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IN THE SUPREME COURT OF FLORIDA

Case No._____

Lower Court Case No. 2009-CF-4417

TERRY ANTONIO SMITH,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

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JURISDICTIONAL STATEMENT

This is an original action under Florida Rule of Appellate Procedure 9.100(a). Article I, Section 13 of the Florida Constitution provides "[t]he writ of habeas corpus shall be grantable of right, freely, and without cost. It shall be returnable without delay, and shall never be suspended unless, in case of rebellion or invasion, suspension is essential to the public safety." Mr. Smith was sentenced to death, and the instant petition accompanies his Initial Brief from the lower tribunal's order denying his 3.851 Motion for Postconviction Relief. Fla. R. App. P. 9.142(b).

Where a trial has resulted in "incongruous and manifestly unfair results" a court of appeal has the "inherent authority to grant a writ of habeas corpus." Stephens v. State, 974 So. 2d 455, 457 (Fla. 2d DCA 2008). The ends of justice call on the Court to grant the relief sought in this case. Mr. Smith's petition raises claims involving fundamental state and federal constitutional error. This Court's exercise of its habeas corpus jurisdiction and of its authority to correct constitutional error is warranted in this action. As this petition shows, habeas corpus relief is proper.

PRELIMINARY STATEMENT

The first nine volumes of the nineteen-volume record on direct appeal, comprising the pleadings, status conferences, and preliminary motions hearings, will

be referenced as “R” followed by the volume number and then the page number: (R. 7:101). The next ten volumes, comprising the transcripts of the guilt and penalty phases of Mr. Smith’s trial, will be referenced as “T” followed by the volume number and page number: (T12: 606). The record on appeal of the postconviction proceeding will be referenced as “PCR” followed by the page number: (PCR: 1).

REQUEST FOR ORAL ARGUMENT

Mr. Smith has been sentenced to death. Resolution of these issues will determine whether he lives or dies. This Court has allowed oral argument in other capital cases in a similar posture. Mr. Smith respectfully requests oral argument because a full opportunity to air the issues through oral argument would be appropriate in this case, given the seriousness of the claims at issue and the stakes involved.

GROUNDS FOR HABEAS CORPUS RELIEF

Mr. Smith asserts that his conviction was obtained in violation of his rights guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution because his appellate counsel rendered ineffective assistance of counsel during this direct appeal. Appellate counsel’s deficient conduct and the resulting prejudice render Mr. Smith’s conviction unconstitutional.

PROCEDURAL HISTORY

The Honorable Adrian G. Soud, Judge for the Circuit Court of the Fourth Judicial Circuit in and for Duval County, Florida, entered the judgments of conviction and sentence at issue.

On May 21, 2009, Mr. Smith was indicted on three counts of first degree murder. The guilt/innocence phase of his trial commenced on February 28, 2011, and lasted four days. On March 3, 2011, the jury returned a guilty verdict on each count charged. The penalty phase of Mr. Smith's trial was held on March 11, 2011. The same day after 2.5 hours of deliberation, the jury rendered an advisory verdict, recommending the death penalty by a vote of 8-4 on Count 1, recommending life without the possibility of parole on Count II, and recommending the death penalty by a vote of 10-2 on Count III. (R. 4:746). Following a Spencer hearing held on April 15, 2011, the trial court sentenced Mr. Smith to death on Counts I and III on May 12, 2011. The court found the following aggravators: (1) Mr. Smith was previously convicted of another capital felony (great weight); (2) the capital felony was committed while Mr. Smith was engaged in an attempt to commit robbery (great weight); and (3) the capital felony

was for pecuniary gain. The second and third aggravators merged, therefore the court did not weigh them independently.

The court found the following mitigating circumstances: (1) the age of Mr. Smith at the time of the crime (moderate weight); (2) Mr. Smith's non-statutory "mental mitigators" (moderate weight); (3) Mr. Smith loved his children and their mothers and they loved him (some weight); (4) Mr. Smith was a good brother to his siblings (little weight); (5) Mr. Smith took care of his sister's seven children when she worked at night (moderate weight); (6) Mr. Smith was dependable (some weight); (7) Mr. Smith was a good employee and would do well in a structured environment where he would be required to show deference to authority (slight weight); (8) Mr. Smith could be rehabilitated and make positive contributions to society (little weight); and (9) Mr. Smith grew up in a terrible neighborhood with a high crime rate and low graduation rate (some weight). The jury's sentencing recommendation was given great weight.

The Florida Supreme Court affirmed Mr. Smith's convictions and sentence on direct appeal. Smith v. State, 139 So. 3d 839 (Fla. 2014). The following issues were raised in Mr. Smith's direct appeal: (1) The evidence was insufficient to support his convictions for premeditated murder for the deaths of Berthum Gibson and Keenthia Keenan; (2) The trial court erred in giving additional weight to the felony murder circumstance on the basis that the murders were premeditated; (3)

Mr. Smith's sentence is disproportionate; (4) Florida's capital sentencing scheme is unconstitutional under Ring v. Arizona, 122 S. Ct. 2428 (2002). All of the claims raised on direct appeal were denied. The United State Supreme Court denied Mr. Smith's writ of certiorari on December 1, 2014.

