IN THE SUPREME COURT OF FLORIDA

CASE NO. SC05-632

WYDELL JODY EVANS

Appellant,

v.

STATE OF FLORIDA

Appellee.

ANSWER BRIEF OF APPELLEE

ON APPEAL FROM THE EIGHTEENTH JUDICIAL CIRCUIT IN AND FOR BREVARD COUNTY, FLORIDA

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MISCELLANIOUS

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STATEMENT OF THE CASE

On November 10, 1998, the grand jury for Brevard County returned an indictment charging Appellant with first degree premeditated murder, kidnapping, aggravated assault and possession of a firearm by a convicted felon. (R[1] Vol. III, 451-452) Appellant filed a motion to suppress statements and admissions on the grounds they were not voluntary and were obtained in violation of his *Miranda2* rights. (R Vol. III, 497-504, 529) A hearing on the motion to suppress was conducted July 8, 1999, and October 18, 1999. (R Vol. I and II, 1-296) Following testimony and argument of counsel the, trial court denied the motion to suppress. (R Vol. II, 265-266, 290; Vol. III, 544-545) Upon defense motion, the trial court granted the motion to sever the possession-of-a-firearm-by-a-convicted-felon charge from the remaining charges. (R Vol. III, 554-555)

Jury trial was held on October 25, 1999, the Honorable Jere Lober presiding. (T Vol. V-XV, 1-2145) Defense counsel made a motion *in limine* to prevent disclosure that Appellant had previously been in jail when a phone conversation between Appellant and the victim was overheard by pod-mate Edward

[1] AR@ designates the original Record on Appeal which consists of pages 1-680. AT@ designates the original trial record and penalty phase which consists of pages 1-2429. "PCR" designates the postconviction record on appeal.

Rogers. (T Vol. XIII, 1633) The trial court denied the motion but agreed to give a limiting instruction. (T Vol. V, 33) After the jury was sworn, but before opening statements, defense counsel moved for invocation of the rule of sequestration. Defense counsel asked that Appellant's mother be excluded from the rule but the trial court refused to do this. (T Vol. IX, 944) Appellant objected to the trial court's excusal of the victim's father from operation of the rule of sequestration. (T Vol. IX, 944-953)

During opening statement, defense counsel objected to the prosecutor giving jury instructions in her opening statement. (T Vol. IX, 967) The trial court overruled the objection but did give a cautionary instruction to the jury. (T Vol. IX, 967) During the testimony of the first State witness, the victim's father caused a courtroom disturbance. (T Vol. IX, 1000) Defense counsel moved for a mistrial because of this outburst. The motion was denied. (T Vol. X, 1015) Following the testimony of Edward Rogers, the trial court instructed the jury not to infer that Appellant was guilty of any other crime simply because he had been in jail when Rogers heard the statements he testified to. (T Vol. XII, 1417) Appellant's statements to the police officers were admitted into evidence over objection. (T Vol.

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2 *Miranda v. Arizona*, 384 U.S. 436 (1966).

XII, 1509, 1536-1537)

Defense counsel moved for judgment of acquittal arguing that the evidence failed to show any premeditation as to the murder charge and that there was no evidence of a kidnapping since the alleged victims could have left at any time. (T Vol. XIII, 1738-1754) The trial court denied the motion. (T Vol. XIII, 1754) The motion was renewed at the end of all the evidence and again denied. (T Vol. XIV, 1886) During the state's rebuttal argument, defense counsel objected and moved for a mistrial when the State suggested that the Appellant could have prevented the situation by turning over the gun. Defense counsel argued that such comment, coupled with a previous comment, improperly shifted the burden of proof to the defense. (R Vol. XIV, 2098-2099) The trial court denied the motion and overruled the objection, stating that the State's argument went to Appellant's motivation. (T Vol. XV, 2100) Following deliberations, the jury returned verdicts finding Appellant guilty as charged on all three counts. (T Vol. XIV, 2143-2145)

The penalty phase began November 3, 1999. (T Vol. XVV-XVII, 2196-2418) Defense counsel objected to the State presenting the summaries of prior offenses contained in a pre-sentence investigation report. (T Vol. XVI, 2224) The trial court ruled that the summaries were admissible and also noted that the

objections to them were preserved for appellate purposes. (T Vol. XVI, 2229, 2243) Following deliberations, the jury returned an advisory recommendation that Appellant be sentenced to death by a vote of ten to two. (T Vol. XVI, 2418)

