963). The court said that having Mr. Smith call the witnesses was "not acceptable at all" and suggested the possibility of having the witnesses be sworn and then narrate their testimony without defense counsel questioning them (R2. 964). The court deferred ruling on the

issue (R2. 965).

After the State rested its case, the court returned to the issue. The two witnesses were identified as Kahn Campbell and James Hawkins (R2. 1238). Defense counsel reiterated his view that he could not call the witnesses under the rules of professional conduct based upon his personal opinion of their credibility and upon a confidential conversation with Mr. Smith (R2. 1239). Defense counsel and the court agreed that counsel's personal opinion of the witnesses' credibility was not sufficient grounds not to present their testimony (R2. 1239). Defense counsel again asked that the witnesses be called as court witnesses, but the court denied the request (R2. 1240). Defense counsel suggested allowing Mr. Smith to call the witnesses himself, but the court rejected that suggestion as well (R2. 1240-42). The State refused "to take a position that would preclude a Defense witness from testifying" (R2. 1244). The court ruled that if defense counsel believed his recollection of his confidential conversation with Mr. Smith was correct, then counsel was correct to refuse to present the witnesses (R2. 1246-47).

Mr. Smith addressed the court, reiterating his desire to call the witnesses (R2. 1248-49). Defense counsel proffered that Campbell and Hawkins would testify to what they said at

their depositions (R2. 1252).[12] Counsel emphasized, “Mr. Smith does, in fact, want these people to testimony [sic] for him” (R2. 1252).

The trial court's refusal to allow Mr. Smith to call witnesses denied Mr. Smith his right to present a complete defense, in violation of the sixth, eighth and fourteenth amendments. See Washington v. Texas, 338 U.S. 14 (1967); Crane v. Kentucky, 476 U.S. 683, 690 (1986); Pointer v. Texas, 380 U.S. 400 (1965). Due process requirements supersede the application of state rules. Chambers v. Mississippi, 410 U.S. 284, 302 (1973); Rock v. Arkansas, 107 S. Ct. 2704 (1987); Taylor v. Illinois, 108 S. Ct. 646 (1988). Where a defendant is prevented from presenting evidence which is 'plausibly

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[12]Khan Campbell and James Hawkins, testified in their depositions that they saw Mr. Smith at Norm’s Bar, located across the street from the Hogley-Wogley at 11:30 PM on March 20, 1983. They indicated that they remembered the date because earlier in the day (around noon) Hawkins and Campbell had taken Campbell’s pregnant girlfriend, Dylan Walters, to a hospital emergency room and left her there. After the depositions, the State disclosed hospital records allegedly demonstrating that the witnesses were in error regarding their recollection of seeing Mr. Smith on the night of the homicide. The hospital record that the State produced showed that Walters was treated in an emergency room at 3:20 PM on March 28, 1983. However, a careful examination of the hospital record demonstrated that on March 28th Campbell was accompanied by her grandmother, Freddie Mae Hampton, not James Hawkins (PC-R. 2251). After receiving the hospital record, Mr. Sanders abandoned the defense and refused to call the witnesses.

relevant' to his theory of defense, this constitutes reversible error. Coxwell v. State, 361 So. 2d 148 (Fla. 1978); Coco v. State, 62 So. 2d 892 (Fla. 1953). Witnesses who would have provided Mr. Smith with an alibi were more than plausibly relevant. The trial court's exclusion of evidence was constitutional error of the first order "and no showing of want of prejudice [will] cure it." Davis v. Alaska, 415 U.S. 308, 317-18 (1974).

These legal principles were well known at the time of Mr. Smith's direct appeal. Appellate counsel provided ineffective assistance in failing to raise this issue on direct appeal.

C. MR. SMITH'S INVOLUNTARY ABSENCES

Mr. Smith was twice involuntarily absent from the trial court proceedings in his case. Before trial, the court held a hearing on a defense motion in limine (R2. 246). Counsel argued the first point of the motion, which concerned statements Mr. Smith had made to law enforcement(R2. 248-50), and was well into arguing the second point of the motion, which involved the State's intention to present similar fact evidence of an armed robbery (R2. 250-60), when Mr. Smith was finally brought into the courtroom (R2. 260). The court conducted no inquiry of Mr. Smith regarding his absence.