Mr. Smith filed a timely Motion to Vacate Judgments of Conviction and Sentence with Special Request for Leave to Amend on November 20, 2015. (PCR. 265-462). The State filed its response on January 19, 2016. (PCR. 474-537). Mr. Smith filed a Motion to Stay or Continue Post-Conviction Proceedings Pending the Outcome in Lambrix and Jones. (PCR. 563-567). After a status hearing on March 11, 2016, where both the State and Defendant presented argument as to the implications of Hurst v. State, 136 S. Ct. 616 (2016), the court granted a 60-day continuance of the proceedings. (PCR. 579). Mr. Smith filed a Motion to Amend Defendant's Motion to Vacate Judgments of Conviction and Sentence on January 25, 2017. (PCR. 606-624). The State filed a Response to the Amended Motion to Vacate Judgments of Conviction and Sentence on June 7, 2017. (PCR. 645-651). On July 27, 2017, Mr. Smith filed a Second Motion to Amend Defendant's Motion to Vacate Judgments of Conviction and Sentence. (PCR. 680-736). The State filed its response on August 21, 2017. (PCR. 758-768). Pursuant to the August 22, 2017 case management conference the court entered an order on August 30, 2017, granting an evidentiary hearing on claims 2, 3, 4, 8, 9, 14(a), 14(c), 15, and

16.[1] That order was entered on August 30, 2017. (PCR.769-772). On November 22, 2017 Mr. Smith filed a third Motion to Amend Defendant's Motion to Vacate Judgments of Conviction and Sentence. (PCR: 790-803). At the case management conference held November 27, 2017 the Court held that Mr. Smith would be able to address the claim from the most recent amendment at the evidentiary hearing. (PCR: 2233). The court granted the motion to amend on December 1, 2017. (PCR: 833-834). The evidentiary hearing was held December 5, 6, and 8, 2017. On September 20, 2018 the circuit court filed an Order Denying in Part Defendant's Motion for Postconviction Relief and Granting in Limited Part Defendant's Motion for Postconviction Relief as to a New Penalty Phase Pursuant to Hurst. (PCR. 1790-1870).

[1] Claim 2 was a Batson claim regarding jury selection. Claim 3 was an IAC claim for allowing hearsay, stipulating to booking photos, failing to impeach witnesses, permitting testimony that impugned Mr. Smith's character, and offering harmful evidence of the detectives' opinion as to the case and Mr. Smith. Claim 4 addressed the violation of the Confrontation Clause in allowing a medical examiner to testify about autopsies he did not perform. Claim 8 was newly discovered evidence in the form of Edward Haney's recantation of his trial testimony. Claim 9 was a Brady/Giglio claim relating to the State's interactions with Edward Haney. Claim 14(a) was an IAC claim for counsel's failing to investigate the crime scene and ballistics. Claim 14(c) was an IAC claim for failing to investigate the handprint on the outside of the house. Claim 15 was an IAC claim misadvising on the consequences of taking the stand. Claim 16 was a prosecutorial misconduct claim for making arguments contrary to the evidence presented.

Introduction to Ineffective Assistance of Appellate Counsel

In order to establish a claim for ineffective assistance of appellate counsel, the defendant must make a two-pronged showing:

> (1) specific errors or omissions which show that appellate counsel's performance departed from the norm or fell outside the range of profession acceptable performance; and (2) the defect of that performance compromised the appellate process to such a degree as to undermine confidence in the fairness and correctness of the appellate result.

Wilson v. Wainwright, 474 So. 2d 1162, 1163 (Fla. 1985).

Appellate counsel neglected to address any of the preserved errors and this performance "fell outside the range of professionally acceptable performance." Id.

It is a well-established principle that a contemporaneous objection is necessary to preserve an error for appellate review, unless it is a fundamental error. Gore v. State, 964 So. 2d 1257, 1265 (Fla. 2007). Preserved errors raised on direct appeal are subject to the harmless error test, which "places the burden on the State, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is not reasonable possibility that the error contributed to the conviction." State v. DiGuilio, 491 So. 2d 1129, 1138 (Fla. 1986). The issues not preserved by trial counsel face a higher standard in that, in in order to be cognizable they must be fundamental errors, or errors that are the "equivalent to a denial of due process." State v. Johnson, 616 So. 2d 1, 3 (Fla.1993).

The prejudice of neglecting to raise meritorious issues that would have been cognizant on direct appeal is clear, although this Court has stated that it is difficult to "precisely measure the impact of counsel's failure to urge his client's best claims." Wilson at 1165.

1. Appellate counsel was ineffective in failing to raise the court's error in overruling a hearsay objection in regards to testimony from three witnesses

The court erred in overruling hearsay objections for Ray Dukes, Justin Harper, and Detective Nelson when each of these witnesses repeated what Breon Williams told them. (T13: 706, 747; T15: 1089). This improperly bolstered Breon Williams testimony by allowing the jury to hear the testimony multiple times, and from witnesses with fewer credibility issues.

