IN THE SUPREME COURT OF FLORIDA
CASE NO. SC07-2258

Samuel L. Smithers
Appellant,
v.
STATE OF FLORIDA
Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE 13TH JUDICIAL CIRCUIT FOR HILLSBOROUGH COUNTY,
STATE OF FLORIDA

REPLY TO ANSWER BRIEF OF APPELLEE

ALI A. SHAKOOR
Fla. Bar No. 0669830
STAFF ATTORNEY

JAMES VIGGIANO JR.
Fla. Bar No. 0715336
STAFF ATTORNEY

RICHARD E. KILEY
Fla. Bar No. 0558893
STAFF ATTORNEY
CAPITAL COLLATERAL REGIONAL COUNSEL
MIDDLE REGION
3801 Corporex Park Drive, Suite 210
Tampa, Florida, 33619
(813) 740-3544

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PRELIMINARY STATEMENT

This pleading addresses issues I and II of Mr. Smithers initial brief. As to all other claims, Mr. Smithers relies on the Initial Brief and Petition for writ of Habeas Corpus. Reference to the trial transcript will be: (FSC ROA Vol.___p.#). The post-conviction record shall be referenced as: (PCR Vol. ___p.#).

ISSUE I

> WHETHER THE LOWER COURT CORRECTLY FOUND THAT DEFENDANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL DURING THE GUILT PHASE OF HIS CAPITAL TRIAL. (restated by Appellee)

There was a failure to Move to Keep the Racial Bias Portion of Smithers' Confession from the jury.

Appellee's reliance on Jones v. State, 748 So.2d 1012, 1023 (Fla. 1999), on page 30 of Appellee's Answer brief, is misplaced and is distinguishable from Appellant's case. The Jones Court noted that Jones was a white male charged with murdering a white female. Appellant was charged and confessed to murdering two prostitutes; one African-American and one white prostitute. Regarding the contention that the racial comments made by Mr. Smithers to Detective Flair, the following testimony was elicited at trial:

> Q. When he goes back on the 13th and the girl was there, did he tell you whether or not he had asked her to leave again?

A. Yes. He said that he asked her to leave and she refused to do so.
Q. What did she do or how did she react when he asked her to leave?
A. At some point they were in the garage and she threw a planter against his truck.
Q. Prior to throwing the planter do you know whether or not she hit him on the shoulder or the arm?
A. Yes.
Q. Okay. What was his response to her hitting him on the shoulder or the arm?
A. He told her that she wasn't going to hit him and he said he got upset about it.
Q. Did he tell you whether or not he hit her in any part of her body?
A. He said he hit her several times with a fist, with his first.
Q. And did he tell you where on the body?
A. In her face and head.
Q. Did he tell you – Did he make any comments as to whether or not he had hit her again?
A. After that, yes.
Q. *Yes. Did anything kick in that make her – made him hit her again?*
A. *He said that some prejudice may have set in so he hit her again.*
Q. *And that is because she was black?*
A. *Yes.* (Emphasis added)
Q. After he hits her again does he tell her that he is going to call the police?
A. Yes.
Q. And does he tell you how she reacts?
A. She throws the planter against his truck.
Q. Against his truck?
A. Yes.
Q. And did it damage the truck?
A. Caused a dinger on his truck.
Q. And how did he react when she threw the planter at

his truck?
A. He was angry about it. He hit her, she fell against the wall. He said a piece of wood fell and hit her in the face and landed on her face.
Q. Now did he demonstrate for you how it was that he did this?
A. I don't remember.
Q. Do you remember detective any expressions on his face when he is telling you this?
A. Yes. He appeared to be angry when he was talking about it.
Q. Did he tell you how hard he shoved her?
A. He shoved her hard enough that she fell down against the wall.
Q. Did he tell you whether or not there was any blood as a result of her hitting the wall?
A. Yes. He said there was blood splatter on the wall.
Q. Now did he tell you what part of her body she hit?
A. Her head and face.
Q. He tell you where she had hit her head in what part of the garage?
A. That she had fallen against the wall and some of the hoes, and a saw had fallen and a piece of wood fell and hit her on the face.
Q. Did he get up after that?
A. No.
Q. Did he do anything or did he attempt to revive her in anyway?
A. He said he started to do CPR and then he said no he didn't do it and he left.
Q. Did he tell you why he stopped?
A. That she didn't deserve to have the CPR.
Q. Did he say whether or not she deserved to die?
A. Yes. (FSC ROA Vol. IX p. 1055-59)