After the State had presented two witnesses in its case,

Mr. Smith was also absent from an in-chambers discussion regarding the location of the defense table in the courtroom (R2. 725). The discussion arose when the prosecutor said, "[T]he seating arrangements in the courtroom have become in dispute. It appears that Mr. Smith wants to sit where the prosecution is sitting yesterday so Mr. Smith can stare down witnesses" (R2. 725). Defense counsel clarified, "For the record, it's our position you have a hard time seeing the witnesses from the table where we're sitting" (R2. 725). The court offered to move the defense table "closer to the rail, if you wish, so he may see at a better angle. But once people take tables, that's where they stay through the course of the trial" (R2. 726). The court made no mention of Mr. Smith's absence from this discussion and never asked Mr. Smith about it.

That a defendant's involuntary absence from a critical stage constituted constitutional error under Florida and federal law was widely known at the time of Mr. Smith's direct appeal. See Drope v. Missouri, 420 U.S. 162 (1975); Illinois v. Allen, 397 U.S. 337 (1970); Proffit v. Wainwright, 685 F.2d 1227 (11th Cir. 1982); Francis v. State, 413 So. 2d 1175 (Fla. 1982); Amazon v. State, 487 So. 2d 8 (Fla. 1986). As this Court has held, a capital defendant has "the constitutional

right to be present at the stages of his trial where fundamental fairness might be thwarted by his absence." Francis, 413 So. 2d at 1177. See also Garcia v. State, 492 So. 2d 360, 363 (Fla. 1986) ("Appellant is correct in his assertion that he has a constitutional right to be present at all crucial stages of his trial where his absence might frustrate the fairness of the proceedings"). This right derives in part from the Confrontation Clause of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment. Proffitt, 685 F. 2d at 1256.

The constitution defines those stages where presence is required as any proceeding at which the defendant's presence has a "reasonably substantial relationship to his ability to conduct his defense." Id. at 1256. The determination of whether the defendant's presence is required should focus on the function of the proceeding and its significance to trial. Id. at 1257.

While "[a] capital defendant is free to waive his presence at a crucial stage of the trial," such a waiver "must be knowing, intelligent, and voluntary." Amazon v. State, 487 So. 2d 8, 11 (Fla. 1986). See also Schneckloth v. Bustamonte, 412 U.S. 218 (1973); Johnston v. Zerbst, 304 U.S. 458 (1938). "Counsel may make the waiver on behalf of a client, provided

that the client, subsequent to the waiver, ratifies the waiver either by examination by the trial judge, or by acquiescence to the waiver with actual or constructive knowledge of the waiver." Id. See also Coney v. State, 653 So. 2d 1009, 1013 (Fla. 1995). In determining the constitutional adequacy of the waiver, a trial court must question the defendant about his understanding of his right to be present during the critical stage at issue, and the record must affirmatively demonstrate that the defendant knowingly waived this right. Francis, 413 So. 2d at 1178.

If a defendant is involuntarily absent from any critical stage of the proceedings, relief is warranted unless the State can show first that the defendant made a knowing, intelligent, and voluntary waiver of the right to be present, Francis, 413 So. 2d at 1178, and that the defendant's absence was harmless beyond a reasonable doubt. Id. (citing Chapman v. California, 386 U.S. 18 (1967). If the Court is "unable to assess the extent of prejudice, if any, [the defendant] sustained by not being present during [a critical stage]," the Court must conclude that "[the defendant's] involuntary absence without waiver by consent or subsequent ratification was reversible error and that [the defendant] is entitled to a new trial." Francis, 413 So. 2d at 1179.

In Mr. Smith's case, the court made no inquiries whatsoever regarding Mr. Smith's absences. Mr. Smith had a right to be present at the pre-trial motion hearing and at a discussion of whether he could see the witnesses from his seat in the courtroom. Direct appeal counsel provided ineffective assistance in failing to raise this issue.

D. CONCLUSION

These issues should have been presented to this Court on direct appeal. The issues were preserved for appeal. The failure of appellate counsel to raise these issues on direct appeal clearly undermine confidence in the outcome of the direct appeal. A new direct appeal should be ordered.

CLAIM IV

FLORIDA'S CAPITAL SENTENCING PROCEDURE DEPRIVED MR. SMITH OF HIS SIXTH AMENDMENT RIGHTS TO NOTICE AND TO A JURY TRIAL AND OF HIS RIGHT TO DUE PROCESS.

