

**IN THE SUPREME COURT OF FLORIDA  
CASE NO. SC13-717**

**TODD ZOMMER  
Appellant,  
v.  
STATE OF FLORIDA  
Appellee.**

**ON APPEAL FROM THE CIRCUIT COURT  
OF THE 9<sup>TH</sup> JUDICIAL CIRCUIT FOR OSCEOLA COUNTY,  
STATE OF FLORIDA**

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**REPLY TO ANSWER BRIEF OF APPELLEE**

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## PRELIMINARY STATEMENT

This pleading addresses arguments from Claim II of Mr. Zommer's Initial Brief. As to all other claims and arguments not mentioned in this pleading, Mr. Zommer relies on the Initial Brief. Reference to the trial transcript will be: (FSC ROA Vol. \_\_\_p.#). The post-conviction record shall be referenced as: (PCR Vol. \_\_\_p.#).

### CLAIM II (From Initial Brief)

**MR. ZOMMER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE SENTENCING PHASE OF HIS CAPITAL TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION. TRIAL COUNSEL FAILED TO ADEQUATELY REHABILITATE HIS WITNESS ON RE-DIRECT EXAMINATION. TRIAL COUNSEL'S PERFORMANCE WAS DEFICIENT, AND AS A RESULT THE DEATH SENTENCE IS UNRELIABLE.**

On page 44 of the State's Answer Brief, they submit and quote directly from trial counsel's evidentiary hearing testimony, (PCR Vol. XIX p. 1814-14), that it would be "devastating" for trial counsel to argue with Dr. Jeffrey A. Danziger, MD, about his diagnosis of antisocial personality disorder. Mr. Zommer is not making the point that trial counsel should "argue" with Dr. Danziger. Moreover, by using

the term “rehabilitate”, Mr. Zommer is not stating that the witness was impeached, and therefore needed to be rehabilitated with prior consistent statements, as the State argues in citing EHRHARDT’S FLORIDA EVIDENCE §611.2 (2013 ed.) on page 45. Trial counsel simply needed to rehabilitate the damaging testimony concerning antisocial personality disorder, so that the jury would not be left with the thought that the defense expert was basically calling the appellant an unredeemable sociopath.

After defense expert Dr. Jethro Toomer seemed to insinuate during cross examination that Mr. Zoomer had antisocial personality disorder, trial counsel effectively put forth evidence inconsistent with such a diagnosis. (FSC ROA Vol. XXXIII p. 1599-1607).

Trial counsel effectively elicited from Dr. Toomer that the appellant spent over two years happily married, drug free, with no criminal activity and was concerned about the welfare of others. (FSC ROA Vol. XXXIII p. 1600-1601). As trial counsel admitted during the evidentiary hearing, such questioning and testimony was very effective during the trial. (PCR Vol. XIX p. 1810). Actually, trial counsel seemed to concede that he could have done a better job of questioning Dr. Danzinger in a similar manner as he questioned Dr. Toomer.

Regarding the rehabilitation of Dr. Danzinger the following exchange took place,

when the doctor was questioned by CCRC-M counsel during the evidentiary hearing:

Q. No. To clarify my question, you did not ask him anything that would –

A. Okay.

Q. – have elicited that; it came out in cross.

A. I didn't.

Q. Right.

A. I thought you said – you were asking me if I did, and I – I don't think I did, but I don't remember completely. It came out on cross, I believe.

Q. Yes.

And on redirect, you could have – could you not have questioned Dr. Danziger about some of those factors that you questioned Dr. Toomer about –i.e., helping out friends with living conditions, um, being a good father and a good husband – without directly challenging him on the word antisocial personality disorder? Could you have questioned him about Todd Zommer's behavior, without challenging his diagnosis in front of the jury in an explicit kind of way?

A. I – yeah, I could have. I could have just said, now, Doctor, let's talk about this and talk about that. You know, asked those same kind of questions – Which were pretty good, weren't they?

