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

INITIAL BRIEF OF APPELLANT

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REQUEST FOR ORAL ARGUMENT

The resolution of the issues in this action will determine whether Mr. Smith lives or dies. This Court has allowed oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be appropriate in this case, given the seriousness of the claims involved and the fact that a life is at stake. Mr. Smith accordingly requests that this Court permit oral argument.

CITATION KEY

The record on direct appeal of Mr. Smith's trial shall be cited (FSC ROA Vol. # p.#). The record of Mr. Smith's evidentiary hearing shall be cited as (PCR Vol. # p.#)

STATEMENT OF THE CASE AND FACTS

I. PROCEDURAL HISTORY

Stephen V. Smith was indicted on December 3, 2003, along with Dwight T. Eaglin and Michael Jones. Mr. Smith was indicted for two counts of first degree murder. (FSC ROA Vol. I p. 1-2). The Honorable William L. Blackwell presided over the jury trial conducted in this case on June 19-23, 2006. After hearing all of the evidence, the jury recommended that Mr. Smith be sentenced to death by a vote of 9-3. (FSC ROA Vol. XX p. 3909). On August 18, 2006, the trial judge

followed the jury's recommendation and sentenced Mr. Smith to death for the murder of CCI Correction Officer Darla Lathrem. A timely appeal was filed and the Florida Supreme Court denied relief. See Smith v. State, 998 So.2d 516 (Fla. 2008). The United states Supreme Court Petition for writ of certiorari was denied on April 20, 2009. See Smith v. Florida, 129 S.Ct. 2006, 173 L. Ed2d 1101, 77 USLW 3575. Mr. Smith's 3.851 motion was timely filed. An evidentiary hearing was held on September 22, 2011. The post-conviction court entered its Corrected Final Order Denying Motion for Postconviction Relief on December 2, 2011. The Notice of Appeal was filed on December 20, 2011. This appeal follows.

EVIDENTIARY HEARING FACTS

A. TESTIMONY OF DR. MICHAEL SCOTT MAHER:

After reciting his qualifications, Dr. Maher was qualified as an expert as a medical doctor with an expertise and a diplomate in forensic psychiatry without objection from the State. (PCR Vol. VIII p. 1230-1236). Dr. Maher was retained to evaluate Mr. Smith on September 14, 2009. (PCR Vol. VIII p. 1238). In preparation for his meeting with Mr. Smith, Dr. Maher reviewed social service records going back to Rhode Island, records related to his criminal offenses, as well as records related to treatment that he had received, trial testimony of Dr. Schaerf, and Department of Corrections records. (PCR Vol. VIII p. 1239). Dr. Maher had

also reviewed raw data of the tests that Mr. Smith was given throughout his life. (PCR Vol. VIII p. 1240).

Regarding the crime itself, the following questions were asked and answered at the evidentiary hearing:Q. What did – did Mr. Smith appear to be evasive?

> A. He was at times evasive, yes. He was particularly evasive when talking about sexual issues related to his background, his experience, and especially his sister's sexual abuse in the family.
>
> In other respects he was not particularly evasive in –
>
> Q. So why was he evasive in regards to issues that could possibly help him?
>
> A. He was anxious, embarrassed. I believe he felt humiliated when talking about and revealing his sexual history, his family's sexual history.
>
> He clearly indicated a feeling of wanting to protect his sisters from being seen as helpless, pathetic, humiliated sexual objects. It took some encouragement on my part to get him to reveal and confirm information which was already in the records.
>
> Q. Did you confront him with this information on occasion?
>
> A. I did. I confronted him in the sense that I said, look, this is here, it's in these records, these people have said this, is it right or not, is it true or not.
>
> Q. Other than the sexual incidents, did you find Mr. Smith to be a frank individual in regard to his own experiences?
>
> A. He was extremely open and reluctant to talk about his criminal history, his background, his own bad acts, if you

will.
Q. Doctor, how could you be open and reluctant at the same time?
A. Well, he's open in some areas and some – with regard to some content, and reluctant with regard to some to other content.
Q. Well, specifically, was he open in regards to his prior murder, murder of an elderly woman in Fort Lauderdale, Florida?
A. Yes, he was.
Q. Now, what did he say about that?
A. He said, "I have no excuse. I don't really know what happened exactly, but I have no excuse," and made it clear that he was willing to talk about it if I wanted to talk about it.
Q. Did you want to talk about it?
A. Not – not particularly, not in a great deal of detail.
Q. Why not, sir?
A. I had a lot of information on the record and it wasn't particularly or specifically related to this proceeding. It certainly is relevant information, but while it is relevant information, it wasn't the top priority for that discussion.
Q. Sir, was he open and honest about the instant case, the murder of Darla Lathram?
A. To the best of my knowledge, he was. I had a good deal of information about that, so I had some idea of what other witnesses and individuals had said about it. I had a good idea in my own mind of what he believed really happened.
Q. You had read the trial transcript, had you not, sir?
A. Yes, I have.
Q. What did he tell you about the murder of Darla Lathram?
A. He told me it was a terrible thing. He told me he was engaged in an escape plan with these other men and he took responsibility for it.

He understood that – that he was responsible, even though he told me he didn't – he wasn't the one who

physically killed her or struck her. He did not offer excuses for himself.

Q. However, sir, did Mr. Smith tell you that the murder of Darla Lathram was planned by anyone?

A. No, he did not. He said it was a terrible thing and it happened. He said he didn't know it was going to happen.

I asked him, "Well, if you take responsibility for it, why would you take responsibility for it if nobody planned it?"

He said, "Well look, we were escaping and we knew that bad things could happen. I knew that bad things could happen. And this happened and it's not what I wanted, and I don't know if they wanted it or not" – referring to the other two men – "but it's not what I wanted. I didn't know it was going to happen, but I was there, I know I'm responsible for it."

He was very, very unambiguously clear about that.

Q. In other words, he admitted to being a participant in a felony murder.

A. Yes, he did.

Q. Would you say that would be against his best interests?

A. In some ways, yes. He had already been convicted, so it's a bit moot.

It was certainly – if I may add, it was certainly against his best interests, in that he – he is enough of a normal human being that he has a desire for people to see him in a positive light.

And he was – he understood that admitting to me that he was a murderer didn't cast him in a positive light, I wouldn't see him in a positive way, that I would judge him and condemn him as a murderer or that I might.

And he – he was uncomfortable with that. He wasn't as uncomfortable with that as he was with the sexual matters, but he was uncomfortable with that.

He told me that he had – had tried to communicate his sorrow and remorse to the guard's family. And he

believed that he had been forgiven at least by some of them, and that meant a lot to him.
Q. Doctor, did he tell you that due to an outbreak of violence against another inmate, the escape plan was accelerated, it was – it went off before scheduled?
A. Yes.
Q. Did he tell you that the reason Mr. England was caught is because they didn't have time to complete the proper making of the escape ladder?
A. He told me something like that.
His description of what we might call the technical aspects of his escape plan didn't sound to me as well organized and set out as he seemed to think it was, but he did say it didn't go off as expected, and form his point of view it – there were sudden unexpected events that occurred in the context of this escape.
Q. Did he say words to the effect, summation, "all of a sudden it was on"?
A. Yes, he did. He probably used words almost exactly to those words. (PCR Vol VIII p. 1243-1248).

Regarding the question of brain damage, Dr. Maher testified at the evidentiary hearing as follows:

Q. Okay. Doctor, from your meeting with Mr. Smith and your evaluation of the records that were provided to you from Mr. Sullivan's boxes, were you able to determine if Mr. Smith was brain damaged or suffered neurological impairment?
A. Based on my full evaluation of all the information I had, it is my belief more likely than not that he has brain impairment or brain damage.
And that's based on his entire history, his background, his history of abuse as a child, as well as the neuropsych testing, and to a smaller, lesser extent my interview with him.
Q. Okay. Let me jump ahead a little bit, sir.

Did you or did you not review neuropsychological testing raw data?
A. I did.
Q. From several testers?
A. Two testers, I think.
Q. Okay. Now, Doctor, did that indicate a discrepancy between his verbal and performance IQ?
A. Yes, it did.
Q. And was that difference approximately – or was it not, approximately 12 points?
A. Yes.

THE COURT: Will you repeat that question, please? The last question.

MR. KILEY: Yes, Your Honor. I'm desperately trying to keep from leading.

BY MR. KILEY:

Q. Did the raw data which you reviewed from prior the testers indicate a discrepancy between his verbal IQ and his performance IQ?
A. Yes. It did demonstrate a discrepancy in the percentile scored and it demonstrated a discrepancy that was clinically significant.
Q. And that was a difference of 12 points, sir?
A. That's correct.
Q. And what does that tell you, sir?
A. The discrepancy between verbal performance IQ is a broad indicator – and when I say broad indicator, it's nonspecific – but it is a broad indicator of some areas of the brain functioning significantly better than other areas, and that is an indicator of impairment, dysfunction, abnormal development, or injury of some kind.
Q. Did you determine that Mr. Smith was ambidextrous?
A. I determined that he was partially ambidextrous, yes.
Q. And what did that tell you, sir?
A. People who are ambidextrous are often ambidextrous because some part of their brain is unable to or limited in its able to perform the function that usually arises out of that area of the brain.

So, for example, if an individual has problems in the left motor area growing up, the area that controls the right hand, they will almost always become left-handed, because the brain shifts that function from the left side to the right side.

As an example of where, if there's impairment in the brain, the brain early on in life will shift that function, maybe not fully, but pretty completely to the other area.

And in that instance, you see people who are ambidextrous, they do – have one – they have a preference for the right side for some actions and a preference for the left side for others.

Q. Right. Other than the discrepancy in the test scores and the issue of Mr. Smith's ambidextri – ability to use his right hand as well as his left, were there any other symptoms of neurological defects that you observed from the material you reviewed and from your interview with Mr. Smith?

A. Mr. Smith has a manner and style of communication, which can be explained both by brain impairment and by other things –

THE COURT REPORTER: I'm sorry, which style of communication?

THE WITNESS: Manner and style of communication, which can be explained by brain damage or impairment, as well as other things.

In the context of his history and background in testing, it is my opinion that, upon interview, some of his pattern of disorganization in relating stories in a chronological fashion is related to neurological impairment.

So he had a pattern when he was – after he got talking, and when he would get going with a story, of – of trailing off into sort of disconnected pieces of the story, and then not getting back to the mainstream of the story. And that's a pattern that you see in people who were otherwise healthy, but brain injured.

It's also, however, a pattern that you see in other

psychiatric disorders, such as post-traumatic stress disorder, although he presents a complex case and the interview only adds some information to the testing conclusions.

BY MR. KILEY:

Q. So, is it your testimony here today that, although Mr. Smith may suffer from neurological defects, those defects are overwhelmed by more obvious diagnosis? For example, post-traumatic stress, extreme anxiety disorder.

How about dissociative disorder, did you find Mr. Smith to have a dissociative disorder?

A. Let me go back to you first question.

Q. Okay.

A. I do indeed believe that he has some neuropsychological deficits and I believe those are hidden and obscured, overwhelmed if you will, by the psychological, emotional, social, and other symptoms that he has acquired through his life beginning from childhood.

So I believe that he has some underlying brain problems, but they're very difficult to identify and diagnose because of the overwhelming burden of the other problems he has. (PCR Vol. VIII p.1248-1253).

