

IN THE SUPREME COURT OF FLORIDA

STEPHEN SMITH,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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CASE NO. SC12-53  
L.T. No. 03-CF-1526  
DEATH PENALTY CASE

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

ANSWER BRIEF OF APPELLEE

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## STATEMENT OF THE CASE AND FACTS

This Court summarized the relevant facts in its opinion affirming Smith's judgment and sentence of death:

### **I. THE FACTS AND PROCEDURAL HISTORY**

Smith and his codefendants, Dwight Eaglin and Michael Jones, were indicted for the first-degree murder of Officer Lathram [sic] at Charlotte Correctional Institution (CCI) during an escape attempt.[FN1] The murder was charged under the alternative theories of premeditated murder and felony murder while engaged in escape or resisting an officer with violence. The defendants were tried separately.

FN1. The three prisoners also were indicted for the first-degree murder of another inmate, Charles Fuston. The State entered a *nolle prosequi* on that count as to Smith.

#### **A. The Guilt Phase**

During 2003, the defendants worked with a small group of other CCI prisoners on renovations to the inmate dormitories. This construction work included plumbing and welding and thus provided inmate work crews with access to a number of tools. Beginning in early 2003, Smith, who was serving multiple life sentences, and Jones began to formulate an escape plan. They planned to build a ladder and escape over the perimeter fence. When their first plan was thwarted, however, Smith and Jones developed a new plan with Eaglin.

Under the new plan, the inmates would join ladders from the tool room at CCI by drilling holes and adding bracing. The amalgamated ladder would rise sixteen feet above the ground and span across the tops of both perimeter fences, which were at least twenty feet apart. With the ladder-bridge in place, Eaglin would go over the first perimeter fence and, when the guard truck drove by, attack the driver with a hammer. Because they needed access to ladders and other necessary tools, the trio planned to escape during the ongoing dormitory renovation project.

Smith and the others decided to escape before construction was completed on the final dormitory. To further facilitate the plan, Smith volunteered for the inmate crew that sometimes worked at night, which already included Jones and Eaglin. At such times, five or six prisoners worked in the empty dormitory under the supervision of a single corrections officer. In talking to other inmates about the plan, Smith said that he would kill any correctional officer guarding them and that he would be famous on the news. Smith preferred to escape when a female officer was on duty so that he could rape her-just in case he was killed during the escape.

On June 11, 2003, with renovations soon to be completed, the defendants put their plan into action. At 4:00 p.m., Officer Lathram [sic] took five inmates-the three defendants and two other inmates-to work in the dormitory for the evening. At 8:30 p.m., Lathram [sic] accounted for the five inmates, and about twenty minutes later, another officer personally picked up the count slip from Officer Lathram [sic].

After the head count, Eaglin beat up one inmate and locked him in a cell; Eaglin then returned with a sledgehammer and beat him to death. Smith and Jones told Officer Lathrem they needed something from a locked mop closet. They all went to the closet, where the officer began to search for the correct key. Eaglin struck her twice in the head with the sledgehammer. They took the officer's radio and keys. While Eaglin struggled to put the officer's body into the closet and lock the door, Smith and Jones left to assemble the ladders for the escape. Before joining Smith and Jones, Eaglin found the other inmate and hit him in the head with another hammer. Injuring the inmate was part of the plan because that inmate did not want to escape and did not want to be disciplined for cooperating with the escape plan. The defendants carried two large ladder sections outside and put them together. When they attempted to lift the ladder, however, it collapsed and fell against the perimeter fence, setting off an alarm.

Correctional officers responding to the alarm saw the three defendants attempting to escape. Eaglin stood between the perimeter fences; Smith was climbing a ladder leaning against the inner fence, with Jones standing nearby. Upon seeing the guards, Smith and Jones ran into the dormitory, where they were quickly apprehended. The correctional officers also discovered a pool of blood outside a locked mop closet. Officer Lathrem lay dead in the closet, a sledgehammer on the floor beside her. The responding officers also found the two other inmates, one with a head injury in one cell and the other dead in another cell.

The jury returned a verdict finding Smith guilty of first-degree murder.

### **B. The Penalty Phase**

In the penalty phase, the State presented evidence about Smith's 1990 convictions for murder, armed robbery, and armed burglary with assault, in which Smith broke into a home, stole money, and beat to death the elderly woman he encountered there. The State also presented evidence of Smith's other 1990 convictions for armed sexual battery, armed burglary, armed robbery, and kidnapping. In that break-in, Smith stole a VCR and tapes and took a young girl outside the house where he forced her to perform oral sex on him. As a result of these crimes, Smith was sentenced to multiple life sentences, some consecutive to others. Finally, the State also introduced evidence that in 1981, Smith was convicted in Rhode Island for the armed sexual assault of his sister.[FN2]

FN2. Also in the penalty phase, the medical examiner testified that Officer Lathram [sic] had no defensive wounds, consistent with having no awareness of the attack, and that she was unconscious upon the sledgehammer's impact. Three victim impact witnesses also read statements.

Smith presented numerous witnesses, including family members and a former Rhode Island social worker, regarding his background and character.[FN3] They testified that Smith's father was frequently intoxicated, violent, and physically abusive. He also

sexually abused Smith's sisters. Smith's father was a poor provider, and the family essentially lived on welfare. Smith's parents did not display affection, provide religious or moral guidance, or require school attendance. The State of Rhode Island removed Smith from his home because he could not be controlled at home. From ages eleven to eighteen, he was in state placements ranging from group homes to juvenile prisons, and twice underwent psychiatric evaluation. Smith regularly escaped from many of the placements and returned home, and he frequently violated the law. As a young man, Smith and his younger brother went to Florida where they used drugs heavily, and where Smith had a sexual relationship with his aunt.

FN3. Smith's brother testified by video deposition from a Rhode Island prison where he is serving a life sentence for murdering and raping his stepdaughter. The evidence at the penalty phase showed, however, that all of Smith's sisters are married, employed, and living productive lives.

Dr. Frederick Schaerf, an expert in forensic psychiatry, testified that Smith has a history of depression, mood disorder, attention deficit disorder, hyperactivity (as a child), and substance abuse. However, Smith's depression and substance abuse were in remission. Smith has a low normal IQ "in the 80 range," and the doctor concluded that he has an antisocial personality disorder.

Finally, Smith presented various witnesses to testify about the supervision and safety policies and procedures at CCI at the time of the murder.

### **C. The Trial Court's Order**

By a vote of nine to three, the jury recommended a sentence of death. The trial court adopted the recommendation, finding the following aggravating factors: (1) the defendant was a convicted felon under a sentence of imprisonment; (2) he had prior violent felony convictions; (3) the murder was committed for the purpose of escape from custody, and the victim was a law enforcement officer engaged in official duties (merged); and (4) the murder was cold, calculated, and



premeditated (CCP). In mitigation, the court found (1) Smith's background (great weight); (2) Smith's expression of remorse (little weight); and (3) mental and emotional health issues, including a history of depression, attention deficit disorder, and substance abuse (some weight).[FN4] The court rejected as mitigating the "failure of officials at CCI to properly administer the prison and to properly supervise inmates." The trial court concluded "that the aggravating circumstances in this case greatly outweigh the mitigating circumstances present."

