IN THE SUPREME COURT OF FLORIDA
CASE NO. SC18-42

DELMER SMITH, **CAPITAL POSTCONVICTION CASE**

Appellant/Petitioner
v.

STATE OF FLORIDA, et al.
Appellee/Respondent.
_____/

MOTION FOR REHEARING

Comes now the Appellant/Petitioner, Delmer Smith (hereinafter referred to as "Mr. Smith"), who hereby files this Motion for Rehearing pursuant to Florida Rule of Appellate Procedure 9.330 and respectfully requests that this Honorable Court reconsider its written opinion dated **Thursday, March 5, 2020**. This Court's opinion affirmed the postconviction court's written order denying Mr. Smith's motion for postconviction relief. Respectfully, this Court's decision overlooked, or misapprehended, facts that were previously raised in Mr. Smith's Initial Brief. Though Mr. Smith will focus on narrow issues in this motion, no issue or claim previously raised is hereby abandoned.

Ineffective Assistance of Trial Counsel for Failing to Conduct a Complete Investigation of Available Mitigating Circumstances for Presentation During Penalty Phase

In Claim I of his Initial Brief, Mr. Smith argued that the circuit court erred in denying Mr. Smith's claim that trial counsel provided ineffective assistance under

Strickland v. Washington, 466 U.S. 668 (1984), for failing to find and present mitigation concerning the breadth of abuse suffered by Mr. Smith as a child, along with other available mitigating information.

In its opinion dated March 5, 2020, this Court denied Mr. Smith's claim, finding as follows:

> Smith relies on *State v. Lewis*, 838 So. 2d 1102 (Fla. 2002), for the proposition that an attorney must conduct a thorough investigation and preparation of mitigation evidence before a defendant can knowingly and intelligently waive mitigation evidence. See id. at 1113 ("Although a defendant may waive mitigation, he cannot do so blindly; counsel must first investigate all avenues and advise the defendant so that the defendant reasonably understands what is being waived and its ramifications and hence is able to make an informed, intelligent decision."). But the attorney in *Lewis* spent "very little time readying for the penalty phase proceedings," id. at 1109, and that lack of effort damaged the defense team's relationship with Lewis's family members, who grew uncooperative, which is what led the defendant to waive mitigation. Id. at 1109 -10.
>
> Here, unlike in Lewis, it was Smith and his family, not defense counsel, who hampered the mitigation investigation. Defense counsel testified at the evidentiary hearing that despite Smith's objections, a mitigation specialist was hired to contact Smith's family members, and that Smith objected again after learning the specialist had spoken to his family. At that point, Smith's family members, including a sister who had previously been cooperative, stopped returning phone calls from the defense team. Considering Smith's limitations on and interference with counsel's penalty phase investigation, we hold that the alleged failures on the part of defense counsel do not rise to ineffective assistance of counsel. *See Brown v. State*, 894 So. 2d 137, 146 (Fla. 2004).

Smith v. State, No. SC18-42, 2020 WL 1057243, at *5 (Fla. March 5, 2020). This Court's decision overlooked and misapprehended important facts regarding this claim.

The additional mitigation uncovered during postconviction, which was always readily available, enlightened Dr. Eisenstein to amend his first diagnoses from the initial trial, which was that Mr. Smith has profound unequivocal brain damage, frontal lobe executive functioning impairment, and illogical and inflexible thinking. (PC-ROA 957). Dr. Eisenstein also diagnosed Mr. Smith at the initial trial as suffering from intermittent explosive disorder, developmental learning disorders, and attention deficit disorder greatly impairing his memory. (PC-ROA 957). Moreover, Dr. Eisenstein provided a report during the initial trial based on vague information, stating that Mr. Smith was abused and further victimized sexually as a child. Dr. Eisenstein was not aware of the specific details because trial counsel never procured and provided information about the abuse Mr. Smith suffered. (PC-ROA 960).

On page 5 of this Court's Opinion, there is just a passing reference to the fact that Dr. Eisenstein was hired as an expert a mere one month prior to the start of the trial. Dr. Eisenstein, extremely experienced, having done mitigation evaluations in approximately 150 capital cases, characterized the timeframe as not a normal amount of time to be asked to conduct a full-blown evaluation and investigation of a client.

(PC-ROA 941, 945). He recalled no conversation from Mr. Smith's counsel about getting a continuance to conduct a more complete penalty phase investigation. (PC-ROA 946). The lateness in which the mental health expert was retained in this case resembles the ineffective assistance of counsel displayed in *Larzelere v. State*, 979 So. 2d 195, (Fla. 2008), which held that:

> The record also supports the trial court's finding that counsel's performance did not improve upon retaining Dr. Krop. Wilkins and Howes failed to provide Dr. Krop with the investigator's report, Claude Murrah's trial testimony, or Harry Mathis's deposition, all of which would have alerted Dr. Krop to the possibility of sexual or physical abuse. According to Dr. Krop, Wilkins told him that no family members were available to assist in his evaluation. In State v. Coney, 845 So.2d 120, 129 (Fla. 2003), (quoting trial court's order), this Court held that trial counsel's "hurried preparation" for a mental health evaluation was ineffective assistance of counsel, where defense counsel "furnished little or no background information to the doctors, did not attend the evaluations, and did not believe it was his responsibility to explain to the doctors the meaning of statutory mitigation factors under law." In the instant case, counsel did not give Dr. Krop the investigator's report, Murrah's testimony, or Mathis's deposition, and neither Wilkins nor Howes attended when Dr. Krop was deposed by the State. Given this evidence, we find that the trial court did not err in concluding that Larzelere's waiver was not made knowingly and intelligently and that the trial counsel was deficient for failing to sufficiently investigate potential mitigation.