Ring v. Arizona, 122 S. Ct. 2428(2002) overruled Walton v. Arizona, 497 U.S. 639 (1990), "to the extent that it allows a sentencing judge sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty." Ring at 2443. The role of the jury in Florida's capital sentencing scheme, and in particular Mr. Smith's capital trial, neither satisfies the Sixth Amendment, nor renders harmless the failure to satisfy Apprendi v. New

Jersey, 530 U.S. 466 (2000)and Ring.

On October 24, 2002, this Court rendered its decisions in Bottoson v. Moore, 833 So.2d 693 (Fla. 2002), cert. denied 537 U.S. 1070, and King v. Moore, 831 So.2d 143 (Fla. 2002), cert. denied. 537 U.S. 1067, relating to the United States Supreme Court's decision in Ring and thus, its impact upon the constitutionality of Florida's death penalty sentencing scheme. A careful reading of the various separate opinions in those published decisions establish that Mr. Smith is entitled to sentencing relief.

In both Bottoson v. Moore and King v. Moore, each justice wrote separate opinions explaining his or her reasoning for denying both petitioners relief. In both decisions, a *per curiam* opinion announced the result. In neither case do a majority of the sitting justices join the *per curiam* opinion or its reasoning. In both cases, four justices wrote separate opinions explaining that they did not join the *per curiam* opinion, but "concur[red] in result only." Bottoson v. Moore, 833 So. 2d at 694; King v. Moore, 831 So. 2d at 143.[13]

[13]In many ways, the Bottoson v. Moore decision contains the primary opinions of the seven justices. This Court had seven participating justices in that decision, while in King v. Moore, Justice Quince was recused. Generally, the separate opinions in King rely upon the separate opinions in Bottoson as more fully reflecting the reasoning of its author.

When the four separate opinions that concur in result only are analyzed, it is clear that relief was denied in the two cases based upon facts present in those cases that are not present in Mr. Smith's case. Under the logic of those four separate opinions, concurring in result only, Mr. Smith is entitled to sentencing relief as a result of Ring v. Arizona.

Mr. Smith's death sentence was imposed in an unconstitutional manner because he was required to prove the non-existence of an element necessary to make him eligible for the death penalty. Under Florida law, a death sentence may not be imposed unless the judge finds the fact that "sufficient aggravating circumstances" exist to justify imposition of the death penalty. Fla. Sat. Sec 921.141 (3). Because imposition of a death sentence is contingent upon this fact being found, and the maximum sentence that could be imposed in the absence of that finding is life imprisonment, the Sixth Amendment required that the State bear the burden of proving it beyond a reasonable doubt. Ring at 2432("Capital defendants. . .are entitled to a jury determination of any fact the legislature conditions an increase in their maximum punishment.").

The Due Process Clause of the Fourteenth Amendment requires the State to prove beyond a reasonable doubt every

fact necessary to constitute a crime. In re Winship, 397 U.S. 358 (1970). The existence of "sufficient aggravating circumstances" that outweigh the mitigating circumstances is an essential element of death-penalty-eligible first degree murder because it is the sole element that distinguishes it from the crime of first degree murder, for which life is the only possible punishment. Fla. Stat. Secs. 775.082, 921.141. For that reason, Winship requires the prosecution to prove the existence of that element beyond a reasonable doubt. Mr. Smith's jury was told otherwise. The instructions given to Mr. Smith's jury violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution and the Sixth Amendment's right to trial by jury because it relieved the State of its burden to prove beyond a reasonable doubt the element that "sufficient aggravating circumstances exist" which outweigh mitigating circumstances by shifting the burden of proof to Mr. Smith to prove that the mitigating circumstances outweigh sufficient aggravating circumstances. Mullaney v. Wilbur, 421 U.S. 684, 698 (1975).