FN4. The trial court rejected Smith's antisocial personality disorder as a mitigator.

Smith v. State, 998 So. 2d 516, 519-22 (Fla. 2008). After this Court affirmed the conviction and sentence, Smith petitioned the United States Supreme Court for certiorari review, but his petition was denied. Smith v. Florida, 129 S. Ct. 2006, 173 L. Ed. 2d 1101 (2009).

On March 24, 2010, Appellant filed his initial motion for postconviction relief pursuant to Florida Rule of Criminal Procedure 3.851. (PCR V2:209-352). The State filed its response on May 24, 2010 (PCR V2:369-98). After reviewing the State's response and conducting a case management conference, the trial court entered an order denying Appellant's legal claims and granting an evidentiary hearing on Claims I and II. (PCR V4:656-62). In Claim I, Smith alleged that his trial counsel was ineffective at the guilt phase for failing to object to testimony that Smith intended to rape a female correctional

officer during the escape attempt. In Claim II, Smith argued that his penalty phase counsel was ineffective for failing to provide his mental health expert, Dr. Fredrick Schaerf, with records from the Department of Corrections which indicated that Smith had been diagnosed with posttraumatic stress disorder (PTSD).<sup>1</sup> At the evidentiary hearing conducted on September, 22, 2011, collateral counsel presented testimony from Smith's trial counsel, Paul Sullivan, and from psychiatrist, Dr. Michael Maher. In rebuttal, the State presented testimony from Dr. Schaerf.

Lead trial counsel Paul Sullivan testified that he was court-appointed, along with attorney Joe Lombardo, to represent Stephen Smith at trial. (PCR V8:1353-54). Sullivan was primarily responsible for the penalty phase, but because the defense team were treating the guilt phase almost like the first portion of the penalty phase, Sullivan testified that he was more involved with the guilt phase than normal. Trial counsel explained that the likelihood of getting a second degree murder conviction for Smith was minimal because of the acts of the co-defendants and the principal and felony murder rules, the fact that Smith was

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<sup>1</sup> The 85 pages of prison records from 1996-2000 are attached to Appellant's motion for postconviction relief as Attachment B. (PCR V2:267-352).

serving time in prison at the time of the murder, and because Smith had given a full videotaped confession. (PCR V8:1355-57).

Sullivan was aware from reviewing the discovery material that inmate Kenneth Lykins would testify that Smith had made statements indicating a plan to rape a female prison guard during the escape attempt. (PCR V8:1357-58). Sullivan recalled that, at trial, inmate Lykins testified that he heard Smith talking about his plans to escape quite a few times. Smith wanted to try the escape when there was a female officer in the dorm and he indicated that whoever was guarding the building was going to die to prevent alarming others, and if a female officer was present on the night of the escape, he was going to rape her: "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." (DAR V31:605, 637-38; PCR V8:1358). Sullivan also recalled that Smith made similar statements in his videotaped walk-thru confession to FDLE Agent Uebelacker when Smith acknowledged an intention that if Officer Lathrem had not been killed, all three of the inmates would have probably raped her:

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.

(DAR V35:1173; PCR V8:1358-60). Sullivan explained that, given his experience and knowledge of the law,<sup>2</sup> he viewed the State's evidence regarding Smith's intent to rape the victim as relevant and admissible because it was inextricably intertwined to the charged crime. Sullivan testified that if he had made a motion to exclude Smith's statements regarding the rape on the ground that it was evidence of a collateral crime, the motion would have been unsuccessful. Sullivan additionally testified that Smith's plan to rape officer Lathrem demonstrated his intent to commit the escape and murder, yet another reason why he did not believe that an objection to that line of testimony would have succeeded. (PCR V8:1359-64, 1387-91).

Trial counsel Sullivan testified that he retained two mental health experts prior to trial, psychologist Dr. Newman, and forensic psychiatrist, Dr. Frederick W. Schaerf. (PCR V8:1396). Sullivan testified that his mitigation investigation involved obtaining a voluminous amount of background material. (PCR V8:1391-96). Sullivan travelled to Rhode Island and obtained Smith's records from the Rhode Island Department of

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<sup>2</sup> Mr. Sullivan was an experienced criminal trial attorney who had been practicing criminal law since 1988, both as a prosecutor and as a private defense attorney. He handled approximately 150 trials, including multiple death penalty cases. (PCR V8:1383-84).

Children and Families; obtained Smith's school and juvenile records; records from Smith's extensive prior crimes, including all of the transcripts and "eight or nine" psychiatric evaluations in Smith's prior murder and penalty phase trial in Broward County. (PCR V8:1374, 1392-93). Counsel also obtained all of Smith's records from the Department of Corrections and the Florida Department of Law Enforcement. (PCR V8:1391-96). When questioned about the 85 pages of DOC records that are the subject of Smith's postconviction claim, Sullivan testified that he had no recollection of whether he actually failed to provide the records to Dr. Schaerf. Sullivan had the DOC records in his possession and recalled taking a large number of documents to Dr. Schaerf's office, but Sullivan had no recollection of actually providing these specific documents to his expert. (PCR V8:1405-09).

At Smith's penalty phase, Dr. Schaerf testified that in addition to examining Smith, he also reviewed "a long list of records" involving many aspects of Smith's life dating back to his early days in Rhode Island. Dr. Schaerf testified that he reviewed court documents from Smith's other criminal cases, including psychologist and psychiatrist reports; some DOC records and school records; Rhode Island Department of Family and Children records; Smith's statements about the murders at

CCI; and numerous depositions from family members and people familiar with Smith from Rhode Island. (DAR V41:778-80). On cross-examination, Dr. Schaerf testified that he had not reviewed 14,000 pages of documents from the Florida Department of Law Enforcement (FDLE), including 1,500 to 2,000 pages from DOC related to Smith. (DAR V41:815-820). Based on his review of records and mental status examination, Dr. Schaerf opined that Smith suffered from several psychiatric diagnoses: major depression, mood disorder, attention deficient disorder as a child, a history of polysubstance abuse, and antisocial personality disorder. (DAR V41:781-95).