Appellee's contention on page 31 of the Answer brief that: " This statement was relevant and admissible as it was inextricably intertwined with the confession and

was relevant to prove Smithers' identity and intent to commit the homicide." is belied when the entire testimony of Detective Flair is reviewed. Identity regarding the murder of Denise Roach was not at issue in that Mr. Smithers had already confessed to Detective Flair about the murder of Christy Cowan *before* confessing to the murder of Denise Roach. (FSC ROA Vol. IX p. 1040-50). Furthermore, a careful reading of the above cited passage clearly shows that the State, by using leading questions on direct examination, had deliberately injected the inflammatory statements regarding the prejudice which "kicked in" because Roach was black.

Appellee's reliance on Robinson v. State, 574 So.2d 108, 113 (Fla. 1991) on page 29-30 of Appellee's Answer Brief is misplaced. Appellee fails to consider the previous holding for the same defendant in Robinson v. State, 520 So.2d 1 (Fla. 1988). Johnny Robinson was granted relief. The Robinson, 1988 Court held:

> We agree with appellant that the prosecutor's examination of this witness was a deliberate attempt to insinuate that appellant had a habit of preying on white women and thus constituted an impermissible appeal to bias and prejudice. Id. At 6.

The Court went on to further hold:

> The prosecutor's comments and questions about the race of the victims of prior crimes committed by appellant easily could have aroused bias and prejudice on the part of the jury. That such an appeal was improper cannot be questioned. The questioning and resultant testimony had no bearing on any aggravating or mitigating factors. Id. At 7.

Furthermore, the Court held:

> Accordingly, under the circumstances of this case, particularly in the absence of a cautionary instruction we cannot presume that the prejudicial testimony did not remain imbedded in the minds of the jurors and influence their recommendation. Because we cannot say beyond a reasonable doubt that the jury's recommendation was not motivated in part by racial considerations, we cannot deem the error harmless. Id. At 8.

In Mr. Smithers' case, the inference that Smithers was more brutal and vicious to Denise Roach because she was black, remained imbedded in the minds of the jurors and influenced their verdict and their subsequent death recommendation. Attorney Hernandez was ineffective in failing to object or make a motion in limine. Had he done either, the issue would have been preserved for review on direct appeal.

In Davis v. State & Crosby, 872 So.2d 250 (Fla. 2004), this Court addressed the matter of racial bias in this manner:

> The necessity of vigilance against the influence of racial prejudice is particularly acute when the justice system serves as the mechanism by which a litigant is required to forfeit his or her very life. As the United States Supreme Court first stated more than twenty-five years ago, "death is different in kind for any other punishment imposed under our system of criminal justice." *Gregg v. Georgia*, 428 U.S. 153, 188, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); *see also State v. Dixon*, 283 So.2d 1, 7 (Fla. 1973) (stating that because "[d]eath is a unique punishment in its finality and in its total rejection of the possibility of rehabilitation ..., the Legislature has chosen to reserve its application to only the most aggravated and unmitigated of most serious crimes"). We have acknowledged that "death is

> different" in recognizing the need for effective counsel in capital proceedings "from the perspective of both the sovereign state and the defending citizen." *Sheppard & White, P.A. v. City of Jacksonville*, 827 So.2d 925, 932 (Fls. 2002).
>
> In *Robinson v. State*, 520 So.2d 1, 7 (Fla. 1988), this Court emphasized that the "risk of racial prejudice infecting a criminal trial takes on greater significance in the context of a capital sentencing proceeding." Accordingly, we vacated a death sentence because of the prosecutor's suggestion during cross-examination of a defense expert that the black defendant preyed on white women. Id. At 254-55.