A. Yes, they were. (PCR Vol. XIX p. 1810).

As Attorney Sims admits, antisocial personality disorder is a diagnosis that he would prefer not be stated in front of a jury. (PCR Vol. XIX p. 1802). Trial counsel concedes that calling his client an antisocial personality, is analogous to saying that he is a sociopath, with no cure for his condition. (PCR Vol. XIX p. 1805-06). No reasonable or effective attorney would have allowed this information

to be presented to a jury, unchallenged, without at least providing some nuance to show non-sociopath aspects of Mr. Zommer's character. Failing to address this issue constitutes ineffective assistance of counsel under Strickland v. Washington, 466 U.S. 668 (1984).

Dr. Michael Maher, MD testified for the appellant at the evidentiary hearing. (PCR Vol. XVIII p. 1562). As argued in the Initial Brief, Dr. Maher testified as follows, regarding an Axis I diagnosis pursuant to the Diagnostic and Statistical Manual of Mental Disorders (DSM IV):

BY MR. KILEY

Q. Would you say that the DSM-IV is – that's a primary authority?

A. I would.

Q. And would you say that every – most mental health professionals rely on it?

A. Yes.

Q. Do you rely on it?

A. I do.

Q. Okay. In the DSM-IV, will you find diagnoses categorized into three axes, Axis I, Axis II and Axis III?

A. Yes. There are also two other axes that are not diagnoses, per se.

Q. What are they called, Axis IV and Axis V?

A. Axis IV and Axis V. Axis IV is related to description of stressors in a person's life and Axis V is related to — or is described as a global assessment of function. So it is an attempt to describe, in a single number, the person's general ability to function in their life.

Q. And when you say stressors, would it be – like, an Axis IV diagnosis for me would be that I'm standing here

in open court, trying to make my case, and I may be under some considerable stress doing that?

A. That might be a minor stress for you. It would be more things that are unusual for a person's life than a routine part of their life. So a divorce, car accident, an illness, loss of a job, those are things that would more typically be included on the Axis IV.

Q. Okay. What is an Axis I?

A. Axis I is the primary psychiatric diagnosis.

Q. Is bipolar disorder an Axis I?

A. It is.

Q. Can you give me some other examples of Axis I diagnoses?

A. Schizophrenia, primary depression, anxiety disorders, generalized anxiety disorders, phobias, other forms of depression, dysthymic depression, adjustment disorder and depression. Um -

Q. PTSD?

A. Post-traumatic stress disorder, substance abuse disorders are also coded on Axis I.

Q. Okay. How about Axis II, what's that?

A. Axis II is reserved for what we call personality disorders; disorders of personality, development and identity.

Q. Can you give me some examples of that, sir?

A. Personality disorders would include dependent personality, narcissistic personality, antisocial personality and some others.

Q. You said conduct disorder?

A. Conduct disorder is a Axis I disorder appropriate to children.

Q. Okay. But - an Axis II diagnosis - narcissistic personality disorder, antisocial personality disorder - would you or would you not prescribe Haldol for the treatment of that?

A. No.

Q. Why not?

A. Because they're disorders of personality



development. They're thought of and understood as disorders of personality development, not disorders of fundamental brain functioning or physiological medical functioning. So given that those disorders are not biological disorders, we would not focus on biological treatment to treat those disorders.

Q. I think I see what you mean. And I'm gonna try to paraphrase it and you correct me if I'm wrong. An Axis II diagnosis is "may, right? I mean, someone becomes a narcissist through his behavior over the years. An Axis I diagnosis is there's a chemical imbalance or some other physiological cause of the man's disorder.

A. That's very roughly correct. So an Axis II disorder, a personality disorder, is never made before 18 years of age, because – and often not until well after 18 years of age – because the personality, in personality disorder, is the stable adult personality. And that's language directly from the diagnostic manual. So in order to be diagnosed with a personality disorder, it has to be a stable, adult personality characteristic. And that means it's something that a person grows into, develops into, um, manifests as a stable adult pattern of feeling, thought and behavior.

Q. So if you were to say that a child runs away from home and smokes marijuana and, uh – uh, is truant from school, therefore he is antisocial personality disorder, would that be a correct assessment of this man?