At the postconviction evidentiary hearing, trial counsel Sullivan explained that he went to great lengths to uncover all available mitigating evidence, but was unaware that he apparently failed to give the DOC records to Dr. Schaerf.<sup>3</sup> (PCR V8:1371-73). Although Sullivan felt he should have given the DOC records to Dr. Schaerf if he did not do so, he acknowledged that this was not the focus of what he wanted to utilize Dr. Schaerf for at the penalty phase. (PCR V8:1373). Sullivan explained that his penalty phase strategy was to present evidence of Smith's

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<sup>3</sup> Likewise, Dr. Schaerf testified at the evidentiary hearing that he recalled reviewing various DOC records prior to trial which he was not given a copy of, but he could not recall with specificity exactly which DOC records he reviewed. (PCR V9:1437, 1465-66).

terrible upbringing and not necessarily to focus on any statutory mental mitigators because there was no evidence to support them. (PCR V8:1373-78). Sullivan testified that he did not want to "turn off the jury" by saying that they should excuse the things that Smith had done because he has some sort of mental defect. (PCR V8:1402). Sullivan explained that Smith's videotaped walk-thru interview with Agent Uebelacker, among other evidence, refuted the applicability of the statutory mental mitigator that Smith was under the influence of an extreme mental or emotional disturbance at the time of the murder. (PCR V8:1373-74). Likewise, trial counsel was unaware of any evidence from Smith's previous "eight or nine" mental health evaluations to support the statutory mental mitigator that Smith's capacity to appreciate the criminality of his conduct was substantially impaired at the time of the murder. (PCR V8:1373-74).

Collateral counsel presented testimony from a mental health expert retained during the postconviction proceedings, forensic psychiatrist Dr. Michael Maher. Dr. Maher testified that he first examined Smith in March, 2010. (PCR V8:1238). After reviewing the records obtained by trial counsel Sullivan and interviewing Smith, Dr. Maher concluded that Smith had a brain impairment or injury. Dr. Maher found that Smith's neurological

issues were very difficult to identify and diagnose because they were overwhelmed by Smith's other psychological deficits. (PCR V8:1249-54). According to Dr. Maher, Smith suffers from posttraumatic stress disorder (PTSD) and dissociative experiences which likely began after he was sexually assaulted as an adolescent. (PCR V8:1254-58). Dr. Maher also discussed the anxiety Smith suffered from two stabbing incidents, one by his father when he was a child and another while he was incarcerated in prison. Dr. Maher testified that, at the time of the crimes, Smith suffered from "overwhelming and paralyzing feelings of anxiety" when he witnessed codefendant Eaglin beat another inmate to death immediately prior to the escape attempt, and after Darla Lathrem was murdered, Smith's ability to understand and respond was dramatically impaired. (PCR V8:1280, 1321-22). Dr. Maher testified that, in his opinion, both statutory mental mitigators were applicable in this case given Smith's diagnosis of PTSD and his dissociative state. (PCR V8:1280-83).

On cross examination, Dr. Maher testified that Smith has suffered from PTSD and dissociative disorder since childhood, but he acknowledged that numerous psychiatrists had examined Smith between 1973-1993 and had never made this diagnosis. (PCR V8:1284-95). Dr. Maher testified that he also examined Smith's mental health records from DOC, beginning in 1993, and noted



that a number of DOC mental health professionals did not diagnose PTSD. (PCR V8:1297-316). In fact, one DOC psychologist examined Smith two weeks after the May, 1996, stabbing incident in prison, which Dr. Maher opined was the cause of his reoccurrence of PTSD, and noted that Smith was not suffering from any psychiatric distress at that time. (PCR V8:1303). Rather, the only documented diagnosis of PTSD was during Smith's incarceration during August, 1996 - August, 1999. (PCR V8:1316). Dr. Maher also acknowledged that the Diagnostic and Statistical Manual of Mental Disorders (DSM) cautions that malingering should be ruled out when considering a diagnosis of PTSD in a forensic setting, but yet, Dr. Maher did no testing for malingering when examining Smith. Dr. Maher also testified that he was unaware that Smith had been diagnosed with malingering in 1992. (PCR V8:1326-29).

In rebuttal, the State presented the testimony of Dr. Schaerf, who had previously testified at Smith's penalty phase. Dr. Schaerf testified that he was retained by Paul Sullivan and was asked to perform a mental health examination of Smith so that he could testify before the jury regarding Smith's "psychiatric life story behavior." (PCR V9:1430). Trial counsel Sullivan provided a number of documents to Dr. Schaerf for his review prior to the penalty phase. (PCR V9:1433-37). Dr. Schaerf

also recalled Sullivan showing him other records, including DOC records, but he could not recall specifically which DOC records he reviewed. (PCR V9:1437-40, 1465-66). Dr. Schaerf testified that he reviewed the DOC records attached to Smith's postconviction motion, and those records indicated that Smith was diagnosed with PTSD around October, 1996, after a stabbing incident in prison and Smith obtained treatment for this diagnosis until 2000. Dr. Schaerf explained that in all of the mental health records he reviewed, there were approximately thirteen or fourteen different psychiatric diagnoses for Smith, and the DOC records probably documented at least six or seven different diagnoses. (PCR V9:1442).

Dr. Schaerf testified that after reviewing the DOC records attached to Smith's postconviction motion, he could have informed the jury that Smith had been diagnosed with PTSD while in prison, but he likely would not have informed the jury of this information because the PTSD was in remission. Dr. Schaerf explained that at the time of his mental health examination and penalty phase testimony, Smith had no symptoms of PTSD and the only active diagnosis he would testify to with any certainty was antisocial personality disorder. (PCR V9:1443-47, 1456-57, 1462-63). Similarly, Dr. Schaerf did not find any evidence in the records, or from the facts of the crime, that indicated Smith

was suffering from dissociative episodes or symptoms at the time of the crime. (PCR V9:1460-62).

After hearing the testimony from the evidentiary hearing and reviewing the written closing arguments, the trial court issued a detailed order denying Smith's postconviction claims. (PCR V6-7:957-1158). This appeal follows.

### SUMMARY OF THE ARGUMENT

The postconviction court properly denied Smith's claim that his trial counsel was ineffective for failing to move to exclude evidence that Smith intended to rape a female correctional officer during his escape attempt. As Smith's trial counsel explained at the evidentiary hearing, the evidence of Smith's intent to rape the victim was inextricably intertwined with the charged murder and any motion to exclude this evidence would have been denied. Because Smith failed to carry his burden of establishing both deficient performance and prejudice, this Court should affirm the court's denial of this claim.

The postconviction court properly denied Smith's claim that his penalty phase counsel was ineffective for failing to provide his forensic psychiatrist with psychological records from the Department of Corrections indicating that Smith had been diagnosed with posttraumatic stress disorder (PTSD) years before the instant murder. The trial court's factual finding that Smith failed to establish that trial counsel failed to provide these documents to his expert is supported by the record. Furthermore, the court properly found that, even had trial counsel failed to provide these records to his expert, this did not equate to a finding that trial counsel was constitutionally deficient. Finally, the court noted that Smith failed to establish that he

was prejudiced by trial counsel's alleged failure to disclose the DOC records because there was no reasonable probability of a different result even had the jury been made aware of Smith's diagnosis of PTSD.

