

IN THE
SUPREME COURT OF FLORIDA

CASE NO. SC12-2466

LOWER CASE NO. F00-40026A

COREY SMITH,

Appellant,

-vs-

STATE OF FLORIDA,

Appellee.

_____ /

APPEAL FROM THE ELEVENTH JUDICIAL CIRCUIT
IN AND FOR MIAMI-DADE COUNTY, FLORIDA

REPLY BRIEF PURSUANT TO FLA.R.CRIM.P. 3.851(i)
COREY SMITH

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STATEMENT OF THE CASE

Appellant realleges and reavers the Statement of the Case presented in his Initial Brief as if fully set forth herein.

ARGUMENT

ISSUE I

THAT THE COURT ERRED IN BY NOT GIVING COUNSEL ENOUGH TIME TO PROPERLY LITIGATE SMITH'S 3.851 MOTION. (1) IT WAS AN ABUSE OF DISCRETION FOR THE TRIAL COURT TO DENY SMITH'S MOTION TO CONTINUE THE HUFF HEARING, AND (2) DENY SMITH'S MOTION FOR PERMISSION TO AMEND MOTION TO VACATE JUDGMENT OF CONVICTIONS AND REFUSE TO CONSIDER THE SENTENCES AND SUPPLEMENTAL/ AMENDMENT TO MOTION TO VACATE JUDGMENTS OF CONVICTION AND SENTENCES ON ITS MERITS.

In its Response Brief, the State claims SMITH is raising new arguments in this appeal other than those he raised before the Circuit Court when he moved to continue the Huff Hearing and request permission to file amended pleadings. The State also accused defense counsel of "prioritiz[ing] other matters before this case" as a reason to punish SMITH for his attorney's failure to have filed his amended pleadings sooner. (State's Resp. Br., p. 49).

The Record in this case was voluminous. In the beginning of this undertaking, defense counsel had an understanding of that when he accepted the

appointment, but had no idea how much time would be needed for review.

Counsel was not appointed to step in the shoes of the CCRC-South and continue the litigation as they had been carrying on. He was tasked to independently review the Record to decide if the pleadings needed to be amended or supplemented as well as prepare for the hearing.

On May 15, 2012, approximately one month into his appointment, counsel confessed to the Court that because of his participation in a seven-week Federal trial, he had not had the opportunity to pick up the boxes of records from the Capital Collateral Commission Regional Office (R.20. 73). Nonetheless, the Court to set the Huff Hearing on July 5, 2012, a mere six weeks away.

Counsel utilized his limited time as best he could. He realized that he needed more time to review the Record as well as visit SMITH in order to discuss his position on supplementing or amending the pleadings. One issue that required further investigation was the mental health mitigation that was eventually waived. The six weeks given counsel were not adequate to accomplish all of this activity AND prepare for the Huff Hearing. This lack of time and the reasons for it were clearly raised in the Motion to Continue Huff Hearing that was filed, objected to by the State, and denied.

Comments by Court during the hearing held December 13, 2011, when the CCRC-South was permitted to withdraw, provided additional support for the contention that the Circuit Court's refusal to continue the Huff Hearing denied him due process and constituted an abuse of its discretion. Firstly, it was the CCRC-South which sought to withdraw from SMITH's case. This was not a situation where SMITH was seeking to discharge his attorneys. SMITH, who appeared at the Hearing by telephone, was asked if he objected to the withdrawal of his attorneys particularly in light of the delay that would be caused by the introduction of new counsel in the case. The colloquy between the Court and SMITH has been reproduced in SMITH's Initial Brief, see Appellant Initial Br., p.12, and shows the Court telling SMITH that any new attorney appointed to his case would need six to twelve months to get up to speed and litigate his case. SMITH agreed to allow the CCRC-South to withdraw believing that his new attorney would be given that time.

Once the Huff Hearing had taken place, SMITH was now at a disadvantage playing catch-up. There were some issues that were argued during the Huff Hearing that although they were denied, the Court acknowledged that it might reconsider its ruling if the Motion to Vacate was amended or supplemented. There was no time given for that to occur. The Court was particularly concerned with

any other issues that counsel could anticipate adding to the newly discovered evidence claim that required the taking of evidence. Not having had the opportunity to meet with his client before the Huff Hearing, counsel could only think of the potential mental health issue. It seemed that the Court was attempting to mitigate the due process violation caused by denying the Motion to Continue the Huff Hearing by granting leave to counsel to amend/supplement the Motion to Vacate when his review of the Record was complete, and he had the opportunity to meet with his client. In the meantime, the evidentiary hearing would proceed limited to the newly discovered evidence issue. How else could the Court's ruling be interpreted?

Additional reasons cited in SMITH's Motion for Permission to Supplement/Amend as preventing him from preparing his supplemental pleadings sooner were his participation in two jury trials. One of them was in Federal Court and the other was a death-penalty case in State Court. Both required a lot of preparation and pretrial litigation that was all time-sensitive. Counsel was not choosing to prioritize these cases, other Courts were setting deadlines that he was required to follow. The trials in question did occur on schedule, and counsel's obligations to his clients in those cases could not at that point be subordinated to the demands in this case.