A. No. It's categorically a misuse of the Diagnostic and Statistical Manual. And the reason for that is, if we're talking about a child or adolescent, it absolutely is improper to characterize that as a stable collection of adult characteristics.

Q. Okay.

A. Now, it is true that children with that pattern of behavior are at higher risk for developing a personality disorder. But they're also at higher risk of developing a lot of other things and they may not develop a personality disorder. So it would be an improper, premature diagnosis to diagnose a person, who hasn't reached the

stage of a stable adult personality, with a personality disorder.

Q. You testified before, though, that when Mr. Zommer was 12, he was being treated for bipolar disorder, an Axis I disorder; is that or is that not correct, sir?

A. In - he was, indeed, being treated for an Axis I disorder, and that's different than a personality disorder.

Q. Okay, sir. When a client - trained clinician, such as yourself, is confronted with a Axis I diagnosis, what do you do?

A. We attempt to understand why they're suffering from that. We attempt to understand any particular details, going beyond the basic diagnosis, the subtype or characteristics, which might trigger illness episodes in that disorder, and we develop a treatment plan. That treatment plan generally includes consideration of biological treatment, usually medications, as well as social behavior and educational treatments.

Q. I'm a little confused, sir.

A. To make that simpler -

Q. Please?

A. - we prescribe a treatment plan which includes medication and talk therapy.

Q. Okay. So you - you'd say this man's bipolar?

A. Yes.

Q. And has been presenting bipolar symptoms since age 12?

A. Mr. Zommer, indeed, has bipolar disorder and preliminary presentation of that goes back to age 12.

Q. And that's why, at the children's home, they prescribed psychotropic medication to combat bipolar disorder, correct, sir?

A. That's correct, yes.

Q. Ultimately, what is your diagnosis of Mr. Zommer?

A. Bipolar disorder and substance abuse disorder.

Q. Okay. Bipolar disorder you said is Axis I, what is Axis II?

A. There is no Axis II diagnosis.

Q. For Mr. Zommer?

A. That's correct.

Q. What is substance abuse disorder?

A. It's an Axis I disorder. And the substance abuse is poly-substance abuse, focusing particularly on stimulants.

Q. And there's no doubt that Mr. Zommer abused stimulants, correct, sir?

A. I don't think there's any doubt in the record. And based on my interview with his wife - ex-wife and him, no, I don't think there's any doubts about that.

Q. He freely admits to using drugs?

A. He does.

Q. But denies medicating himself for his bipolar disorder?

A. He admits to using drugs. I don't think he freely admits to the - to everything he knows about his drug use.

Q. Sir, in reviewing the records completely and listening to the witnesses, and having your evaluations, did you reach an opinion as to whether or not - I'm sorry. Do you recall -

MR. KILEY: Vol. XXXIV pages 1752, 1753.

BY MR. KILEY

Q. - trial counsel asked the following questions and the following answers were given by Dr. Jeffrey Danziger.

Question: In reviewing the records completely and listening to the witnesses, and having your evaluations, did you reach an opinion as to whether or not, on the day of the murder, April 9<sup>th</sup>, 2005, Todd Zommer was suffering from a mental illness?

Answer: In my opinion, he was suffering from a mental illness in April of 2005 at the time of this offense.

Question: And that mental illness was?

Answer: That mental illness, in my opinion, was bipolar disorder.

Question: Did you investigate the possibility of substance abuse as a secondary diagnosis of Mr. Zommer?

Answer: I did. Mr. -

Question: And - go ahead. I'm sorry.

Answer: yes, I did.

Question: And what did you base that diagnosis on?

Answer: That diagnosis was based on Mr. Zommer's self-report. But given what he admitted to me about his use, he was rather candid and did not appear to hold anything back about the substances he was using.

Question: The reports that you have read over the years, including reports of individuals that reportedly did drugs with him at or about the time of the – both before and after the time of the murder, did that help verify your diagnosis?

Answer: It did. And that diagnosis was that at or around April 2005, the major and most problematic drugs were two stimulants: Cocaine and crystal methamphetamine.