## ARGUMENT

### ISSUE I

THE POSTCONVICTION COURT PROPERLY DENIED SMITH'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE.

In his first claim, Smith argues that trial counsel was ineffective at the guilt phase for failing to object to evidence that Smith planned to rape a female correctional officer during the escape attempt. The postconviction court granted an evidentiary hearing on this claim, and subsequently denied it based on a finding that Smith failed to establish both deficient performance and prejudice as required by Strickland v. Washington, 466 U.S. 668 (1984). (PCR V6:957-62). The State submits that the lower court properly concluded that Appellant was not entitled to relief on his ineffective assistance of counsel claim based on his failure to establish deficient performance and prejudice.

In order for a defendant to prevail on a claim of ineffective assistance of counsel pursuant to the United States Supreme Court's decision in Strickland, a defendant must establish two general components.

First, the claimant must identify particular acts or omissions of the lawyer that are shown to be outside the broad range of reasonably competent performance under prevailing professional standards. Second, the clear, substantial deficiency shown must further be demonstrated to have so affected the

fairness and reliability of the proceeding that confidence in the outcome is undermined.

Maxwell v. Wainwright, 490 So. 2d 927, 932 (Fla. 1986).

Furthermore, as the Strickland Court noted, there is a strong presumption that counsel's performance was not ineffective. Strickland, 466 U.S. at 690. A fair assessment of an attorney's performance requires that every effort be made to eliminate the distorting effects of hindsight and to evaluate the conduct from counsel's perspective at the time. Id. at 689. The defendant carries the burden to "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Id.

On appeal, when reviewing a trial court's ruling on an ineffectiveness claim, this Court defers to the trial court's findings on factual issues, but reviews the trial court's ultimate conclusions on the deficiency and prejudice prongs de novo. Bruno v. State, 807 So. 2d 55, 62 (Fla. 2001). In this case, the lower court properly identified the applicable law in analyzing Smith's claim, correctly applied this law to the facts as presented in the trial and postconviction proceedings, and concluded that Smith was not entitled to postconviction relief.

In rejecting Smith's ineffective assistance of guilt phase counsel claim, the postconviction court stated:

5. As to Claim 1, Defendant argues that trial counsel was ineffective during the guilt phase of the trial for failing to object to testimony that Defendant wanted to rape a female correctional officer during the escape attempt. Defendant believes this was failure to object to introduction of evidence of an uncharged and uncommitted offense, of which the probative value far outweighed the prejudicial effect, depriving him of a fair trial. Defendant further argues that the State cannot make evidence of other crimes a feature of the trial, or introduce the evidence solely to show bad character, yet the State did both in this case. The State argues that Defendant's admission was part of his intent to escape and kill the guard, so no alarm would be raised. It believes the evidence was inseparable and inextricably intertwined with the crime charged, and was admissible. The State points out that in proving its case, it is entitled to paint an accurate picture of the events surrounding the crime charged, and that intertwined or inseparable evidence is admissible to establish the entire context out of which the crimes arose. Smith v. State, 699 So.2d 629, 645 (Fla. 1997); Conde v. State, 860 So.2d 930, 948 (Fla. 2003). Therefore, the State believes that trial counsel had no basis upon which to object, and could not have been ineffective for making a meritless argument. "In order for [the evidence] to be admissible as inextricably intertwined evidence, the evidence must be a relevant and inseparable part of the act which is in issue, and it must be necessary to admit the evidence to adequately describe the crime charged." Thomas v. State, 885 So.2d 968, 975 (Fla. 4th DCA 2004), *citing* Griffin v. State, 639 So.2d 966, 967 (Fla. 1994).

6. At the evidentiary hearing, trial counsel, Paul Sullivan, testified that he reviewed a statement by another inmate that the escape plan included a plan to rape a female correctional officer. He reviewed the testimony of Agent Uebelacker in which Defendant admitted this plan. He believed Defendant stated during the walkthrough of the crime a point at which he might have raped the guard, but Defendant indicated that once the escape attempt got under way, he did not think about the rape plan. 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. He did not believe it was objectionable and that it was admissible evidence, as the rape plan was intertwined with the crime charged. The evidence was relevant and went to Defendant's intent to commit the escape, so Mr. Sullivan did not think he would have prevailed if he had objected.

7. On cross examination, Mr. Sullivan testified that he filed a motion to suppress the video of Defendant's walkthrough, but that motion was denied. He believed evidence of something that might have happened during the escape would be part and parcel of the escape, and thus intertwined with the escape as showing intent to commit the escape. He cited Charles W. Ehrhardt, *Florida Evidence*, §404.17 (West, 2006 ed.), and §90.402 Fla. Stat. (2006), and while he did not recall if he researched that law at the time, that law reflected his thought regarding the evidence. Mr. Sullivan stated on redirect that he did not recall researching the law regarding intertwined crimes at the time of trial, but he had enough trial experience to believe a motion in limine would not work. **Based on Mr. Sullivan's testimony and belief that the rape plan was intertwined with the escape attempt, and the argument and authority cited by the State, the Court finds Mr. Sullivan's performance regarding this issue was not defective.** Kenneth Lykins testified at trial that Defendant mentioned wanting to rape a female officer during the escape attempt. Defendant admitted he had wanted to rape a female officer as part of the escape plan during his walkthrough with Agent Uebelacker. The State briefly mentioned the rape plan twice during closing arguments. From the record, it does appear Defendant wanting to rape a female officer was intertwined with his escape plans. It does not appear that the rape plan was made a feature of the trial. Further, Defendant has not established prejudice. Even had counsel objected, and even if the rape plan had not been presented, there was no reasonable likelihood of a different outcome, as there was sufficient other evidence presented for the jury to find Defendant guilty. See Smith, 998 So.2d at 524-525. There also would not have been any reasonable

probability of changing the jury's decision that the aggravating factors outweighed the mitigating factors had the rape plan not been presented, since the jury heard evidence regarding Defendant's prior convictions for murder and sexual offenses, Defendant has failed to meet his burden as to either prong of Strickland. Therefore, Claim I is DENIED.

(PCR V6:959-62) (record citations omitted and emphasis added).