On November 8, 1999, Appellant filed a motion for new trial. (R Vol. IV, 606-611) A hearing on the motion was conducted on December 21, 1999. (R Vol. II, 297-337) The motion was denied. (R Vol. III, 400) On January 4, 2000, the trial court conducted a *Spencer*[3] hearing. (R Vol. II, 338-381)

On February 15, 2000, Appellant was sentenced to life in prison as a Prison Releasee Reoffender for the kidnapping conviction and a concurrent term of 108.15 months in prison for the aggravated assault conviction. These sentences were to run consecutive to the sentence of death imposed for the first degree murder charge. (R Vol. III, 446; R Vol. IV, 634-641) The trial court filed written findings of fact in support of his sentence of death. (R Vol. IV, 642-662)

This Court affirmed Appellant=s conviction and death sentence. *Evans v. State*, 838 So. 2d 1090 (Fla. 2002), with the following fact findings:

> On October 21, 1998, two days after being released from prison, Wydell Evans shot and killed his brother's seventeen-year-old girlfriend, Angel, during an argument over

[3] *Spencer v. State*, 615 So.2d 688 (Fla. 1993).

her alleged unfaithfulness to Evans' brother. At the time of the shooting, Evans was in an automobile with Angel, Erica Foster, Sammy Hogan, and Lino Odenat. At some point during the argument, Angel laughed, to which Evans responded, "You think it's funny? You think it's funny?" Evans then pulled out a gun and shot Angel in the chest.

After the shooting, Evans directed Hogan to drive to the home of a man called "Big Dick." As they drove, Evans passed the gun to Odenat and told him to dispose of it. When they arrived at Big Dick's house, Evans left the car and talked to Big Dick. While Evans was talking, Odenat decided to get out of the car and let the others take Angel to the hospital. As Odenat opened the door and stepped out, Evans told him to get back into the car and Odenat obeyed. Within a few minutes, Evans returned and directed Hogan to drive into a nearby parking lot. There, Evans threatened Foster and Hogan not to tell who shot Angel or he would kill them and their families. After threatening Foster and Hogan, Evans tried to wipe his fingerprints from inside the car and left with Odenat. Once Evans was out of the car, Foster and Hogan rushed Angel to the hospital where she later died of her wounds.

At the hospital, Foster and Hogan were questioned by the police, at which time they first told police that a white man driving a cream-colored car shot Angel over a drug deal. They later changed their story and reluctantly identified Evans as the shooter. The police found Evans at a motel the next morning. He was taken into custody, charged, and after a jury trial, convicted of one count of first-degree premeditated murder one count of kidnapping, and one count of aggravated assault.

Id. at 1092.

The trial judge found that two statutory aggravators were proven beyond a reasonable doubt: (1) the existence of prior violent felonies; and (2) the crime was committed while Evans was on probation. The judge rejected the statutory mitigating circumstance that the victim was a participant in the Appellant's conduct, finding that although there was some testimony that the victim slapped the gun away causing it to misfire, this testimony was rendered implausible by the testimony of the medical examiner and the location of the bullet in the car.

The trial judge also found that several non-statutory mitigators were proven: (1) Evans had an abused or deprived childhood as a result of his mother's crack addiction (little weight); (2) he contributed to society as evidenced by his exemplary work habits (little weight); (3) he performed charitable or humanitarian deeds (some weight); (4) he counseled youth to avoid crime and stay in school (little weight); and (5) he had good behavior in prison (little weight). The trial court rejected the mitigator of remorse, finding it was not proven. After concluding that the aggravators far outweighed the mitigators, the judge agreed with the jury's recommendation and sentenced Evans Appellant to death. *Id.* at 1097.

