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IN THE
SUPREME COURT OF FLORIDA

CASE NO. SC12-2466

LOWER CASE NO. F00-40026A

COREY A. SMITH,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.
_____/

PETITION FOR WRIT OF HABEAS CORPUS BASED UPON INEFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL

Petitioner, **COREY A. SMITH**, through counsel, and pursuant to the Sixth Amendment to the U.S. Constitution, applicable to the states pursuant to the Fourteenth Amendment of the U.S. Constitution, and Article I, Section XVI of the Florida Constitution, respectfully files this Petition for Writ of Habeas Corpus Based Upon Ineffective Assistance of Appellate Counsel, and in support thereof would state:

1. On March 17, 2005, the Circuit Court for the Eleventh Judicial Circuit in Miami-Dade County, Florida, entered two death sentences in the case of State v. Corey A. Smith, Case No. F00-40026A. The Court also imposed sentences ranging up to life imprisonment for the various non-capital counts of the

Indictment for which SMITH had been convicted. A timely Notice of Appeal was filed.

2. In his Initial Brief, SMITH raised the following issues: (1) the trial court erred in ordering extensive security precautions in and around the courtroom, which were highly prejudicial to the Defendant, without giving the Defendant notice and an opportunity to be heard, in violation of his Sixth and Fourteenth Amendment rights to a fair trial; (2) the trial court erred in not striking the jury panel who had been exposed to an out-of-court comment by the Defendant's mother which several members of the venire disapproved of and found inappropriate; (3) the court erred by allowing the State to use a non-qualified expert to "interpret" the words and phrases used by various persons on taped conversations played to the jury; (4) the court erred in allowing the State to introduce as non-hearsay a police report which contained out-of-court statements of Cynthia Brown accusing SMITH of killing Dominique Johnson, a homicide not charged in this case, and expressing her fear of him, when the State was offering the police report for the truth of its contents and the non-hearsay reason given by the State was pretextual; (5) the trial court erred in limiting the cross-examination of three witnesses: Anthony Fail, Demetrius Jones, and Dr. Emma Lew, the Medical Examiner who testified to the cause of death of Cynthia Brown, crucial to

the State's case; (6) the trial court erred in not granting a mistrial after the prosecutor presented the Medical Examiner with an improper hypothetical, and solicited an opinion from the witness on the same fact after two defense objections were sustained; (7) the court erred in not granting a new trial for the State's intentional failure to provide the defense with a written statement from Mark Roundtree, who had admitted committing the Leon Hadley murder, was sentenced to life imprisonment, then recanted and implicated SMITH, that was materially favorable to the defense; (8) the court erred in not holding a hearing to determine prejudice to the defense after the State failed to disclose to the defense that witness Carlos Walker, who had originally denied any knowledge of the facts of the case during his deposition, had changed his statement testimony at trial and directly implicated SMITH by claiming to have witnessed him ordering Chazre Davis to "smother" Cynthia Brown; (9) the trial court erred in not granting a new trial where the trial was fundamentally flawed by the cumulative effect of prosecutorial misconduct, which could have reasonably been expected to affect the outcome of the trial.

3. On March 19, 2009, the Florida Supreme Court affirmed SMITH's convictions and death sentences. Smith v. State, 7 So.3d 473 (Fla. 2009).

4. SMITH contends that his appellate counsel rendered ineffective assistance of counsel on appeal by failing to raise and to brief the following issues:

ISSUE I

APPELLATE COUNSEL FAILED TO SEEK APPELLATE REVIEW OF THE TRIAL COURT'S ORDERS DENYING SEVERANCE OF COUNTS AND DEFENDANTS AND THEREBY RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION ON DIRECT APPEAL.

SMITH was charged by Indictment with six first-degree murders, four conspiracies to commit first-degree murder, one second-degree murder, one solicitation of first-degree murder, as well as Florida Racketeering Influenced and Corrupt Organizations ("RICO") Act, and conspiracy to commit racketeering. There were other counts involving similar charges against other co-defendants.

On June 3, 2004, SMITH filed two Motions for Severance. One sought to sever Counts IX, X, and XIII for separate trials based on misjoinder. The other was based on Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). The first Motion for Severance was denied on September 14, 2004. The Second Motion for Severance was never ruled upon. However, SMITH proceeded to trial by himself on October 4, 2004, which likely rendered that second Motion moot.