Q. Doctor, would that – do you, first of all, disagree with Dr. Danziger's opinion that on April 5<sup>th</sup> – or in April of 2005, Mr. Zommer was suffering from a mental illness of bipolar disorder?

A. First, let me say I'm very familiar with that testimony, and I've reviewed it in the context on many occasions, and I certainly do not disagree with his diagnosis of bipolar disorder.

Q. Well, can you tell me what a secondary diagnosis of substance abuse is? What would secondary be? Is that – you just said it wasn't an Axis II. What is a secondary diagnosis?

A. Generally, secondary means that – it doesn't mean simply a second diagnosis, it means a diagnosis which is in some way related to or caused by the primary diagnosis.

So what that diagnostic characterization would identify is that the diagnostician, the doctor, believes that the diagnosis is, or in part, caused by or related to the primary diagnosis.

Q. All right, sir. So because Mr. Zommer is bipolar, that led to his other diagnosis, his other Axis I diagnosis of poly-substance abuse; is that safe to say, sir?

A. That's the way I would use the terminology. I would

defer to Dr. Danziger to understand his use of that terminology.

Q. Doctor, do you remember the following questions being asked and answered on Dr. Danziger's cross-examination -

MR. KILEY: In Volume XXXIV, page 1758 -

MR. LERNER: I'm gonna pose another objection. The claim is that they didn't - that the defense attorneys didn't present this evidence, yet he's reading extensively from the record that shows that they did present evidence of - of cocaine and drug use. So -

THE COURT: I think he's offering it -

MR. LERNER: - I'm not sure how this is relevant to prove this claim.

THE COURT: I think he's offering it for another purpose, and I'll allow it. You may proceed.

MR. KILEY: Thank you, Your Honor.

BY MR. KILEY:

Q. Question: You did have an Axis II diagnosis. You did find he has an antisocial personality, correct?

Answer: Yes, I do.

Doctor, is that a valid diagnosis?

A. It's my strong opinion that that is not a correct diagnosis, no.

Q. Why is this diagnosis of antisocial personality not valid?

MR. LERNER: Your honor, again, I'm gonna object to the relevance of this. It has nothing to do with the claim, unless they're gone on to another claim. And they have made no claim on ineffective assistance of the psychological experts, it's ineffective assistance of the attorneys, who are entitled to rely on the opinion of the experts that they hire, by law.

THE COURT: Okay. Well, I understand your argument, but I'm -

MR. LERNER: how is this relevant?

THE COURT: - gonna allow the question. You may proceed.

MR. KILEY: Thank you.

MR. LERNER: Thank you, Your Honor.

BY MR. KILEY

Q. Why isn't it valid?

A. The diagnostic formulation that I believe is most strongly supported by the information and evidence available is bipolar disorder and substance abuse disorder.

In order to make a valid personality disorder diagnosis, based on the criteria that are generally accepted in the field and the criteria explicitly enumerated in the DMS series, and DSM-IV in particular, one has to identify enduring personality qualities and characteristics during adulthood which are not caused by or directly related to an Axis I diagnosis.

Q. So, sir - let me just interrupt you, because I - quite frankly, you're confusing me.

If you can attribute someone's behavior to an Axis I diagnosis, like bipolar disorder and substance abuse, is there any reason to go on to an Axis II disorder?

A. There's no proper diagnostic justification to add an Axis II disorder to further describe symptoms which are better or fully described in an Axis I diagnosis.

There are some other reasons here. I - I don't want to -

Q. Oh, please give 'em.

A. There are a number - the two primary criteria for antisocial personality disorder are behavioral criteria and relationship criteria.

Q. Well, let me get - I'll get to the two behavioral and...

A. Relationship.

Q. Relationship criteria, but does the - did you read the DSM-IV regarding antisocial personality disorder?

A. Many times.

Q. Does it say in the DSM-IV that he can't be antisocial personality if these incidents occur during a manic episode?

A. It doesn't have those exact words, but that is essentially the meaning of what I'm describing; that if

symptoms are better or fully described by an Axis I diagnosis then they are not available to support an Axis II diagnosis then they are not available to support an Axis II diagnosis.