Nonetheless, in its Response Brief, the State faults counsel alleging a lack of due diligence (State's Resp. Br., p. 50). After unjustly accusing counsel of prioritizing other cases, the State faults the CCRC-South for its alleged lack of due diligence. To the extent that the State was accusing the CCRC-South of neglect of SMITH's case, the State cannot then impute it to newly appointed counsel, who has been nothing but diligent in his efforts to prepare and present SMITH's case within an artificially compressed time period.

Skeleton motions to vacate filed merely to toll the one-year limitations period are disfavored. Fla.R.Crim.P. 3.851 has been specifically amended to outlaw that practice, as noted by the State. The State suggests, however, that SMITH's argument for a continuance of the Huff Hearing, and to permit the amendment/supplement to the Motion to Vacate was presented in order to replace a skeleton Motion to Vacate. This is another dishonest argument by the State intended to prejudice the Court and impugn SMITH's counsel.

That the Court held the evidentiary hearing on the newly discovered evidence issue as scheduled at the Huff Hearing should not prevent the Court from considering the supplemental pleadings that were filed before the final Order was issued. Even if counsel had been able to file all of the supplemental pleadings before the evidentiary hearing, it is clear that insufficient time was available to

have been able to schedule a new Huff Hearing, and include any new issues that might have been determined warranted inclusion. There would have been no reason to reschedule the evidentiary hearing based upon newly discovered evidence because there was no overlap between that witness, Chazre Davis, and the other issues before the Court. Of course, all the prolonged litigation could have been avoided had the Circuit Court recognized the meritorious issues raised in the Motion for Continuance, and continued the Huff Hearing.

In its Response Brief, the State requests this Court to strictly apply Rule 3.851(f)(4) that requires motions to amend to be filed within 30 days of the evidentiary hearing (State Resp. Br., p. 55). Rigid adherence to deadlines of this sort is not required when the equities support including all of an inmate's constitutional claims in one proceeding. In a twist of the notion that "death is different", the State relies upon a time limitation not present in any other post-conviction motion, such as a motion filed under Rule 3.850, or even in a civil context to support a strict adherence to rule. Fla.R.Civ.P. 1.190(e). ("At any time in furtherance of justice, upon such terms as may be just, the court may permit any process, proceeding, pleading, or record to be amended or material supplemental matter to be set for in an amended or supplemented pleading. At every stage of the action the court must disregard any error or defect in the proceedings which

does not affect the substantial rights of the parties.”) Given this Court’s historic and commendable concern for the seeking of justice in litigation relating to the death penalty, it is inconceivable that an inmate sentenced to death should have less right to amend or supplement his pleading as would be afforded a party in a civil case or in non-capital post-conviction proceedings.

In United States v. Cronin, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984), the U.S. Supreme Court determined that under some circumstances, the denial of a motion to continue trial could constitute per se ineffective assistance of counsel if counsel could not reasonably be expected to prepare for trial within the time given by the Court. A determination of counsel’s ineffectiveness in those circumstances would not require a finding of prejudice. Underlying the reasoning of the Supreme Court in Cronin is that not giving an attorney reasonable time to prepare violates the due process rights of the defendant.

The reasoning in Cronin applies in this case. It was unreasonable for the Circuit Court to expect that newly appointed counsel would be able to review the voluminous Record, visit with SMITH, and prepare and file supplemental pleadings within the less than six weeks he was granted between May 15, and July 5, 2012. The Circuit Court abused its discretion by denying the Motion to

Continue Huff Hearing that raised those grounds and denying the amended pleadings that followed.

SMITH had sought in his Supplemental Motion to Vacate to raise an issue of newly discovered evidence regarding the admissions of perjury made by Demetrious Jones during the related John Doe Federal trial, and that the decision by both the U.S. Attorney's Office not to charge him with perjury, and the State Attorney's Office to allow him to testify regardless, should have been disclosed pursuant to Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). SMITH argued that if the State suppressed exculpatory evidence, such as the existence of promises of immunity for an important cooperating witness, it cannot complain when the Defendant raises that ground for relief in a post-conviction motion that was otherwise untimely. The State should not be able to benefit by withholding this favorable evidence until the expiration of any limitations period.

In its Response Brief, the State urges the Court to find no Brady violation because SMITH was a defendant on trial in Federal Court and thereby "possessed" the exculpatory information (State's Resp. Br., p. 58).

While it is true that SMITH may have been present to witness Jones' perjurious testimony in Federal Court, he did not know what had occurred within the U.S. Attorney's Office that caused him to decline to prosecute Jones for his alleged perjury. The State Attorney's Office did not disclose why it would use an admitted perjurer as a witness. It was the decision of these prosecutors that was not disclosed.

The Demetrius Jones perjury/Brady/Giglio issue was properly brought at the earliest time possible by defense counsel. It is a serious issue that deserves to be heard on the merits. The Circuit Court abused its discretion when it refused to consider this issue on its merits. In the Federal trial, Jones had fabricated his presence when SMITH ordered Leon Hadley to be murdered. SMITH was charged with Hadley's murder in this case, but Jones was not asked about Hadley's murder in this trial. This omission may have been calculated to enable the State to avoid the Brady/Giglio issue. Even if this Court were to find that the Court below did not abuse its discretion when it rejected as untimely SMITH's supplemental pleadings on the other issues, the coverup of Jones' perjury and the decisions made not to prosecute should be heard on the merits.