The postconviction court properly denied Smith's claim as the evidence establishes that trial counsel was not deficient for failing to object to testimony from inmate Lykins regarding Smith's intent to commit a rape during the escape attempt or for seeking to exclude Smith's statements regarding the planned rape contained in his videotaped confession to Agent Uebelacker. Trial counsel could not specifically recall whether he researched the issue prior to trial, but based on his extensive criminal experience in this area, he believed the evidence surrounding the rape was inextricably intertwined with the escape plan and would not have been excluded even had he filed a motion in limine.<sup>4</sup>

As trial counsel properly concluded, the law is well established that Smith's admission regarding his desire to rape the female guard before escaping the prison was part and parcel

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<sup>4</sup> Trial counsel filed a motion to suppress Smith's entire videotaped walk-thru confession to Agent Uebelacker on other grounds, but this motion was denied. See Smith v. State, 998 So. 2d 516, 523-24 (Fla. 2008) (affirming trial court's denial of Smith's motion to suppress his statements to Agent Uebelacker).

of his intent to escape and to kill the guard so that no warnings or alarms could be made. Evidence of Smith's planned sexual assault on the victim, even if it constituted an uncharged crime, was inseparable and inextricably intertwined with the charged crime, and was therefore admissible. In Griffin v. State, 639 So. 2d 966, 968 (Fla. 1994), this Court stated:

[E]vidence of uncharged crimes which are inseparable from the crime charged, or evidence which is inextricably intertwined with the crime charged, is not Williams rule evidence. It is admissible under section 90.402 because "it is a relevant and inseparable part of the act which is in issue.... [I]t is necessary to admit the evidence to adequately describe the deed." Charles W. Ehrhardt, Florida Evidence § 404.17 (1993 ed.).

In proving its case, the State was entitled to paint an accurate picture of the events surrounding the charged crimes. Smith v. State, 699 So. 2d 629 (Fla. 1997). As this Court has noted in similar situations, inextricably intertwined evidence or inseparable crime evidence may be admitted to establish the entire context out of which a criminal act arose. See Conde v. State, 860 So. 2d 930, 948 (Fla. 2003) (finding that trial court did not abuse its discretion in admitting evidence that defendant imprisoned a prostitute in his apartment with duct tape as it was inextricably intertwined with the charged murder because it explained the context in which evidence connecting the defendant to the murders was discovered); Sexton v. State,

697 So. 2d 833, 836-38 (Fla. 1997) (finding that the trial court did not abuse its discretion in admitting evidence of defendant's incestuous relationship with his daughter because it was relevant to show his motive for the charged murder of his son-in-law); LaMarca v. State, 785 So. 2d 1209, 1212-14 (Fla. 2001) (holding trial court did not err in admitting testimony that defendant raped his daughter because it put into context the defendant's statements and was relevant to prove premeditation and motive for the murder of the defendant's son-in-law); Hunter v. State, 660 So. 2d 244, 251 (Fla. 1995) ("Among the purposes for which a collateral crime may be admitted is establishment of the entire context out of which the criminal action occurred. . . . Inseparable crime evidence is admitted not under 90.404(2)(a) as similar fact evidence but under section 90.402 because it is relevant.") (citations omitted); Bryan v. State, 533 So. 2d 744, 746 (Fla. 1988).

Smith's reliance on two Fourth District Court of Appeals cases, Thomas v. State, 885 So. 2d 968 (Fla. 4th DCA 2004), and Griner v. State, 662 So. 2d 758 (Fla. 4th DCA 1995), in support of his claim that the evidence of the planned rape was not inextricably intertwined evidence is misplaced as these two cases are clearly distinguishable from the instant case. In Griner, the defendant robbed a victim outside of a restaurant,

and after fleeing the scene, committed another robbery two blocks away about a half hour later. Griner, 662 So. 2d at 758-59. The trial court severed the two robbery counts for separate trials, but the judge admitted evidence of the first robbery as Williams rule<sup>5</sup> evidence in the second trial. Id. at 759. On appeal, the State recognized that the two incidents were not admissible as Williams rule evidence, but argued that the evidence was admissible under Griffin v. State, 639 So. 2d 966 (Fla. 1994), as "inseparable crime evidence." Id. The Fourth District Court of Appeal rejected this argument and found that the two separate events were not "inextricably intertwined" but were simply two crimes which occurred in a short time period. Id. at 759-60.

In Thomas, the Fourth District Court of Appeal, relying on its earlier decision in Griner, found that six armed robberies committed in another county, three hours earlier than the charged robbery, were not admissible as inextricably intertwined evidence. Thomas, 885 So. 2d at 973-76. The Thomas court found that the prior six armed robberies were not necessary to prove the motive or intent for the armed robbery which occurred three hours later in a different county.

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<sup>5</sup> Williams v. State, 110 So. 2d 654 (Fla. 1959).

Clearly, the two cases relied on by Appellant involving incidents with separate and distinct robberies are distinguishable from the instant facts where Smith's plan to rape the female correctional officer was inextricably intertwined and part and parcel of her murder and the planned escape attempt. The instant case is much more closely aligned to the facts in Sexton, LaMarca, and Conde, supra. The testimony at Smith's trial established that Smith and his codefendants planned their escape when a female correctional officer was guarding them and they were going to rape and kill her prior to the escape. Smith's intent to commit the rape was part of the overall escape plan and was unquestionably admissible as inextricably intertwined evidence.

Trial counsel Sullivan testified that he was aware prior to trial that the State would present evidence that Smith told another inmate and Agent Uebelacker that he planned to rape a female correctional officer prior to the escape. Trial counsel acknowledged that he had no valid legal argument which would have precluded the admission of this inextricably intertwined evidence. As trial counsel noted, had he moved to exclude this evidence, the trial court would have denied his motion. This Court has repeatedly noted that trial counsel is not deficient for failing to file a nonmeritorious motion. See Lukehart v.

State, 70 So. 3d 503, 512-13 (Fla. 2011) (holding that trial counsel cannot be deemed ineffective for failing to raise a meritless claim); Ferrell v. State, 29 So. 3d 959, 976 (Fla. 2010); Peede v. State, 955 So. 2d 480, 502-03 (Fla. 2007); Maharaj v. State, 778 So. 2d 944, 958 (Fla. 2000). Given this evidence, the postconviction court properly found that Appellant failed to establish deficient performance by trial counsel.

Additionally, although not required to address the prejudice prong of Strickland given Smith's failure to prove deficient performance, the lower court nevertheless found that Smith also failed to establish prejudice. See Waterhouse v. State, 792 So. 2d 1176, 1182 (Fla. 2001) (holding that "[w]hen a defendant fails to make a showing as to one prong, it is not necessary to delve into whether he has made a showing as to the other prong"). As previously noted, any objection to the evidence surrounding Smith's statements regarding his intent to rape the victim would have been meritless. Because the trial judge would not have excluded this inextricably intertwined evidence, Smith cannot establish prejudice based on trial counsel's failure to file a motion seeking to exclude this relevant and admissible evidence.

