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No. SC19-680
Lower Tribunal No. 2009-CF-4417

IN THE

Supreme Court of Florida

TERRY ANTONIO SMITH,
Petitioner,

v.

MARK S. INCH
SECRETARY, DEPARTMENT OF CORRECTIONS,
Respondent.

REPLY BRIEF OF PETITIONER

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PRELIMINARY STATEMENT

This proceeding involves a Petition for Writ of Habeas Corpus filed contemporaneously with Mr. Smith's appeal of the circuit court's denial of his initial Motion to Vacate Judgments of Conviction and Sentence. The State has filed its answer to Mr. Smith's petition, and this reply follows. This reply will address only the most salient points argued by the State. Mr. Smith relies upon his petition in reply to any argument or authority argued by the State that is not specifically addressed in this reply.

CITATIONS TO THE RECORD

The following will be utilized to cite to the record: "R." – record on direct appeal; "T." – trial transcript; "PCR." – postconviction record on appeal; "AB." refers to the State's habeas answer brief. Any additional citations will be self-explanatory.

REPLY TO CLAIM 1: APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THE COURT'S ERROR IN OVERRULING A HEARSAY OBJECTION REGARDING THE TESTIMONY OF THREE WITNESSES.

The State argues that appellate counsel was not ineffective for failing to raise trial counsel's preserved hearsay objections to Mr. Harper, Mr. Dukes and Detective Nelson's trial testimony because the trial court did not abuse his discretion when he overruled trial counsel's objections. (AB. 7-8).

Prior consistent statements may be admitted if the speaker testifies at trial and there is an inference that the testimony is fabricated due to bias, corruption, or other motivation. Taylor v. State, 855 So. 2d 1, 22 (Fla. 2003). However, the State's argument overlooks the requirement that the prior consistent statements must be made *prior* to when the motive to fabricate originated. Jackson v. State, 498 So. 2d 906, 910 (Fla. 1986).

The State used the testimony of Mr. Harper, Mr. Dukes, and Detective Nelson to improperly bolster Mr. Williams's testimony by repeating his version of events that he communicated *after* he participated in Desmond Robinson's murder. Their testimony was inadmissible hearsay and did not rebut the inference that Mr. Williams had recently fabricated his testimony. Mr. Williams's statements to those individuals were made *after* his motive to fabricate arose. Mr. Williams was cross-examined by defense counsel about his admission that he did not call the police after he witnessed the shooting of his friend Desmond Robinson. (T13. 655, 651, 644). Mr. Williams's statements to Mr. Harper, Mr. Dukes, and Detective Nelson are all suspect because they were made after he decided not to call the police to report the crime. Mr. Williams's motivation to lie arose as soon as the crime was committed.

REPLY TO CLAIM 2:

APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THE TRIAL COURT'S ERROR SUSTAINING THE STATE'S RELEVANCY OBJECTION WHEN DEFENSE COUNSEL CROSS-EXAMINED A STATE'S WITNESS AS TO POSSIBLE BIAS IN THE CASE.

The State claims that Mr. Nixon's testimony about the source of his distrust for the police would have been cumulative to Breon Williams's testimony about law enforcement's use of aggressive interrogation tactics. (AB. 12). The State's argument ignores the fact that Mr. Nixon's reason for his distrust of law enforcement would have significantly impacted his credibility by showing his own bias.

Mr. Nixon was not allowed to testify about what past experiences with law enforcement that led to his distrust. While this information typically would not be a permissible area of inquiry, the State opened the door by eliciting vague and unclear testimony about Mr. Nixon's interactions with the police. Fotopoulos v. State, 608 So. 2d 784, 791 (Fla. 1992). Once the State opened the door, Mr. Smith's trial counsel had the right to clarify the issue for the jury. Id. There is a substantial difference between a general distrust of law enforcement based on their reputation in the community and a personal distrust earned from specific interactions with law enforcement in the course of arrest and prosecution. This distinction would have been critical to the jury's evaluation of Mr. Nixon's credibility as the only "neutral" witness in the State's case.