Regarding dissociative experiences, the following testimony was elicited at the evidentiary hearing:

Q. Thank you, sir.

Doctor, did Mr. Smith describe or was it subsequently discovered by you by review of the records of his early childhood and his adolescent years that he had dissociative experiences?

A. Yes.

THE COURT: Dis – associative expeeriences?

MR. KILEY: D-I-S-S-O-C-I-A-T-I-V-E, dis –

THE COURT: Dissociative.

THE WITNESS: Yes, it was revealed to me that he had such experiences.

The first clear dramatic instance of that was documented during his adolescence and I don't believe indeed it was the first incident of it. It was a clear dramatic tragic instance of it.

Q. What is it?

A. Dissociative experiences are experiences that many people have, and some – many normal people have – occasionally report them under extreme stress. And they are experiences where one part of the brain, in a functional sense and also in a fundamental, physical and neurological sense, becomes essentially disconnected, disassociated with another with another part of the brain.

People will sometimes describe this as feeling that they're disconnected from their own bodies. They will also describe it as an out-of-body experience.

Sometimes women delivering babies will describe dissociative experiences. It's an experience which occurs under the circumstances of extreme stress to some people, not all people.

It can be an experience which occurs in the absence of any psychiatric diagnosis, but it also occurs as a symptom of psychiatric diagnosis, and particularly occurs in individuals who are exposed chronically and repeatedly to emotionally overwhelming stress. It is in that context it that exists in Mr. Smith's life and background.

Q. So, in other words, sir – or rather, I 'm still a little bit confused about this.

Does the dissociative experience happen while he's undergoing this abuse or does it happen while something else is happening? In other words, do you – does Mr. Smith's dissociative experience thing have anything to do with him being anally raped by his uncle Charlie –

A. Yes.

Q. – on a fishing boat?

A. Yes.

Q. Now, did the dissociative experience occur during the rape or afterwards, at a later period in time?

A. Both.

Q. Both.
A. And that's what makes it a manifestation of illness. So that an individual who's exposed to extreme stress and develops the psychological defense mechanism against that overwhelming emotional distress of disconnecting within themselves, disassociating within themselves, that individual then tends to repeat that pattern of what might be called "internal escape" from their own feelings, When they encounter other circumstances of stress; sometimes overwhelming stress; sometimes stress that in itself is not overwhelming, but remind them of the overwhelming stress.
Q. Much like – would it be much like someone who was, say in Vietnam and sees a Vietnam era infantry helmet and that would trigger unpleasant memories for that individual that saw the helmet?
A. Indeed it is in the combat context that we've learned a lot about this in the Vietnam era.

And sometimes the stress, as you point out in that example, that triggers the dissociative episode, is only a stress to that individual. So the Vietnam era helmet isn't a stress to anybody else.
Q. See the world –
A. But because it evokes particular memories for that individual, it's a stress for them. And it may be such a severe stress that they have what people in that era, that historical era, particularly referred to as flashback. And that's a dissociative episode, where they're disconnected from their present day reality and overwhelmed by the memory and the appearance of the past reality.
Q. So is it safe to say that if Mr. Smith witnessed a violent horrible incident; to wit, the murder of Darla Lathram, he would be disassociating himself and disassociating back to the violent horrible circumstances of some of the incidents in his childhood?
A. Yes. It is certainly likely that an individual with his background, he in particular, would respond that way.

And it raises another issue, which is, that this is not

true only when the individual is a passive recipient of the stressful circumstance, but is also true when they have something to do with creating that stress.

So if you take the combat veteran, he may go to a rifle range to practice shooting thinking he's just fine and when he gets there and starts shooting his gun, he has a flashback.

So even if the person does things themselves to put themselves in that situation, they may then still be overwhelmed by it, especially if things occur which are unexpected.

Q. Like an unplanned murder?

A. Like an unplanned murder, certainly. (PCR Vol. VIII p. 1254-1258).

The issue of PTSD was addressed in the evidentiary hearing in this manner:

Q. You answered my next question, so I'll have to jump around here.

What's anxiety, sir?

A. Anxiety is a state of mind that human beings experience, we all experience it, it's a condition without which we couldn't get to court on time sometimes. And that might not provoke anxiety for everybody, but it may for some people. It's something we call "worry" or "concern" at times.

It is something that exists for human beings in a balance, so that a certain amount of anxiety is healthy; too little anxiety is unhealthy; too much anxiety is unhealthy.

So it is a condition of a state of mind of a feeling of the limbic system, a particular part of the brain which can be documented on brain scanning, in which there is concern, alertness, focus of attention.

In a normal person under normal circumstances it exists in a balance and helps us function in life. When we see a yellow light, we get a little worried, we better stop, we put on the brakes and we stop at the red light.

If we had no concern about it, we might just drift

through the yellow light and have an accident.

So anxiety is a normal state of mind that we all experience.

It's also a state of mind which can be associated with illness, including severe psychiatric illness.

Q. Well, would you say, sir, that Mr. Smith reporting to you that he had been sexually abused by his uncle Charlie, and Mr. Smith --- did Mr. Smith report to you that he also was stabbed in prison?

A. He did.

Q. Did Mr. Smith also report to you as a result of that stabbing he remembered a stabbing perpetrated upon him by his father, where a knife was thrown and he was stabbed in the leg?

A. Yes.

Q. Well, would that cause normal anxiety or a lack of anxiety or abnormal anxiety in a person?

A. It – generally those are circumstanced that would put a person at high risk for developing an anxiety disorder, abnormal anxiety.

They are, specifically in the context of his history, some of what I would consider an uncountable number of traumatic and emotionally overwhelming experiences which have produced anxiety and have been both cause and effect of a life-long post-traumatic anxiety disorder which he suffers from.

Q. Okay. So, put it in language that this poor lawyer can understand. Abnormal stressful situations and incidents produce abnormal stressful anxiety.

A. That's correct.

Q. Now, Doctor, were you provided with a copy of the 3.851 and the attachments A and B?

A. I was.

Q. Okay, Did you read attachment B?

A. I did.

Q. Did that attachment appear to be part of the 15,000 – 15,00 pages of DOC records that you reviewed?

A. Yes. There were excerpts and references in that

Q. And do you recall an incident beginning in 19 – occurred in 1986 – 1996 – I'm sorry, Madam Court Reporter – where Mr. Smith was stabbed while in prison?
A. Yes.
Q. In fact, that's one of the first few pages of the documents in exhibit – attachment B of the 3.851 motion.
A. Yes, that's correct.
Q. It is also a medical report from the hospital where Mr. Smith was treated. Correct, sir?
A. Yes.
Q. And it also showed a diagram, a generic diagram of a human being, and showed where the knife went into him several times; are you not, sir?
A. I recall the medical illustration indicating the sites, yes.
Q. Did you or did you not read subsequent notations in the DOC documents which indicated a diagnosis of PTSD?
A I did. There were numerous specific references to that diagnosis and there were numerous entries which documented the symptoms and the basis for that diagnosis, including extreme anxiety.
Q. Okay. But the pages indicated merely the letters, capitals P-T-S-D. Isn't that correct, sir?
A. Those were entered in those records and reflect that diagnosis, yes.
Q. What does the capital letters P-T-S-D mean?
A. It stands for post-traumatic stress disorder.
Q. Doctor –
A. And post-traumatic stress disorder is an anxiety disorder.
Q. Whoa, whoa, whoa, we'll get to that.

Doctor, what do the letters capital D-S-M, dash capital I-V mean?
A. What they mean to me in this context is diagnostic and statistical manual five – six – I'm sorry, four.
Q. Four. What does the DS – and what in heaven's name is Diagnostic –

THE COURT REPORTER: I'm sorry.

THE COURT: Will you repeat that, please? Diagnostic and Statistical Manual.

BY MR. KILEY:

Q. – Statistical Manual, Roman Numeral IV?

A. It is one of the authoritative treatises that psychiatrists and other mental health professionals use to guide evaluation and diagnosis of psychiatric disease.

Q. Is it an accepted treatise or an authority utilized by mental health professionals?

A. Yes, it is.

Q. Is it utilized by psychologists?

A Yes.

Q. Is it utilized by psychiatrists?

A. Yes.

Q. What does the DSM-IV say about PTSD?

A. It characterizes it as an anxiety disorder, a disorder primarily of anxiety regulation and disregulation. It identifies it as a disorder which is caused by emotionally overwhelming trauma and results in symptoms that appear potentially immediately after, but in the case of post-traumatic stress disorder at least for a period of six months after a trauma.

And it describes a variety of symptoms related to it, including such things at reliving the trauma, hyperalertness, sleeplessness, paranoid and suspicious feelings, as well as associated problems including depression, relationship conflicts, substance abuse and a variety of other issues.

Q. All right. So if a mental health professional were provided with a psychiatric record from the Department of Corrections that indicated PTSD, he would then – therefore, then immediately go look up in the DSM-IV to determine if the defendant met the criteria of PTSD?

A. Depending on his familiarity, yes, I would certainly expect a mental health professional to be either familiar with it or to familiarize themselves once it's brought to their attention.

Q. Would you do that?
A. Yes.
Q. And did you do that?
A. Yes. I didn't go to the manual. I know the manual pretty well. It wasn't necessary.

Dr. Maher further explained the use of the DSM-IV in this manner:

Q. All right. Now if you look in the DSM-IV you will find – or will you find diagnoses categorized into three axises; Axis 1, Axis 2, and Axis 3?
A. Yes.
Q. All right. And PTSD, is it or is it not included in an Axis I diagnosis?
A. It is an Axis I diagnosis.
Q. What's an Axis I diagnosis?
A. Axis I diagnosis is a primary psychiatric or mental health diagnosis, so it is a medical diagnosis in the psychiatric area which is of a primary nature.

An example of that would be schizophrenia, major depressive disorder, post-traumatic stress disorder, those things are those types of Axis I diagnosis.
Q. Schizoaffective disorder, would that also be?
A. Schizoaffective disorder is also Axis I diagnosis.
Q. Is disassociate disorder a Axis I diagnosis?
A. It is.
Q. All right. What is Axis 2 diagnosis?
A. Axis 2 diagnoses are limited to personality disorder diagnoses, which is a characterization of personality structure and an identification of an unbalanced personality to the point that it becomes problematic for the individual.

So a personality Axis 2 diagnosis is where we would put personality disorders.
Q. And what's an Axis 3?
A. Axis 3 diagnoses are other medical diagnoses, such as Alzheimer's disease, high blood pressure, a broken bone, we call an Axis 3.

> Q. And – okay. Well, what does a trained clinician do when confronted with an Axis 1 diagnosis?
> A. As the primary psychiatric diagnoses, the issue related to the Axis I is that one needs to see an understanding of a clinical picture and a historical picture which fits the basic criteria.
>
> I would in this case rely on the DSM-III. There are other diagnostic manuals that might be used.
>
> THE COURT: Do you mean DSM-IV?
>
> THE WITNESS: I'm sorry, DSM-IV. Pardon me.
>
> So the Axis I diagnosis, like I said, is the primary psychiatric diagnosis. And to the extent that that characterizes and explains the symptoms for the individual's behavior, life circumstances, impairment, limitations, it is a complete diagnosis.
> BY MR. KILEY:
> Q. So if you can attribute an Axis I diagnosis to an individual, do you have any reason to diagnose someone with Axis 2 diagnosis?
> A. Not unless there is a pattern of symptoms or history which, independent of that Axis I diagnosis, is associated with personality features, qualities and dysfunction. (PCR Vol. VIII p. 1258-1268).