Mr. Smith's death sentences are also invalid and must be vacated because the elements of the offense necessary to establish capital murder were not charged in the indictment in violation of the Sixth, Eighth, and Fourteenth Amendments to

the United States Constitution, the Florida Constitution, and Due Process. Jones v. United States, 526 U.S. 227 (1999), held that "under the Due Process Clause of the Fifth Amendment and the notice and jury guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." Jones, at 243 , n. 6. Apprendi v. New Jersey, 530 U.S. 466 (2000), held that the Fourteenth Amendment affords citizens the same protections when they are prosecuted under state law. Apprendi, 530 U.S. at 475-476. [14] Ring v. Arizona, 122 S.Ct. 2428 (2002), held that a death penalty statute's "aggravating factors operate as 'the functional equivalent of an element of a greater offense.'" Ring, at 2441 (quoting Apprendi, 530 U.S. at 494, n. 19). In Jones, the United States Supreme Court noted that "[much turns on the determination that a fact is an element of an offense, rather than a sentencing consideration," in significant part because "elements must be charged in the indictment." Jones, 526 U.S. at 232.

Like the Fifth Amendment to the United States Constitution, Article I, Section 15 of the Florida

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[14]The grand jury clause of the Fifth Amendment has not been held to apply to the States. Apprendi, 530 U.S. at 477, n. 3.

Constitution provides that “no person shall be tried for a capital crime without presentment or indictment by a grand jury”. Like 18 U.S.C sections 3591 and 3592(c), Florida’s death penalty statute, Florida Stats. §§ 775.082 and 921.141, makes imposition of the death penalty contingent upon the government proving the existence of aggravating circumstances, establishing “sufficient aggravating circumstances” to call for a death sentence, and that the mitigating circumstances are insufficient to outweigh the aggravating circumstances. Fla. Stat. § 921.141 (3). Florida law clearly requires every “element of the offense” to be alleged in the information or indictment. In State v. Dye, 346 So. 2d 538, 541 (Fla. 1977), the Florida Supreme Court said “[a]n information must allege each of the essential elements of a crime to be valid. No essential element should be left to inference.” In State v. Gray, 435 So. 2d 816, 818 (Fla. 1983), this Court stated “[w]here an indictment or information wholly omits to allege one or more of the essential elements of the crime, it fails to charge a crime under the laws of the state,” an indictment in violation of this rule cannot support a conviction; the conviction can be attacked at any stage, including “by habeas corpus”. Gray, 435 So. 2d at 818. Finally, in Chicone v. State, 684 So. 2d 736, 744 (Fla. 1996), this Court stated

"[a]s a general rule, an information must allege each of the essential elements of a crime to be valid." It is impossible to know whether the grand jury in this case would have returned an indictment alleging the presence of aggravating factors, sufficient aggravating circumstances, and insufficient mitigating circumstances, and thus charging Mr. Smith with a crime punishable by death. The State's authority to decide whether to seek the execution of an individual charged with a crime hardly overrides- in fact- is an archetypical reason for the constitutional requirement of neutral review of prosecutorial intentions. See e.g., United States v. Dionisie, 410 U.S. 19, 33 (1973); Wood v. Georgia, 370 U.S. 375, 390 (1962); Campbell v. Louisiana, 523 U.S. 393, 399 (1998).

The Sixth Amendment requires that "[i]n all criminal prosecutions, the accused shall . . be informed of the nature and cause of the accusation . . ." A conviction on a charge not made by the indictment is a denial of due process of law. State v. Gray, supra, citing Thornhill v. Alabama, 310 U.S 88 (1940), and DeJonge v. Oregon, 299 U.S. 353 (1937). By wholly omitting any reference to the aggravating circumstances that would be relied upon by the State in seeking a death sentence, the indictment prejudicially hindered Mr. Smith "in the

preparation of a defense" to a sentence of death. Fla. R. Crim. P. 3.140(o). Based on the foregoing, Mr. Smith respectfully requests that his sentence of death as well as the advisory sentence be vacated in light of Ring v. Arizona and a life sentence imposed. At the very least, a re-sentencing proceeding that comports with the Sixth Amendment as explained by Ring v. Arizona is required.

CONCLUSION AND RELIEF REQUESTED

Mr. Smith, through counsel, respectfully urges that the Court issue its Writ of Habeas Corpus, vacate his unconstitutional conviction and sentence of death, and/or order a new direct appeal.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition for a Writ of Habeas Corpus has been furnished by United States Mail, first class postage prepaid, to Catherine Blanco, Assistant Attorney General, Department of Legal Affairs, Westwood Center, 7th Floor, 2002 North Lois Avenue, Tampa, Florida 33607, on January 18, 2005.

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CERTIFICATE OF FONT

This petition is typed in Courier 12 point not proportionately spaced.

MARTIN J. MCCLAIN