Evans appealed his sentence to the Florida Supreme Court, raising six issues:

> POINT I
>
> IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE 1, SECTION 9 AND 22 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN PERMITTING THE STATE TO ELICIT HEARSAY TESTIMONY THROUGH ITS POLICE OFFICER WITNESSES.
>
> POINT II
>
> IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE I SECTION 9 & 16 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR MISTRIAL BASED ON COMMENTS BY THE PROSECUTOR DURING CLOSING ARGUMENTS IN THE GUILT PHASE WHICH IMPROPERLY SHIFTED THE BURDEN OF PROOF TO THE APPELLANT.
>
> POINT III
>
> IN VIOLATION OF THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I SECTION 9, 16 & 17 OF THE FLORIDA CONSTITUTION, APPELLANT WAS DENIED DUE PROCESS BECAUSE OF THE INCOMPLETE AND CONFUSING JURY INSTRUCTION GIVEN BELOW.
>
> POINT IV
>
> THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR JUDGEMENT OF ACQUITTAL AS TO PREMEDITATED MURDER AND KIDNAPPING.
>
> POINT V
>
> IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I SECTION 9 & 16 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN ALLOWING THE STATE TO PRESENT PORTIONS OF A PRE-SENTENCE INVESTIGATION DURING THE PENALTY PHASE WHERE APPELLANT WAS

NOT GIVEN ANY OPPORTUNITY TO REBUT THE INFORMATION.

POINT VI

IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE I SECTION 17 OF THE FLORIDA CONSTITUTION, THE IMPOSITION OF THE DEATH PENALTY IS PROPORTIONALLY UNWARRANTED IN THIS CASE.

Initial Brief of Appellant, Florida Supreme Court Case No. SC00-468. Appellant sought certiorari review in the United States Supreme Court. Review was denied October 6, 2003. *Evans v. Florida*, 540 U.S. 846 (2003).

Evans filed a Motion for Postconviction Relief on February 26, 2004 (PCR Vol. V, 487-666). The State filed a Response (PCR Vol. V, 668-705). The court ordered an evidentiary hearing to begin October 18, 2004 (PCR Vol. V, 717-718). The evidentiary hearing took place October 18-19 and December 16, 2004.

STATEMENT OF THE FACTS

Postconviction evidentiary hearing testimony. The defense presented testimony from trial counsel, Ken Studstill, and five lay witnesses: Barbara McFadden, Margaret O'Shaughnessy, Sandra Evans, Lilly Evans, and Oren Javon Evans. Appellant testified. The defense presented testimony of three mental health experts: Dr. Richard Carpenter, Dr. Harry McClaren[4], and Dr. Henry Dee.

[4] Dr. McClaren was hired by the State but was called by the

Barbara McFadden, a special education teacher, previously taught high school classes for students with emotional disabilities. Currently, she coordinated special education programs for Brevard County Schools. (PCR Vol. I, 6-8) Her classroom was a self-contained kind of program. The students were with her all day and she taught all subjects. Evans was 16 years old when he joined her class. (PCR Vol. I, 10) He was not comfortable in her classroom. He was "more difficult to reach and to develop a rapport." (PCR Vol. I, 9) He had previously been in learning disabled and speech therapy classes. Learning disorders had been detected in elementary school. (PCR Vol. I, 10) Evans had been recommended for "severely emotionally disturbed" when he was removed from her classroom Afor something that must have happened in the community.@ (PCR Vol. I, 11) At that time, he was on a third or fifth grade level for reading and math. (PCR Vol. I, 11)

Many students in her class had committed "a lot of different crimes ... had significant emotional behavior disorders ... they liked coming to my classroom ..." (PCR Vol. I, 12) However, Evans did not have any interaction with the other students in her class. He had learning disorders and behavior problems. (PCR Vol. I, 12) She recalled an incident where Evans "jumped right

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defense.

out of his seat angry and upset about being there ... he walked out of the classroom ... I went after him ... I just recalled him saying to me, you need to get back ... I remember that rage in his face ... I called for assistance." (PCR Vol. I, 13-14) Evans was agitated all the time. (PCR Vol. I, 15) He was very restless, hyperactive, unable to concentrate, and was constantly looking around. He was recommended for the severely emotionally disturbed program. (PCR Vol. I, 16)