In general, a prior consistent statement is not admissible to bolster a witness's trial testimony. Taylor v. State, 855 So. 2d 1, 22-23 (Fla. 2003); Chandler v. State, 702 So. 2d 186, 197 (Fla. 1997). However, there are certain conditions that make prior consistent statements admissible. First, the witness who made the prior consistent statement must be testifying and subject to cross-examination. Taylor at 22. On cross-examination the defense must make an express or implied charge that their testimony is fabricated due to some improper influence: bias, corruption, or some other motive to fabricate testimony. Id. The consistent statement may then be introduced to rebut the insinuation of fabricated

testimony. Id. Importantly, the prior consistent statement must be made ***prior*** to when the motive to fabricate originated. Jackson v. State, 498 So. 2d 906, 910 (Fla. 1986).

In Parker v. State, 476 So. 2d 134, 136 (Fla. 1985) the co-defendant's girlfriend testified that the defendant had confessed to her. The State then introduced prior consistent statements of the co-defendant's girlfriend through her mother and sister to corroborate that testimony. Id. The State argued that when she told her mother and sister what the defendant had said her motivation to lie (in order to save her boyfriend from the electric chair) had not arisen yet. Id at 137. However, this Court found that as the girlfriend of the co-defendant her bias had *always* existed and the prior statements should not have been admitted as they did not occur prior to her having motivation to fabricate. Id. This Court also found the error to be harmless in that case. Id.

Breon Williams testified at trial and was subject to cross-examination. Mr. Williams was cross-examined as to the police tactics used during his interrogation as well as the fact that he was good friends with the Desmond Robinson, but did not call the police after seeing him shot (T13: 655, 651, 644). Defense counsel also reiterated that after the shooting Mr. Williams did not return to the scene of the crime, but instead called Kirk Brewer to retrieve his scooter for him. (T13: 643, 653).

Mr. Williams' testimony on cross-examination did not make his prior statements admissible as Mr. Williams's bias and motive to fabricate arose as soon as the crime was committed. Like the witness in Parker, he has *always* had a reason to lie about this crime. This was also "intimated" by counsel on cross examination when he pointed out that Mr. Williams did not call to report the shooting of his good friend, Desmond Robinson. See Jackson v. State, 498 So. 2d 906, 910 (Fla. 1986). Additionally counsel implied consciousness of guilt when he pointed out that Mr. Williams did not go fetch his scooter himself, but instead asked Kirk Brewer to do it. In Jackson, where the record indicated defense counsel had "intimated" that the improper motive existed prior to the statements, the prior statements were found to have not been admissible. Id.

The admission of the prior consistent statements was prejudicial because it impermissibly bolstered Mr. Williams' testimony. Mr. Williams' testimony was direct evidence of guilt and to have it reiterated by his father, his friend, and a law enforcement officer undoubtedly made an impression on the jury. In Quiles v. State, 523 So. 2d 1261, 1264 (Fla. 2nd DCA 1988), the district court found that where witness credibility was critical it was a miscarriage of justice to allow testimony by a police officer ("especially by a police officer") that bolstered the witness's credibility by reciting the witness's version of events. Id. In Mr. Smtih's case, witness credibility was key and to have his co-defendant's version of events

offered repeatedly to the jury by multiple witnesses, "especially a police officer," was a miscarriage of justice and ought to have been raised on direct appeal. Id. Appellate counsel's failure to raise this preserved issue is particularly egregious since she litigated the issue in Taylor v. State, 855 So. 2d 1, 22-23 (Fla. 2003), and would have known that it was a meritorious issue.

2. Appellate counsel was ineffective in failing to raise the trial court's error in sustaining the State's relevancy objection while defense counsel cross-examined a State witness as to his possible bias in the case

The trial court erred in sustaining the State's relevancy objection and not allowing the defense to inquire into why witness Anthony Nixon did not trust the police. A defendant's right to cross examination is grounded in his Sixth Amendment right to confront his accusers. Davis v. Alaska, 415 U.S. 308, 316, 347 (1974); Crawford v. Washington, 541 U.S. 36, 38 (2004); McDuffie v. State, 970 So. 2d 312, (Fla. 2007). Cross-examination is limited by what was brought out on direct, but once counsel has "opened the door" during direct-examination, otherwise inadmissible material can be brought out on cross-examination to "qualify, limit, or explain" previous testimony. Rodriguez v. State, 753 So. 2d 29, 42 (Fla. 2000) quoting Tompkins v. State, 502 So. 2d 415, 419 (Fla.1986). This Court has held that it is "fatal error" not to allow cross-examination where counsel is laying the predicate for impeachment. Coco v. State, 62 So. 2d 892, 892-93 (Fla. 1953); McDuffie v. State, 970 So. 2d 312, 324 (Fla.

2007). In McDuffie, where the trial court did not allow cross-examination to question the credibility of the witness's in-court identification, this Court found error. Similarly, where the testimony is related to testimony on direct-examination and "plausibly related to the defense" it may be reversible error to "curtail that inquiry." Patrick v. State, 104 So. 3d 1046, 1057–58 (Fla. 2012) quoting Coxwell v. State, 361 So.2d 148, 152 (Fla.1978).