ISSUE II

THAT THE TRIAL COURT ERRED WHEN IT DENIED SMITH'S NEWLY DISCOVERED EVIDENCE CLAIM BY APPLYING A PURELY SUBJECTIVE STANDARD TO JUDGING THE CREDIBILITY OF CHAZRE DAVIS RATHER THAN CONSIDERING THE IMPACT HIS TESTIMONY WOULD HAVE HAD BEFORE A JURY.

In its Response Brief, the State argues that Chazre Davis' testimony could not be considered as newly discovered evidence because SMITH's trial counsel knew that he had given statements to the police investigators denying that he had conspired with SMITH to kill Cynthia Brown. The State claims that since the defense was aware of the existence of that evidence and failed to introduce it, SMITH has not met the due diligence prong required in presenting a claim of newly discovered evidence (State Resp. Br., pp. 62-3). Under the circumstances in this case, the fact that SMITH's trial counsel may have been aware that Davis had previously denied conspiring with SMITH to murder Brown did not disqualify them from presenting Davis' testimony as newly discovered evidence.

There was more to Davis' post-arrest statement than a mere denial of guilt in Brown's murder. He testified that on each occasion he was confronted by the detectives, he was threatened with dire consequences in his own case if he refused to cooperate and testify against SMITH.

Davis' denial of a conspiracy with SMITH to kill Brown would not have helped SMITH before Davis' guilt in Brown's murder was judicially established by his guilty plea, which had not happened by SMITH's trial. His conviction as a principle adds, rather than detracts, from his credibility.

The State admits that SMITH's trial counsel were diligent in seeking to introduce as much of Davis' exculpatory evidence as was legally admissible at trial. During Penalty Phase, testimony was presented from one of Davis' jail roommates who had heard Davis deny any role by SMITH in Brown's murder. SMITH's trial counsel may have had knowledge that Davis had denied conspiring with SMITH to kill Brown, but they did not have the evidence. The evidence was only available after the trial when Davis provided the Affidavit to SMITH's post-conviction counsel.

In its Response, the State claims that Davis was impeached by the confusion he exhibited when cross-examined on a statement he made in 1998. But Davis explained on redirect the circumstances surrounding that 1998 statement (R23.154-55).

That Davis was solicited to cooperate against SMITH, and in the process made statements that exculpated him made his testimony more credible. Detective Alfonso admitted to having used his violation of parole based upon the Brown

murder to solicit Davis' cooperation against SMITH. The Circuit Court failed to properly weight Davis' testimony.

In its Response Brief, the State ignores that portion of Davis' testimony that undermined the credibility of Carlos Walker, another accomplice witness who testified at trial (R23.128-29). Walker was the State witness who testified in deposition to having no knowledge of SMITH's involvement in the Brown murder. At trial, he surprised SMITH offering damning testimony. Not only was this portion of Davis' testimony newly discovered, but it undermined the credibility of an important witness against SMITH by showing his personal bias.

In its Response Brief, the State urges this Court to find that there was "competent and substantial" evidence to support the Circuit Court's finding in this case. The State does not explain how the Court can find Davis' consistent denials of SMITH's culpability in the murder of Brown were untruthful. The lengthy quotation from this Court's Opinion rendered in SMITH's direct appeal does not list any witness who heard or had personal knowledge that Davis either killed Brown or was paid by SMITH to do so (State's Resp. Br., pp. 61-2, quoting Smith v. State, 7 So.3d 473, 486-87 (Fla. 2009). Although there was evidence that SMITH told people he wanted Brown dead and that he solicited others to kill her, there was no testimony directly linking Davis and SMITH to Brown's murder.

Davis' repudiation of the State's theory connecting SMITH to Brown's murder, despite the threats he received from the detectives, would have been powerful evidence undermining the State's case by "weaken[ing] the case against [the defendant] so as to give rise to a reasonable doubt as to his culpability." Swafford v. State, 125 So.3d 760, 767 (Fla. 2013).

SMITH was sentenced to death in Brown's murder. Even if this Court might agree with the Court below and find that Davis' testimony would not have warranted a new trial, it would certainly have undermined the death sentence imposed and would have probably yielded a life sentence. Swafford., citing Jones v. State, 591 So.2d 911, 915 (Fla. 1991).

ISSUE III

THAT THE TRIAL COURT ERRED IN ITS DETERMINATION THAT SMITH'S COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL IN REGARDS TO THE SPEEDY TRIAL ISSUE IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION.

In its Response Brief, the State claims that SMITH's original Motion to Vacate alleged that the only ineffective assistance of counsel SMITH received was limited to his trial counsel's purported failure to have filed a written Demand for Speedy Trial. Since that was not the case, and, according to the State, SMITH's trial commenced within the window, his speedy trial rights were not violated

(State's Resp. Br., p. 67). This was not an accurate characterization of SMITH original articulation of this issue.