When she found out Evans was accused of murder, she was not surprised or shocked; her only surprise was that it didn't happen sooner. (PCR Vol. I, 17) She would have testified at his trial had she been asked. (PCR Vol. I, 18) Evans was an angry and explosive person but he was not violent in her presence. (PCR Vol. I, 19) He was disruptive in her classroom, and would get up and leave because he did not want to be disruptive. (PCR Vol. I, 21) Her other students did not make him feel welcome. (PCR Vol. I, 24) They would Agang up on him and [say] you=re not going to mess up our class or hurt our teacher.@ (PCR Vol. I, 24) His IQ was in the average range (PCR Vol. I, 24) Even with learning disabilities, students can overcome their disabilities with willingness and the right supervision. (PCR Vol. I, 26) Although all of her students had a history of anger, Wydell "was a little harder to reach. I was going to need more time and

space ... we didn't get that opportunity." (PCR Vol. I, 27) Evans was not a planner. (PCR Vol. I, 28) AWhatever was going on, he was just going to react to ... it was like ready, aim, fire, instead of thinking for a second.” (PCR Vol. I, 28) He read on a very low level and did not give her the impression of being college material. (PCR Vol. I, 28)

Margaret O'Shaughnessy is a former counselor for special-needs students. (PCR Vol. I, 30) She recalled an incident where Evans was mad at a female student; he attacked her as she tried to board a school bus. (PCR Vol. I, 31) Evans had Asuch a violent short trigger." (PCR Vol. I, 33) Eventually, he was taken out of high school and placed in "homebound to evaluate SED placement." The SED placement was never completed. (PCR Vol. I, 34)

Evans received mostly failing grades. There was an incident where he knocked a teacher to the ground. (PCR Vol. I, 35) Although O’ Shaughnessy was not called to testify at his trial, she would have been willing to do so. (PCR Vol. I, 35)

O'Shaughnessy did not know if Evans had a relationship with the girl he knocked down at the bus area. He was 16 years old at the time. AHe was such an angry individual.@ (PCR Vol. I, 37) He never made any threats toward her. The other students would have protected her. (PCR Vol. I, 38) At one point, he

retaliated against a teacher for turning him in; he told her Ahe would get her." (PCR Vol. I, 40)

O'Shaughnessy was aware Evans had been hit by a car at age 3, and developed a speech impediment. He did not have medical treatment at that time. (PCR Vol. I, 41) Her friends "in the black community" told her Evans had been raised "on the streets." His mother cared about him but had a drug problem. Evans was very protective of her. (PCR Vol. I, 41-2) He was Avery impulsive, very impulsive.@ (PCR Vol. I, 43). He did not think things through; he was "a short fuse that just exploded." (PCR Vol. I, 44)

Kenneth Studstill was Evans= trial counsel, appointed as conflict attorney. (PCR Vol. I, 46) After a case is over, he files an affidavit with the court for fees and costs reflecting the amount of time he spent on the case. (PCR Vol. I, 47-8)

Studstill recalled that Sammy Hogan testified that Evans shot Angel and threatened Hogan and another witness, Erica Foster. He then forced them to drive to another location after the shooting. (PCR Vol. I, 51-2) Studstill avoided impeaching Hogan=s inmate status. (PCR Vol. I, 53) Erica Foster also testified that Evans had threatened her and forced them to go to another location rather than taking Angel to the hospital. (PCR Vol. I, 54) He avoided impeaching her, as well. (PCR Vol. I,

55)

Studstill knew Evans had consumed alcohol prior to the murder but did not believe it was significant. (PCR Vol. I, 57) He did not request that Evans have a mental evaluation nor did he pull medical records. (PCR Vol. I, 58, 59) Although the victim was Wydell=s brother=s (O.J.) girlfriend, he did not interview O.J., who was incarcerated at the time. (PCR Vol. I, 59)

Studstill deposed the State's witnesses prior to trial. (PCR Vol. I, 59-60) He hired an agency to interview witnesses, independent of him deposing them. (PCR Vol. I, 60) He met with Evans several times prior to trial, face-to-face, for approximately four hours. (PCR Vol. I, 61) He did not note whether or not his client had a quick temper. (PCR Vol. I, 62) He sought a plea to a lesser included offense, but the State would not agree. (PCR Vol. I, 63) During his conversations with Evans, Anothing happened in the heat of passion.@ (PCR Vol. I, 64)

Studstill did not think Evans was Anuts@ or Acrazy.@ From what Evans revealed, Ahe told me the thing was an accident and the defense would be to try and go in that direction." He did not recall exploring other possibilities except as to "powder residue and that sort of thing." (PCR Vol. I, 64) He did not

recall anything "extraordinary" about this case. PCR Vol. I, 66) At the time of Evans' trial, he had taken approximately 13 death cases to verdict. (PCR Vol. I, 67) It was not his practice to have two attorneys for a death case. He uses Brevard County standards regarding the number of attorneys for a death case. (PCR Vol. I, 68)