Counts IX and X concerned the conspiracy to murder, and the first-degree murder of Cynthia Brown. The State's theory was that Brown was a witness against SMITH in a separate murder not charged in this Indictment, and he conspired to have her killed in order to silence her as a witness. SMITH allegedly requested that her boyfriend, Chazre Davis, kill her.

Count XIII charged the second-degree murder of Marlon Beneby. Beneby allegedly worked for SMITH's drug organization, the John Does, and was suspected of selling his own drugs at the John Doe drug holes. According to the witness testimony, John Doe second in command, Latravis Gallashaw, shot Beneby to death.

SMITH made the argument in his pretrial Motion for Severance that these incidents did not share the continuity or connection with the racketeering enterprise or the other separate incidents of murder alleged in the Indictment to be joined together in one trial.

Despite the preservation of the issue, appellate counsel did not raise it on direct appeal.

This deficiency was noted by this Court during Oral Argument. The Court and SMITH's appellate counsel, Teresa Pooler, engaged in the following colloquy:

JUSTICE'S QUESTION: Did anyone, certainly raised on appeal, make an argument that all these kids should not be joined together? That they should be tried separately. That, these were murders at different times that, was that issue made?

APPELLATE COUNSEL'S ANSWER: Not to my knowledge, Judge.

JUSTICE'S RESPONSE: Well again, you are the only one who would have the complete knowledge.

APPELLATE COUNSEL'S ANSWER: I don't believe that it was, Your Honor. I believe that these were all joined, there was no kind of motion to separate them out.

The concern expressed by the Court during Oral Argument was well-taken. Rule 3.150 of the Florida Rules of Criminal Procedure (a) states in pertinent part:

> (a) **Joinder of offenses**. Two or more offenses that are triable in the same court may be charged in the same indictment or information in a separate count for each offense, when the offenses, whether felonies or misdemeanors, or both, are based on the same act or transaction or on two or more connected acts or transactions.

Rule 3.152 of the Florida Rules of Criminal Procedure states in pertinent part:

> (a) **Severance of offenses**.
> (1) In the case of two or more offenses are improperly charged in a single indictment or information, the defendant shall have a right to a severance of the charges on timely motion.
>
> (2) In a case of two or more charges of related offenses are joined in a single indictment or information, the Court will nevertheless grant a severance of charges on motion of the state or of the defendant:

> (A) Before trial on a showing that the severance is appropriate to promote a fair determination of the defendant's guilt or innocence of each offense; or
>
> (B) During trial, only with defendant's consent, on a showing that the severance is necessary to achieve a fair determination of the defendant's guilt or innocence to each offense.

This Court has previously remarked "[t]he danger in improper consolidation lies in the fact that evidence relating to each of the crimes may have the effect of bolstering the proof of the other. While the testimony in one case standing alone may be insufficient to convince a jury of the defendant's guilt, evidence that the defendant may have also committed another crime can now be effective tipping the scales. Therefore, the Court must be careful there is a meaningful relationship between the charges of two separate crimes before permitting them to be tried together." Crossley v. State, 596 So.2d 447, 450 (Fla. 1992). "[I]nterest and practicality, efficiency, expense, convenience, and judicial economy, do not outweigh the defendant's right to a far determination of guilt or innocence." Ellis v. State, 622 So.2d 991, 999 (Fla. 1993) (quoting Wright v. State, 586 So.2d 1024, 1030 (Fla. 1991).

In Wright, this Court held that offenses are "connected acts of transactions" within the meaning of the rules if they occurred within a single episode.

> [t]he rule does not warrant joinder or consolidation of criminal charges based on similar but separate episodes, separated in time, which are 'connected' only by similar circumstances and the accused's alleged guilt in both or all instances. Courts may consider 'the temporal and geographical association, the nature of the crimes, and the manner in which they were committed.'

Id., at 1029-30 (quoting Garcia v. State, 568 So.2d 896, 899 (Fla. 1990).

Even where joinder is otherwise proper, a defendant is entitled to have separate trials upon a showing that severance is "necessary to achieve a fair determination of the defendant's guilt or innocence of each offense." Fotopoulos v. State, 608 So.2d 784, 790 (Fla. 1992), cert. denied, 508 U.S. 924 (1993).