MR. KILEY: A moment please, Your Honor?

( Mr. Kiley conferring privately with co-counsel.)

BY MR. KILEY

Q. Doctor, regarding the antisocial personality disorder, the Diagnostic and Statistical Manual. Fourth Edition, defines antisocial personality, in Axis II, Cluster B, as : A, there is a pervasive pattern of disregard and for violation of the rights of others occurring since age 15, as indicated by three or more of the following.

So any diagnosis, sir, of Mr. Zommer's conduct at age 12, 13 or 14 – for example, fire-setting in the home, fights in the children's home – without – standing by themselves, is not a proper diagnosis for – or not a proper criteria for Axis II antisocial personality disorder, right off the bat, right?

A. That is correct.

Q. Okay. Now,, three or more of the following: One, failure to conform to social norms with respect to lawful behavior, as indicated by repeatedly performing acts that are grounds for arrest.

Two, deception, indicated by repeatedly lying, uses of aliases or conning others for personal profit or pleasure.

Three, impulsiveness or failure to plan ahead.

Four, irritability and aggressiveness as indicated by repeated physical fights or assaults.

Reckless disregard for the safety of self or others.

Consistent irresponsibility, as indicated by repeated failure to sustain consistent work behavior or honor financial obligations.

Lack of remorse, as indicated by being indifferent or – rationalize having hurt, mistreated or stolen from another.

The individual is at least 18 years of age or other – or older.

There is evidence of conduct disorder with onset before age - 15 years old.

And, D, the occurrence of antisocial behavior is not exclusively during the course of schizophrenia or a manic episode. Is that what it says?

A. Yes.

Q. Now, how does this apply to Mr. Zommer?

A. The criteria that you've read are accurate and, um, reasonably complete. There are additional criteria. And the - essentially, all of those criteria, up to D, he would meet the criteria for diagnosis of antisocial personality disorder.

But antisocial personality disorder also requires that those patterns of behavior, symptoms, manifestation of his life and behavior, are not being caused exclusively, as it states in criteria D, by manic episodes. It also requires that they not be better explained by a variety of other conditions.

For example, if that pattern of behavior only occurs during the time the person is using, seeking or withdrawing from cocaine, and there's a significant period of their life that could be identified where they're not involved in cocaine use and those behaviors are not present, then that is very strong evidence contrary to the antisocial personality disorder diagnosis.

Q. For example, when you testified that Mr. Zommer was a very loving father and a loving, caring husband, he wasn't using drugs, so, therefore, he was a responsible adult, he was not irresponsible.

A. Indeed. There is an episode of his life, extending for a significant period of time, where he was married, engaged in a responsible family, married to a woman who was not, by any means, a pushover - wasn't easily exploited, wasn't easily tricked, wasn't abused by him, a person who wouldn't tolerate that kind of behavior and, in my judgment, would certainly have reported it to me when I interviewed her about it - where he did not demonstrate any of those antisocial personality characteristics.



What that says is those characteristics and those behaviors are related to his Axis I diagnosis. And they are not enduring, independent characteristics of his personality as an adult; rather, they are symptoms of illness identified in the Axis I disorder.

Q. Would you expect a psychiatrist to give a dual diagnosis such as that? (PCR Vol. XVIII p. 1590-1605).

An objection was lodged by the State and answered in this manner:

MR. LERNER: Your Honor, again, I'm gonna object. The -

MR. KILEY: Judge -

MR. LERNER: - question-

THE COURT: Let him finish his objection, Mr. Kiley.

MR. LERNER: The question is about the psychiatrist. That's not the claim. We don't have a claim of ineffective assistance of psychiatric experts, we have a claim of ineffective assistance of counsel.

THE COURT: All right. Mr. Kiley.

MR. KILEY: Judge, that issue will be explored when they call counsel. But I think I'm allowed - or this man's allowed to make an opinion as to whether or not that was a valid psychiatric diagnosis.

THE COURT: And how does that relate to any of your three claims that we're here on?

