IN THE SUPREME COURT OF FLORIDA
CASE NO. SC 12-53

STEPHEN SMITH
Appellant,
v.
STATE OF FLORIDA
Appellee,

ON APPEAL FROM THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR CHARLOTTE COUNTY, FLORIDA

REPLY BRIEF

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PRELIMINARY STATEMENT

This reply brief addresses Issues I and II of Appellee's Answer brief. (Received on 7/25/2012) As to all other issues, Mr. Smith stands on the previously filed initial brief and Habeas Corpus petition.

ISSUE I

> THE POSTCONVICTION COURT PROPERLY DENIED SMITH'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE. (AS STATED BY APPELLEE)

The lower court and the appellee's reliance on Conde v. State, 860 So.2d 930 (Fla. 2003) is misplaced. The facts of Conde differ markedly with the facts of the case at bar:

> On January 13, 1995, Conde picked up Rhonda Dunn, a prostitute, and took her to his apartment. After twice engaging in sexual relations, Dunn lay on the bed with Conde for approximately five minutes and then got up to enter the bathroom. Conde followed her from behind and began to manually strangle her. A struggle ensued, in which Dunn suffered numerous defensive wounds and fell to the floor with Conde on top, continuing to strangle her. Dunn eventually died from asphyxiation. Conde then disposed of her body by driving it to another location and leaving it on the side of the road.
>
> This sequence of events had occurred on five prior dates. On each occasion, Conde picked up a prostitute, they engaged in sexual relations at his apartment, and Conde then strangled the victim to death, later depositing the body along the side of a road. This series of murders

> occurred over the course of six months and was preceded by the breakup of Conde's marriage, which occurred when his wife discovered that Conde was using the services of prostitutes. Conde later confessed to all six murders and stated that after each murder, he knelt over the deceased body and verbally blamed the victim for his marital problems.
>
> Conde was arrested in June of 1995, after fire rescue personnel discovered a woman, naked and bound in duct tape, trapped in his apartment. During the investigation of that crime, evidence was discovered in Conde's apartment that linked him to the series of murders. Upon his arrest, Conde was read his *Miranda* rights, consented to searches of his apartment and automobile, and consented to the taking of saliva and blood samples. He was interrogated over the course of the afternoon and evening of his arrest date but did not admit to the crimes. The next day, he was allowed to telephone his family, after which he confessed to each murder. He was charged by a six-count indictment with the first-degree murder of all six victims. The counts were severed, and his first trial, held in October 1999, was for Dunn's murder. The trial court permitted the State to introduce *Williams* rule evidence of the other five murders. On the basis of DNA, fiber, tire, and shoe evidence, together with medical testimony and Conde's confession, the jury found Conde guilty of first-degree murder. Id. at 937.

In Mr. Smith's case, there were no multiple murders, no issue of identity that this inflammatory statement about raping a female guard could establish.

After the ladder collapsed, Smith was observed at the ladder, still inside the perimeter, entered Dorm A and waited to be arrested. (FSC ROA Vol. XXX p. 417-420). The Conde court went on to hold:

> Similar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue, including, but not limited to proof of... intent,... plan,...identity, or absence of mistake or accident, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity." § 90.404(2)(a), Fla. Stat (2002. Such evidence is called *Williams* rule evidence in reference to this Court's decision in *Williams v. State*, 110 So.2d 654 (Fla. 1959). " The test of admissibility [of *Williams* rule evidence] is relevancy. The test of inadmissibility is a lack of relevancy. *Id* .at 660. However, a trial court may not allow relevant collateral crimes to become a feature of the trial, which occurs when inquiry into the collateral crimes "transcend[s] the bounds of relevancy to the charge being tried" and the prosecution "devolves from development of facts pertinent to the main issue of guilt or innocence into an assault of the character of the defendant."Id. at 945.

In Mr. Smith's case, the statement made to inmate Lykins, (FSC ROA Vol. XXXI p. 604-605) and the statement made to Agent Uebelacker (FSC ROA Vol. XXXV p. 1173), was just that; *a statement*. It was not similar fact evidence of other crimes, wrongs or acts. This was clarified by Attorney Sullivan at the evidentiary hearing:

> Q. And based upon your knowledge of the law in that area, crimes that are inextricably intertwined with the crime in question, are those crimes that you cannot limine out usually?
> A. Right.
> Q. But for that to happen, there has to have been a crime embedded within the overall crime that you're trying, correct?
> A. Well, I guess, or there's an – there could be an

> attempt. I don't know.
>
> Ordinarily you – you're right, ordinarily you'd find it in the context of this crime was committed and that crime was committed, only one of them was charged, the evidence of them both comes in because they all happened at the same time.
>
> Q. And of course, in this situation with Mr. Smith there was no crime committed, nor is there a period of the intent to commit it.
>
> A. Right, there was no rape or attempted rape committed.
>
> Q. It was just words.
>
> A. Yeah, it was just words, right.
>
> Q. And those words would be prejudicial to Mr. Smith in his murder trial?
>
> A. I think so yes. (PCR Vol. VIII p. 1412-1414).