Id. at 206. Trial counsel testified to their experience in trying capital cases at the evidentiary hearing. They understood the gravity of the event. The failure to retain a mental health expert shortly after being appointed, was deficient performance on the part of trial counsel. Mr. Smith was prejudiced because Dr. Eisenstein eventually amended his initial diagnoses once apprised of the finally revealed information about

Mr. Smith's horrific childhood. Mr. Smith's advisory panel never learned this information. The specific details about the abuse provided Dr. Eisenstein information for an additional diagnosis of Post-Traumatic Stress Disorder and strengthened his opinion that both statutory mental mitigators were present in Mr. Smith's case. (PC-ROA 979-985). There is a reasonable probability that, but for trial counsel's deficient failure to investigate the specific details about the emotional, psychological, physical and sexual abuse Mr. Smith suffered as a child, the advisory panel would have been moved to vote for mercy and would have recommended a life sentence. Trial counsel also testified that he was not aware of any efforts between the penalty phase in front of the jury and the subsequent hearing pursuant to *Spencer v. State,* 615 So. 2d 688 (Fla. 1993), to contact Mr. Smith's siblings about the abuse suffered by Mr. Smith within the household. (PC-ROA 1021). Therefore, even the trial court did not receive details about the specific abuse suffered by Mr. Smith, prior to rendering its findings and sentencing order.

The Court's decision overlooks or misunderstands a point on page 5 of its Opinion, as it states "Here, unlike in *Lewis*, it was Smith and his own family, not defense counsel, who hampered the mitigation investigation." That statement absolves trial counsel of their responsibilities. Trial counsel's team made mere phone calls to siblings living in Detroit but did not even bother to travel to see them and talk to them and learn the specific details about the references to abuse within the

household. During postconviction proceedings, Dr. Eisenstein traveled and spoke to Mr. Smith's siblings personally in Detroit and uncovered weighty mitigation concerning tragic and severe physical abuse Mr. Smith suffered during the most crucial stages of his development.

Moreover, Mr. Smith did not waive mitigation nor otherwise prevent trial counsel from doing exactly what postconviction counsel endeavored to accomplish. Mr. Smith's overt actions in signing release forms, not being adverse to trial counsel contacting some relatives, and the fact that his nieces actually testified during the penalty phase, belies any notion of Mr. Smith truly preventing trial counsel from doing what postconviction counsel was able to accomplish in presenting mitigation.

This Court's opinion overlooks its own guidance concerning how this area of mitigation is weighty and significant. *See State v. Bright*, 200 So. 3d 710 (Fla. 2016); *Bevel v. State*, 221 So. 3d 1168 (Fla. 2017). Trial counsel had a duty to use their skills and experience to provide Mr. Smith with effective assistance of counsel. Trial counsel should have realized that a mere mention of physical and sexual abuse warranted further inquiry. There is no excuse for trial counsel's failure to work toward a bond with Mr. Smith's family and take the time to travel to meet the family of a defendant facing capital punishment. This defendant, Delmer Smith, suffered from horrific childhood torment which included intrafamily racialized violence and sexual abuse. Mr. Smith's advisory panel knew very little about him, and trial

counsel did a disservice to Mr. Smith by failing to present the weighty mitigation for the advisory panel to consider. The advisory panel was unaware that Mr. Smith suffers from Post-Traumatic Stress Disorder, and there is a reasonable probability that the panel would have been compelled to vote for mercy had it learned the details of the trauma Mr. Smith suffered.

WHEREFORE, because this Court overlooked, or misapprehended points of fact, Mr. Smith respectfully requests that this Honorable Court review the record on appeal and grant Mr. Smith a rehearing or any other relief this Court deems appropriate.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Motion for Rehearing has been emailed to Christina Pacheco, Assistant Attorney General, at capapp@myfloridalegal.com and christine.pacheco@myfloridalegal.com and mailed via United States Postal Service to Delmer Smith, DOC # 135769, Union Correctional Institution, 7819 N.W. 228th Street, Raiford, Florida 32026 on this 19th day of March, 2020.

/s/ Ali A. Shakoor
Ali A. Shakoor
Florida Bar No. 069830
Assistant CCRC
Shakoor@ccmr.state.fl.us
Support@ccmr.state.fl.us

/s/ Eric C. Pinkard
Eric C. Pinkard
Florida Bar No.651443
Capital Collateral Regional Counsel
CAPITAL COLLATERAL REGIONAL
COUNSEL-MIDDLE REGION
12973 N Telecom Parkway
Temple Terrace, FL 33637
813-558-1600
PINKARD@ccmr.state.fl.us
Support@ccmr.state.fl.us

CERTIFICATE OF COMPLIANCE AND FONT SIZE

I hereby certify that a true copy of the foregoing Motion for Rehearing was generated in Times New Roman, 14 point font, pursuant to Fla. R. App. 9.210 (a) (2).

/s/ Ali A. Shakoor
Ali A. Shakoor
Florida Bar No. 069830
Assistant CCRC
Shakoor@ccmr.state.fl.us
Support@ccmr.state.fl.us

/s/ Eric C. Pinkard
Eric C. Pinkard
Florida Bar No.651443
Capital Collateral Regional Counsel
CAPITAL COLLATERAL REGIONAL
COUNSEL-MIDDLE REGION
12973 N Telecom Parkway
Temple Terrace, FL 33637
813-558-1600
PINKARD@ccmr.state.fl.us
Support@ccmr.state.fl.us