REPLY TO CLAIM 3:

APPELLATE COUNSEL WAS INEFFECTIVE FOR 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 State incorrectly argues in its answer brief that this issue was not preserved for appeal because speculation was not the proper objection. (AB. 13). Speculation was the proper objection because whether or not Edward Haney *believed* Raylan Johnson's confession required Mr. Haney to speculate. Mr. Haney may testify to his own observations, such as his observation that Raylan Johnson could not give details about the crime and later recanted. Fla. Stat. § 90.604. The jurors can draw their own conclusions from Mr. Haney's observations, but the jury should not be subjected to Mr. Haney's speculation as to the truth of Raylan Johnson's confession. In Thorp, this Court found testimony improper where a witness interpreted what someone else said. Thorp v. State, 777 So. 2d 385, 395-96 (Fla. 2000).

REPLY TO CLAIM 4:

APPELLATE COUNSEL WAS INEFFECTIVE FOR NOT RAISING THE PRESERVED ERROR OF A WITNESS STATING THAT HE HAD SEEN TERRY SMITH ON A PREVIOUS OCCASION WITH A 10 MM GLOCK AND THAT IS HOW HE KNEW WHAT KIND OF GUN WAS USED IN THE CRIME.

Mr. Peterson's testimony that he had previously seen Mr. Smith with a 10mm Glock handgun was irrelevant, prejudicial, and grounds for a mistrial. The State

claims that under Amoros v. State, Mr. Peterson's testimony was admissible because it established a sufficient link between the weapon and the crime. (AB. 15). However, Amoros differs from Mr. Smith's case in three very significant ways. In Amoros, the defendant was seen with the weapon during a specific time frame "a little more than a month prior to the subject killing." Amoros at 1257. In Mr. Smith's case, Mr. Peterson's testimony about when he saw Mr. Smith with the weapon was vague and he gave no indication that the sighting was recent. Additionally, the weapon in Amoros was ultimately recovered and the bullets were tested against those found at the crime scene. Finally, there were bullets recovered from the prior incident and those bullets were compared to the weapon used in Mr. Amoros's case. Amoros at 1258. Although the testing and bullet comparison made the prior incident relevant in Mr. Amoros's case, the weapon was not tested in Mr. Smith's case and the reference to the prior incident was vague.

The State argues that Mr. Peterson's observations of the sale of the gun after the crime make the prior incident relevant. Mr. Peterson's observation of the gun sale does nothing to link the weapon to the prior incident. Furthermore, it is unclear if Mr. Peterson actually observed the sale at all as his testimony is contradicted by other witnesses. Walter Dumas testified that three people were present when he bought the gun: Kodi, Raylan Johnson, and someone older. (T14. 952). Ulyssess Johnson testified that it was just himself, "my brother and my cousin" and when

asked whether it was Mr. Peterson or "a different cousin," he responded that it was "a different cousin." (T14. 876).

There was no evidence linking the weapon seen in the prior instance to the weapon used in this crime. It is objectionable and prejudicial because it portrays Mr. Smith as someone who either regularly carries a firearm on his person, or worse, as someone who has previously committed a crime with a firearm.

REPLY TO CLAIM 5:
THE STATE COMMITTED PROSECUTORIAL MISCONDUCT BY SOLICITING TESTIMONY THAT WITNESSES HAD A GENERALIZED FEAR OF MR. SMITH.

The State argues that the testimony of Ulysses Johnson, Breon Williams, and Jonathan Peterson that they were afraid of retaliation by Mr. Smith for coming forward was admissible because it was relevant to their credibility. (AB. 17).