In his original Motion to Vacate, SMITH noted what he believed at the time was the failure of his trial counsel to file a written Demand for Speedy Trial in a footnote (R2.333). In calculating the speedies' time table, however, SMITH relied upon the announcement his attorney made in open court on June 16, 2004, as the beginning of the 60 days within which trial must commence. Since the written Speedy Trial Demand was filed on June 8, 2004, the State had eight fewer days to comply with Rule 3.191.

Even in the original Motion to Vacate, SMITH complained about the representations made by his trial counsel at the hearing on June 29, 2004, when the 60-day time clock was tolled for 45 days. At that hearing, which SMITH did not attend, his counsel represented to the Court that he had agreed to a 30-day tolling. SMITH's trial counsel represented to the Court that the 30 days was agreed to by the State. When the State claimed that the agreement was for a 60-day tolling, the Court split the difference and tolled the speedies period for 45 days. As SMITH described the violation in his original Motion to Vacate:

Defense counsel made that representation even though he entered the courtroom with the impression that the tolling would be for 30 days. Thus, defense counsel permitted his client's right to a speedy trial to be tolled for a period that his client had not agreed to, while making the false representation that Mr. Smith knew exactly what the agreement was. The Court and the State accepted that representation and no mention was made of the fact that, because the agreement changed during the proceedings, defense counsel could not have made his client aware of the new agreement.

(R2.334).

At the Huff Hearing, counsel argued the speedy trial violation as pled. He had not yet had the opportunity to meet with SMITH to discuss its accuracy. When he subsequently met with SMITH and discussed the speedies issue, SMITH indicated that the original Motion to Vacate misstated the facts. In the Amended Motion to Vacate, SMITH claimed that contrary to what was represented in the original Motion, he had not agreed to any tolling of the speedy trial period. The representations made by his trial counsel on the Record that he had agreed to a 30-day tolling were false. He reiterated his request for an evidentiary hearing to advance his claims.

In his Amended Motion to Vacate, SMITH also focused on the hearing on September 14, 2004, when the Motion to Dismiss was denied, and the trial date was scheduled. The Amended Motion demonstrated that trial counsel had been ignorant as to the correct time-line, and failed to properly preserve SMITH's

speedy trial rights after the Demand for Speedy Trial had been filed. He requested an evidentiary hearing to explore that issue as well.

Even as articulated in the original Motion to Vacate, if the Court had granted an evidentiary hearing, the evidence presented in the Amended Motion would have been before the Court, and an Amendment to the Motion to Vacate to conform it to the evidence would have been proper. If the Huff Hearing had been continued, and counsel had had the opportunity to meet with SMITH and go over the case with him, an Amended Motion would have been filed, and everything would have been heard in the appropriate manner and time. SMITH deserves to have the speedy trial issue decided based upon the Amended Motion.

ISSUE VI

THAT THE TRIAL COURT ERRED IN FINDING THAT SMITH'S TRIAL COUNSEL DID NOT RENDER INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS WHEN HE STATED IN OPENING STATEMENT A CAUSE OF DEATH FOR CYNTHIA BROWN THAT HE KNEW COULD NOT BE SUPPORTED BY THE EVIDENCE THEREBY LOSING CREDIBILITY WITH THE JURY AND PREJUDICING SMITH'S DEFENSE.

In its Response Brief, the State argues that since SMITH had not challenged the giving of the manslaughter lesser-included offense for the murder of Leon Hadley at trial, he could not raise such a challenge on appeal. SMITH concedes

the point, and withdraws application of this issue to the Leon Hadley first-degree murder conviction.

As to the count charging the murder of Melvin Lipscomb, for which the jury returned a manslaughter verdict, the State argues that pursuant to State v. Calderon, 951 So.2d 1031 (Fla. 3d DCA 2007), the crime was properly prosecuted within the extended Statute of Limitations pursuant to the Amendment to Florida Statute Section 775.15(2)(b) that was effective October 1, 1996. SMITH conceded that point as well.

SMITH's argument challenges the validity of Calderon, a Third District case, in light of the principles set forth by the U.S. Supreme Court in Stogner v. California, 539 U.S. 607, 123 S.Ct. 2446, 156 L.Ed.2d 544 (2003). Although the Court in Stogner held that the statute in question could not be extended without violating the ex post facto clause in the case before it because the old limitations period had already elapsed, it did not rule that it could be extended if the crime had not yet been charged by the date of the enactment of the statute.

ISSUE IV

THE TRIAL COURT ERRED WHEN IT DETERMINED THAT TRIAL COUNSEL'S FAILURE TO REQUEST A RICHARDSON HEARING WHEN WITNESS CARLOS WALKER CHANGED HIS TESTIMONY AT TRIAL CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL PURSUANT TO THE SIXTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION.

In its Response Brief the State claims that by citing Delaware v. Van Arsdall, 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986), in his Initial Brief, SMITH is raising a new claim. The State also suggests that because Van Arsdall concerns a cross-examination issue, it has no application in this case. The State is incorrect in its analysis of Van Arsdall's application to the Richardson inquiry raised therein.