The failure to limine out this inflammatory and highly prejudicial statement resulted in the State using said statement as a non-statutory aggravator in the closing argument:

> The defendant said if it is a female officer he was going to get a piece of you know what before he escaped, and if he died he wanted to be in that position. That is what he thinks of human life and the situation. (FSC ROA Vol. XXXVI p. 1354)

Without this inflammatory and highly prejudicial statement to inflame the passions of the jury; the evidence indicated that Steven Smith merely assembled the escape ladder and did not kill or rape anybody. He was a minor participant in this felony murder.

Not only did this testimony concern an uncharged act, but it concerned an act

that never took place to begin with. There was no evidence of a sexual attack on Officer Lathrem and the State did not even allege that Mr. Smith or any of his co-defendants raped or attempted to rape Lathrem. Additionally, the testimony was not similar fact evidence or Williams Rule evidence. The testimony had no relevance to the crimes charged and the testimony was unfairly prejudicial and inflammatory. See Fla. Stat. § 90.403.

The testimony was an attack on Mr. Smith's character. The testimony deprived Mr. Smith of a fair trial. The impermissible character attack impaired Mr. Smith's presumption of innocence and was an improper basis for the jury to render a verdict against him. The jury was led to believe that Mr. Smith was disgusting, dangerous, a sexual threat to women, and of very bad character.

This statement was made a feature of Smith's trial on several occasions. First, the statement made to inmate Lykins, (FSC ROA vol. XXXI p. 604-605). Next, the statement made to Agent Uebleacker (FSC ROA XXXV p. 1173). In that statement, Smith clearly renounces any intent to rape the murder victim by saying " No. My intentions were to get the hell out of here". Id. And again, when pressed by Uebleacker, Smith dismissed the possibility of rape by saying "nah. Too much fear, scared." Id. In spite of this obvious abandonment of any attempted rape; (and there was no attempt to even abandon). The State attorney in his closing

highlighted the statement for the sole purpose of inflaming the passions of the jury. The prejudice is obvious. Mr. Smith's jury recommended death by a vote of 9 to 3. Without the prejudicial sexual overtones cultivated by the State; at least 3 other jurors would have sentenced Mr. Smith for what he did. That is, assemble a ladder while another defendant killed the victim making Smith a minor participant. Instead, the jury was offended by the sexist comments and recommended death for something Smith may have thought, rather than did. Relief is proper because the prejudicial effect far outweighed the probative value of an event which never happened.

ISSUE II

THE POSTCONVICTION COURT PROPERLY DENIED SMITH'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE (AS STATED BY APPELLEE)

Appellee's contention that counsel failed to establish the basic premise of his claim, i.e., that counsel failed to provide the prison records to his expert. (See Answer Brief, p. 35). is rebutted by the trial testimony of Dr. Schaerf.:

> Q. Let me lay a few ground work things down before I get into what your psychiatric evaluation was. And the first issue kind of ground work is - and Mr. Sullivan addressed this with you partially - is your record review. Okay. You told us what you reviewed, right? You went through a list of things?
> A. I went through a short list. Mr. Sullivan repeated

> some things. There are some things that he did not mention but, yes, sir.
> Q. Let me ask you this, did you have the opportunity to review the fourteen thousand pages of reports and documents that are - that are relevant to this case from the Florida Department of Law Enforcement?
> A. No, sir.
> Q. Did you have an opportunity to review the 1,500 to 2,000 pages of medical and classification records from the Department of Corrections related to the defendant Smith?
> A. No, sir.
> Q. Did you have opportunity to review the testimony - well, let's say the statements to Florida department of Law Enforcement, the depositions of and the trial testimony of witnesses Kenneth Lykins and witness - I just lost his name - Jessie Baker?
> A. No, sir.
> Q. Okay. You didn't have an opportunity to review the over hour-long video disk of the defendant's walk-through confession in this case, did you?
>
> A. Well, actually, I was able to review the transcript of that. I attempted to review the actual video, but it did not turn out on the disk that I was given.
> Q. And psychiatrically speaking, wouldn't it have been helpful to have seen not only what he said but how he said it on the video?
> A. Well, quite frankly, Mr. Feinberg, *the reason I didn't look at those records was, A, I wasn't provided them,* (emphasis added) (FSC ROA Vol. XLI p. 815-16)