In Rodriguez v. State, 753 So. 2d 29, 42 (Fla. 2000), a witness providing testimony against the defendant was asked by defense counsel if he disliked the defendant. On re-direct, the State then drew an objection from the defense when the prosecutor asked the witness why he disliked the defendant in an attempt to rehabilitate the witness's credibility. Id. The court in Rodriguez overruled the objection, but proffered the testimony to determine how prejudicial it would be to the defendant,[2] and ultimately allowed a limited portion of that testimony to come in. Id. This Court upheld the determination of relevancy, and found that the trial court properly limited the testimony such that it was not prejudicial. Id.

This sequence of events and questioning is very similar to what occurred in this case. Mr. Nixon testified on direct that he disliked police in response to the State asking why he had not reported hearing gunshots and seeing people flee the

[2] The testimony related to previous crimes the defendant had committed and time he spent incarcerated with the witness.

scene. (T13: 722-723). When the defense counsel attempted to delve deeper into the issue on cross examination, the court sustained the State's objection. (T13: 727). This line of questioning was relevant to Mr. Nixon's credibility and possible bias. Unlike in Rodriguez, it would not have been prejudicial to Mr. Smith, so the only issue is relevance. As the question went to the credibility and bias of the witness, and was "plausibly related to the defense," it was reversible error to exclude the testimony. Patrick v. State, 104 So. 3d 1046, 1057-58 (2012).

Mr. Nixon is one of only two people to provide eyewitness testimony at the scene of the crime, and he is the only lay witness who does not have a personal stake in the case. The jurors may well have valued his testimony, which tended to corroborate Mr. Williams' statement of events. Where the defendant was not permitted to bring Mr. Nixon's credibility into question, his Sixth Amendment right to confront his accusers was denied and he was prejudiced by the testimony which tended to support his co-defendant's damning narrative. Failure to raise this preserved and meritorious issue on direct appeal undermines the reliability of the appellate process.

3. Appellate counsel was ineffective in failing to raise the preserved objection to Mr. Haney's testimony, that although Raylan Johnson confessed to him, he did not believe Raylan Johnson's confession.

The court erred in admitting testimony (over defense's objection of speculation) that Mr. Haney did not believe Raylan Johnson when he confessed to

this crime. (T15: 1022). A lay witness should not give their conclusions on something jurors can interpret for themselves, especially here where Raylan Johnson did not testify. Thorp v. State, 777 So. 2d 385, 395–96 (Fla. 2000). Florida law permits a lay witness to testify as to an opinion or inference when "the witness cannot readily, and with equal accuracy and adequacy, communicate what he or she has perceived to the trier of fact without testifying in terms of inferences or opinions ***and*** the witness's use of inferences or opinions will not mislead the trier of fact to the prejudice of the objecting party. Id. at 395 (emphasis added). Mr. Haney did not need to assess the reliability of Raylan Johnson's confession for the jury, because it was the sole province of the jury to assess that evidence. The jury never heard evidence from Raylan Johnson, only Mr. Haney's assessment that he did not believe Mr. Johnson's confession. This speculative testimony was highly prejudicial to the defense who insinuated throughout the trial that Raylan Johnson may have been the perpetrator of this crime.

4. Appellate counsel provided ineffective assistance by not raising the preserved error of a witness stating that he had seen Terry Smith on previous occasions with a 10 mm handgun and that is how he knew what kind of gun was used in this crime.

During Jonathan Peterson's testimony the following exchange occurred:

Mr. Caliel: Now prior to leaving that day when you were talking with Terry, was there ever any discussion of what type of gun it was that he had used? Did you know what type of gun it was?

Jonathan Peterson: I know what type of gun it was because I seen Terry with it prior to the incident.

Mr. Caliel: Okay. So the gun that I showed you, the photograph of that gun in State's Exhibit No. 88, um, that looked like the gun that you had described, and you had seen that with Terry prior to the day when you-all went to pick him up?

Jonathan Peterson: Yes, sir.

Mr. Caliel: Okay. What type of gun was it?

Jonathan Peterson: A ten millimeter.

Mr. Caliel: And so you know that because you had seen it on Terry Smith's person on a prior occasion?

Jonathan Peterson: Yes, sir.

Mr. Caliel: And that was the same gun you saw in the car that night?

Jonathan Peterson: Yes, sir.

(T14: 903).

In order for evidence about the defendant possessing a gun to be relevant the State must establish a sufficient link between the weapon and the crime. Amoros v. State, 531 So. 2d 1256, 1260 (Fla.1988); Jackson v. State, 25 So. 3d 518, 528 (Fla. 2009). In Jackson a witness testified that the defendant regularly keeps a little pistol in his waistband. Id. As there was a "significant time difference" between the incident the witness was describing and the murder, this Court found that the testimony should not have been admitted. Id. In Amoros, this Court found that a sufficient link was established by the State because weapon was test fired

and then the bullets from the weapon and the bullet from the victim's body were compared. Amoros v. State, 531 So. 2d 1256, 1260 (Fla. 1988). This court again employed the same reasoning more recently in Agatheas v. State, 77 So. 3d 1232, 1240 (Fla. 2011). In Agatheas, this Court found that a gun recovered five years after the crime was not relevant to any material fact, and even under the alleged reason for admission it was more prejudicial than probative under Section 90.403, Florida Statutes. Evidence of possession of a firearm or any sort of prior bad act is prejudicial in that it invites the jury to "base a verdict of guilty on the conclusion that because the defendant is of bad character or has a propensity to commit a crime, he therefore probably committed the crime charged." Straight v. State, 397 So. 2d 903, 908 (Fla. 1981).