Underlying the rules of discovery are constitutional issues of due process and, in the case of impeachment of witnesses, rights of confrontation. See, generally, Mungin v. State, 79 So.3d 726, 734 (Fla. 2011), citing Brady v. Maryland, supra (the Fifth and Fourteenth Amendments to the United States Constitution require prosecutors to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial); State v. Hampton, 113 So.3d 109, 110 (Fla. 5th DCA 2013), citing Arizona v. Youngblood, 488 U.S. 51,

109 S.Ct. 333, 102 L.Ed.2d 281 (1988) (failure of the State to preserve evidence violates due process); DeCastro v. DeCastro, 957 So.2d 1258, 1260 (Fla. 3d DCA 2007) (discussing the constitution of due process protections afforded criminal condemnors compared to those afforded criminal defendants in a more typical criminal proceeding); Thomas v. State, 28 So.3d 240 (Fla. 4th DCA 2010), citing Roviaro v. United States, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957) (due process rights can force disclosure of confidential informant's identity over State's limited privilege).

Pre-trial depositions are provided to criminal defendants in order to preserve their right to fairly discover the evidence against them before trial. A defendant is entitled to rely upon the statements made to prepare his defense. This also implicates the Sixth Amendment right to effective assistance of counsel and the confrontation of witnesses.

On direct appeal, the Court considered whether SMITH was entitled to a Richardson Hearing in light of the State's claim that he had failed to properly object. SMITH's Motion for Mistrial was found to have been adequate to preserve the issue for direct review, but the Court determined that the failure to have granted one was harmless beyond a reasonable doubt. Smith, 7 So.3d at 505-6.

In a case where a witness' trial testimony is a repudiation of his testimony during deposition, a defendant's right to confront a witness is implicated. When considering a confrontation clause violation, Van Arsdall guides the prejudice inquiry. In Van Arsdall, the Court described the type of prejudice that must be established by a defendant alleging the confrontation clause violation as more focused on the effect on the witness, not on the effect on the trial's outcome. The Court stated:

The State somewhat tentatively suggests that a defendant should have to show 'outcome determinative' prejudice in order to state a violation of the confrontation clause: unless the particular limitation on cross-examination created a reasonable possibility that the jury returned an inaccurate guilty verdict, that limitation would not violate the confrontation clause. We disagree. While some constitutional claims by their nature require a showing of prejudice with respect to the trial as a whole, (citations omitted), the focus of the confrontation clause is on individual witnesses. Accordingly, the focus of the prejudice inquiry in determining whether the confrontation right has been violated must be on the particular witness, not on the outcome of the entire trial. It would be a contradiction in turn to conclude that a defendant denied any opportunity to cross-examine the witnesses against him nonetheless had been afforded his right to 'confront[ation]' because use of that right would not have affected the jury's verdict.

475 U.S. at 679-80, 106 S.Ct. At 1435-36.

Given the significance of Walker's turnaround, the impact of the discovery, due process, and confrontation clause violations should have been considered by the

Court as it impacted on the jury's perception of his testimony when determining whether a Richardson violation had occurred that warranted a mistrial.

The failure of trial counsel to have made a timely objection and requested a Richardson Hearing prejudiced SMITH despite this Court's handling of the issue on direct appeal. SMITH stands by his position on this issue, and believes that it should be considered by this Court along with the other allegations of constitutionally ineffective counsel SMITH has raised in his Motion to Vacate.

ISSUE VI

THAT THE TRIAL COURT ERRED IN FINDING THAT SMITH'S TRIAL COUNSEL DID NOT RENDER INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS WHEN HE STATED IN OPENING STATEMENT A CAUSE OF DEATH FOR CYNTHIA BROWN THAT HE KNEW COULD NOT BE SUPPORTED BY THE EVIDENCE THEREBY LOSING CREDIBILITY WITH THE JURY AND PREJUDICING SMITH'S DEFENSE.

In its Response Brief, the State suggests SMITH's argument in his Initial Brief is different from the argument he made in his original Motion to Vacate, so the Court should not hear it. The State contends that the original Motion to Vacate complained only of SMITH's trial counsel's failure to have retained a forensic expert to support the statements made in opening statements. The State is incorrect that the issue raised in the court below should be limited to the failure to

retain a forensic expert. SMITH is entitled to present in this appeal the true constitutional violation caused by his trial counsel's opening statement and attempted cross-examination of Dr. Emma Lew, the Medical Examiner, in the Cynthia Brown homicide, regarding sexual asphyxia.

The presentation of this issue in the original Motion to Vacate was predicated on the existence of expert evidence to support the claims made by trial counsel. SMITH's trial counsel were given the benefit of the doubt that they were acting in good faith. Post-conviction counsel reviewing the Record, and assuming that the proffers made during trial had a factual foundation naturally assumed that an expert would have supported the position. By that reasoning, not retaining an expert to provide the factual foundation could be considered ineffective assistance of counsel.

The State was able to show that a forensic expert was retained by trial counsel in the case. According to the State, that was the end of the inquiry. SMITH's trial counsel had rendered effective assistance of counsel by retaining a forensic expert, but chose not to call him.

After undersigned counsel visited SMITH and thoroughly discussed this issue with him, he gained more insight into this issue. A Supplemental Motion to Vacate which revised the statement of that issue as follows:

INEFFECTIVE ASSISTANCE OF COUNSEL IN PRESENTING
DEFENSE OF EXPERT MEDICAL EXAMINER'S TESTIMONY
AS TO CYNTHIA BROWN'S CAUSE OF DEATH.