Regarding the alleged strategy of Sullivan focusing only on Smith's abusive and horrific childhood (See page 36 of Appellee brief), and regarding his failure to provide his expert with the DOC records. Mr. Sullivan testified at the evidentiary hearing:

BY MR. SULLIVAN:

But I was shocked when I read your motion to learn that there was an allegation I hadn't given those to Dr. Scharef. I thought you must have been wrong, but I'm told by everyone that I didn't give them to Mr. Scharef. I don't have an independent recollection that I did. And if he says then I did not, then I'd take his word for it.

Q. And they were records referencing Mr. Smith's mental health.

A. Yes. There was - again, there was - Mr. Smith had been in Florida prison so long, he had a gigantic stack of stuff, much of - I went through a stack of stuff. And only a portion of it was mental health records, but there was certainly a portion of them that were mental health records.

There were evaluations by psychiatrists and psychologists and therapists, and diagnoses made and stuff like that. But I don't - that wasn't the focus of what I wanted Dr. Scharef to look at, but I should have given that to him. (PCR Vol. VIII p. 1372-1373).

Mr. Sullivan then testified as to what he would have done had he been aware of the DOC mental health records in this manner:

A. Right. Because if I had to live with the case for a couple years and with Mr. Smith and all the record, I didn't really see - see any there, so -

Q. Okay. And if you reviewed any mental health records at this time, this late date, and that those mental health records indicated that Mr. Smith had mental health problems, and you, after reviewing that material, you would be making a - a retroactive decision, so to speak.

I mean, you would be looking at it and saying at this point, "well, if I had this material I would have done it," that's all just in retrospect, correct?

A. Right.

MR. VIGGIANO: One moment, Your Honor.

THE COURT: Yes, sir.

(Discussion was held off the record.)

BY MR. VIGGIANO:

Q. If you have evidence in those records that you apparently did not provide to Dr. Schaerf -

THE COURT: may we clarify 'those records"? Because there's been reference by Mr. Sullivan, the witness to several records.

You're referring now to the Department of Corrections records?

MR. VIGGIANO: Yes, Your Honor.

THE COURT: Okay. I apologize for interrupting you, but it - I was not clear.

MR. VIGGIANO: Yes, ma'am.

BY MR. VIGGIANO:

Q. The department of Correction records that are in question, those - those pages that you did not provide to Dr. Scharef, if those records did show evidence of mental problems that Mr. Smith was suffering at the time, that's not something you would have ignored, correct?

A. Right.

Q. And you would have presented that to Dr. Scharef for his review and evaluation.

A. Well, obviously I did not. I did not ignore them, because I was familiar with the records, I knew I had them. I had reviewed all of those DOC records, and apparently I did not give them to him.

So, I can't answer your question, yes, I obviously would have given them to him.

Q. If there were evidence of mental health issues in records –

A. Yes.

Q. – and you had the possibility of developing statutory mitigation, it's not something you, as a defense attorney, would have ignored –

MS. GUTMORE: I'm going to object based on speculation, Your Honor.

THE COURT: He didn't finish the question yet.

BY MR. VIGGIANO:
Q. That's not something that you, as a capital defense attorney, would have ignored.
A. It's something that I should not have ignored, right. (PCR Vol. VIII p. 1380-1382)

Regarding the tactical ramifications of Mr. Sullivan's failure to provide his expert with proper evidence of Mr. Smith's mental state at the time of the crime, Mr. Sullivan testified at the evidentiary hearing in this manner:

Q. And they were records referencing Mr. Smith's mental health.
A. Yes. There was – again, there was – Mr. Smith had been Florida prison so long, he had a gigantic stack of stuff, much of – I went through a stack of stuff. And only a portion of it was mental health records, but there was certainly a portion of them that were mental health records.

There were evaluations by psychiatrists and psychologists and therapists, and diagnoses made and stuff like that. But I don't – that wasn't the focus of what I wanted Dr. Schaerf to look at, but I should have given that to him.
Q. With respect to your focus overall, you were not trying to develop any mental health mitigation, were you?
A. I felt like the compelling story of the terrible life that Mr. Smith had gone through as a child right up until – and from stepping from that terrible childhood into institutions was our most strongest mitigation that we had.