Even if this Court were to find that trial counsel was deficient for failing to move to exclude the evidence regarding

the planned rape and that the trial court would have granted such a motion, the admission of Smith's statements was harmless error and would not constitute prejudice under the Strickland standard. See State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986) (stating that error is harmless if State proves that there is no reasonable possibility that error contributed to conviction); Cox v. State, 966 So. 2d 337, 347-48 (Fla. 2007) (finding that a defendant is unable to meet Strickland's prejudice standard if error is harmless). As this Court noted on direct appeal, there was substantial evidence supporting the jury's verdict under both the premeditated and felony murder theory of prosecution, and the evidence of Smith's statements regarding his intent to rape a female correctional officer clearly would not have affected the jury's verdict in the guilt phase given the overwhelming evidence of Smith's guilt of the charged murder. See Smith, 998 So. 2d at 524-25 (discussing the substantial evidence supporting Smith's conviction under both the premeditated and felony murder theory of first degree murder). Furthermore, as the lower court properly noted, the evidence did not affect the jury's recommendation of the death penalty as the jury was aware that Smith had previously been convicted of first degree murder and other violent sexual offenses, including an armed sexual assault of his sister and sexual battery on a teen-



aged girl during a burglary. As there is no question that confidence in the jury's verdict or recommendation was not affected by the admission of evidence indicating Smith's desire to rape a female correctional officer during the escape and murder, this Court should affirm the lower court's order denying Smith claim of ineffective assistance of counsel.

## ISSUE II

THE POSTCONVICTION COURT PROPERLY DENIED SMITH'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE.

In his second claim, Smith alleges that his trial counsel was ineffective at the penalty phase for failing to have his forensic psychiatrist, Dr. Frederick Schaerf, review records from the Department of Corrections indicating that Smith had previously been diagnosed with posttraumatic stress disorder (PTSD) during his incarceration. After hearing testimony at the postconviction evidentiary hearing from trial counsel Paul Sullivan and Dr. Schaerf, as well as Dr. Maher (an expert retained by collateral counsel in the postconviction proceedings), the lower court denied Smith's claim and found that he failed to carry his burden of establishing both deficient performance and prejudice as required by Strickland v. Washington, 466 U.S. 668 (1984).

8. As to Claim II, Defendant argues that trial counsel was ineffective during the penalty phase for failing to conduct adequate investigation into Defendant's background in order to provide mitigation evidence. Defendant argues that trial counsel failed to provide defense expert Dr. Schaerf with medical, psychiatric and classification records from the Department of Corrections, in which Defendant had been diagnosed with post traumatic stress disorder (PTSD). By not providing these documents to the expert, Defendant believes trial counsel's ineffectiveness deprived him of mental mitigation evidence. Without presentation of the PTSD diagnosis, Defendant argues the jury was led to believe he was unaffected by the

abuse he suffered as a child. An evidentiary hearing was granted on the portion of this claim regarding the issue of whether counsel was ineffective for not providing the aforementioned documents to Dr. Schaerf, and whether Dr. Schaerf's opinion would have been different had he been provided those documents.

9. At the evidentiary hearing, defense witness Dr. Maher testified that he had interviewed Defendant in 2010. He believed that Defendant has brain damage or impairment. His review of the raw data of testing of Defendant conducted by other experts indicates a discrepancy between Defendant's verbal and performance IQ scores of approximately 12 points, which he found clinically significant. Dr. Maher stated that this discrepancy is a broad indication of impairment. He testified that Defendant's pattern of relaying stories in a disjointed manner can be a sign of a psychiatric disorder such as PTSD. Dr. Maher opined that Defendant was affected by his childhood abuse and stabbings and violence in prison, and had dissociative experiences as a defense mechanism in response to stress that his mind likens to those past experiences. He believed that, due to his PTSD, Defendant's ability to react voluntarily was dramatically impaired when he saw codefendant Eaglin kill the victims. On cross examination, Dr. Maher indicated he had not spoken with anyone who had evaluated or tested Defendant, and admitted that no other expert had diagnosed Defendant with PTSD. He had not conducted malingering testing on Defendant. He was not aware that Defendant had previously been diagnosed with malingering. Dr. Maher believed that the Department of Corrections mental health documents indicated either PTSD, or information consistent with that diagnosis, since anxiety and depression can be manifestations of PTSD. **He conceded that the records do not indicate Defendant showed any signs of PTSD after 1999.**

10. Mr. Sullivan testified that he worked hard to obtain all documents possible, giving Dr. Schaerf the records he thought the doctor should have, and believed he gave Dr. Schaerf the Department of Corrections mental health records as well. While there were mental health records in the documents reviewed by Dr. Schaerf, that was not what he wanted the doctor

to focus on. He thought that Defendant's bad childhood was better to present to the jury. He retained Dr. Schaerf because he was good at linking a defendant's background with his medical or psychological conditions to give a narrative of who the defendant is. Mr. Sullivan stated that he was looking for Dr. Schaerf to tell him what mental health mitigation existed, because he did not see any mental health mitigation in Defendant's records. He thought Defendant's background of being institutionalized the majority of his life in either juvenile detention facilities or jails was the more compelling story. Although Mr. Sullivan did discuss existing mental health issues during the penalty phase, his focus was more oriented toward the Defendant's background, which provided a stronger basis for mitigation. He did not want to turn the jury off by trying to excuse the crime because Defendant had mental health problems. He recalled taking a lot of documents to Dr. Schaerf, but did not recall whether he gave copies of all those documents to him.

11. Dr. Schaerf testified that his purpose was to examine Defendant's life and attempt to present psychological life story mitigation to the jury, to give the jury a picture of Defendant's life story and why he did what he did. He recalled reviewing Department of Corrections records that he was not given copies of, though he did not recall now specifically which records. Upon being shown the specific Department of Corrections documents that were the basis of this Claim, Dr. Schaerf indicated he had reviewed those documents. He agreed with Dr. Maher that the Department of Corrections documents showed Defendant was given a diagnosis of PTSD, which appeared to have resolved itself by 2001, at which time Defendant was no longer receiving treatment. Dr. Schaerf stated that the Department of Corrections records would not change his opinion, because the PTSD and other diagnosis were either in remission, or were not quite accurate. Defendant did not show any symptoms of PTSD when interviewed that would have caused him to diagnose PTSD, and Defendant was not suffering from any symptoms of PTSD when he testified. Dr. Schaerf disagreed with Dr. Maher that Defendant had a history of dissociative episodes because there

was no evidence Defendant had dissociative symptoms, he did not see signs of such episodes when he interviewed Defendant, and saw no documentation of such episodes in Defendant's records. Dr. Schaerf did not "think [Defendant] was having a dissociative episode ever". He did not believe any diagnosis of PTSD was relevant to his purpose in testifying at the penalty phase, and it would not have added anything to his testimony.