Ultimately, Dr. Maher testified that if all of the symptoms and problems and circumstances that are present are being evaluated in the individual's life are reasonably explained by an Axis I diagnosis, then an Axis 2 diagnosis should not be made. (PCR Vol. VIII p. 1269).

Dr. Maher explained the mis-diagnosis of Mr. Smith in this manner:

> Q. Now, if you found out that this man was suffering from post-traumatic stress disorder because he was beaten and raped and stabbed as a child and also abused in various institutions, would that add something to the

equation? Would that be an explanation as to why this man is engaging in this behavior?
A. Yes. And that information tends to take it out of the antisocial personality disorder supporting evidence.
Q. So in other words, you're going to have to find out, in order to properly diagnose an individual, what causes them to act in an antisocial manner? Correct, sir?
A. What causes them to break the rules and what their state of mind is when they're breaking the rules. It's also related to what their intent is.
Q. And if they have diagnosable mental illness such as bipolar disorder, schizophrenia, post-traumatic stress disorder, dissociative disorder, that would be an adequate explanation on why this man is not a sociopath.
A. If I could restate in my response to you –
Q. Please do, but probably –
A. That's an adequate explanation that properly characterizes his behavioral symptoms of antisocial personality disorder, as behavioral symptoms of an Axis I disorder, specifically post-traumatic stress disorder, acute stress disorder, depression, dissociative disorder.

So it – your description properly addresses the issue that those symptoms in his case do not support the diagnosis of antisocial personality and Axis 2 diagnosis, but rather they support those other diagnoses and Axis I disorders.
Q. So, sir, you would not fault a mental health professional if he didn't know this man was previously diagnosed with an Axis I disorder. You just did, though, when provided with the information.
A. Certainly given his behavioral history, his criminal history, it's understandable why someone evaluating him might, I would say, jump to the conclusion, but might reach the conclusion that he had an antisocial personality disorder.
No, it's understandable why that might happen. (PCR Vol.VIII p. 1274-1275).

Dr. Maher further testified that because Mr. Smith is in the controlled environment of death row; his anxiety level has gone down. (PCR Vol. VIII p. 1276). Although the anxiety level of Mr. Smith had gone down, Dr. Maher discussed how Mr. Smith's PTSD re-surfaced during the escape and how his mind was affected by it in this manner:

> Q. Okay. Now, in the psychological reports from the Department of Corrections that you were provided and they were attached as attachment B, did any of these reports indicate Mr. Smith became – began to experience anxiety when he witnessed violence being perpetrated on others or violence being perpetrated on himself?
> A. He experienced heightened anxiety with both of those. And when I say "heightened anxiety," certainly there's some normal experience of anxiety that would be expected under those circumstances and there's also a higher level of anxiety.
>
> This is one of the things I did speak to him specifically about in my interview and it is very clear to me that he is emotionally undone.
>
> What I mean by that is his emotional state becomes disintegrated, not connected, disconnected, when he thinks about and experienced and puts himself in the position of observing an individual abuse and mistreat another individual, and this ultimately associates back to his family's treatment of his sisters.
> Q. For example , sir, from the trial, an inmate, who's name escapes at the time, savagely and brutally and mortally beat another inmate in the presence of Mr. Smith. Would you say that he – upon that inmate being beaten, would that have brought about fear and feelings of anxiety?
> A. I think overwhelming and paralyzing feelings of anxiety. It is indeed my opinion that that instance

resulted in overwhelming and paralyzing feelings of anxiety.

Q. Now, take that overwhelming and paralyzing feeling of anxiety and add that to the incident where Darla Lathram was killed by Tommy Eaglin in front of Mr. Smith.

A. I'm – I don't know. Was there a question there?

Q. What would have happened in Mr. Smith's mind?

A. His ability to understand realistically and respond in a knowing and voluntary way would have been dramatically impaired.

Q. Okay, sir. And you're saying that all of this post-traumatic stress that happened when he was stabbed is also – brings about the feelings and the anxiety that he felt when he was being raped, his sisters were being raped and he was being horribly abused by his family at age ten?

A. At age ten and before, yes.

Q. And before then.

Sir, in light of the diagnosis of PTSD continuing from 1996 to the murder of Darla Lathram do you have an opinion as to whether Mr. Smith was under an extreme emotional or mental disturbance?

A. Yes, I do.

Q. And what is that opinion?

A. He was.

Q. He was?

A. And that is related to the diagnoses that I've described here today.

Q. Or how about the capacity for the defendant to appreciate the criminality of his conduct was substantially impaired at the time of the offense?

A. I believe it was substantially impaired at the time of her death and the moments immediately leading up to her death. I think that he knew that he was trying to escape from the prison and he was aware that that was against the law and he's get in a lot of trouble if he got caught.

With regard to the escape plan, I don't think he was particularly impaired in his understanding of the

> wrongfulness of it.
>
> With regard to the way in which that plan could go out of control and jeopardize people's lives, I do think he was substantially impaired in his capacity to appreciate that, anticipate that, understand that, and then when it actually happened I think he was quite severely impaired.
>
> Q. But this is a man that escaped either internally by his dissociative episodes or externally by his running away from home and running away from the childhood treatment institutions he was place in, he's been doing that since he was a child in one way or another, escaping, correct?
>
> A. That is indeed my testimony in my deposition.
>
> Q. And do you think that might have affected his capacity to appreciate the criminality of his conduct?
>
> A. It is my opinion within a reasonable certainty that it did in fact affect his capacity to appreciate the criminality of his conduct. (PCR Vol. VIII p.1279-1283).

On re-direct examination, Dr. Maher testified that he had reviewed the deposition of a Dr. Willingham. (PCR Vol. VIII p. 1335-1336). Dr. Willingham was not called by the State in Mr. Smith's trial; however, his pre-trial deposition indicated an Axis I diagnosis of dissociative experience. (PCR Vol. VIII p. 1336).

Regarding the records not supplied to Dr. Scharef, Dr. Maher testified in this manner at the evidentiary hearing:

> 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 I?
>
> 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 I disorder and not antisocial personality disorder; the Axis I disorder being depression, being anxiety, being post-traumatic stress. Is that safe to assume, sir?
> A. Yes. (PCR Vol. VIII p. 1342-1343).

B. TESTIMONY OF ATTORNEY PAUL SULLIVAN:

Paul Sullivan was a court appointed attorney appointed to represent Mr. Smith during his capital trial. (PCR Vol. VIII p. 1354). Mr. Sullivan testified that his strategy in the guilt phase was that of trying to get Mr. Smith convicted of second degree murder rather than first degree murder as this would get Mr. Smith out from under the potential death penalty. (PCR Vol. VIII p. 1355).

During the evidentiary hearing, the following testimony was elicited from Mr. Sullivan:

> Q. Did you review a statement by inmate Kenneth Likens?
> A. Yes.
> Q. From Mr. Likens, did you learn of a purported statement made by Stephen Smith that the escape plan included a plan to rape a prison guard during the escape?
> A. Yes.
> Q. Did you learn that the purported reason for the plan to

rape a female prison guard was because if Stephen Smith died during the escape, at least he would have had sex before the – before he died?
A. I know Mr. Likens testified to that at some point. I don't know if it was at the trial or at depo.
Q. Well, do you recall inmate Likens testifying at trial that Mr. Smith said, quote, "I'm going to get me a piece of pussy before I leave, because if I get out of there and die, at least I know I get a shot of ass before I left"?
A. I don't remember those exact words, but I remember the substance of what you're saying and Mr. Likens testifying to that, yes.
Q. And if that's in the record, you wouldn't dispute that?
A. No, not – pardon me. No, not at all.
Q. Did you also review the testimony of Agent Ubelaker?
A. Yes.
Q. Did Agent Ubelaker testify, as you recall, when he asked what Mr. Smith meant when he said he would get some, Mr. Smith said, quote, "Probably would get some pussy"?
A. Yes.
Q. Do you recall during the trial the prosecutor saying in closing, quote, "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 in the situation," unquote?
A. I don't specifically recall that, but I don't doubt that it's – if it's in the record, I don't doubt that it was said.
Q. To your knowledge, no rape ever took place during the attempted escape, correct?
A. Correct.
Q. Mr. Smith never attempted to rape any prison guard, correct?
A. Correct.
Q. In fact, didn't Mr. Smith say he had no intent of having sex during the escape.

A. I don't know. It seems to me like in the walk-through I thought he made a reference to something about if there was an occasion that might have taken advantage of it, to have sex with the female guard.
Q. Do you recall –
A. But I do – but I also recall, I think him saying that once everything got started, he didn't have any interest in sex any longer.
Q. You recall that?
A. Yes.
Q. And he was not charged with rape, of course, correct? There was no charge.
A. Correct.
Q. And he was not charged with attempted rape.
A. Correct.
Q. And as a criminal defense attorney, you would not want the jury to hear evidence or testimony of an uncharged collateral crime, correct?
A. Correct.
Q. You wouldn't want the jury to hear evidence of where there is a danger of unfair prejudice, that would show bad character. (PCR Vol. VIII p. 1356-1360).

Mr. Sullivan filed no pre-trial motions nor did he attempt to object to try and keep the above cited statements out of evidence. (PCR Vol. VIII p.1361-1362). By way of clarification, Mr. Sullivan testified in this manner:

BY MR. VIGGIANO:
Q. You didn't – you said you didn't file any pretrial motions other than – you mentioned no motion in liminie, but you filed no other pretrial motions to try to – try to prevent –
A. Keep that statement out, that's correct.
Q. And to make it – to get it clear, you had no definitive reason to allow this statement to come into evidence, that you –

A. No. I would have preferred that it not be in evidence. And I didn't have a strategic decision to get it into evidence, that's correct.
Q. Okay. And you didn't preserve that issue for appeal by objection at all.
A. That's correct. (PCR Vol. VIII p. 1362)

Regarding the missing DOC records, the following testimony was elicited at the evidentiary hearing:

Q. And do you recall the Assistant State Attorney Feinberg cross-examining Dr. Scharef at trial?
A. Yes.
Q. And with reference to FSC ROA Volume 7, pages 815 – beginning at 815, the following questions and the following answers being given:

Attorney Feinberg asking the following question:

"Let me lay a few groundwork things down before I get into what your psychiatric evaluation was.

At the first issue, kind of groundwork is, and Mr. Sullivan addressed this with you partially, or is your record review – okay, you told us what you reviewed, right? You went through a list of things."

Answer: I went through a short list, Mr. Sullivan repeating some things, there are some things he did not mention, but yes, sir.

Question: Let me ask you this . Did you have the opportunity to review the 14,000 pages of reports and documents that are – that are relevant to his case from the Florida Department of Law Enforcement?

Answer: No, sir.

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 this defendant Smith?

Answer: No, sir." (PCR Vol VIII p.1367-1368).

After being confronted with the above cited trial testimony, Mr. Sullivan testified at the evidentiary hearing in this manner:

> 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 say 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,” or “If I had this material I wouldn’t 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 had 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).