As restated, the focus of the Sixth Amendment violation was where it should have been all along, attempts to impeach the testimony of Dr. Lew. SMITH's trial counsel had attempted to do so by (1) claiming in opening statement that the evidence would show that Brown died of a drug overdose when there was no evidence that was going to support that theory and they knew it; and (2) presenting the sexual apyxia alternative cause of death theory without factual basis.

The revised issue raised constitutional issues of far greater magnitude than the mere failure to have retained a forensic expert, but still applied to the substance of the presentation of expert testimony. In this case, trial counsel discredited their defense by presenting alternative theories relating to Brown's cause of death that they knew could not be supported by any evidence, and where the only evidence that was going to be presented to the jury would be uncontradicted by the forensic expert competent to testify on the subject. By making knowingly false statements to the jury, trial counsel lost credibility. This ineffective assistance of counsel was indistinguishable from that found in Robinson v. State, 702 So.2d 213, 217 (Fla. 1997).

This is another example of the prejudice SMITH suffered because his attorney was given insufficient time to prepare for the Huff Hearing. By arguing against consideration of this issue as framed, the State is seeking to exploit its success in having deprived counsel of his ability to properly represent SMITH in the proceedings below.

ISSUE VII

THAT THE TRIAL COURT ERRED IN NOT REQUIRING THE STATE TO AFFIRMATIVELY DISCLOSE ANY FILES OF COOPERATING WITNESSES THAT HAD BEEN ILLEGALLY MADE SECRET AND NOT DISCLOSED BEFORE TRIAL.

In its Response Brief, the State complains that SMITH has impermissibly shifting the burden to the State. It opines that the deposit of the prosecutor's files in the Registry satisfies whatever burden of production required by law. This is a fallacious argument.

The State has to know that merely reviewing the prosecutor's file would not reveal which, if any, of the cases against cooperating witnesses had secret proceedings. There would be no guarantee that the impropriety was preserved in writing. What if a guilty prosecutor purged the files? In that case, how could SMITH prove secret proceedings existed?

If counsel were to find clues suggesting secret proceedings, how would he prove it? The State Attorney's Office or U.S. Attorney's Office would have to investigate and reveal the truth. SMITH is merely requesting that the State disclose those secret proceedings now. If there are none, then that is the end of the issue. If the secret proceedings infected this case, however, than that should be brought to the attention of the Court so that the issue can be properly litigated.

ISSUE VIII

THAT THE TRIAL COURT ERRED IN DENYING SMITH AN EVIDENTIARY HEARING ON THE POST-TRIAL DISCLOSURE OF THE GETER TAPES THAT WERE THE SUBJECT OF A MOTION FOR NEW TRIAL THAT WAS NEVER HEARD.

In its Response Brief, the State reiterated its claim that the post-trial disclosure of the Geter tapes issue had been abandoned when trial counsel failed, after filing a Motion for New Trial Based Upon Newly Discovered Evidence, to petition this Court to relinquish jurisdiction so that the Motion could be heard. There was no case authority offered supporting that proposition of law.

The State's efforts to distinguish Jones v. State, 745 So.2d 1061 (Fla. 2nd DCA 1999), or Jarrett v. State, 654 So.2d 973 (Fla. 1st DCA 1995), should not persuade the Court to find abandonment. As to Jones, why does it make a difference in terms of the preservation of the issue if a defendant fails to get an

evidentiary hearing on a motion for new trial after requesting the appeals court to relinquish jurisdiction and a defendant who requests an evidentiary hearing before the trial court, does not receive a ruling, and raises the issue in a post-conviction motion? As to Jarrett, if absconding from the jurisdiction while a motion for new trial was pending does not constitute abandonment, why should a defendant who was always under the jurisdiction of the court not entitled to raise an issue on post-conviction relief based upon a motion filed in the trial court that was never ruled upon? The issue raised in both of those cases relevant to SMITH's case was their treatment of the abandonment issue, not the substance of the issue being litigated.

To the extent that the Circuit Court determined that the allegations were legally insufficient, remand should be ordered to permit SMITH to file a legally sufficient motion as to this issue. Spera v. State, 971 So.2d 754, 761-2 (Fla. 2007) (when a defendant's initial 3.850 motion for post-conviction relief is determined to be legally insufficient for failure to meet either the rule or other pleading requirements, the trial court abuses its discretion when it fails to allow the defendant at least one opportunity to amend the motion). In its Order denying SMITH's Motion to Vacate, the procedure authorized in Spera for treatment of post-conviction motions that were deemed legally insufficient were not followed.

ISSUE IX

THAT THE TRIAL COURT ERRED IN DENYING SMITH AN EVIDENTIARY HEARING IN ORDER TO PRESENT CLAIMS BASED ON THE 2006 ABA REPORT FINDING FLORIDA'S DEATH PENALTY SYSTEM FLAWED.