At the conclusion of Jonathan Peterson's testimony, defense counsel asked to approach the bench with the court reporter and moved for a mistrial on the grounds that the prosecutor asked two follow-up questions about the witness having seen the defendant with a gun before. (T14 :912). Both defense counsel and the prosecutor presented argument and the trial judge reserved ruling. (T14: 912-915). Prior to closing arguments the trial court denied the motion. (T17: 1368). The State went on to emphasize the testimony in closing: "He [Mr. Peterson] also knew exactly what caliber of

gun was used because he saw it and he told you he had seen it on this defendant before." (T17: 1389).

The State argued that the testimony regarding the firearm was relevant as "it's corpus to the crime" and that it was not prejudicial as "there is nothing illegal about just being in possession of a firearm." (T14: 913). While testimony about the *actual* murder weapon would have been relevant, the State did not establish a sufficient link between the firearm Mr. Peterson had seen on a prior occasion and the murder weapon. Mr. Peterson's affirmation that it was the same gun is far below the standard established in Amoros, where the weapon was test-fired and then a bullet comparison was done. Without sufficiently linking the weapon Mr. Peterson had seen to the murder weapon, his testimony was irrelevant.

Additionally, in both Amoros and Agatheas, an assessment of the amount of time between the firearm sighting and the murder was essential to deciding whether the testimony was relevant. The record does not indicate how long ago Mr. Peterson saw the defendant with a 10 mm handgun. Furthermore, since the weapon was never recovered, the most the ballistics expert could testify to was that three of the recovered bullets were consistent with a 10 mm handgun. (T14: 979) He was unable to say that they were

fired from the same firearm or match them to the casings that were found at the scene. (T14: 981, 983).

The testimony was highly prejudicial because it demonstrated a propensity to commit crimes with a firearm. While the prosecutor argued that there is nothing illegal about having a firearm, logically a person who possesses a firearm is far more likely to commit a crime with a firearm than someone who does not possess a firearm. Similar to Agatheas, when there is no relevance to testimony regarding a firearm, it only serves to prejudice the jury by demonstrating bad character and propensity for crime. Agatheas v. State, 77 So. 3d 1232, 1239 (Fla. 2011).

Fundamental Error

Fundamental errors may be raised for the first time at any point, including in a post-conviction proceeding. Bell v. State, 585 So. 2d 1125 (Fla. 2d DCA 1991); Johnson v. State, 460 So.2d 954 (Fla. 5th DCA 1984), *approved*,483 So.2d 420 (Fla. 1986). Fundamental errors are those that are "equivalent to a denial of due process." State v. Johnson, 616 So. 2d 1, 3 (Fla. 1993).

The errors articulated below are fundamental, and although not objected to at trial, they should have been raised on direct appeal because they violated Mr. Smith's right to due process.

5. Appellate counsel was ineffective in not raising the issue of prosecutorial misconduct where the State solicited testimony that witnesses had a generalized fear of Mr. Smith

The State suggested to several witnesses that they either did not come forward with information (or were not entirely truthful with police) because they feared retaliation by Mr. Smith. While not objected to by trial counsel, it ought to have been raised by appellate counsel as a fundamental error.

In State v. Price, 491 So. 2d 536, 537 (Fla. 1986), this Court held that threats made to a witness by a third party should not have been admitted because the evidence of the threats was more prejudicial than probative. Id. While acknowledging that they are hearsay, the trial court explained that they were ostensibly admissible to explain the witness's change in testimony. Id. Nonetheless, this Court found it highly prejudicial, commenting that the trial court attributed the threats to the defendant and used it as a basis to exceed the maximum recommended sentence several times over. Id. at 537. In Madison v. State, 726 So. 2d 835, 837 (Fla. 4th DCA 1999), the court of appeals interpreted Price to mean that threats must be attributable to the defendant in order to be admissible, although they did explain that as the threat relates to someone's credibility it may be admissible anyway as long as it is more probative than prejudicial. Id. Generalized fear of the defendant appears to have only been addressed in the form of hearsay testimony from the victim, which implicate other evidentiary issues. However, the issue was "distilled" down to this:

> A victim's extrajudicial declarations of fear of the defendant are admissible under the state of mind exception to the hearsay rule ... only if there is a

> manifest need for such evidence. i.e. if it is relevant to a material issue in the case. Where there is a substantial likelihood of prejudice to the defendant's case in the admission of such testimony, it is inadmissible if it bears only a remote or artificial relationship to the legal or factual issues raised in the case.

Selver v. State, 568 So. 2d 1331, 1334 (Fla. 4th DCA 1990), quoting United States v. Brown, 490 F.2d 758 (D.C. Cir. 1974).

At trial, the prosecutor asked witness Breon Williams why he never went to the police with the information he had about the case. (T13: 644). Mr. Williams answered that he did not want to be involved and put his or his family's life at risk. (T13: 644). The prosecutor then asked "You were fearful of retaliation?" (T13: 644). Mr. Williams answered in the affirmative. (T13: 644).