Mr. Sullivan further testified:

BY MR. VIGGIANO:

Q. Mr. Sullivan, on cross-examination you mentioned a motion you filed to suppress the walk-through video.

A. Right.

Q. Yeah. And the purpose of that motion was to suppress the overall walk-through of the whole complete crime, correct?

A. The statement, right, the entire statement, right.

Q. It wasn't merely a motion to get filed specifically to try to suppress the statement that Mr. Smith intended on committing a rape on the way out of the prison?

A. Right. I did not file a merely tailored motion in liminie towards that specific statement.

Q. And with respect to either suppressing or limining out the statement about the intended rape, you mentioned a few times that you reviewed the law on whether or not this was inextricably intertwined with the overall crime. Did you do that research recently, after receiving the 3.851 motion or did you do that research back during the trial?

A. You know, I know that I did it two days ago, because I was preparing for my testimony and I wanted to make sure I knew what I was talking about.

I don't have a specific recollection of whether I researched the issue back at the time of the trial or not.

But again, I've tried a bunch of jury trials. I'm not

> Perry Mason, but I've been around long enough to where I've soaked up a good many of the rules of evidence and I just don't see that as a winning objection.
> 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 liminie 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).

C. TESTIMONY OF Dr. FREDERICK W. SCHAREF, M.D.:

Dr. Scharef is a licenced psychiatrist, who has a medical license to practice in Florida. (PCR Vol. IX p. 1424). He was certified as a forensic psychiatrist in 2007. (PCR Vol. IX p. 1426). Dr. Scharef was retained as an expert by Defense counsel for Mr. Smith's trial in 2006. (PCR Vol. IX p. 1465-1466, 1472). This

was only the third capital case, in which Dr. Scharef worked on as a psychiatrist. (PCR Vol. IX p. 1472). At the evidentiary hearing, the following questions were asked and answered during the defendant's cross-examination:

> Q. Good afternoon, Dr. Scharef. I believe you testified on multiple occasions today that post-traumatic stress syndrome is not something that you would have focused on or made a feature of your presentation back in 2006; is that correct?
> A. Yes.
> Q. But that's not to say that's something you would totally discount, correct?
> A. No. I will again say that in reviewing the records he was treated for that at the time and was diagnosed with that at the time.
> Q. And again, at the time you treated Mr. Smith in 2006, you didn't have those psychiatric records in your possession, did you?
> ...
> A. When I examined him, I don't recall that I had those records, that's correct.
> ...
> Q. It's okay if you don't remember. Doctor, post-traumatic distress syndrome, is something that can be triggered–
> A. Yes.
> Q. –by a violent event?
> A. Yes.
> Q. And, for example, did you hear the testimony or did you read or study during your time examining Mr. Smith that there was an episode where Mr. Smith saw another man bet to death- -
> A. Yes.
> Q. - - When he tried to escape? And couple that with the act of escaping itself, that could also trigger a post-traumatic stress syndrome out of remission - -

> A. Yes.
> Q. - - meaning he sees a violent event and he's also under the heightened anxiety of trying to escape?
> A. That's possible, yes.
> Q. And, Doctor, is it safe to say that anxiety is a component of post-traumatic stress disorder?
> A. Well, it is if you're talking about specific types. I mean there's certainly people that have a hypervigilance where they're always automatically hypervigilant and they scan and they are afraid. If you've been in a car accident, it can often cause problems where you can't drive, it can show itself in many ways. If you're afraid of flying, of course, we understand, and I've seen that, so the answer is yes. (PCR Vol. IX p. 1465-1467).

The previous passage demonstrates the fact that Dr. Scharef was not "certified" as a forensic psychiatrist when he examined the defendant in 2006, he did not have possession of DOC records that showed that Mr. Smith had been previously diagnosed with PTSD, and Dr. Scharef conceded that Mr. Smith witnessing another man beaten to death during the stress of a prison escape, could have triggered his PTSD out of remission. Dr. Scharef also opines that anxiety is a component of PTSD.

In the following questions and answers, Dr. Scharef opined about the difference between Axis I and Axis II diagnosis and other matters regarding this case:

> Q. Okay. Sir, we talked about Axis I 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 2.
Q. And post-traumatic stress disorder, that would be Axis 1, 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 you 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 state retained expert.
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.
Q. Okay. Antisocial personality disorder, that's not an Axis 1 diagnosis, is it?

A. Axis 2, personality disorder.
Q. And Axis 1 diagnoses, they are treatable, are they not, with medication and/or therapy?
A. Yes.
Q. How about Axis 2 diagnoses, are they treatable?
A. Well, the answer is yes and no. Some are obviously treatable, and some are even treatable with medications. Some are treated by cognitive therapy. Most psychiatric conditions have the possibility for treatment. Most of the Axis 1s, as you know, have very high rates of success with treatment if you have a willing patient and the right diagnosis and the right pharmacology. What is more difficult to treat is personality disorder, since our personality disorders stay fixed by the time we're 20. **And the antisocial personality disorder is probably untreatable in 2011.** (emphasis added)
Q. You're saying that antisocial personality disorder is not treatable?
Court. He said is probably untreatable.
A. (witness). Is probably untreatable in 2011, but hopefully would be some day it can be treated.
Q. (Mr. Shakoor). Okay. In talking to Mr. Smith, in talking to his whole defense team for that matter, did you receive any information about Mr. Smith being raped by an uncle when he was a small boy?
A. Yes.
Q. Do you remember when you received that information?
A. That was part of his life story that I think I even included and discussed in discussing him of his tumultuous background.
Q. So you knew about that back in 206?
A. Yes.
Q. Is it safe to say that was a pretty traumatic event, being raped as a small boy by an uncle?
A. Absolutely.
Q. Did you learn any information about Mr. Smith having a knife thrown at him by his father as a small boy?

A. Yes.
Q. Okay. That's also safe to say that's also a pretty traumatic event, right?
A. Yes.
Q. And of course you read about him being stabbed in prison in 1996?
A. Yes.
Q. And it's also safe to say that's a pretty traumatic event for an adult?
A. Yes.
Q. Now, certain traumatic events, based on your experience, it can be suppressed or repressed, right?
A. Yes. (PCR Vol. IX p. 1472-1477).

The previous passage shows that Dr. Scharef diagnosed Mr. Smith with anti-social personality disorder, an Axis 2 diagnosis which Dr. Scharef opines is probably untreatable in 2011. PTSD is an Axis 1 diagnosis, treatable, and if trial counsel provided Dr. Scharef with the necessary background materials, he would have likely diagnosed Mr. Smith with PTSD, and Mr. Smith would have received a life sentence.

SUMMARY OF THE ARGUMENTS

ISSUE I. Trial counsel rendered ineffective assistance of counsel by failing to move in limine to prevent, or object to and move for a mistrial based on state elicited testimony that Mr. Smith planned to rape a female prison guard during the escape attempt. The probative value of the testimony was substantially outweighed by the prejudicial impact on the defendant. Not only did the testimony allow the state to

bring up an uncharged act, but it was an act that was never even attempted, let alone actually happened. The statement had no relevance to the crimes charged and the statement was unfairly prejudicial and inflammatory to Mr. Smith.

ISSUE II. Mr. Smith received ineffective assistance of counsel during the penalty phase of his trial, by failing to present evidence of statutory and non-statutory mitigation to the jury. Trial counsel failed to provide his retained expert with the necessary background materials to show that Mr. Smith was suffering post-traumatic stress disorder (PTSD), at the time of the crime. There were plenty of materials available to trial counsel that could have been provided to the expert, which demonstrate that past experiences, along with subsequent diagnoses, indicated that Mr. Smith suffered from PTSD, along with dissociative disorder, and brain damage. The actions related to the escape triggered Mr. Smith's PTSD, and had the jury been presented with testimony to this fact, along with all of the relevant statutory and non-statutory mitigation, they would have voted for a life sentence.

THE STANDARD OF REVIEW

Under principles set forth by this Court in Stephens v. State, 748 So.2d 1028 (Fla. 1999), the issues in this initial briefs are mixed questions of law and fact requiring de-novo review with deference only to the factual findings by the lower court.

ISSUE I

Mr. Smith did not receive effective assistance of counsel in the guilt phase of his trial, violating his Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendment rights under the United States Constitution, and his corresponding rights under the Florida Constitution. Mr. Smith's trial attorney rendered ineffective assistance of counsel when he failed to object to the testimony that Mr. Smith wanted to rape a female prison guard during his escape attempt. Trial counsel was ineffective for failing to object to the introduction of evidence of an uncharged offense and uncommitted offense. The probative value of said evidence was far outweighed by the prejudicial effect and deprived Mr. Smith of a fair trial.

THE LOWER COURT'S ERROR

The post-conviction court denied the above cited issue by holding:

> While Mr. Sullivan was concerned that the statement was made, and that the victim was female, and believed that the whole thing was prejudicial to Defendant, he did not object to this testimony at trial because he thought it was intertwined with the crime. (Evidentiary hearing transcript I p. 142). He did not believe it was objectionable and that it was admissible evidence, as the rape plan was intertwined with the crime charged. (PCR Vol. VI p. 960-961).

This was error. At trial, inmate Kenneth Lykins testified that Mr. Smith said that he would rape a female prison guard during his prison escape. Specifically, Inmate Kenneth Lykins testified that Mr. Smith said, "I'm gonna get me a piece of

pussy before I leave because if I get out there and die, at least I know I gotta a shotta ass before I left." The following took place:

> Q. Did the defendant indicate to you that they wanted to try to do this escape when any particular officer was there as opposed to a different one?
> A. Yes, he did.
> Q. What did he say about that?
> A. It had to do with a female officer.
> Q. Okay. He wanted to try this when there was a female officer in the dorm?
> A. Yes.
> Q. And how often did he tell you female officers supervised that crew?
> A. Not always, but more than male officers.
> Q. Now, with regard to not just escaping but killing someone, did the defendant say anything in your presence indicating an intent to kill anyone?
> A. Yes, he has.
> Q. And what was that?
> A. It was two people, not just one.
> Q. Okay.
>
> A. His first he wanted to kill James Beeston - - well, John Beeston because he felt like he snitched on him the first time when he tried to escape and had him placed back on CM. So, therefore, he told me before he leaves that he was gonna hit John Beeston in the head with whatever he - - whatever weapon that he was gonna use. But he says, I want to kill that son of a bitch before I leave prison.
>
> And the second one is that whoever else was in the building was gonna die. His statement to me was that they didn't want nobody to alarm no other officer or inmates and to kill everything in there so they wouldn't have to worry about somebody trying to alert nothing while they get over the fence.
> Q. They needed time to assemble this ladder, right?

A. Of course.
Q. What - -
A. And that - -
Q. What - -
A. - - he made a statement to me sitting on the locker the night before that if a female officer happens to be present in the dorm the night that they escape that he was gonna rape her - - well, his exact words is, **I'm gonna get me a piece of pussy before I leave because if I get out there and I die, at least I know I got a shotta ass before I left**. And my statement was to him is, is you're a damn fool if you kill a officer in the State of Florida.
Q. All right. Did - -
A. And I don't think that your escape plan will do you a bit of damn good. (Emphasis added). (FSC ROA Vol. XXXI p. 604-605).