In its Response Brief, the State alleges that SMITH was obligated to raise the constitutionality of the jury instructions based upon the ABA Report on direct appeal (State Resp. Br., p. 91). This argument is disingenuous since the ABA Report was issued after SMITH's trial, and the Amendment to Jury Instructions 7.11 did not occur until 2009. Any attempt by SMITH to have raised this issue on direct appeal would have been rejected due to his lack of contemporaneous objection to the jury instructions during Penalty Phase. See, e.g., McCray v. State, 71 So.3d 848, 879 (Fla. 2011). The only real opportunity SMITH had to raise this issue is in post-conviction proceedings.

This Court noted in McCray, "McCray's claim is analogous to the argument often asserted by defendants that Florida's Standard Jury Instructions unconstitutionally minimize and denigrate the role of the jury in violation of Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), which this Court has repeatedly rejected." Id. In light of the findings of the ABA Report, that Instruction 7.11, which seeks to instruct jurors as to their advisory

role function, was not affective, and was amended as a result, is understandable that such challenges are routine. It is not understandable is why they are always rejected.

The U.S. Supreme Court had recognized the crucial role of jury recommendations in Florida's capital sentencing scheme. See, Harris v. Alabama, 513 U.S. 504, 510-11, 115 S.Ct. 1031, 130 L.Ed.2d 1004 (1995). See also, Spaziano v. Florida, 468 U.S. 447, 465, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984). Nonetheless, this Court has stood firm against any suggestion that the prior Instruction 7.11 was inadequate even after it was found to be so in the ABA Report. Maybe all of those Caldwell challenges routinely dismissed in the past had merit after all?

SMITH has made no effort to run from this Court's decision in Seibert v. State, 64 So.3d 67 (Fla. 2010), which rejected the idea that the ABA Report compelled the conclusion that Instruction 7.11 was unconstitutional. Seibert, however, was decided on the issue of whether appellate counsel had been ineffective for failing to raise it on direct appeal since the ABA Report had been issued after his trial. In addition, Seibert based its ruling on the merits and Rolling v. State, 944 So.2d 176, 180 (Fla. 2006), wherein the defendant's effort to raise the ABA Report as newly discovered evidence was rejected. Rolling, in turn, relied

upon the identical holding in Weatherford v. State, 940 So.2d 1112, 1120 (Fla. 2006).

It appears that every claim attempting to raise the ABA Report to support a Caldwell claim against old Instruction 7.11 has been rejected on procedural ground. After initially rejecting the challenge to Instruction 7.11 as barred because the ABA Report was issued after the trial, reliance on past precedent to reject the claim on the merits easily followed. But an instruction that does not work should not be relied upon, and any instruction that was shown to be flawed should not continue to be upheld relying on cases cited before those flaws were exposed. SMITH contends that his case should present the Court with an opportunity to fully hear this issue on the merits.

ISSUE X

THAT THE TRIAL COURT ERRED IN AFFIRMING THAT LETHAL INJECTION UTILIZED BY FLORIDA CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

In its Response Brief, the State insists that SMITH is procedurally barred from challenging lethal injections because the issue was not raised on direct appeal (State's Resp. Br., p. 92). It seems that the better authority would permit the Eighth Amendment implications of the lethal injection protocol to be raised

whenever it becomes known as a factual matter that a potential violation has occurred.

SMITH suggests that the long-standing belief that lethal injection, as practice in Florida and elsewhere, was humane and not violative of the Eighth Amendment has been under attack. Most recently, Time Magazine published in its May 26, 2014, issue an article titled “Fatally Flawed”, which poses the question in the headline: “Lethal Injection is Supposed to be Quick, Painless and Humane. So Why is it Now so Troubling?” The article raises issues relevant to Florida’s lethal injection protocol, and may turn out to be a harbinger of change to come.

In Deparzine v. State, — So.3d —, 2014 WL 1640219 (Fla. April 24, 2014), when this Court was considering a challenge to Florida’s method of execution, the Court observed:

[A]s of this date, the Governor has not signed a death warrant for Deparzine; consequently, even if ordered to do so, the Department of Corrections could not state with any certainty who Deparzine’s eventual executioners will be. In light of this Court’s consistent and summary rejection of challenges of this nature, the post-conviction court did not err in summarily denying Deparzine’s claims.

2014 WL 1640219 * 30.

SMITH finds himself in a similar situation.

ISSUE XI

THAT THE TRIAL COURT ERRED IN FINDING THAT TRIAL COUNSEL'S FAILURE TO OBJECT TO THE PRINCIPAL INSTRUCTION GIVEN IN CONNECTION WITH THE CONSPIRACY COUNTS CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION.

In its Response Brief, the State alleges claims that SMITH erred in relying upon McKay v. State, 988 So.2d 51 (Fla. 3d DCA 2008), and Evans v. State, 985 So.2d 1105 (Fla. 3d DCA 2007), because they concern the claim of ineffective assistance of appellate, and not trial, counsel (State Resp. Br., pp. 94-5). The State raises a distinction without a difference.

The core holding in both McKay and Evans was that the failure to object to the giving of a principal instruction in the conspiracy count constituted ineffective assistance of counsel. It was immaterial whether the claims raised are a failure of trial or appellate counsel. The case of Ramirez v. State, 371 So.2d 1063 (Fla. 3d DCA 1979), clearly established the standard of practice applicable to trial attorneys in effect at SMITH's trial. In Evans, trial counsel had made an objection to the giving of the principal instruction in the conspiracy count. The issue on appeal was why appellate counsel had not raised such a clearly meritorious issue that had properly preserved.