12. Thus, Dr. Schaerf's testimony refutes Defendant's contention that trial counsel did not provide the specific Department of Corrections records attached to the 3.851 motion to Dr. Schaerf, as he stated that he had reviewed Department of Corrections records with counsel prior to testifying at the penalty phase of trial, and could not say those specific documents had not been reviewed. Further, even if those specific documents had not been provided, Dr. Schaerf testified that they would not have changed his opinion, as he disagreed with the diagnosis of PTSD, and believed that any diagnosis of PTSD would not have been relevant at the time he testified, as the condition would have been in remission for several years at that time. That Defendant has now offered expert opinions different from those of the experts appointed before trial does not mean relief is warranted. Cherry v. State, 781 So.2d 1040 (Fla. 2000). 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 gives a more favorable diagnosis. Asay v. State, 769 So.2d 974 (Fla. 2000). Further, a subsequent finding of a mental deficiency does not necessarily warrant a new sentencing hearing, unless the psychiatric examinations were so grossly insufficient that they ignored clear indications of either mental retardation or organic brain damage. State v. Sireci, 502 So.2d 1221, 1224 (Fla. 1987). Although Dr. Maher opined that Defendant showed broad indications of brain damage or mental impairment: there was no evidence presented of clear indications that Defendant suffered from either mental retardation

or organic brain damage, and no evidence the pretrial experts ignored any such clear indications of those conditions. 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". The Court finds this was reasonable trial strategy, and that trial counsel was not defective. Further, the Court finds Defendant has not established prejudice. Even had the diagnosis of PTSD by Department of Corrections staff, or any of the other 14 diagnosis made by those staff, been presented to the jury, there is no reasonable probability of a different outcome, as even with this evidence, the mitigating factors would not outweigh the aggravating circumstances. Defendant has failed to meet his burden as to either prong of Strickland. Therefore, Claim II is DENIED.

(PCR V6:962-67) (record citations omitted and emphasis added).

As noted, in Issue I, supra, in order for Appellant to prevail on his claim on ineffective assistance of counsel claim, he must identify a particular act or omission by his lawyer that is shown to be outside the broad range of reasonably competent performance under prevailing professional standards, and that the deficiency so affected the fairness and reliability of the proceeding that confidence in the outcome is undermined. Strickland v. Washington, 466 U.S. 668 (1984). When reviewing the lower court's order denying Smith's claim, this Court defers

to the lower court's factual findings and reviews the court's conclusions on the deficiency and prejudice prongs de novo. Bruno v. State, 807 So. 2d 55, 62 (Fla. 2001).

In addressing Smith's claim that trial counsel was ineffective for failing to provide Dr. Schaerf with prison records detailing Smith's prior diagnosis of PTSD, the lower court made a factual finding that Smith failed to establish the basic premise of his claim, i.e., that counsel failed to provide the prison records to his expert. Trial counsel Sullivan testified at the evidentiary hearing that he compiled a voluminous amount of information regarding Smith's background, including obtaining the psychological and medical records from DOC and FDLE which were the subject of Smith's claim. Sullivan recalled taking a large number of documents to Dr. Schaerf's office, but Sullivan had no specific recollection of actually providing these documents to his expert. Dr. Schaerf testified that he recalled reviewing various DOC records prior to trial which he was not given a copy of, but he could not recall exactly which DOC records he reviewed. Thus, based on this equivocal testimony, the trial court properly found that Appellant failed to prove that trial counsel failed to provide these records to Dr. Schaerf.

Even assuming trial counsel failed to provide the prison records to Dr. Schaerf, such an omission did not equate to a finding of constitutionally deficient performance falling below the broad range of competent performance under prevailing professional standards. Trial counsel testified at length regarding his strategy of focusing on Smith's abusive and horrific childhood in an attempt to humanize him in the eyes of the jury and explain Smith's behavior. Trial counsel obtained and reviewed a large amount of background information during his investigation, including numerous psychological reports, and provided this information to Dr. Schaerf so that the expert could explain how Smith's background affected his behavior. During the penalty phase, Dr. Schaerf testified that, in addition to personally examining Appellant, he reviewed court documents from Appellant's other cases, including psychologist and psychiatrist reports; some Department of Corrections (DOC) records and school records; Rhode Island Department of Family and Children records; Appellant's statements about the murders at CCI; and numerous depositions from family members and people familiar with Smith from Rhode Island.<sup>6</sup> (DAR V41:778-80; see also PCR V9:1433-36). Obviously, as trial counsel explained at the

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<sup>6</sup> On cross-examination, Dr. Schaerf testified that there were other documents that he reviewed that were not mentioned in his brief recitation of the materials he examined. (DAR V41:815).



evidentiary hearing, he did a substantial amount of work in gathering all available background information on Smith and providing it to his expert, and if counsel inadvertently failed to provide Dr. Schaerf with the 85 pages of prison medical and psychological records, this did not render his performance constitutionally deficient.

Additionally, the postconviction court noted that even if trial counsel failed to provide these records to Dr. Schaerf, Smith could not establish that he was prejudiced in any manner. The court noted that Dr. Schaerf's penalty phase testimony would not have changed and, even if the jury had been made aware of the diagnosis of PTSD, there was no reasonable probability that it would have resulted in a different outcome as the mitigating factors would not have outweighed the aggravating circumstances. As this Court noted in Cherry v. State, 781 So. 2d 1040, 1048 (Fla. 2000), when addressing the prejudice prong of a claim directed at penalty phase counsel's performance, the defendant "must demonstrate that there is a reasonable probability that, absent trial counsel's error, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death."

At the penalty phase proceedings, Dr. Schaerf testified, among other opinions, that Smith suffered from major depression,

attention deficit disorder, substance abuse, and antisocial personality disorder. (DAR V41:781-95). At the postconviction proceedings, Dr. Schaerf testified that the 85 pages of DOC medical and psychological records attached to Smith's postconviction motion indicated that Smith had been diagnosed by DOC personnel in 1996 as having PTSD after he was the victim of a stabbing incident in prison. (PCR V9:1441). Smith had the PTSD diagnosis for a while and received medication. The diagnosis of PTSD resolved around 2000 and Smith stopped taking any medications and obtaining psychiatric treatments. (PCR V9:1441, 1456-57). Dr. Schaerf, unlike Smith's postconviction expert Dr. Maher, did not find any evidence that Smith was suffering from PTSD or dissociative disorder at the time of the murder in June, 2003. (PCR V9:1456-64). Dr. Schaerf testified that the prior diagnosis of PTSD, like the other 13-14 diagnoses made by DOC, were "either in remission or not quite accurate or not relevant." (PCR V9:1442-44).