Ulyssess Johnson was also asked why he never contacted the police. (T14: 858). Mr. Johnson answered that he was scared. (T14: 858). When prodded he added "he (Terry Smith) just told me that he had maybe shot three people, you know, he knew now where I stayed at. I don't stay too far from his momma's house, so…" (T14: 859). Later in his testimony, when asked why he denied any knowledge of the incident he answered that he was "still nervous about being downtown and what I was there for." (T14: 861). Mr. Johnson then confirmed that he was afraid he might be in trouble. (T14: 861). At which point, the prosecutor asked "were you still scared of possible retaliation by this defendant?" and Mr. Johnson confirmed that he was. (T14: 861).

While perhaps relevant in showing Mr. Johnson's motivation not to report any of this to the police, it is highly prejudicial to Mr. Smith's character in showing that even his own friends were afraid of him. In the second instance, when the prosecutor asked a leading question about his fear of retaliation, the testimony was irrelevant as the witness had already given two credible reasons for denying knowledge of the crime. (T14: 861). This testimony was elicited to denigrate Mr. Smith's character and distract the jurors from the primary reason Mr. Johnson gave for not being forthcoming with the police; that he was concerned he might be in trouble for his involvement in the crime. (T14: 861).

Similarly objectionable testimony came from Jonathan Peterson when questioned as to why he never went to the police about the incident: "a fear of retaliation and living by the code in the streets." (T14: 904).

Price, Madison, and Selver show that non-specific evidence of threats needs to be carefully weighed before it is admitted. In the instant case, Breon Williams, Ulyssess Johnson, and Jonathan Peterson made reference to a general fear of retaliation by Mr. Smith. In Selver the Fourth District Court of Appeal found testimony regarding a general fear of the defendant to be more prejudicial than probative as it did not assist in proving a material issue. Selver v. State, 568 So. 2d 1331, 1334 (Fla. 4th DCA 1990). Here, the prejudicial effect of the jury hearing

that the defendant's friends were afraid of him outweighs the probative value of explaining why they failed to report this crime.

6. Appellate counsel rendered ineffective assistance of counsel in failing to raise the fundamental error in admitting evidence of uncharged crimes

On direct examination of Edward Haney the State elicited the fact that the defendant was harboring a fugitive (Edward Haney) in his home. This testimony was unnecessary and the reasoning behind its admission is unpersuasive. The purported reason was to establish why the Mr. Smith felt he could confide in Edward Haney. (T17: 1454). This was just a pretext for introducing more evidence of bad acts of the defendant.

Evidence of uncharged crimes is generally not admissible, although under Section 90.404 (2)(a) "similar fact evidence of other crimes is relevant to prove a material fact in issue…, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity." Fla. Stat. 90.404 (2)(a). In Robinson v. State, 487 So. 2d 1042 (Fla. 1986), this Court held that testimony about collateral crimes committed by the defendant should not have been admitted even as they related to the credibility of witnesses. Specifically, in order to rebut testimony that Robinson was a good person the State asked several witnesses "are you aware…the defendant went back to the jail and committed yet another rape?" Robinson v. State, 487 So. 2d 1042 (Fla. 1986).

> Arguing that giving such information to the jury by attacking a witness' credibility is permissible is a very fine distinction. A distinction we find to be meaningless because it improperly lets the State do by one method something which it cannot do by another. Hearing about other alleged crimes could damn a defendant in the jury's eyes and be excessively prejudicial. We find the State went too far in this instance.

Id.

Under Williams v. State, 110 So. 2d 654, 662 (Fla. 1959) this evidence of collateral crimes should not have been admitted as its only true relevance was to show bad character or propensity.

7. Appellate counsel provided ineffective assistance of counsel by failing to raise the State's prosecutorial misconduct in implying that Mr. Smith was guilty by association with its own witnesses

Not only did the State attempt to paint Mr. Smith as a criminal, but during closing argument the prosecutor repeatedly denigrated his own witnesses in order to reinforce the idea that Mr. Smith was a criminal by association. (T17: 1389, 1444, 1459-60).

In repeatedly denigrating Mr. Smith for his association with other criminals, the State committed fundamental error and violated Mr. Smith's rights to due process by making inflammatory arguments to the jury.

> The proper exercise of closing argument is to review the evidence and to explicate those inferences which may be reasonably drawn from the evidence. Conversely, it must not be used to inflame the mind and passions of the jurors so that their verdict reflects an emotional

> response to the crime or the defendant rather than the logical analysis of the evidence in light of the applicable law.

Bertolotti v. State, 476 So. 2d 130, 134 (Fla. 1985).

In the state's closing argument the prosecutor chose to emphasize both factual and fictional crimes of their own witnesses, including, Raylan Johnson, who was not called as a witness, although his hearsay statements were admitted through several other witnesses.

> I want you to keep in mind ladies and gentlemen, if you don't like these people: Jonathan Peterson, Ulyssess Johnson, Raylan Johnson who was charged with three counts of accessory after the fact for selling that gun and burning those clothes, if you don't like Edward Haney, that defendant chose these witnesses. We didn't. Those are the people that defendant called to pick him up from a murder from three murders. Those are the people that defendant chose to share what he had done with. And who better to call to pick you up than someone else who murders people and someone else who shoots people. That's who he's going to tell. That makes perfect sense.