Declarations of fear of the defendant should only be admitted when there is "a manifest need for such evidence, i.e. if it is relevant to a material issue in the case." Selver v. State, 568 So. 2d 1331, 1334 (2d DCA 1990), citing United States v. Brown, 490 F.2d 758, 774 (D.C. Cir. 1973). There was no "manifest need" in this particular case because the State had already addressed the credibility of their witnesses and justified their reluctance to come forward without unnecessarily impugning the character of Mr. Smith. The jury had already heard that Ulyssess Johnson and Breon Williams were reluctant to come forward because they were afraid of getting in trouble for being involved, and yet the prosecutor pushed them

further, soliciting their agreement that they were afraid of Mr. Smith. (T13. 644, T:14, 859). This testimony was unnecessary and specifically elicited to impugn Mr. Smith's character.

REPLY TO CLAIM 6:
APPELLATE COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL IN FAILING TO RAISE THE FUNDAMENTAL ERROR IN ADMITTING EVIDENCE OF UNCHARGED CRIMES.

The State argues that the testimony that Mr. Smith was harboring Mr. Haney as a fugitive was relevant because it gave context to a confession that otherwise seemed somewhat untimely. (AB. 20). The context of the conversation is not something the jury is instructed to consider when evaluating the credibility of the witness. See *Fla. Standard Jury Instruction in Criminal Cases 3.9*. While tangentially relevant to the witness's credibility, it should have been excluded as more prejudicial than probative. Fla. Stat. § 90.403. Under Rule 403, even admissible evidence should be excluded if its relevance is "substantially outweighed by the danger of unfair prejudice." Id. The Court in Hernandez v. State explained that attorneys may delve into areas that affect the credibility of witnesses, but qualified that "inquiry into collateral matters should not be permitted, unless there is reason to believe it may tend to promote the ends of justice and it seems essential to the true estimation of the witness's testimony by the jury." Hernandez v. State, 360 So. 2d 39, 41 (Fla. Dist. Ct. App. 1978) citing Wallace v. State, 41 Fla. 547, 26 So.

713, 722 (1899). The argument that the context of the confession makes it more credible is attenuated and does not make the inclusion of collateral crime evidence "essential."

REPLY TO CLAIM 7:
THE STATE COMMITTED PROSECUTORIAL MISCONDUCT IN IMPLYING THAT MR. SMITH WAS GUILTY BY ASSOCIATION WITH ITS OWN WITNESSES.

Extraneous reflection on the crimes and/or criminality of others is irrelevant to the defendant's guilt or innocence and ought to be excluded as highly prejudicial. Johnson v. State, 559 So. 2d 729, 729 (Fla. Dist. Ct. App. 1990), aff'd, 575 So. 2d 1292 (Fla. 1991); Roach v. State, 146 So. 240, 240 (1933).

To attribute the witnesses' criminal activity to the defendant is factually incorrect, irrelevant and prejudicial.

> The rule 'res inter alios acta' forbids the introduction against an accused of evidence of collateral facts which by their nature are incapable of affording any reasonable presumption or inference as to the principal matter in dispute, the reason being that such evidence would be to oppress the party affected, by compelling him to be prepared to rebut facts of which he would have no notice under the logical relevancy rule of evidence, as well as prejudicing the accused by drawing away the minds of the jurors from the point in issue.

Watkins v. State, 163 So. 292, 293 (1935).

This rule has been applied in similar circumstances to the Mr. Smith's case, where someone else's crimes are discussed and used against the defendant. Skipper v. State, 319 So. 2d 634, 638 (Fla. 1st DCA 1975). In Skipper, the prosecution

devoted much of its presentation to testimony regarding the defendant's son's crimes, which led up to the crime for which the defendant was on trial. While the defendant's son's crime discussed in Skipper became a feature of the trial, it was also much more relevant than the collateral crimes discussed in relation to Mr. Smith in the instant case. In Skipper, the court found that a minimal explanation of the son's crime would have sufficed to balance the relevance of the information with the prejudice to the defendant.

In Mr. Smith's case, there was no need to attribute witnesses' criminality (both real and imagined) to Mr. Smith. The State argues that there was "overwhelming" evidence of Mr. Smith's guilt, but the evidence was largely non-eyewitness testimony supplied by the very witnesses whose criminality was attributed to Mr. Smith. (AB. 22). By attributing their criminality (and thereby their credibility issues) to Mr. Smith, the State effectively glossed over legitimate issues of credibility that ought to have been assessed by the jury.