The lower court properly noted that the fact that Appellant retained a different expert during the postconviction proceedings who gave a more favorable opinion than Dr. Schaerf did not entitle him to relief. See generally Asay v. State, 769 So. 2d 974, 986 (Fla. 2000) (stating that trial counsel's reasonable investigation is not rendered incompetent merely

because the defendant has now secured the testimony of a more favorable expert in postconviction); Jones v. State, 732 So. 2d 313 (Fla. 1999) (stating that the mental health expert's opinion is not rendered less competent merely because collateral counsel has retained an expert in postconviction to come to a different conclusion based on similar evidence). In contrast to Dr. Schaerf, Dr. Maher testified that Smith had PTSD and was suffering from a dissociative state during the crime. Dr. Maher opined that Smith's dissociative state began when codefendant Eaglin beat another inmate and became worse as the incident progressed. Dr. Maher concluded that Smith was suffering from "paralyzing feelings of anxiety" during the crime. However, a review of the trial testimony, as well as Smith's videotaped walk-thru interview with Agent Uebelacker, clearly refutes Dr. Maher's opinions regarding Smith's psychological state at the time of the murder and escape attempt. As Dr. Schaerf stated, Smith's actions, including assembling the ladders used in the escape attempt, clearly refutes any diagnosis of a dissociative state at the time of the murder.

Appellant claims that had the jury been informed of Smith's diagnosis of PTSD, the outcome of the penalty phase proceeding would have been different. To the contrary, as Dr. Schaerf testified, the prior diagnosis of PTSD years before the murder

was not relevant to Smith's behavior because the evidence did not establish that he was suffering from PTSD at the time of the murder and escape attempt. Even if trial counsel had obtained a different expert, like Dr. Maher, to opine that Smith was suffering from PTSD, it would not have resulted in a life recommendation or sentence. As this Court noted on direct appeal, the jury was well aware of Smith's horrific childhood and mental health issues:

Smith presented numerous witnesses, including family members and a former Rhode Island social worker, regarding his background and character.[FN3] They testified that Smith's father was frequently intoxicated, violent, and physically abusive. He also sexually abused Smith's sisters. Smith's father was a poor provider, and the family essentially lived on welfare. Smith's parents did not display affection, provide religious or moral guidance, or require school attendance. The State of Rhode Island removed Smith from his home because he could not be controlled at home. From ages eleven to eighteen, he was in state placements ranging from group homes to juvenile prisons, and twice underwent psychiatric evaluation. Smith regularly escaped from many of the placements and returned home, and he frequently violated the law. As a young man, Smith and his younger brother went to Florida where they used drugs heavily, and where Smith had a sexual relationship with his aunt.

FN3. Smith's brother testified by video deposition from a Rhode Island prison where he is serving a life sentence for murdering and raping his stepdaughter. The evidence at the penalty phase showed, however, that all of Smith's sisters are married, employed, and living productive lives.

Dr. Frederick Schaerf, an expert in forensic psychiatry, testified that Smith has a history of

depression, mood disorder, attention deficit disorder, hyperactivity (as a child), and substance abuse. However, Smith's depression and substance abuse were in remission. Smith has a low normal IQ "in the 80 range," and the doctor concluded that he has an antisocial personality disorder.

Smith, 998 So. 2d at 521. Furthermore, as this Court noted, the trial court considered and weighed Smith's mental health issues with his "dysfunctional family background."

In this case, the trial court found the following mitigating factors and assigned the weight indicated: (1) Smith's background (great weight); (2) Smith's expression of remorse (little weight); and (3) mental and emotional health issues (some weight). Smith contends that the latter factor was entitled to more weight because these issues were intertwined with his background. However, with regard to the latter factor, the court found that Smith's history of depression, substance abuse, and attention deficit disorder was proven and may be related to his "dysfunctional family background." The court thus considered them in context with Smith's background to which it gave great weight. Smith has not demonstrated that the trial court abused its discretion in ascribing the mental health issues some weight.

Id. at 527.

As the lower court properly found, Appellant failed to establish that there was a reasonable probability of a different outcome had the jury been made aware of the diagnosis of PTSD. There were four significant aggravating factors present in the instant murder of correctional officer Darla Lathrem: (1) under a sentence of imprisonment; (2) prior violent felony convictions, including first-degree murder, burglary, robbery,

and sexual battery; (3) the murder was committed for the purpose of an escape from custody, and the victim was a law enforcement officer engaged in official duties (merged); and (4) the murder was cold, calculated, and premeditated (CCP).<sup>7</sup> Given these serious aggravating circumstances, there is no reasonable probability of a different outcome at the penalty phase even had counsel performed as alleged in the postconviction motion.

Appellant erroneously asserts in his brief that “[t]he investigation regarding mitigation was abandoned, leads were not pursued” and the presentation of mitigating evidence focused on Appellant’s childhood and his Broward County charges. Initial Brief of Appellant at 68. Appellant further incorrectly asserts that his case is “squarely on point with the facts” in Porter v. McCollum, 558 U.S. \_\_\_, 130 S. Ct. 447 (2009). Contrary to these claims, trial counsel Sullivan performed an extremely thorough and complete investigation of Smith’s background and provided this material to his forensic psychiatrist, Dr. Schaerf. (PCR V5:844-48). Appellant can only point to trial counsel’s alleged failure to provide Dr. Schaerf with 85 pages of prison records. This situation is clearly not “squarely on point with the facts”

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<sup>7</sup> This Court noted that two of the aggravators, CCP and prior violent felony convictions, were two of the most serious aggravating factors in Florida’s capital sentencing scheme. Smith, 998 So. 2d at 527 (quoting Chamberlain v. State, 881 So. 2d 1087, 1108-09 (Fla. 2004)).

of Porter.

In Porter, the United States Supreme Court found that the defendant's trial counsel was ineffective for failing to discover and present extensive mitigating evidence regarding Porter's 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 capacity. Porter, 130 S. Ct. at 449. Porter's trial counsel presented only one witness at the penalty phase, Porter's ex-wife, and the "sum total" of the mitigating evidence was inconsistent testimony about Porter's behavior when he was intoxicated and testimony that he had a good relationship with his son. Id. at 449. Clearly, the extensive investigation and presentation of mitigating evidence done by trial counsel in the instant case is not even remotely similar to the facts in Porter.

The State submits that the instant case is more analogous to the situation this Court recently confronted in Hildwin v. State, 84 So. 3d 180, 187-91 (Fla. 2011). In Hildwin, this Court rejected a claim that penalty phase counsel was deficient for failing to provide institutional records to his mental health expert because, even if more weight had been given to the mitigating evidence, it would not have resulted in a life sentence given the significant aggravation. Likewise, even if

the jury had been made aware of the PTSD diagnosis and had given greater weight to Smith's mitigation, it would not have altered the outcome given the significant aggravation present in this case. Accordingly, this Court should affirm the lower court's order denying Smith's claim of ineffective assistance of penalty phase counsel.



**CONCLUSION**

In conclusion, Appellee respectfully requests that this Honorable Court affirm the lower court's order denying Appellant postconviction relief.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Richard E. Kiley, Assistant CCRC-M, Office of the Capital Collateral Regional Counsel, Middle Region, 3801 Corporex Park Dr., Suite 210, Tampa, Florida 33619-1136, this 24th day of July, 2012.

**CERTIFICATE OF FONT COMPLIANCE**

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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