In Mr. Smithers' case, the inference that Smithers treated Roach more brutally than he treated his white victim, (Cowan) mandates the same relief that was granted in Robinson.

ISSUE II

> WHETHER THE LOWER COURT CORRECTLY FOUND THAT DEFENDANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL DURING THE PENALTY PHASE OF HIS CAPITAL TRIAL. (Restated by Appellee)

The lower court, in its ORDER DENYING AMENDED MOTION TO VACATE JUDGEMENT OF CONVICTION AND SENTENCE, held: "Neither this Court nor the Florida Supreme Court relied on drowning as a factor for finding the HAC or CCP aggravators, Defense counsel were not deficient in their performance." (PCR Vol. II p. 340-341). This was error. Appellee's contention on page 39 of the Answer

Brief that:

> The State cites to both this Court's sentencing order where drowning was not mentioned as a factor in finding CCP, and the Florida Supreme court's opinion where drowning was not mentioned as a factor in determining the CCP aggravator. (See response, pages 27-29, citing Smithers v. State, 826 So.2d 916, 929-930 (Fla. 2002), attached)

ignores one very important fact; the penalty phase jury heard the following:

> But there is strangulation. Why? Because we know she is still alive because we got foaming, we got many other injuries. She's getting up, she is alive, she is feeling the pain, the heinous, atrocious and cruel pain that is about to be inflicted on her and he picks her up and he strangles her, starts strangling her. There is your other injury. And now he thinks she is dead, probably because she's strangled and she loses consciousness. So he drags her by the ankles and drags her that extral 150 feet to the pond so she can be with her friend Denise Roach. Throws her in the pond. He is going back to the garage. He gets the axe, he goes to the water hose, he begins to wash it. Marion Whitehurst pulls up just to check to see if the lawn has been cut and doesn't expect him to be there because the gate was locked. Sam, what are you doing here? Oh, hi Ms. Whitehurst, just had to chop some limbs. What's going on now in that cold pond, Christy Cowan is now coming out of unconsciousness, she is now conscious. She starts hollaring for help. She doesn't know if anybody is there to hear or not but instinctively she starts screaming out the best she can. How do we know? Two things, the defendant had said so and two she is in that water swallowing the water, gagging and foaming air with water. Foaming, possible drowning. (FSC ROA Vol. XVIII p. 2280-2282)
>
> .....Backstep to Sam. Marion has already left. Just wouldn't shut up. Just wouldn't shut up. Will you shut up? Throws limbs on her. Psychotic or angry? Just got

> rid of the only witness that could have seen this. I'll finish her off. Wades down in the pond, she is still alive, she dies. Cold, calculated, premeditated design. Heinous atrocious cruel. 25C, the foaming. Alive. Dead 25A. (FSC ROA Vol. XVIII p. 2285)

Appellee overlooks the fact that it was the penalty phase jury who heard this impassioned argument and subsequently tendered a recommendation of death. It is naive to believe that they were not swayed by this impassioned argument.

Appellee's contention on page 46 of the Answer Brief that: "As this was a reasonable strategic decision, under *Strickland,* it is virtually unchallengeable." is also misplaced. Reasonable attorney performance obliges counsel to "to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process."

Strickland v. Washington, 466 U.S. 668, 685 (1984). "One of the primary duties defense counsel owes to his client is the duty to prepare himself adequately prior to trial." Magill v. Dugger, 824 F.2d 879, 886 (11th Cir. 1987); "pretrial preparation, principally because it provides a basis upon which most of the defense case must rest, is, perhaps, the most critical stage of a lawyer's preparation."