In Ellis v. State, supra, this Court found that the various first-degree murder charges could not be joined together because there was no "meaningful relationship" between them.

If this issue had been raised on appeal, the Court might have considered the existence of the RICO and RICO conspiracy charges as providing the "meaningful relationship" necessary to permit joinder. See, Lugo v. State, 845 So.2d 74 (Fla. 2003). But Lugo does not stand for the proposition that all crimes that would

normally be improperly joined can now be combined together under all circumstances in a RICO case. The same rules governing misjoinder issues have to be considered when determining misjoinder in a RICO context. In addition, in a case where a defendant is accused of conspiring to murder or to murder nine people, not one of whom was actually killed by him, the danger of a jury basing its decision to convict on the evidence presented as to other murders could prevent a fair determination of the cause.

The murders in question extended over a three-year time-period. They each encompassed entirely separate circumstances, and were not related to each other. They were all committed by different individuals, all of whom were allegedly acting on behalf of or on the instructions of SMITH or not. The RICO evidence indicating that SMITH was the leader of the John Does increased the danger that he would be held responsible for homicides that could be connected to the John Doe organization, for which he had little or no personal involvement.

Not raising the misjoinder issue constituted ineffective assistance of appellate counsel.

ISSUE II

APPELLATE COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION WHEN SHE FAILED TO CHALLENGE THE STANDARD JURY INSTRUCTION REGARDING ROLE OF THE JURY IN PENALTY PHASE AS UNCONSTITUTIONAL ON DIRECT APPEAL.

SMITH has raised in Issue IX in his Initial Brief the error in the trial court failing to grant him an evidentiary hearing based upon the ABA Report published in 2006 that concluded its investigation of Florida's death penalty system "convinced that there is a need to improve the fairness and accuracy", as the State of Florida "fails to comply or is only in partial compliance with" certain minimum safeguards and policies to insure fairness and "many of these shortcomings are substantial". As a result of the ABA Report's findings, Instruction 7.11 was revised. In re Standard Jury Instructions, 22 So.3d 17 (Fla. 2009). Since the deficiencies found by the ABA Report established that the version of Instruction 7.11 used to charge the jury at SMITH's Penalty Phase was misleading, SMITH contended that he should be entitled to an evidentiary hearing to establish the prejudice

In her Order denying SMITH's 3.851 Motion, the Court interpreted SMITH's issue as a challenge to the jury instruction, which he was required to

raise on direct appeal citing Rodriguez v. State, 919 So.2d 1252, 1262, n. 7 (Fla. 2005). To the extent that the Court was correct, appellate counsel should have challenged the version of Instruction 7.11 that was given to the jury during Penalty Phase.

ISSUE III

APPELLATE COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION WHEN SHE FAILED TO CHALLENGE THE PROTOCOL FOR LETHAL INJECTION ON DIRECT APPEAL.

In Issue X of his Initial Brief, SMITH contends that the trial court erred in denying him an evidentiary hearing to challenge the lethal injection protocol utilized by Florida to implement the death penalty as cruel and inhumane punishment under the Eighth Amendment. In the alternative, SMITH requested the Court permit him to challenge whatever protocol in place if a death warrant is signed.

In the Order denying SMITH's 3.851 Motion, the Court found that the claim should have been raised on direct appeal. To the extent that the Court is correct, appellate counsel was ineffective for failing to have raised it.

ISSUE IV

THAT APPELLATE COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO CHALLENGE THE JURY INSTRUCTION ON MANSLAUGHTER GIVEN AT TRIAL IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION ON DIRECT APPEAL.

In Issue XI of his Initial Brief, SMITH complains that his trial counsel failed to object to the principal instruction given in connection with the conspiracy counts as constituting ineffective assistance of counsel. Ramirez v. State, 371 So.2d 1063 (Fla. 3d DCA 1979), which held that a principal instruction should not given with respect to a conspiracy count was controlling precedent at the time of the trial. If trial counsel had objected, and cited Ramirez, the court would have likely held to the jury instructions so that the principal instruction amended would not have applied to the conspiracy counts. SMITH has shown that failure to have objected constituted ineffective assistance of counsel citing McKay v. State, 988 So.2d 51 (Fla. 3d DCA 2008); Evans v. State, 985 So.2d 1105 (Fla. 3d DCA 2007).