MR. KILEY: Well, it relates to Claim III because it was an improper diagnosis. Mr. Sims -

THE COURT: Your Claim III is that the -

MR. KILEY: He failed to rehabilitate his own expert.

THE COURT: So how can he rehabilitate his expert by establishing his expert was wrong?

MR. KILEY: Well, by pointing out as -

THE COURT: That's not rehabilitation.

MR. KILEY: Well, sir, if I may, with all the other experts, Dr. Toomer, Dr. Tressler, the defense team - Miss

Cashman did Dr. Tressler and Mr. Sims did Dr. Toomer – did answer or question these people the exact same way I’m questioning Dr. Maher. The only person he didn’t do it to – and there lies the IAC – is Dr. Danziger. So, you know, I think I should be allowed to elicit an opinion that would – as Dr. Danziger testified, that this man’s bipolar, this man was abusing drugs and he also has an antisocial personality disorder – I think I have the right to ask would an antisocial personality disorder be exhibiting some of the traits that Mr. Zommer was exhibiting.

THE COURT: Well, that doesn’t go to your claim. What we’re having here is simply testimony that is in – at this point, disagreeing with the testimony of the defense expert at trial. And it may relate to the claim that the defense didn’t call the expert they should have, or something to that effect, but that’s not the claim that’s made. The claim is that the – counsel failed to adequately rehabilitate his witness, referring to Dr. Danziger on redirection examination.

And it seems really strained to suggest that the – Dr. Danziger could have been rehabilitated by questioning showing that – or tending to show that his diagnosis was in error.

I’ll allow some latitude. I don’t want to cut you off from your theory here, but I – I really don’t see where we’re going at this point.

MR. KILEY: Very well, sir. I’ll tie it up.

THE COURT: Very well.

BY MR. KILEY:

Q. Doctor, you were talking about Zommer not being antisocial personality if it occurred within a manic episode. Can you briefly tell the Court what other factors would lead you to believe that Mr. Zommer is not antisocial personality? Are [sic] there a two-prong test?

A. Yes, there is a two-prong test. And the two-prong test is related to, one, behavior. And essentially, antisocial personality disorder, under the proper circumstances, is made by the diagnosis of a pattern of

rule-breaking behavior, usually criminal behavior, and a pattern of, um, exploitive, abusive – not necessarily physically, but exploitive, abusive, non-empathetic, non-caring relationships with others throughout the person's entire life, regardless of other circumstances. So there's a relationship criteria, where a person is nasty, selfish, exploitive, out for themself, doesn't care about anybody else and they break rules to get it. So those are the two criteria.

Q. Did you find Mr. Zommer had that?

A. No. He certainly had a pattern of breaking rules in a variety of different ways in his life, but related to the Axis I diagnoses. And there were times, during his drug use in particular, where he was certainly exploitive and selfish and – and disregarding of other people's feelings. But when he was not using drugs or under the influence of a manic or other psychotic episode, particularly during this two and a half year period that can be identified when he was with – when he was married, he did not demonstrate those characteristics.

Q. How about when he was using drugs? Did he also exhibit some other behavior that would lead you to believe – for example, sharing his drugs?

A. Yes, he did, in fact. Even when he was using drugs he wasn't all bad, so to speak.

Q. How about providing other drug addicts with a place to live?

A. Yes, he had history of that. And that's typical of an individual who is hitting bottom because of drug use, but has better qualities. Which we can see in those bits and pieces of his drug use history and in the larger picture of his marriage. And all professionals, uh, addressing the big picture of diagnosis, um, are aware of that reality.

Q. And you read the testimony of – of Dr. Toomer, did you not, sir?

A. Yes.

Q. And – and did you not read the cross-examination of Dr. Toomer by the prosecution?

A. Yes, I did.

Q. And they pointed out that Mr. Zommer was exhibiting antisocial personality traits?

A. Yes.

Q. And then did you read the redirect of Dr. Toomer by Mr. Kelly Sims?

A. I did.

Q. And did Mr. Sims, or did not Mr. Sims, also elaborate what you just elaborated: Drug – antisocial personality drug addicts don't share their drugs?