Studstill stated that he always files a motion for separate juries for the guilt and penalty phase. (PCR Vol. I, 69) He never moved to have penalty phase counsel appointed; he handled both guilt and penalty phase. (PCR Vol. I, 71) He did not explore mental health issues. (PCR Vol. I, 72) Since he did not obtain Evans' medical records, he was not aware of a closed head injury sustained at age three. (PCR Vol. I, 75) He did not obtain school records and was not aware Evans had been in special learning disabled classes. He was not aware of angry outbursts, truancies, fighting or assaults on teachers. (PCR Vol. I, 75-6) He did not recall any evidence for statutory mitigation. (PCR Vol. I, 77) Had he been advised of the closed head injury Evans had sustained at age three, he would have looked into it. (PCR Vol. I, 78) He knew of Evans' criminal record and that it reflected random violence. (PCR Vol. I, 79) He did an extensive investigation into the crime, including employing a private detective agency and deposing State

witnesses. (PCR Vol. I, 80) There was conflicting testimony. (PCR Vol. I, 82) He did not believe there was evidence of a Aheat of passion@ defense. (PCR Vol. I, 82) He sought a reduction in charges prior to trial as Evans "insisted he could do the time." (PCR Vol. I, 83) Evans never believed he would be found guilty of first-degree murder; he insisted "it was an accident." (PCR Vol. I, 83)

Studstill sent letters to various people in the community regarding any available information for his client. (PCR Vol. I, 84-5) He was not aware of any brain damage. (PCR Vol. I, 86) Evans= mother advised him that Wydell received good grades in school. (PCR Vol. I, 86) Studstill had previously been successful in having clients examined and committed; however, "I didn't have any reason in the world to think there was anything wrong with Wydell Evans mind in the sense that it would be a mitigating factor of any kind, and certainly not a defense in the guilt phase ... " (PCR Vol. I, 87) He would have explored any kind of serious brain damage. (PCR Vol. I, 88)

Studstill was aware Evans had been drinking prior to the murder because, "he talked about it and then said but he wasn't [drunk] - - - that he knew what he was doing at the time." (PCR Vol. I, 89) He did not think he had grounds for a statutory mitigation instruction. (PCR Vol. I, 91) Wydell was "the holy

terror of his community, actually. That came out after the trial." He had a reputation for being "one mean man." (PCR Vol. I, 93)

Studstill started early in preparing for the penalty phase. (PCR Vol. I, 94) He said, "I, obviously, defended the man, I didn't just walk through the trial." (PCR Vol. I, 95)

He did not consider that Evans may have been under extreme emotional disturbance, or could not appreciate the criminality of his conduct. He was competent to stand trial.

Studsill knew by "talking to him." (PCR Vol. I, 96) He saw no reason to have his client examined. He believed Evans was competent, but, if he'd known about the head injury, he "would have done something." (PCR Vol. I, 97)

Evans admitted during the guilt phase that he was perfectly aware of everything and that he had been functioning fine. Studstill was confined to what he was willing to tell him. (PCR Vol. I, 98)

Evans had initially given a detailed explanation that he was not there when Angel had been shot. (PCR Vol. I, 98) He later claimed it was an accident. (PCR Vol. I, 99) Evans told him he had been drinking but that he had a clear recollection of what had occurred. (PCR Vol. I, 100) Studstill's strategy was "I had some conflict in the evidence, in the testimony of the people

that were in the car." Lino Odenat=s testimony supported the idea that it was an accident. (PCR Vol. I, 101)

Studstill has been a trial attorney for thirty-eight years and had completed approximately twelve capital cases at the time of defendant's trial. (PCR Vol. I, 102) It was difficult to explain to the jury why the car occupants did not take Angel to the hospital after the shooting. (PCR Vol. I, 103) Evidence indicated Evans was in charge of the car after the shooting. He even acknowledged that he was responsible for the delay in taking Angel to the hospital. (PCR Vol. I, 104, 105)

Studstill has previously used mental-health issues as mitigation in capital cases. (PCR Vol. I, 105) There were no indications that Evans suffered from any mental illness nor that he was "out of touch with reality." (PCR Vol. I, 106-07) To the contrary, there were no indications of an epileptic seizure or blackout. (PCR Vol. I, 107)