In the Order denying SMITH's 3.851 Motion, the Court found that the adequacy of the jury instructions was an issue that should have been raised on

direct appeal citing Johnson v. State, 903 So.2d 888, 899 (Fla. 2005). It therefore found SMITH's claim procedurally barred.

To the extent that the Court was correct, appellate counsel was ineffective for failing to challenge the jury instruction as plain error. If prior counsel was not required by the standards of her profession to raise plain error, any procedural bar erected by the Court should be removed, and the issue allowed to proceed as presented in the Initial Brief.

Although the Court below sought to excuse trial counsel from having failed to anticipate a change in the law, appellate counsel could also be found ineffective for failing to argue that the manslaughter instruction given in this case was fundamentally flawed. Pierce v. State, — So.3d —, 2013 WL 4222974 (Fla. 5th DCA Aug. 16, 2013).

In Pierce, the Court noted that although appellate counsel is not necessarily required to anticipate changes in the law, appellate counsel can be ineffective for failing to raise favorable cases decided by other jurisdictions during the pendency of an appeal that could result in a reversal. For instance, before Montgomery was decided by this Court, it was before the First District Court of Appeals. Montgomery v. State, 70 So.3d 603 (Fla. 1st DCA 2009). On February 12, 2009, which was before the Opinion affirming the Judgment and Sentences in this case,

the First District held that the standard manslaughter instruction, which was utilized in this case, improperly suggested an intent to kill. Since the legal argument had been adopted in one district court case, albeit by another district, appellate counsel was ineffective for failing to raise the argument. Shabazz v. State, 955 So.2d 57 (Fla. 1st DCA 2007) (holding appellate counsel ineffective for failing to raise favorable cases from other districts in Florida even though controlling law in district which appeal was heard was unfavorable); Ortiz v. State, 905 So.2d 1016 (Fla. 2d DCA 2005) (determining that appellate's counsel's failure to request supplemental briefing on favorable appellate decision from other district court constituted ineffective assistance of counsel); Whatley v. State, 679 So.2d 1269 (Fla. 2d DCA 1966) (determining that although issue was not completely settled, counsel was ineffective for failing to cite favorable case law from another district in effect at time of pending appeal).

Since the district court in Montgomery had already been issued, appellate counsel had a duty to bring the holding of that decision to the attention of this Court. Failure to do so constituted ineffective assistance of counsel on appeal.

STANDARD FOR DETERMINATING INEFFECTIVENESS OF APPELLATE COUNSEL

Claims of ineffective assistance of appellate counsel are properly presented in a Petition for Writ of Habeas Corpus. Jackson v. State, — So.3d —, 2013 WL 5269865 (Fla. Sept. 19, 2013), citing Freeman v. State, 761 So.2d 1055, 1069 (Fla. 2000). Consistent with the Strickland standard, to grant habeas relief is based on ineffectiveness of appellate counsel, this Court must determine

> First, whether the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professional acceptable performance and, second, whether the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result.

Jackson, 2013 WL 5269865 * 23, quoting Pope v. Wainwright, 496 So.2d 798, 800 (Fla. 1986). The defendant has the burden of alleging the specific serious omission overt act or overt act upon which the claim of ineffective assistance of counsel can be based. Id., citing Freeman, 761 So.2d at 1069; see also, Lynch v. State, 2 So.3d 47, 83 (Fla. 2008).

SMITH has met his burden of showing how appellate counsel overlooked binding or persuasive, but established, precedent from other district courts of appeals, and failed to address and present issues which if they had been properly

brought before this Court on direct appeal would have compromised the appellate process to such a degree as to undermine confidence in the correctness of the result.

CONCLUSION

Upon the arguments and authorities aforementioned, Petitioner requests this Court vacate His Judgments of Conviction and Sentences, and remand the case for new trial.

Respectfully submitted,

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s/Charles G. White
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed/e-mailed this 24th day of October, 2013, to: SANDRA JAGGARD, ASST. ATTORNEY GENERAL, Office of the Attorney General, 444 Brickell Avenue, Miami, FL 33131.

Respectfully submitted,

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