In the instant case, SMITH's trial counsel made no objection to the giving of the principal instruction in the conspiracy counts despite Ramirez. The only question remaining to the Court is the extent to which SMITH can be deprived of relief from this clear Sixth Amendment violation.

This was an issue that had originally been filed pro se by SMITH while he was represented by CCRC-South counsel. Undersigned counsel moved to adopt. To the extent SMITH's original pro se claim for relief was legally insufficient, it should be remanded under Spera so that it could be amended.

The prejudice that can flow from improperly injecting principal liability into a jury's consideration of a conspiracy count was fully set forth in Ramirez, and constituted the basis of its holding. Conspiracy is a separate and distinct crime from the offense which is the object of the conspiracy. It is two steps removed from the actual commission of the substantive offense. Evidence that a person aided and abetted another in the commission of an offense or was sufficient to convict the person as a principal in such an offense is insufficient to convict that other person of a conspiracy to commit the subject offense. Ramirez, 371 So.2d at 1065. The Third District was further guided in its decision by this Court's cautionary language and concern for conspiracy prosecutions expressed in Goldberg v. State, 351 So.2d 332 (Fla. 1977).

Contrary to what is maintained by the State, the case law cited by SMITH clearly entitled him to relief on this issue.

ISSUE XII

THAT THE TRIAL COURT ERRED WHEN IT DETERMINED THAT TRIAL COUNSEL HAD NOT RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION WHEN IT FAILED TO OBJECT TO AN ERRONEOUS MANSLAUGHTER INSTRUCTION.

In its Response Brief, the State disputes SMITH's contention that the manslaughter instruction given in violation of State v. Montgomery, 39 So.3d 252 (Fla. 2010), should not be considered retroactive. SMITH had conceded that Montgomery was decided after his trial, although the prior District Court of Appeals case had decided prior to the Opinion in SMITH's case on direct appeal. Consequently, SMITH has also raised this issue in his Petition for Writ of Habeas Corpus alleging ineffective assistance of counsel on appeal, which is currently before the Court.

In addition, as this Court stated in Smith v. State, 598 So.2d 1063, 1066 (Fla. 1992):

[W]e hold that any decision of this Court announcing a new rule of law, or newly applying an established rule of law to a new or different factual situation, must be given retrospective application by the courts of this state in every case pending on direct review

or not yet final . . . to benefit from the change in law, the defendant must have timely objected at trial if an objection was required to preserve the issue for appellate review.

As in Smith, the issue before the Court is a jury instruction subsequently determined to be erroneous.

Although Montgomery had not been decided before SMITH's trial, this Court's decision had ignored Bess v. State, 146 Fla. 562, 1 So.2d 580 (Fla. 1941), it clearly stated that it was unnecessary to support a conviction of manslaughter that the act causing death be committed with evidence that the defendant had the intent to kill. The existence of other case law at the District Court level holding to the contrary did not absolve SMITH's trial counsel from making an objection. See, e.g., Jefferies v. State, 849 So.2d 401 (Fla. 2d DCA 2003); Loony v. State, 756 So.2d 239, 240 (Fla. 2d DCA 2000). At the time of trial, trial counsel should have been aware of this disputed jury instruction issue and objected to the standard manslaughter instruction later invalidated by this Court in Montgomery.

SMITH reiterates his contention that he meets the retroactivity standards set by this Court in Witt v. State, 387 So.2d 922 (Fla. 1980), and the U.S. Supreme Court in Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). The fundamental principle supporting the Montgomery decision was that manslaughter by act did not require an intent to kill. Trial courts which are

following the standard manslaughter instruction were failing to properly instruct on an essential element of an offense, the benefits of the rule should be deprived for those who were wrongfully convicted under it. See, e.g., Fiore v. White, 531 U.S. 225, 121 S.Ct. 712, 148 L.Ed.2d 629 (2001) (a defendant can only be provided with due process if each essential element of the offense at the time of the conviction becoming final is proven beyond a reasonable doubt). In essence, based on this Court's own precedent, and despite other intervening District Court of Appeals' decisions, the law set forth in Montgomery should have been the law in existence at the time of SMITH's trial.

CONCLUSION

Upon the arguments and authorities aforementioned, Appellant requests this Court vacate the Order denying his Motion to Vacate Judgments of Conviction and Sentences, as amended, with directions to hear the issues raised in his Supplement/Amendment to Motion to Vacate Judgments of Conviction and Sentences filed October 5, 2012, and conduct any evidentiary hearings necessary to fully litigate the constitutional issues raised in this post-conviction death penalty case.

Respectfully submitted,

/s/Charles G. White
CHARLES G. WHITE, ESQ.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed/e-mailed this 28th day of May, 2014, to: SANDRA JAGGARD, ASST. ATTORNEY GENERAL, Office of the Attorney General, 444 Brickell Avenue, Miami, FL 33131.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the Initial Brief of Appellant was typed in Times New Roman 14.

CHARLES G. WHITE, ESQ.