(T17: 1389).

The State called Jonathan Peterson, Ulyssess Johnson, and Edward Haney in its case in chief. Ulyssess Johnson and Jonathan Peterson both testified to picking up Mr. Smith on the night of the crime. (T14: 849, 895). While the State brought out that Jonathan Peterson pleaded to a manslaughter charge, there was no testimony that Mr. Ulyssess Johnson was involved in any sort of criminal activity. In fact he did not have any convictions for violent crimes, nor had he ever been arrested, something the State acknowledged during a pre-trial conference. (T14:

909, R7: 1304). Mr. Ulyssess Johnson was the one who testified that he received a phone call from Mr. Smith, so the idea that "those are the people to pick him up from a murder- from three murders…someone else who murders people and someone else who shoots people" is inaccurate, unfair to the witness, and extremely prejudicial to Mr. Smith. Furthermore the idea that the State did not pick these witnesses is nonsensical. While the State may not be able to pick who is involved, they certainly exercise discretion over who they call as a witness. Notably, Raylan Johnson, the person who was charged with three counts of accessory after the fact, was not called by the State as a witness.

In discussing Jonathan Peterson's testimony during closing argument, the State emphasized his crimes and the fact that he was someone Mr. Smith chose to confide in, stating

> Again, angels are not witness to plans hatched in hell. Jonathan Peterson is no angel. That man would not have shared the details of his crime with an angel. He would share it with somebody like Jonathan Peterson. Somebody who would go to jail for murder. (T17: 1459-60).

By characterizing Mr. Peterson this way, the State incriminated Mr. Smith merely by his association with "somebody like Jonathan Peterson." (T17: 1459).

The State again apologized for their witnesses saying "in a perfect world, every crime would be witnessed by saints. But folks, angels are not witnesses to

plans that are hatched in hell." (T17: 1444). The State demonized its own witnesses and improperly cast Mr. Smith as guilty by association with them. This statement belies how the prosecutor sees his role. A prosecutor's job is not to cast aspersions on witnesses, but "to develop the facts and the evidence for the guidance of the court and jury, and not to consider himself merely as attorney of record for the State, struggling for a verdict." Washington v. State, 86 Fla. 533, 543 (Fla. 1923).

Similar generalizations were made with regards to other witnesses in an attempt to bolster their credibility and minimize their true motivations for not being forthright with law enforcement. In his closing argument, the prosecutor imputed answers given by individual witnesses onto all of the witnesses that live in the neighborhood. The prosecutor argued to the jury "witnesses live by a code of the street." (T17: 1444). In reality only one witness, Jonathan Peterson, made mention of the "code of the street." But the prosecutor used this one mention of "code of the street" to improperly vouch for other witnesses by using it as an explanation for the witnesses' failure to contact law enforcement. Specifically, the prosecutor argued "the people in that neighborhood told you there's a code and they don't talk to the police and Anthony Nixon is a prime example of this." (T17: 1385). At no point in his testimony did Anthony Nixon make any reference to a "code." He explained that the police have a bad reputation and that is why he did

not call the police. This is an entirely different sentiment than the one expressed by Jonathan Peterson, who explained the "code of the streets" by saying "in the streets you don't just go volunteer information." (T14: 904). More importantly, the prosecutor's cryptic references to the "code of the streets" excused the witnesses' failure to report this crime. It gave the jurors an excuse other than the logical (and evidence based) conclusion the jurors might well have reached; that the witnesses were afraid of inculpating themselves for their own roles in this crime. Indeed, Kirk Brewer, Ulyssess Johnson, and Breon Williams had given that very excuse; that they were afraid of getting in trouble for their involvement. (T13: 735; T14: 861; T13: 648).

This blanket excuse, provided by Jonathan Peterson and then attributed to all the witnesses, prejudiced Mr. Smith in that the jury was being told that it's simply the people in this neighborhood's custom not to interact with the police. Instead it was the witnesses' fear of acknowledging their own involvement and culpability in this crime that kept them from talking to the police. Their reluctance to come forward speaks to their own consciousness of guilt and bias. With the State relying heavily on the testimony of these very witnesses, these generalizations not based in evidence violated Mr. Smith's right to due process.

8. Appellate counsel was ineffective for failing to raise the fundamental error of the state introduction detectives' opinions as to Mr. Smith's lack of remorse.