House v. Balkom, 725 F.2d 614, 616 608, 618 (11th Cir.), cert. denied, 469 U.S. 870 (1984). No tactical motive can be ascribed to an attorney whose omissions are based on ignorance, Brewer v. Aiken, 935 F.2d 850 (7th Cir 1991), or in the failure to

properly investigate or prepare. Had Attorney Robbins consulted with an independent medical examiner, he would have learned that Cowan's lungs were "relatively light" in that a normal drowning victim's lungs would weigh 1.000 grams or more and in Cowan's case her lung weights were down in the 400 to 500 gram range, which while not completely disproving drowning, it's certainly inconsistent with drowning. (PCR Vol. VII p. 1019), also there was no hemorrahaging to the mastoid air sinuses which is seen in people who struggle when they drown. (PCR Vol. VII p. 1019). Ultimately, he would have learned that in all probability, Cowan was manually strangled first and then hit after she was strangled. (PCR Vol. VII p. 1023).

In Driscoll v. Delo, 71 f.3d 701, 707 (8th Cir. 1995) the court held:

> The district granted Driscoll habeas corpus relief and ordered that he receive a new trial because his counsel was ineffective in allowing the jury to retire with the factually inaccurate impression that the victim's blood could have been present on Driscoll's knife. On appeal, the state argues that Driscoll failed to establish that defense counsel's handling of the serology evidence either constituted unreasonable performance or caused Driscoll prejudice. The state contends that the district court did not engage in the required two-part *Strickland* analysis; specifically, that the court failed to consider whether the asserted errors by counsel prejudiced the defendant. While we acknowledge that shortcomings of the district court's consideration of prejudice, we reject the state's basic argument after engaging in the full, two-part *Strickland* review de novo. Id. At 707.

In Mr. Smithers' case, trial counsel was ineffective in allowing the penalty phase jury to retire with the factually inaccurate impression that Christy Cowan was alive and drowning when she was placed in the pond. Defense counsel relied upon the cross-examination of Dr. Hair as opposed to presenting an independent review by an independent Medical Examiner. Had he done so, the State would not have been able to create the factually inaccurate impression that Cowan was alive in the pond. Relief is proper.

CONCLUSION

Wherefore, in light of the facts and arguments presented in this Reply and the facts and arguments presented in Appellants Initial Brief, Mr. Smithers hereby moves this Honorable Court to:

1. Vacate the judgments and sentences in particular, the sentence of death.

2. Order a new trial .

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing **REPLY TO ANSWER BRIEF OF APPELLEE** has been furnished by United States Mail, first class postage prepaid, to all counsel of record on October _____, 2008.

ALI ANDREW SHAKOOR
Florida Bar No. 669830
Assistant CCC

JAMES VIGGIANO
Florida Bar No. 0715336
Assistant CCC

RICHARD E. KILEY
Florida Bar No. 0558893
CAPITAL COLLATERAL REGIONAL
COUNSEL-MIDDLE REGION
3801 Corporex Park Drive Suite 210
Tampa, Florida 33619

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that a true copy of the foregoing **Reply to Answer Brief of Appellee,** was generated in a Times New Roman 14 point font, pursuant to Fla. R. App. P.9.210.

RICHARD E. KILEY
Florida Bar No. 0558893
Assistant CCC

JAMES VIGGIANO
Florida Bar No. 0715336
Assistant CCC

ALI ANDREW SHAKOOR
Florida Bar No. 669830
CAPITAL COLLATERAL REGIONAL
COUNSEL-MIDDLE REGION
3801 Corporex Park Drive
Suite 210
Tampa, Florida 33619

Copies to:
The Honorable William Fuente
Circuit Court Judge
800 E. Kennedy Blvd
Ste. 124
Tampa, FL 33602

Candance Sabella
Assistant Attorney General
Office of the Attorney General
Concourse Center 4
3507 East Frontage Road
Suite 200
Tampa, FL 33607-7013

Ada Carmona
Assistant State Attorney
Office of the State Attorney
800 E. Kennedy Blvd.
Ste. 124
Tampa, FL 33602

Samuel L. Smithers
DOC#124639
Union Correctional Institution
7819 N.W. 228th Street
Tampa, FL 32026