There was a similar statement by Mr. Smith during his taped confession. The taped confession was played before the jury during Detective Uebelacker's testimony. The following took place:

MR. SMITH: Well, when he hit her that second time, I knew she was gone.
AGENT UEBELACKER: So - - I don't understand. So you wouldn't do it if she was dead? I don't understand?
MR. SMITH: No. My intentions were to get the hell out of here.
AGENT UEBELACKER: Okay. But if she - - if she wasn't dead, what would have happened? What was your intentions?
MR. SMITH: Well, if it was earlier, if we had - - if we had time, all three would a - - probably would a got some.
AGENT UEBELACKER: yea? When you say that what

> do you mean?
> MR. SMITH: **Probably would a got some pussy**.
> AGENT UEBELACKER: Okay. All right. But once you - - once you saw that she was - - or you believe she was dead, then you didn't want to then? You were (inaudible)?
> MR. SMITH: nah. Too much fear, scared. (Emphasis added). (FSC ROA Vol. XXXV p. 1173).

The prosecutor also reiterated the statement in closing argument. The following took place:

Closing:

> The defendant talked about wanting to kill Beaston because he is a snitch. And he said to Lykins, and whatever else in the building had to die, kill everything in there so no alarm could be given so we have time to build the ladder. So they had time to build the ladder.
>
> **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. (Emphasis added). (FSC ROA Vol. XXXVI p. 1354).

Mr. Smith's trial counsel did not object to any of the statements and did not move for a mistrial or a limiting instruction.

Paul Sullivan was an attorney appointed to represent Mr. Smith during his capital trial. (PCR Vol. VIII p. 1354). Mr. Sullivan testified that his strategy in the guilt phase was that of trying to get Mr. Smith convicted of second degree murder rather than first degree murder as this would get Mr. Smith out from under the

potential death penalty. (PCR Vol.VIII p. 1355).

During the evidentiary hearing, the following testimony was elicited from Mr. Sullivan:

> Q. Did you review a statement by inmate Kenneth Likens?
> A. Yes.
> Q. From Mr. Likens, did you learn of a purported statement made by Stephen Smith that the escape plan included a plan to rape a prison guard during the escape?
> A. Yes.
> Q. Did you learn that the purported reason for the plan to rape a female prison guard was because if Stephen Smith died during the escape, at least he would have had sex before the – before he died?
> A. I know Mr. Likens testified to that at some point. I don't know if it was at the trial or at depo.
> Q. Well, do you recall inmate Likens testifying at trial that Mr. Smith said, quote, "I'm going to get me a piece of pussy before I leave, because if I get out of there and die, at least I know I get a shot of ass before I left"?
> A. I don't remember those exact words, but I remember the substance of what you're saying and Mr. Likens testifying to that, yes.
> Q. And if that's in the record, you wouldn't dispute that?
> A. No, not – pardon me. No, not at all.
> Q. Did you also review the testimony of Agent Ubilaker?
> A. Yes.
> Q. Did Agent Ubilaker testify, as you recall, when he asked what Mr. Smith meant when he said he would get some, Mr. Smith said, quote, "Probably would get some pussy"?
> A. Yes.
> Q. Do you recall during the trial the prosecutor saying in closing, quote, "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 in the situation," unquote?
A. I don't specifically recall that, but I don't doubt that it's – if it's in the record, I don't doubt that it was said.
Q. To your knowledge, no rape ever took place during the attempted escape, correct?
A. Correct.
Q. Mr. Smith never attempted to rape any prison guard, correct?
A. Correct.
Q. In fact, didn't Mr. Smith say he had no intent of having sex during the escape.
A. I don't know. It seems to me like in the walk-through I thought he made a reference to something about if there was an occasion that might have taken advantage of it, to have sex with the female guard.
Q. Do you recall –
A. But I do – but I also recall, I think him saying that once everything got started, he didn't have any interest in sex any longer.
Q. You recall that?
A. Yes.
Q. And he was not charged with rape, of course, correct? There was no charge.
A. Correct.
Q. And he was not charged with attempted rape.
A. Correct.
Q. And as a criminal defense attorney, you would not want the jury to hear evidence or testimony of an uncharged collateral crime, correct?
A. Correct.
Q. You wouldn't want the jury to hear evidence of where there is a danger of unfair prejudice, that would show bad character. (PCR Vol.VIII p. 1357-1360).

Mr. Sullivan filed no pre-trial motions nor did he attempt to object to try and

keep the above cited statements out of evidence. (PCR Vol.VIII p.1361-1362).

By way of clarification, Mr. Sullivan testified in this manner:

> BY MR. VIGGIANO:
>
> Q. You didn't – you said you didn't file any pretrial motions other than – you mentioned no motion in limine, but you filed no other pretrial motions to try to – try to prevent –
> A. Keep that statement out, that's correct.
> Q. And to make it – to get it clear, you had no definitive reason to allow this statement to come into evidence, that you –
> A. No. I would have preferred that it not be in evidence. And I didn't have a strategic decision to get it into evidence, that's correct.
> Q. Okay. And you didn't preserve that issue for appeal by objection at all.
> A. That's correct. (PCR Vol. VIII p. 1364)

Mr. Sullivan also testified as follows:

> BY MR. VIGGIANO:
> Q. Mr. Sullivan, on cross-examination you mentioned a motion you filed to suppress the walk-through video.
> A. Right.
> Q. Yeah. And the purpose of that motion was to suppress the overall walk-through of the whole complete crime, correct?
> A. The statement, right, the entire statement, right.
> Q. It wasn't merely a motion to get filed specifically to try to suppress the statement that Mr. Smith intended on committing a rape on the way out of the prison?
> A. Right. I did not file a merely tailored motion in limine towards that specific statement.
> Q. And with respect to either suppressing or limining out the statement about the intended rape, you mentioned a

few times that you reviewed the law on whether or not this was inextricably intertwined with the overall crime. Did you do that research recently, after receiving the 3.851 motion or did you do that research back during the trial?
A. You know, I know that I did it two days ago, because I was preparing for my testimony and I wanted to make sure I knew what I was talking about.

I don't have a specific recollection of whether I researched the issue back at the time of the trial or not.

But again, I've tried a bunch of jury trials. I'm not Perry Mason, but I've been around long enough to where I've soaked up a good many of the rules of evidence and I just don't see that as a winning objection.
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 threre 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

Legal Argument

In Strickland v. Washington, 466 U.S. 668 (1984), the United States Supreme Court held that counsel has a "duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Strickland requires a defendant to plead and demonstrate (1) unreasonable attorney performance, and (2) prejudice. Mr. Smith was denied a reliable adversarial testing. Reasonable attorney performance obliges counsel "to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Id. at 685.

Even if counsel provides effective assistance at trial in some areas, the defendant is entitled to relief if counsel renders ineffective assistance in his or her performance in other portions of the trial. Washington v. Watkins, 655 F.2d 1346, 1355, rehearing denied with opinion, 662 F.2d 1116 (5th Cir. 1981), cert. denied, 456 U.S. 949 (1982). See also Kimmelman v. Morrison, 106 S.Ct. 2574 (1986). Even a single error by counsel may be sufficient to warrant relief. Nelson v. Estelle, 642 F.2d 903, 906 (5th Cir. 1981) (counsel may be held to be ineffective due to single error where the basis of the error is of constitutional dimension); Nero v. Blackburn, 597 F.2d 991, 994 (5th Cir. 1979) ("sometimes a single error is so substantial that it alone causes the attorney's assistance to fall below the Sixth Amendment standard").

In Thomas v. State, 885 So.2d 968 (Fla. 4th DCA 2004), during the presentation of its case-in-chief, the prosecution sought to admit and introduce evidence of six separate, unrelated and uncharged armed robberies allegedly committed by the defendant three hours before the commission of the instant offense. The Thomas court held:

> Our court's decision in *Griner v. State*, 662 So.2d 758 (Fla. 4th DCA 1995), supports the exclusion of the six Dade County crimes and requires a reversal and new trial. In *Griner*, two robberies were committed within a distance of approximately two blocks and occurred within a period of approximately twenty-two minutes. After the evidence was admitted at trial as *Williams* rule evidence, the state on appeal recognized that the evidence did not constitute similar fact evidence and argued to this Court that it was properly admissible as "inextricably intertwined" and/or "inseparable crime" evidence under *Griffin v. State*, *supra.*
>
> In rejecting the state's contention on appeal and finding that the admission of this evidence could not be excused or condoned as harmless error, we held: In the present case the facts of the first event were not "inextricably intertwined" with, or "necessary to adequately describe" the second event. The most we can say about the relationship between these two events is that one occurred very soon after the other, which is not sufficient to make the evidence regarding the first incident admissible under *Griffin*, particularly when we weigh the danger of unfair prejudice to defendant against the relevancy of the evidence (citations omitted). Nor can we say that the admission of this evidence was harmless beyond a reasonable doubt under *State v. DiGuilio*, 491 So.2d 1129 (Fla. 1986) *Griner*, 662 So.2d at 759.
>
> Likewise, the admission of six unrelated robberies in Dade

> County three hours prior to the crime at issue here can hardly be considered harmless beyond a reasonable doubt. REVERSED AND REMANDED FOR A NEW TRIAL. Id. at 976.

In Griner v. State, 662 So.2d 758 (Fla. 4th DCA 1995), the Griner court held that two robberies twenty two minutes apart were not intertwined. The court held:

> We would also note that in the present case, the trial court severed the two incidents, which were charged in the same information, for purposes of trial, which appears to be consistent with *Crossley v. State*, 596 So.2d 447, 450 (FLA. 1992). In *Crossley* the defendant, who was armed, kidnapped a woman, then stole her vehicle and her purse. About two hours later he committed an armed robbery in a store which was approximately two miles from where the first incident occurred. The Florida Supreme Court held that the trial court abused its discretion in failing to sever: "The danger in improper consolidation lies in the fact that the evidence relating to each of the crimes may have the effect of bolstering the proof of the other. While the testimony in one case standing alone may be insufficient to convince a jury of the defendant's guilt, evidence that the defendant may also have committed another crime can have the effect of tipping the scales. Therefore, the court must be careful that there is a meaningful relationship between the charges of two separate crimes before permitting them to be tried together." Although the propriety of the severance in this case is not before us, the fact that the trial court concluded that the cases should be severed supports our conclusion that the two cases were not so intertwined as to make the evidence of the first incident admissible in the trial involving the second incident. The state's reliance on *Erickson v. State*, 565 So.2d 328 (Fla. 4th DCA 1990), is misplaced because in *Erickson* this court found that the fondling of the victim

> and another child were "inseparably linked in time." In the present case the crimes, as the facts reflect, were separated in time. Id. at 760.

In Capehart v. State, 583 So.2d 1009 (Fla. 1991), the Florida Supreme Court, discussed the failure to object in the following manner:

> The law is clear that error predicated on the admission of such evidence must be preserved for review by appropriate objection at trial. *Grossman v. State*, 525 So.2d 833 (Fla. 1988), *cert denied*, 489 U.S. 1071, 109 S.Ct. 1354, 103 L.Ed.2d 822 (1989). Accordingly, we do not address the merits of Capehart's claim. The defense counsel's failure to object to the admission of this evidence and the resulting prejudice, if any, is a question appropriately decided in a proceeding for post-conviction relief. *See* Fla .R. Crim. P. 3.850; *see also, e.g., Kelly v. State*, 486 So.2d 578 (Fla.), *cert. denied*, 479 U.S. 871, 107 S.Ct. 244, 93 L.Ed.2d 169 (1986). Id. at 1014.