I thought that it would reach Girard (phonetic) better than focusing more on, you know, a mental illness or something like that, so yes. (PCR Vol. VIII p. 1373-1374).

This Court in Orme v. State, 896 So.2d 725,732 (Fla. 2005) held that:

> The trial court concluded in its order denying postconviction relief that Orme's defense counsel acted reasonably by not presenting bipolar disorder as a defense during the guilt phase and as a mitigator during the penalty phase, stating that there was some disagreement on how to diagnose Orme at the time of trial and at the postconviction proceeding, even with the additional information presented. The court noted that because the experts agreed that Orme was addicted to cocaine, and the drug addiction was a factor in his murder trial, it was reasonable for trial counsel to present only this evidence. We disagree and find that counsel's performance was deficient in both the investigation of Orme's mental health and the presentation of evidence of Orme's mental illness to the jury. Id at 732.

At the evidentiary hearing, the following testimony was elicited regarding Mr. Smith's mental state:

> Q. You testified earlier that you reviewed the deposition of Dr. Willingham; is that correct?
> A. Yes.
> Q. And he was listed as the State's mental health expert in the trial in the instant case. Does that seem to be accurate?
> A. Sounds correct to me, yes.
> Q. Okay. And he evaluated the defendant on June 28th, 2006.
> A. That sounds correct to me, yes.
> Q. Okay. He didn't testify at trial, did he?
> A. I don't believe he did.
> Q. So the only testimony you would have had to review was the deposition?
> A. I don't – yes, I think that is correct.
> Q. Okay.
> A. So it wasn't court testimony, it was deposition testimony.

Q. Okay. Do you know which records were provided to Dr. Willingham?

THE COURT: Excuse me.

So we're clear, the June 28th, 2006 date, does that relate to the deposition of Dr. Willingham or the date that Dr. Willingham interviewed the defendant? I'm unclear on that.

MS. GUTMORE: No problem, Your Honor. The evaluation date, actually – they're – they're the same date, Your Honor.

THE COURT: Okay.

MS. GUTMORE: One moment. I have it. The deposition was taken on the same date that he evaluated the defendant, which is June 28th, 2006.

THE COURT: Thank you.

BY MS. GUTMORE:

Q. Do you believe that's accurate, Dr. Maher?

A. That sounds accurate to me, yes.

Q. Do you know which documents that Dr. Willingham used to formulate his mental health conclusions with respect to Mr. Smith in 2006?

A. I don't have an independent recollection of it. I think there were some *prison documents* and some documents related to his life and history before his incarceration. (Emphasis added).

Q. Okay. And Dr. Willingham, who evaluated the defendant between the guilt phase and the penalty phase and the trial in this case, concluded with respect to Axis I, attention deficit hyperactivity disorder, polysubstance abuse by history, dissociative elements under stress and pseudo-hallucinations by history, is that correct?

A. Yes. (PCR Vol. VIII p. 1318-1320).

Further testimony of Dr. Maher confirmed an Axis I diagnosis, (and as explained in Appellant's initial brief, a valid basis for seeking statutory mental mitigation) by Dr. Willingham in this manner:

BY MR. KILEY:
Q. And, Doctor, counsel for Sovereign mentioned that you reviewed the deposition of a Dr. Willingham? Was it Willingham, Williamson?
A. Willingham, yes.
Q. And he was the State expert that they had retained for Mr. Smith's trial for the murder of Darla Lathrem. Isn't that correct, sir or not?
A. To the best of my knowledge, that's correct.
Q. And Dr. Willingham, the state expert, diagnosed Mr. Smith with an Axis I diagnosis. Do you recall that, sir?
A. I recall that he made a diagnosis of dissociative experiences.
Q. And that's an Axis I isn't it?
A. Yes, sir, it is. (PCR Vol. VIII p. 1335-1336)

Regarding the Axis issue of proper diagnosis of mental illness as it applied to Mr. Smith, Dr. Schaerf testified as follows at the evidentiary hearing:

Q. So you weren't a forensic psychiatrist at the time you examined Mr. Smith, correct?
A. Well, I was board eligible.
Q. Okay. Sir, we talked about Axis 1 and Axis 2 diagnosis. Would you please describe the differences between Axis 1 and Axis 2 diagnosis?
A. Well, Axis 1 and Axis 2 – actually,, as you know, there's five axes.