A. Yes.

Q. Antisocial personality disorder drug addicts don't find other drug addicts a place to stay.

A. Yes.

Q. Antisocial personality disorder people do not stick up for weaker children.

A. Yes.

Q. All right.

A. It would be my opinion that the questioning of that witness brought out all of those issues in an effective manner.

Q. All right. Now, how about – do you recall Dr. Tressler, the second doctor?

A. I have to be careful about the names. I know the testimony but it's sometimes difficult to connect it with the names. Can you tell me his credentials – remind me of his credentials?

Q. Dr. Tressler is a psychologist hired by the State.

A. All right. I think I do have the right information connected with Dr. Tressler.

Q. And he also diagnosed, right out [sic] of the bat, uh, antisocial personality disorder?

A. I recall that.

Q. And do you recall Miss Patricia Cashman impeaching Dr. Tressler with the criteria that Mr. Sims rehabilitated Mr. Toomer with?

A. Yes.

Q. And there was no attempt – you did read Dr.

Danziger's testimony, right?

A. I did.

Q. Direct and cross, right?

A. Many times.

Q. Redirect, sir, right?

A. Yes.

Q. There was no attempt to rehabilitate this untrue statement – obviously untrue, as you testified – that Mr. Zommer does not have an antisocial personality disorder.

A. I did not see, in the line of questioning in that – on that expert, the questions that would have brought out these issues that I have testified about here today, no.

Q. In fact, there was no distinction made between antisocial personality disorder being an Axis II and Dr. Danziger finding an Axis I and, as you testified, if the behavior can be adequately explained by an Axis I, a physiological disorder, like bipolar disorder, there's no reason to go on to Axis II.

A. No, I did not see that those questions were asked of Dr. Danziger. (PCR Vol. XVIII p. 1605-1612).

What the above extended passage indicates is that Mr. Zommer has Bipolar disorder and suffers from substance abuse, and he killed the victim in a manic episode. This falls under the criteria of an Axis I diagnosis in the DSM IV. If an individual's behaviors are explained by an Axis I diagnosis, it is improper to add an additional diagnosis from Axis II; particularly antisocial personality disorder, when Mr. Zommer's characteristics of loving, sharing, and giving, are incompatible with such a diagnosis. The prejudice lies in the fact that Mr. Zommer was sentenced to death, under the false premise that he is an unredeemable sociopath. That is the horrific and false assertion that the appellant's trial counsel decided to allow the jury to take

back into chambers, prior to deliberating about whether the appellant should live or die. Mr. Zommer is entitled to relief.

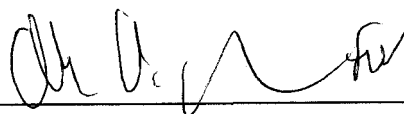
### **CONCLUSION**

Wherefore, in light of the facts and arguments presented in this Reply and the facts and arguments presented in the appellant's Initial Brief, Mr. Zommer hereby moves this Honorable Court to:

1. Vacate the convictions and sentence of death.
2. Order a remand for a new trial and/or penalty phase proceeding.

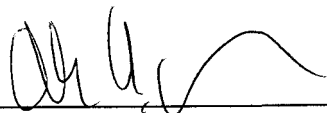
**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief has been furnished by E-MAIL Assistant Attorney General Katherine Diamandis, Katherine.Diamandis@myfloridalegal.com, and U.S. Mail to Todd Zommer, Union Correctional Institution 7819 NW 228<sup>th</sup> Street Raiford, FL 32026-1000, on this 10<sup>th</sup> day of December, 2013.



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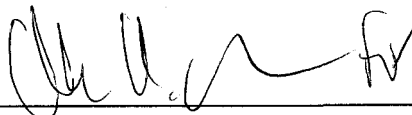


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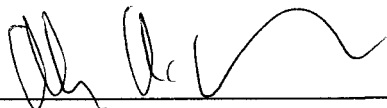
**CERTIFICATE OF COMPLIANCE**

**I HEREBY CERTIFY** that the foregoing Reply Brief was generated in Times New Roman 14-point font pursuant to Fla. R. App. P. 9.210.



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