Generally, any evidence relevant to prove a material fact at issue is admissible unless precluded by a specific rule of exclusion. See 90.402, Fla.Stat.; Zack v. State, 753 So.2d 9 (Fla. 2000) and Butler v. State, 842 So.2d 817. Collateral crime evidence codified in 90.404, Fla. Stat. is also relevant and admissible if used to prove motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident. However, even relevant evidence will be inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice or if introduced to prove a Defendant's bad character or propensity to commit the crime charged. See Butler v. State, supra: Gore v. State, 719 So.2d 1197 (Fla. 1998);

Williams v. State, 621 So.2d 413 (Fla. 1993); State v. DiGuillio, 491 So.2d 1129 (Fla. 1986).

The only limitations to the rule of relevancy are that the State should not be permitted to make the evidence of other crimes the feature of the trial or to introduce the evidence solely for the purpose of showing bad character or propensity, in which event it would not be relevant, and such evidence, even if relevant, should not be admitted if its probative value is substantially outweighed by undue prejudice.

Trial counsel was ineffective in failing to object to the introduction of testimony that Mr. Smith wanted to rape a female prison guard during a prison escape. The testimony was not relevant and necessary to prove the State's case and served only to inflame the jury. Had trial counsel objected, the objection would have been sustained. The jury would not have heard the prejudicial testimony. Because the jury heard that Mr. Smith wanted to rape a female prison guard during the escape attempt, the jury became inflamed, ensuring a conviction and sentence of death. Mr. Smith was prejudiced due to trial counsel's ineffectiveness.

Mr. Smith was prejudiced because if the trial attorney objected, the objection would have been sustained and the trial court would have either granted a mistrial or would have given a limiting instruction. Instead, the jury was allowed to fully consider this "evidence" unfettered and this deprived Mr. Smith of due process and a

fair trial.

Based on Thomas, Griner, and Capehart, the State would not be permitted to introduce uncharged evidence of a sexual battery, let alone evidence of a sexual battery that had never even taken place. Taking the evidence in the light most favorable to the State, there was merely an intent to commit a sexual battery, if even that. Actually, the statement can be dismissed as braggadocio. The statement was characterized by the State as intent to commit a sexual battery and used only to inflame the jury so as to ensure a conviction and sentence of death..

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.

Had defense counsel properly objected there is a reasonable probability that the defendant would not have been convicted and/or received the death penalty. The testimony prejudiced Mr. Smith in the guilt phase of his trial and ensured the jury would recommend death during the penalty phase of his trial. The failure of trial counsel to object to the testimony was deficiency under Strickland. There cannot be confidence in the outcome based on trial counsel's errors. Mr. Smith deserves a new trial.

ISSUE II

MR. SMITH DID NOT RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL DURING THE PENALTY PHASE OF HIS TRIAL, VIOLATING HIS FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION, AND HIS CORRESPONDING RIGHTS UNDER THE FLORIDA CONSTITUTION.

THE LOWER COURT'S ERROR

The post-conviction court denied the above cited issue by holding:

> Trial counsel made a reasonable tactical decision not to pursue further mental health investigation after receiving an initial diagnosis that there was little mental health mitigation, and that initial diagnosis is not rendered incompetent merely because defendant has now secured the testimony of an expert who give a more favorable

> diagnosis
>
> *******
>
> Mr. Sullivan obtained exhaustive background records for Defendant, and after thoroughly reviewing those records, saw no significant mental health mitigation. He relied on Dr. Schaerf's evaluation of Defendant that there was no significant mental health mitigation. Mr. Sullivan made a reasonable trial strategy to focus on Defendant's abusive background in an attempt to humanize Defendant and explain his behavior, rather than "turn a jury off by saying we want to excuse Steve Smith from these things that he's done because he's got some sort of mental defect". (PCR Vol. VI p. 966).

This was error. At the evidentiary hearing, the following testimony was elicited from Attorney Sullivan:

> Q. Is it possible that your decision to proceed, as you testified, was somewhat related to the fact that you hadn't either seen or provided or was going to provide a mental mitigation or the mental mitigation or the mental health records that we talked about earlier?
> A. No, I don't think so. I don't think I made a conscience decision not to give those records to Mr. Schaerf.
>
> Like I said, I went out of my way to get all the records from the other coast and from Rhode Island, I got his kids' records from Maine, I got every record I could, and I gave the ones that I thought were – that I should give to my expert, to my expert.
>
> Again, I can't imagine why I didn't give him the Department of Corrections records. I don't think I made a conscience decision that I didn't want my psychiatrist to see fairly recent psychiatric records. I'm certain I must have somehow overlooked that. And again, that's a mistake on my part and I apologize for it.
> Q. At the beginning at the time that you retained Dr.

Schaerf, and you had an idea that you were going to go with presenting his horrific background to the exclusion of mental health mitigation, correct?
A. No, I can't say that. I was looking to Dr. Schaerf to what his – the mental health mitigation was going to be. We went over the statutory mitigators.

I think that we were – you seem to be implying that I did not present any mental health mitigation. I feel as though I did, I think that's what Dr. Scharef did, I think that's –
Q. Well –
A. So –
Q. – would you agree, though, if the only mental health mitigator or only mental health issue that you did present was antisocial personality disorder on his behalf, that came into – into evidence, correct?
A. Right.

BY MR. VIGGIANO:
Q. Mr. Sullivan, I'm going to show you a letter. This is written on April 21st, 2006, from you and your office to Dr. Schaerf. Would you take a look at that letter?
A. Okay.
Q. Okay. Is it fair to say that that letter outlines in five pages or so Mr. Smith's horrible background that he grew up in?
A. Yes.
Q. And in this letter you're trying to explain I guess to Dr. Schaerf how you want to proceed with the case?
A. Well, I wanted to give him what he had asked for, which was some background – a Pearsey (phonetic) or some research speaker who backed down in the case, yes, and also tell him what I was looking for.
Q. Okay. Can you go to the last – the last paragraph in that letter?
A. Yes. Would you like me to read the first para – the sentence says:

"I am not looking for typical mental health mitigators. I want to focus on his remarkably bad

upbringing."
Q. Do you want to read the whole paragraph?
A. Okay.

"I look forward to speaking with you over the phone on May 1st at 4 p.m. I will be in Newport at that time taking depositions. As we discussed on the telephone, the trial is set to begin June 19th, with Dr. Schaerf's testimony anticipated for June 26th or 27th."

Q. Okay. So it's fair to say at this time, April 21st, 2006, at that time you were on a course to present Mr. Smith's horrible background growing up in Rhode Island?
A. Right.
Q. And you were not on course to develop any statutory mental health mitigation.
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," or "If I had this material I wouldn't 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 had 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, because obviously I didn't give 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. 1376-1380).

It is clear from the above cited testimony that there was nothing "tactical" about Mr. Sullivan's failure to provide Dr Scharef with the DOC records indicating

evidence of Axis I diagnosis was not deliberate action on his part. Had Mr. Sullivan been aware of the Axis I diagnosis, he would not have ignored developing statutory mitigation.

At the evidentiary hearing the following testimony occurred:

> Q. Okay. Did you read attachment B?
> A. I did.
> Q. Did that attachment appear to be part of the 15,000 – 1,500 pages of DOC records that you reviewed?
> A. Yes, There were excerpts and references in that.
> Q. And do you recall an incident beginning in 19 – occurred in 1986 – 1996 – I'm sorry, Madam Court Reporter – where Mr. Smith was stabbed while in prison?
> A. Yes.
> Q. In fact, that's one of the first few pages of the documents in exhibit – attachment B of the 3.851 motion.
> A. Yes, that's correct.
> Q. It is also a medical report from the hospital where Mr. Smith was treated. Correct, sir?
> A. Yes.
> Q. And it also showed a diagram, a generic diagram of a human being, and showed where the knife went into him several times; are you not, sir?
> A. I recall the medical illustration indicating the sites, yes.
> Q. Did you or did you not read subsequent notations in the DOC documents which indicated a diagnosis of PTSD?
> A. I did. There were numerous specific references to that diagnosis and there were numerous entries which documented the symptoms and the basis for that diagnosis, including extreme anxiety.
> Q. Okay. But the pages indicated merely the letters, capitals P-T-S-D. Isn't that correct, sir?
> A. Those were entered in those records and reflect that

> diagnosis, yes.
> Q. What does the capital letters P-T-S-D mean?
> A. It stands for post-traumatic stress disorder.
> Q. Doctor –
> A. And post-traumatic stress disorder is an anxiety disorder. (PCR Vol. VIII p. 1261-1262)

The post-conviction court's reliance on Asay v. State, 769 So.2d 974 (Fla. 2000) is error because it is based on a misapprehension of fact. This was not a more favorable diagnosis; it was a *complete* diagnosis. Trial counsel ignored the fact that Mr. Smith had committed this crime while in the Florida State Prison system. Mr. Smith's state of mind during his incarceration was relevant and critical to giving his expert evidence of statutory mitigation.

Dr. Maher, at the evidentiary hearing, detailed the ramifications of Mr. Sullivan's failure to provide Dr. Scharef with evidence of Mr. Smith's Axis I diagnosis and how it affected the ultimate presentation of mitigation in this manner:

> Q. All right. So if a mental health professional were provided with a psychiatric record from the Department of Corrections that indicated PTSD, he would then – therefore, then immediately go look up in the DSM-IV to determine if the defendant met the criteria of PTSD?
> A. Depending on his familiarity, yes, I would certainly expect a mental health professional to be either familiar with it or to familiarize themselves once it's brought to their attention.
> Q. Would you do that?
> A. Yes.
> Q. And did you do that?
> A. Yes. I didn't go to the manual. I know the manual

pretty well. It wasn't necessary.
Q. But, sir, you've previously testified that a great part of your work regarding family courts in Hillsborough County, lots of special attention and emphasis towards the issue of a particular diagnosis, including post-traumatic stress disorder and childhood abuse and trauma and the effects on adult personality development and behavior.

Did you so testify earlier in this direct examination, sir?
A. I think in my deposition, yes.
Q. And in court here today, did you not, sir?
A. That's a fair summary, yes.
Q. So by the time you read PTSD, you knew what it was. Correct sir?
A. Yes.
Q. All right. Now, if you look in the DSM-IV, you will find – or will you find diagnoses categorized into three axises; Axis 1, Axis 2, and Axis 3?
A. Yes.
Q. All right. And PTSD, is it or is it not included in an Axis 1 diagnosis?
A. It is an Axis 1 diagnosis.
Q. What's an Axis 1 diagnosis?
A. Axis 1 diagnosis is a primary psychiatric or mental health diagnosis, so it is a medical diagnosis in the psychiatric area which is of a primary nature.

An example of that would be schizophrenia, major depressive disorder, post-traumatic stress disorder, those things are types of Axis 1 diagnoses.
Q. Schizoaffective disorder, would that also be?
A. Schizoaffective disorder is also Axis 1 diagnosis.
Q. Is disasssociate disorder an Axis 1 diagnosis?
A. It is.
Q. All right. What is Axis 2 diagnosis?
A. Axis 2 diagnoses are limited to personality disorder diagnoses, which is a characterization of personality structure and an identification of an unbalanced personality to the point that it becomes problematic for the

individual.

So a personality Axis 2 diagnosis is where we would put personality disorders.

Q. And what's an Axis 3?

A. Axis 3 diagnoses are other medical diagnoses, such at Alzheimer's disease, high blood pressure, a broken bone, we call an Axis 3.