REPLY TO CLAIM 8:
APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THE FUNDAMENTAL ERROR OF THE STATE INTRODUCING DETECTIVES' OPINIONS AS TO MR. SMITH'S LACK OF REMORSE.

The State argues that all of the detectives' opinions regarding Mr. Smith's guilt and lack of remorse are admissible because they are interrogation techniques

meant to elicit a response from Mr. Smith.[1] (AB. 23-24). However, the cases respondent cites to describe instances where interrogation techniques led to an admission. See McMillian v. State, 214 So. 3d 1274, 1281 (Fla.2017), McWatters v. State, 36 So. 3d 613, 638 (Fla. 2010), and Jackson v. State, 18 So. 3d 1016, 1022-23 (Fla. 2009). Mr. Smith did not make any admissions during his interrogation. Furthermore, in Jackson, the trial court specifically instructed the jury that the information from the interrogation was meant "only to be considered to establish the context of Jackson's reactions and responses." This instruction let the jury know that the statements of the JSO officers were not necessarily truthful, but were instead calculated to provoke the defendant. In Mr. Smith's interrogation, the statements regarding lack of remorse did not provoke any admissions, only denials, which have little relevance when not offered to juxtapose a later admission. Lacking an admission or even a relevant response, the derogatory depictions of Mr. Smith should have been omitted as they served only to prejudice the jury by subjecting them to the detectives' opinions on Mr. Smith's character, guilt, and lack of remorse.

REPLY TO CLAIM 9:
CUMULATIVE EFFECT

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[1] The State argues that the prosecution in this case did not argue that the defendant was "a shell of person who don't give a crap about society." (AB. 25). While the prosecutors themselves never uttered those words, the argument was nonetheless put before the jury in the form of recorded evidence from the defendant's interrogation. (T.15: 1190-91).

Cumulative error analysis allows the court to consider the cumulative prejudice of errors which, individually, might be dismissed as harmless. Brooks v. State, 918 So.2d 181, 202 (Fla. 2005). When viewed in total, appellate counsel's errors constitute a denial of due process and denied Mr. Smith a meaningful direct appeal.

The State correctly asserts that where an individual claim does not "constitute a basis for relief" then a "cumulative error claim cannot warrant relief." (AB. 25). This should not be construed to mean that if a defendant does not receive relief on an individual claim, then a cumulative claim must also fail. A claim could "constitute a basis for relief" and not actually receive relief because the prejudice is not sufficient, however when viewed cumulatively with other errors the cumulative prejudice may warrant relief.

> Where multiple errors are discovered in the jury trial, a review of the cumulative effect of those errors is appropriate because "even though there was competent substantial evidence to support a verdict ... and even though each of the alleged errors, standing alone, could be considered harmless, the cumulative effect of such errors [may be] such as to deny to defendant the fair and impartial trial that is the inalienable right of all litigants in this state and this nation."

McDuffie v. State, 970 So. 2d 312, 328 (Fla. 2007) quoting Brooks v. State, 918 So.2d 181, 202 (Fla.2005).

In this case the fundamental errors and preserved errors not raised by appellate counsel, when viewed together, denied Mr. Smith a fair appellate review and warrant relief in the form of a new direct appeal.

CONCLUSION AND RELIEF SOUGHT

For all the reasons discussed herein, Mr. Smith respectfully urges this Court to grant habeas relief, set aside his conviction and sentence, and grant him a new direct appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition for Writ of Habeas Corpus has been furnished via electronic service to Lisa Hopkins, Assistant Attorney General, on this 3rd day of October, 2019.

s/ *Karin L. Moore*
KARIN L. MOORE

CERTIFICATE OF FONT

I hereby certify that the foregoing Petition for Writ of Habeas Corpus was generated in Times New Roman 14 point font, pursuant to Fla. R. App. P. 9.210.

s/ *Karin L. Moore*
KARIN L. MOORE