But Axis 1 is the axis or area where the major mental illnesses are described, the major conditions, with the exception of a few, that go to Axis 2.

Axis 2 is reserved for the personality disorders or traits, as well as intellectual functioning like mental retardation.

So the major mental illnesses like schizophrenia, bipolar disorder, major depression, et cetera, are all an Axis 1.

And the personality disorders and the intellectual

functioning issues like a learning disorder or mental retardation are an Axis 2.
Q. And post-traumatic stress disorder, that would be Axis 1 diagnosis, correct?
A. Yes, it would.
Q. And anxiety disorder would be an Axis 1 diagnosis, correct?
A. Well, a specific anxiety disorder would, yes.
Q. Okay. How about dissociative illness, would that be an Axis 1 diagnosis?
A. Dissociative disorder, yes.
Q. Okay. Are you familiar with Dr. Willingham?
A. Yes.
Q. Did you get a chance to review any of his records at the time when you examined Mr. Smith, or any of his notes?
A. I really can't remember.
Q. Do you recall Dr. Willingham diagnosing Mr. Smith with a dis – excuse me, a dissociative illness disorder?
A. No.
Q. You're not stating that he didn't have it, you just can't recall; is that correct?
A. I can't recall.
Q. And Dr. Willingham was a state expert, do you recall that?
A. I actually do not recall that.
Q. But you don't remember Dr. Willingham testifying at trial, do you?
A. No but as you know, the rule was invoked and I came on a Saturday and whatever lawyer it was, I do not.
(PCR Vol. IX p. 1472-1474).

Regarding the records which were *not* provided to Schaerf, the following testimony took place at the evidentiary hearing:

> Q. Having reviewed the Defense Exhibit B which is attached to their motion, which are the defendant's mental health and medical records from the Department of Corrections, would that change your diagnosis that you gave back in 2006 during the penalty phase that Mr. Smith suffered from polysubstance abuse in remission, major depression in remission, and a social personality disorder and a history of ADD?
> A. I'm trying to put together the answer, because it really has two prongs.
> Q. Okay. However you prefer to phrase it.
> A. One prong would be if a diagnosis in a exercise such as the one during his penalty phase were presented and were in an attempt to get significant so a jury can understand what makes up Stephen Smith, one could say that you might want to add that diagnosis and you could, but it would not change relevance.
>
> And the way you would add it would be post-traumatic stress disorder in remission, the same way you could say, well, why don't you add the other 12 or 13, because many of those are either in remission or not quite accurate or not relevant.
>
> One of the issues, of course, is psychiatrists have a hard time entering courtrooms, because we don't have very good validity sometimes and we don't have a blood test or a CAT scan that we could show a jury or – some kind of significant, accurate diagnostic tool.
>
> We also suffer from the issue of not having a unified field approach, where, as we know, psychologists/psychiatrists often differ, have different opinions. (PCR Vol IX p. 1442-1443).

The above contention by Schaerf regarding remission, accuracy and relevance is a prime example of a *post hoc* rationalization condemned in Wiggins v. Smith, 539 U.S. 510, 526 (2003).

Regarding the DOC documents not provided to Dr. Schaerf, Dr. Maher testified as follows:

> Q. Now, is there any doubt in your mind that depressive disorder is properly diagnosed as an Axis 1 disorder?
> A. I don't know if it's properly diagnosed.
>
> Post-traumatic stress disorder includes depression, and depression very often is associated with post-traumatic stress disorder. They are closely related diagnoses.
>
> Some people tend to break their diagnoses apart into different small parts, some people tend to put them together.
>
> The fact that post-traumatic stress disorder was written and crossed out leads me to believe that post-traumatic stress disorder was one of the other diagnoses that these people were considering.
>
> The fact that depressive disorder not otherwise specified, which means they see that their depression is clinically significant, they think it's a disorder, but they're not quite sure how to characterize it, leads me to believe that this is another documentation of support that he was depressed, as a manifestation of post-traumatic stress disorder. And the fact that they didn't reach that conclusion at the time is not strong evidence that he didn't suffer from the disorder.
> Q. Well, my point being, sir, and the crux of the claim, that if anyone were provided with these documents from the Department of Corrections, there are Axis 1 disorders diagnosed by the staff of the Department of Corrections.
> A. Yes, there are, and they're repeated and they're consistent and not identical.
>
> THE COURT: And not identical?
>
> THE WITNESS: Not identical.
>
> BY MR. KILEY:
> Q. The State, Dr. Willingham, was not called. Correct, sir?