Q. And – okay. Well, what does a trained clinician do when confronted with an Axis 1 diagnosis?

A. As the primary psychiatric diagnoses, the issue related to the Axis 1 is that one needs to see an understanding of a clinical picture and a historical picture which fits the basic criteria.

I would in this case rely on the DSM-III. There are other diagnostic manuals that might be used.

THE COURT: Do you mean DSM-IV?

THE WITNESS: I'm sorry, DSM-IV.

Pardon me.

So the Axis 1 diagnosis, like I said, is the primary psychiatric diagnosis. And to the extent that that characterizes and explains the symptoms for the individual's behavior, life circumstances, impairments, limitations, it is a complete diagnosis.

BY MR. KILEY:

Q. So if you can attribute an Axis 1 diagnosis to an individual, do you have any reason to diagnose someone with Axis 2 diagnosis?

A. Not unless there is a pattern of symptoms or history which, independent of that Axis 1 diagnosis, is associated with personality features, qualities and dysfunction.

So, if I may explain briefly.

Q. If I may clarify the question before you explain briefly. Okay?

A. Please go ahead.

Q. Would Axis 2 diagnosis be something like substance abuse?

A. No.

Q. No?

A. No.
Q. But perhaps, say, say you have diagnosed an individual with an Axis 1 diagnosis and that individual had never been treated, it is – is it uncommon for people with an Axis 1 diagnosis to attempt to medicate themselves with alcohol or illegal drugs or even nonprescribed legal drugs?
A. Yes. And those are – substance abuse is also an Axis 1 diagnosis, it's not an Axis 2 diagnosis.
Q. So when you see a psychiatric report saying Axis 1, PTSD, rule out substance abuse, rule out neurological disorder, rule out – what does "rule out diagnosis" mean?
A. Generally it means – and it's a question which is sometimes discussed in the literature.

What it means to me and what I believe it means most reliably, is that the clinician believes there's significant evidence or indication of that diagnosis, but not sufficient to reach a threshold where the clinician is confident that's a proper diagnosis.

So they put it in the there as further evaluation should rule out the possibility that there may also be a substance abuse here. That's what a rule out diagnosis means.
Q. Okay. Now, Doctor, if you would, would you go back to your original explanation as to – before I interrupted you with this other question?
A. Yes. When an Axis 1 diagnosis is made, it's distinguished from an Axis 2 diagnosis, in that, if all of the symptoms and problems and circumstances that are present are being evaluated in the individual's life are reasonably explained by an Axis 1 diagnosis, then an Axis 2 diagnosis would not be made.

So, for example, in a hypothetical circumstance, if somebody returns from combat with a clear traumatic brain injury evident on CAT scan and the post-traumatic disorder with flashbacks of combat situations, and at a result of that they start to smoke marijuana and they get caught smoking marijuana and they get multiple arrests

from smoking marijuana, one might look at that individual and say, well, they're doing a lot of bad acts here.

And under the heading of personality disorder and specifically antisocial personality disorder, we look at bad behavior. So this person may suffer from an antisocial personality disorder.

It would be improper in that hypothetical that I've described because – unless the person doing that before they went to combat.

Q. I understand.

A. And it would be improper because the paranoid behavior and the circumstances are all related the post-traumatic stress disorder and the brain injury that are an Axis 1 diagnosis.

So their basic personality structure and behavior may be affected by their Axis 1 diagnosis, but in that hypothetical description I'm just giving, an Axis 2 diagnosis of any personality disorder would not be proper, assuming the person was a normal, healthy, law abiding individual before they acquired that Axis 1 diagnosis.

Q. All right, sir. Now, let's get on to anti – since you brought it up, antisocial personality disorder. Is that Axis 1 clarification or is it an Axis 2?

A. It's an Axis 2 diagnosis.

Q. And is it or is it not characterized by the disregard of the patient for the rights and feelings of another person?

A. Yes, that's one of the manifestations of it.

Q. Do you know some of the other characterizations of this?

A. Yes. It basically falls into two categories.

The first category is a – is a pretty – usually pretty easy to identify, a straightforward category of behavior, people who have an antisocial personality disorder break rules and they break rules without regard to the properness of the rules. They break rules sometimes impulsively and without a lot of regard to getting caught.

Sometimes they break them after grave consideration of whether they're going to get caught or

not, but without regard to moral issues of the rules.

So part of the onset for personality disorder is that individuals with that are antisocial. They don't respect and follow social rules and standards.

And I'm not talking about minor things. I'm talking about major things.

Q. Well –

A. That might include a criminal who robs 7-Elevens or might include a stock broker who breaks the rules and takes advantage of people who are putting their retirement money with them.

So that behavior is one of the components of antisocial personality disorder.

The second component is fundamentally related to relationships and the capacity for appreciating the state of mind, the position, the well-being, the feelings of other people.

So it falls into two categories, a behavioral category, and let's call it a relationship category.

Q. Doctor – all right. Is antisocial personality disorder characterized usually before someone reaches the age of 15?

A. No. At a matter of fact, the agreed on diagnostic criteria specifically indicate that it's improper to make a personality disorder diagnosis before the age of 18, and in fact, before attaining the qualities of adulthood, which in terms of chronological age is usually said to be 18.

Now, that doesn't mean that we don't look at things that happened before 18. And in fact, we are required to look at things that happened before 18 to consider the diagnosis.

But the diagnosis of the personality disorder is not made until the clinician is well informed to understand that a reasonable stable adult personality structure has been attained, and that's a minimum of `18 years of age.

Q. All right. You testified just previously that antisocial personality disorder is characterized often by a disregard for the rules. Correct, sir?

A. Yes.
Q. Now, if the rules of a particular institution was "don't escape from it," if you knew that this man has been escaping from institutions and running away from home since the age of eight, what would that tell you?
A. That, in isolation, would tell me that he breaks rules. I would want to and need to know more about why he's breaking those rules, to put that rule breaking into a context of whether or not it serves to meet the criteria for antisocial behavior.
Q. Now how about –
A. So in isolation, rule breaking does not make the diagnosis.
Q. Now, if you found out that this man was suffering from post-traumatic stress disorder because he was beaten and raped and stabbed as a child and also abused in various institutions, would that add something to the equation? Would that be an explanation as to why this man is engaging in this behavior?
A. Yes. And that information tends to take it out of the antisocial personality disorder supporting evidence.
Q. So in other words, you're going to have to find out, in order properly diagnose an individual, what causes them to act in an antisocial manner? Correct, sir?
A. What causes them to break the rules and what their state of mind is when they're breaking the rules. It's also related to what their intent is.
Q. And if they have diagnosable mental illness such as bipolar disorder, schizophrenia, post-traumatic stress disorder, dissociative disorder, that would be an adequate explanation on why this man is not a sociopath.
A. If I could restate in my response to you –
Q. Please do, but probably –
A. That's an adequate explanation that properly characterizes his behavioral symptoms of antisocial personality disorder, as behavioral symptoms of an Axis 1 disorder, specifically post-traumatic stress disorder, acute stress disorder, depression, dissociative disorder.

So it – your description properly addresses the issue that those symptoms in his case do not support the diagnosis of antisocial personality and Axis 2 diagnosis, but rather they support those other diagnoses and Axis 1 disorders.

Q. So, sir, you would not fault a mental health professional if he didn't know this man was previously diagnosed with an Axis 1 disorder. You just did, though, when provided with the information.

A. Certainly given his behavioral history, his criminal history, it's understandable why someone evaluating him might, I would say, jump to the conclusion, but might reach the conclusion that he had an antisocial personality disorder.

No, it's understandable why that might happen. (PCR Vol. VIII p. 1264-1275).

The importance of applying an Axis 1 diagnosis in order to establish statutory mental mitigation was not lost on the State as evidenced by the following testimony:

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.

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 1, 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 1 diagnosis by Dr. Willingham in this manner:

BY MR. KILEY:

> Q. And, Doctor, counsel for Sovereign mentioned that you reviewed the depsition 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 1, isn't it?
> A. Yes, sir, it is. (PCR Vol. VIII p. 1335-1336)

Effective counsel, upon learning that the State's expert had diagnosed Mr. Smith with an Axis 1 diagnosis, and his own expert did not, would have called Dr. Willingham as his own witness to establish statutory mental mitigation.

Prejudice

Although the aggravating circumstances were many, the penalty phase jury returned a recommendation of 9 to 3 for death. The prejudice is that had counsel established statutory mental mitigation; at least 3 jurors would have been swayed to return a recommendation of life.

Legal Argument

The issue of the review by this Court of the prejudice prong as determined by the post-conviction court is addressed in Cooper v. Secretary, Department of Corrections 646 F.3d 1328, 1352-53 (11th Cir. Fl. 2011) in this manner:

> As an initial matter, we must determine the correct standard of review under which to review Cooper's claim of prejudice from his counsel's deficient performance. "Federal habeas courts generally defer to the factual findings of state courts, presuming the facts to be correct unless they are rebutted by clear and convincing evidence." *Jones v. Walker*, 540 F.3d 1277, 1288 n.5 (11th Cir. 2008) (en banc). "[W]hen a state court's adjudication of a habeas claim results in a decision that is based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding, this Court is not bound to defer to unreasonably-found facts or to the legal conclusions that flow from them." *Id.* (quotations, citations, and alterations omitted). When a state court unreasonably determines the facts relevant to a claim, "we do not owe the state court's findings deference under AEDPA," and we "apply the pre-AEDPA *de novo* standard of review" to the habeas claim. (Id. at 1352-53).

The prejudice to Mr. Smith is blatant. Mr. Sullivan testified at the evidentiary hearing that upon learning that statutory mental mitigation could have been developed through the Department of Corrections prison records; Sullivan testified "It's something that I should not have ignored, right."(PCR Vol. VIII p. 1380). Mr. Smith shed no blood. The graphic depiction of his horrific childhood swayed 3 jurors. Had Mr. Sullivan provided a nexus between Mr. Smith's childhood and his mental state at the time of the crime, statutory mitigation would have been established. The outcome would have been different. Relief is proper.

In Wiggins v. Smith, 123 S.Ct. 2527 (2003) the Supreme Court of the United

States ultimately held that " The performance of Wiggins' attorneys at sentencing violated his Sixth Amendment right to effective assistance of counsel." Id. At 2529. Justice O'Connor, in delivering the opinion of the Court, stated:

> We established the legal principles that govern claims of ineffective assistance of counsel in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). An ineffective assistance claim has two components: A petitioner must show that counsel's performance was deficient, and that the deficiency prejudiced. *Id.*, at 687, 104 S.Ct. 2052. To establish deficient performance, a petitioner must demonstrate that counsel's representation "fell below an objective standard of reasonableness." *Id.*, at 688, 104 S. Ct. 2052. We have declined to articulate specific guidelines for appropriate attorney conduct and instead have emphasized that "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Ibid.*

The performance of trial counsel fell well below professional norms. The deficiencies of counsel extended to the investigative and preparation aspect of his case. The records were available to trial counsel and should have been forwarded to Dr. Scharef. This error deprived Mr. Smith of statutory mental mitigation and non-statutory mental mitigation. The additional fact that Mr. Smith did not kill Officer Lathram; along with his mental mitigation (both statutory and non-statutory). Would have swayed the penalty phase jury to vote for life. Mr. Smith is entitled to relief under Wiggins.