At Mr. Smith's trial, the State played a recorded interview wherein the detectives interviewing Mr. Smith expressed their opinions about the case and Mr. Smith. The reason for introducing the interview was to put in front of the jury Mr. Smith's denial of having ever been in the house on 5533 Ahmad Drive. Aside from denying everything, Mr. Smith said very little. The State and defense counsel had numerous pre-trial conferences discussing what redactions were to be made to the interview. Nonetheless, the following statements from the detectives were presented to the jury:

> Detective Nelson: We have to testify to the fact that we gave you every opportunity that there is known to man to get straight. To show some type of remorse for what you've done. There is no way you—what kind of remorse—what kind of remorse have you shown?
>
> Detective Chizik: You've shown nothing.
>
> Detective Nelson: What kind of remorse? (T15: 1182-1183)
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> ***
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> Detective Nelson: I have worked with police officers who have shot and killed people, and you know what that police officer did after he shot these people? Stood there and cried. You know why?
>
> Detective Chizik: You showed nothing. You showed no emotion whatsoever. (T15: 1187).
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> ***

> Detective Nelson: Terry, you're gonna have an extremely long, long life in the Florida State Prison, son….But it don't have to be like that. You can explain—you can explain what happened. You can show people that you got some heart, that there's something in there that you're not just a shell of a person that don't give a crap about society. You can show that, but you—you know, you're—I don't even know if you got it in you. (T15: 1190-1191).

This Court has consistently held that introducing evidence of lack of remorse constitutes reversible error when introduced in the penalty phase. Derrick v. State, 581 So. 2d 31, 36 (Fla. 1991). Comments on the lack of remorse raise two issues: First, they violate an accused's "constitutional right to be silent, to rest on a presumption of innocence and to require the government to prove their guilt beyond a reasonable doubt." United States v. Davis, 912 F. Supp. 938, 946 (E.D. La. 1996). Second, these comments serve to denigrate the defendant and inflame the jury. In Gore v. State, 719 So. 2d 1197, 1201 (Fla. 1998) this Court reversed the trial court, where the State engaged in "vituperative and pejorative characterizations" of the defendant. This is after a highly antagonistic cross examination of the defendant where Mr. Gore accused the prosecutor of trying to kill him and the response was "Well, you know what, you're right, I am, because somebody who does what you do deserves to die." Id. at 1201.

An assessment of probative versus prejudicial value under Fla. Stat. §90.403 demands the court to assess the relevance of the evidence weighed against the prejudicial nature of the evidence. The State's opinion as to Mr. Gore's character

was found "inflammatory and abusive," lacking the objectivity expected from the State. Id. at 1202. Generally only experts may give an opinion unless the "witness cannot readily, and with equal accuracy and adequacy, communicate what he or she has perceived to the trier of fact without testifying in terms of inferences or opinions and the witness's use of inferences or opinions will not mislead the trier of fact to the prejudice of the objecting party." Fla. Stat. § 90.701 (1).

The detectives' opinions that were introduced in Mr. Smith's case were irrelevant and should have been excluded as being highly prejudicial. They went well beyond what is necessary to "communicate what he or she has perceived to the trier of fact" and certainly entered into the area of that which will "mislead the trier of fact to the prejudice of the objecting party." Fla. Stat. § 90.701 (1). The detectives went beyond just inferring lack of remorse to denigrating Mr. Smith, referring to him as a "shell of person that don't give a crap about society." (T. 15: 1190-1191). These derogatory statements are very similar to those in Gore suggesting the defendant is not human. Here, the State goes even further than in Gore, bringing in evidence that violates Mr. Smith's constitutional right to remain silent.

Cumulative Effect

The cumulative effect of the improprieties by the State create a picture of the defendant as "a shell of person that don't give a crap about society," someone who

is known to carry a gun, harbor a fugitive, and scare his own friends (who are all criminals from Hell), while simultaneously excusing issues of bias with the witnesses that provide the only direct evidence to this crime. His right to cross-examination was curtailed and inadmissible hearsay was repeated through three witnesses improperly bolstering the only alleged eyewitness to the crime.

The improprieties committed by the State should be considered in aggregate. In Gore this Court considered the cumulative effect of the State's improper argument in closing and the cross-examination of Mr. Gore. Similarly in Nowitzke v. State, this court found that the cumulative effect of "one impropriety after another was so overwhelming as to deprive Nowitzke of a fair trial." Nowitzke v. State 572 So. 2d 1346, 1350 (Fla. 1990).

The defendant is additionally prejudiced by these errors and others argued herein because they were not assessed cumulatively with issues raised on direct appeal. Where there are multiple errors raised this Court must consider whether "the cumulative effect of the errors was such as to deny the defendant the fair and impartial trial that is the inalienable right of all litigants." Brooks v. State, 918 So. 2d 181, 202 (Fla. 2005).

Looking at the errors together, Mr. Smith was prejudiced because he was depicted as someone who regularly carries a gun, his co-defendant's story was improperly repeated through three witnesses' testimony, one of whom was a law

enforcement officer, the denied his ability to raise credibility issues with the one witness who appeared to be a neutral party, and because his defense was undermined by a witness giving his own opinion as to the veracity of another person's confession to this crime.

This was not a fair trial as contemplated by the Sixth Amendment. Mr. Smith was denigrated by the State at every opportunity, while being hampered from presenting an adequate defense.

Conclusion and Relief Sought

Based on the ineffectiveness of appellate counsel Mr. Smith respectfully urges this court to grant a new direct appeal.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via electronic service to Lisa Hopkins, Assistant Attorney General, on this 25th day of April, 2019.

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CERTIFICATE OF COMPLIANCE

This is to certify that the foregoing was generated in Times New Roman 14 point font, pursuant to Fla. R. App. P. 9.100 and 9.210.

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