A. That's – to the best of my knowledge, he was not called.
Q. And his deposition indicates a diagnosis of Axis 1?
A. Yes, I believe it does.
Q. Dr. Scharef at trial, who was not provided with these records at trial, as he testified in trial that he was not provided with these records, diagnosed Mr. Smith as having antisocial personality disorder. Correct, sir?
A. Yes.
Q. So, sir, would you or would you not opine that anyone looking at the Department of Correction records not supplied to Dr. Schaerf, would be able to discern that this man was suffering from an Axis 1 disorder and not antisocial personality disorder; the Axis 1 disorder being depression, being anxiety, being post-traumatic stress. Is that safe to assume, sir?
A. Yes.
Q. All right. Now we have page 27, Bates stamped 6167, date of report 2/9/00. Do you see it, sir?
A. I have it in front of me, sir.
Q. It says mental health of – Part IV, mental health history: History and evaluation and treatment outside of prison; outpatient treatment, checked "yes." Do you see it, sir?
A. Yes.
Q. Inpatient treatment, checked "yes." Do you see it, sir?
A. I do.
Q. Suicide attempts, checked "yes."
A. I see that.
Q. Psychotropic medications, checked "yes."
A. Yes. I –
Q. Now, first of all, Doctor, is it proper to give someone with antisocial personality disorder psychotropic medication?
A. Psychotropic medications are not appropriate for that diagnosis in the absence of other diagnoses.
Q. So, would you say a trained clinician, such as

yourself, if provided with just this page, outpatient treatment, inpatient, psychotropic medication –

THE COURT: Slow down, Mr. Kiley.

BY MR. KILEY:

Q. – outpatient treatment, inpatient treatment, psychotropic medication and suicide attempts, any one of these criterial would prompt a trained professional to look further?

A. Certainly any one would prompt a trained professional to look further for a diagnosis beyond a personality disorder diagnosis, yes.

Q. And did Ms. Gutmore rather skillfully indicate to you that around 2000 Mr. Smith's PTSD episodes were in remission?

A. I don't know that that's what she said. What she asked me was, were there documentation of those continuing in the record, and I said I believed there were not.

Q. But did you also testify that once you have PTSD, you will have it, it doesn't go away by itself without extensive psychiatric treatment, sir?

A. In his case, that is correct, yes.

Q. And in his case, did you not testify on direct examination that once Booston or –

MR. KILEY: A moment, Your Honor.

THE COURT: Yes, sir.

(Discussion was held off the record.)

THE COURT: The word you used, was it F-U-S-T-O-N, the individual who was identified as the stabbing victim in the Department of Corrections; is that what you were referring to in this last question.

MR. KILEY: Yes, Your Honor, but I was confused. It was a man named Beaston who beat with a blunt instrument a man named Fuston –

THE COURT: Okay.

MR. KILEY: – first before the killing of Darla Lathrem. Right?

THE WITNESS: It is my understanding that's the

> chronology of events, yes.
> BY MR. KILEY:
> Q. And was it your testimony on direct examination, that could have triggered mr. Smith and probably did trigger Mr. Smith's anxiety and post-traumatic stress disorder. Correct, sir?
> A. It is my conclusion, more likely than not, it did in fact trigger that.
> Q. Then Officer Darla Lathrem was again murdered by Richard Eaglin.
> A. That's my – it is my belief that that's an accurate description of events, yes. (PCR Vol. VIII p.1341-1346).

Prejudice

Mr. Smith was denied a fair adversarial testing of the evidence due to trial counsel's failure to provide his expert with the documentation needed to establish statutory mental mitigation. Mr. Smith received a recommendation for death by a vote of 9 to 3. Had statutory mental mitigation been established and the non-statutory aggravator been ruled out; the outcome would have been different.

CONCLUSION AND RELIEF SOUGHT

Based on the facts and arguments presented above and in Mr. Smith's initial brief and Habeas Corpus petition; Mr. Smith respectfully moves this Honorable Court to:

1. Vacate the conviction and sentence of death
2. Remand for a new trial or in the alternative
3. Remand for a new penalty phase.

CERTIFICATE OF SERVICE

I HEREBY CERTIFIY that a true copy of the foregoing Reply Brief has been furnished by United States Mail, first class postage prepaid, to all counsel of record on this 28th of August, 2012.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFIY that the foregoing Reply Brief was generated in Times New Roman, 14 pursuant to Fla. R. App. P. 9.210.

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