The investigation regarding mitigation was abandoned, leads were not pursued. The mitigation presentation focused on Mr. Smith's childhood and his Broward county charges. It was ineffective assistance of counsel to abandon further investigation into Mr. Smith's psychiatric history with the DOC. This failure to investigate falls squarely on point with Nero v. Blackburn, 597 F.2d 991, 994 (5th Cir. 1979) ("sometimes a single error is so substantial that it alone causes the attorney's assistance to fall below the Sixth Amendment standard"). The Supreme Court of the United States further held in Wiggins:

> Counsel did not conduct a reasonable investigation. Their decision not to expand their investigation beyond a presentence investigation (PSI) report and Baltimore City Department of Social Services (DSS) records fell short of the professional standards prevailing in Maryland in 1989. Standard practice in Maryland capital cases at that time included the preparation of a social history report. Although there were funds to retain a forensic social worker, counsel chose not to commission a report. Their conduct similarly fell short of the American Bar Association's capital defense work standards. Moreover, in light of the facts counsel discovered in the DSS records concerning Wiggins' alcoholic mother and his problems in foster care, counsel's decision to cease investigation when they did was unreasonable. Any reasonably competent attorney would have realized that pursuing such leads was necessary to making an informed choice among possible defenses, particularly given the apparent absence of aggravating factors from Wiggins' background. Indeed, counsel discovered no evidence to suggest that a mitigation case would have been counterproductive or that further investigation would have been fruitless, thus

> distinguishing this case from precedents in which this Court has found limited investigations into mitigating evidence to be reasonable. Id. At 2530.

Mr. Smith had been incarcerated in the Florida state prison system for over ten years at the time of this offense. His diagnosis of PTSD manifested the horrendous abuse he suffered as a child.

The Florida Supreme 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.

In Mr. Smith's case, the facts of the childhood abuse were known to defense counsel. By not investigating an important part of Smith's life, that is, his conduct and mental state in the Florida state prison system, the penalty phase jury was led to believe that Smith was somehow unaffected by the sexual abuse he suffered, the

beatings, having a knife thrown at him as a child by his father, and how witnessing a murder during an escape could have triggered his PTSD out of any possible remission. Dr. Scharef's testimony that Mr. Smith *just* had Anti-social personality disorder; belies the obvious, and is a mere Axis 2 diagnosis and probably untreatable in 2011. It's obvious that a jury would be reluctant to vote a life sentence, to an escape risk with a disorder that is "untreatable". If the jury heard about how Mr. Smith's Axis 1 diagnosis--a treatable PTSD--manifested itself during the crime, he would have received a life sentence. Testimony at the evidentiary hearing demonstrated that Mr. Smith was still suffering from PTSD at the time of the murders, and at the very least witnessing the murders, could have triggered Mr. Smith's PTSD out of remission. Trial counsel was ineffective for not providing Dr. Scharef with the psychiatric evidence that Mr. Smith while in prison, had statutory and non-statutory mental mitigation.

In Rose v. State, 675 So.2d 567 (Fla. 1996), the defendant was denied effective assistance where counsel failed to investigate the defendant's background and to obtain school, hospital, medical and *prison records* which contained information as to defendant's extensive mental problems. Had trial counsel provided his expert with prison records, the penalty phase jury would have determined that Mr. Smith's mental state at the time of the crime was a direct result

of the abuse he suffered as a child. Relief is proper under Rose.

The United States Supreme Court also addressed lack of investigation in Williams v. Taylor, 529 U.S. 362 (U.S. 2000) stating that "the graphic description of Williams' childhood, filled with abuse and privation, or the realty that he was "borderline mentally retarded," might well have influenced the jury's appraisal of his moral culpability." In Mr. Smith's case, if one substitutes "borderline mentally retarded" with PTSD/ dissociative disorder; the jury's appraisal of his moral culpability would have been influenced in Smith's favor.

In Nibert v. State, 574 So.2d 1059 (Fla. 1990), the Court stated that:

> Nibert presented a large quantum of uncontroverted mitigating evidence. First, Nibert produced uncontroverted evidence that he had been physically and psychologically abused in his youth for many years. The trial court found this to be "possible" mitigation, but dismissed the mitigation by pointing out that "at the time of the murder the Defendant was twenty-seven(27) years old and had not lived with his mother since he was eighteen(18)". We find that the defendant had suffered through more than a decade of psychological and physical abuse during the defendant's formative childhood and adolescent years is in no way diminished by the fact that the abuse finally came to an end. To accept that analysis would mean that a defendant's history as a victim of child abuse would never be accepted as a mitigating circumstance, despite well-settled law to the contrary. Nibert reasonably proved this nonstatutory mitigating circumstance, and there is no competent, substantial evidence to support the trial court's refusal to consider it. Id at 1062.

In Mr. Smith's case, counsel was ineffective in failing to provide his expert with the data to show that Mr. Smith was *still* suffering from the horrendous abuse of his childhood. Statutory and non-statutory mental mitigation would have been established. At least 3 jurors would have been swayed by this evidence of mitigation and Mr. Smith would have received a recommendation for life.

In Porter v. McCollum,558 U.S. ----, 130 S.Ct. 447, 449 (2009) 175 L.Ed.2d 398 (2009), the facts and legal reasoning of the United States Supreme Court fall squarely on point with the facts of Mr. Smith's case. Regarding the post-conviction aspect of Porter's case; the United States Supreme Court contrasted what was presented in penalty phase and what was presented at the post-conviction evidentiary hearing thusly:

> In 1995, Porter filed a petition for postconviction relief I state court, claiming his penalty-phase counsel failed to investigate and present mitigating evidence. The court conducted a 2-day evidentiary hearing, during which Porter presented extensive mitigating evidence, all of which was apparently unknown to his penalty-phase counsel. Unlike the evidence presented during Porter's penalty hearing, which left the jury knowing hardly anything about him other than the facts of his crimes, the new evidence described his abusive childhood, his heroic military service and the trauma he suffered because of it, his long-term substance abuse, and his impaired mental health and mental capacity. Id. At 449.

In Mr. Smith's case, the trial Court knew little about Mr. Smith other than the facts of

the crime itself, and some problematic issues in his family background. Mitigation was minimal.

Regarding the psychological evaluation and its application to Mr. Smith's case; the Porter Court held thusly:

> In addition to this testimony regarding his life history, Porter presented an expert in neuropsychology, Dr. Dee, who has examined porter and administered a number of psychological assessments. Dr. Dee concluded that Porter suffered from brain damage that could manifest in impulsive, violent behavior. At the time of the crime, Dr. Dee testified, Porter was substantially impaired in his ability to conform his conduct to the law and suffered from an extreme mental or emotional disturbance, two statutory mitigating circumstances, Fla. Stat.§ 921.141 (6). Dr. Dee also testified that Porter had substantial difficulties with reading, writing, and memory. And that these cognitive defects were present when he was evaluated for competency to stand trial. 2/Tr. 227-228 (Jan. 5, 1996); see also Record 904-906. Although the State's experts reached different conclusions regarding the statutory mitigators, each expert testified that he could not diagnose Porter or rule out a brain abnormality.
> Id. at 451.

Regarding the investigation of mitigation; the Porter Court held further:

> Because the state court did not decide whether Porter's counsel was deficient, we review this element of Porter's *Strickland* claim *de novo. Rompilla v. Beard*, 545 U.S. 374, 390, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005). It is unquestioned that under the prevailing professional norms at the time of Porter's trial, counsel had an "obligation to conduct a thorough investigation of the defendant's

> background." *Williams v. Taylor,* 529 U.S. 392, 396, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). The investigation conducted by Porter's counsel clearly did not satisfy those norms. Id. at 452-453.

In Mr. Smith's case, the investigation at trial as opposed to the investigation and evaluation of Mr. Smith in post-conviction clearly fell under the prevailing professional norms. The sentencing court heard nothing that would humanize Mr. Smith. Regarding this aspect of the case, the Porter Court further held:

> The judge and jury at Porter's original sentencing heard almost nothing that would humanize Porter or allow them to accurately gauge his moral culpability. They learned about Porter's turbulent relationship with Williams, his crimes, and almost nothing else. Had Porter's counsel been effective, the judge and jury would have of the "kind of troubled history we have declared relevant to assessing a defendant's moral culpability." *Wiggins, supra,*at 535, 123 S.Ct. 2527. Id. at 454.

In Mr. Smith's case, the facts of the crime and the weak mitigation provided, did nothing to enable the sentencing court to assess Mr. Smith's moral culpability. The evidence of horrific child abuse and post-traumatic stress disorder adduced at the evidentiary hearing would have changed the outcome of this case. Relief is proper.

Regarding the issue of prejudice; the Porter Court held:

> The Florida Supreme Court's decision that Porter was not prejudiced by his counsel's failure to conduct a thorough-or even cursory-investigation is unreasonable.

> The Florida Supreme Court either did not consider or unreasonably discounted the mitigation evidence adduced in the postconviction hearing. Under Florida law, mental health evidence that does not rise to the level of establishing a statutory mitigating circumstance may nonetheless be considered by the sentencing judge and jury as mitigating. See, *e.g. Hoskins v. State*, 965 So.2d 1, 17-18 (Fla. 2007) (*per curiam).* Indeed, the Constitution requires that "the sentencer in capital cases must be permitted to consider any relevant mitigating factor." *Eddings v. Oklahoma,* 455 U.S. 104, 112, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982). Yet neither the postconviction trial court nor the Florida Supreme Court gave any consideration for the purpose of nonstatutory mitigation to Dr. Dee's testimony regarding the existence of a brain abnormality and cognitive defects. While the State's experts identified perceived problems with the tests that Dr. Dee used and the conclusions that he drew from them, it was not reasonable to discount entirely the effect that his testimony might have had on the jury or the sentencing judge. Id. at 454-455.

At the evidentiary hearing, it was clear that significant evidence was ignored or forgotten about by trial counsel, and proper mental health mitigation preparation was not done by trial counsel. Relief is proper.

Cumulative Prejudice

Although each individual claim presented by Mr. Smith warrants relief, the cumulative prejudicial effect of all of the prejudice suffered, certainly entitles Mr. Smith to relief. The comments regarding Mr. Smith discussing the possibility of sexually assaulting the victim, should have been liminied out, or objected to at trial.

The comments were introduced solely to inflame the passions of the jury, as Mr. Smith never committed the actual murder, and no type of sexual assault was ever even planned, let alone attempted or committed.

Also, by failing to provide Dr. Scharef with the proper DOC records, both statutory and non-statutory mitigation was withheld from the jury. If the jury heard about the brain damage, dissociative disorder, and PTSD that Dr. Maher opined about, Mr. Smith never would have received a death recommendation. Relief is proper.

CONCLUSION

In light of the facts and arguments presented above, Mr. Smith never received a fair adversarial testing of the evidence. Confidence in the outcome is undermined and the judgment of guilt and subsequent sentence of death is unreliable. Mr. Smith requests this Honorable Court to vacate the convictions, judgments and sentences including the sentence of death, and order a new trial.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief has been furnished by United States Mail, first class postage prepaid, to all counsel of record on this _____day of May, 2012.

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I hereby certify that the foregoing Initial Brief was generated in Times New Roman, 14 pursuant to Fla. R. App. P. 9.210.

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