It was obvious that trial witnesses Sammy Hogan and Erica Foster (occupants from car) were in custody at the time they testified. (PCR Vol. I, 108) He did not get into details about Foster=s and Hogan=s incarceration because it involved minor offenses. (PCR Vol. I, 108-09) It was his strategy that the jury would see they were in custody and therefore he could diminish their credibility as a witnesses. (PCR Vol. I, 109-

110)

Studstill=s strategy for the penalty phase was to show how Evans spent time with relatives and devoted time to his grandmother. He had a lot of children; and "everyone thought he was a good father." (PCR Vol. I, 111) Although he had some redeeming qualities, AI couldn=t erase his criminal record.@ (PCR Vol. I, 112) His mother was a crack cocaine user, she Ajust wasn=t there for him.@ (PCR Vol. I, 112)

Studstill did not want to introduce evidence of Evans= anger and violence during his teen years. (PCR Vol. I, 113) He was aware of Evans= propensity for violence over the years. (PCR Vol. I, 126) He wanted a different jury for the penalty phase: a tactic he used over the years. The request has never been granted. (PCR Vol. I, 127) Studstill has never handled a case where a second attorney was appointed to work with him. (PCR Vol. I, 127-28)

Although his clients may have lied to him, in his experience, they do not lie to the judge nor take the stand. (PCR Vol. I, 130) He believes Evans is guilty of first degree murder and not insane. (PCR Vol. I, 132) He did not hire an investigator after the guilt stage. (PCR Vol. I, 136) He might have presented evidence of violence and Evans= school behavior at the *Spencer* hearing had he known of it. (PCR Vol. I, 140-41)

Evans= PSI (presentence investigation) indicated he was in perfect health. His mental health was perfect; he had only seen a mental heath expert when he was young. (PCR Vol. I, 141, 142)

Sandra Evans, Wydell=s aunt, has known him all of his life, and they lived in the same household. (PCR Vol. I, 143) Wydell=s trial counsel never contacted her. She came to the penalty phase because she did not know Ait was going to go as far as a death penalty.@ (PCR Vol. I, 143) Evans= mother pointed out to her who trial counsel was. She spoke with Studstill about being a character witness. (PCR Vol. I, 144) Studstill told her he wanted the jury to know Ahow good he is and stuff like that.@ (PCR Vol. I, 144)

When Evans was three years old, he was hit by a car. (PCR Vol. I, 145) AHe wasn=t breathing ... @ (PCR Vol. I, 146) After the accident, he started stuttering quite a bit. (PCR Vol. I, 147, 148) Prior to the accident, he spoke very well. (PCR Vol. I, 147, 148) Subsequent to the accident, Ahe was totally different.@ (PCR Vol. I, 148) He was picked on all the time by other children. (PCR Vol. I, 148) There was no father figure around; it was a household of women. (PCR Vol. I, 149) Studstill told her to say Aanything good you can say about him to save his life ... @ (PCR Vol. I, 150)

The family was raised in a religious environment. Their

grandmother taught the family right from wrong. (PCR Vol. I, 151) After Wydell=s mother got hooked on crack cocaine, Wydell could not depend on her. (PCR Vol. I, 151-52) After Wydell=s accident, he spent a night or two in the hospital. He subsequently went to speech therapy. (PCR Vol. I, 153, 154) Their grandmother was a stabilizing influence to everybody. (PCR Vol. I, 155)

Lily Evans, the Appellant=s mother, was contacted by trial counsel one time. She received a letter to come to Studstill=s office to talk about her son. (PCR Vol. I, 155-56) She was told to get character witnesses for her son. She did not know Ait was really as bad as it was.@ (PCR Vol. I, 158) She was told to say good things and family members should say what Atype of person he is.@ (PCR Vol. I, 159)

At one point, Wydell said Amaybe I need another lawyer@ as he walked by her in the hallway during trial. Studstill would tell her, AIt will be okay.@ (PCR Vol. I, 161)

When Evans was hit by a car at age three, three different people picked him up. He was not breathing for at least one minute. (PCR Vol. I, 162-63) His speech and behavior were affected by the accident. (PCR Vol. I, 164) At the time Wydell was hit by the car, the doctor told her he had a slight concussion. After the accident, he angered more quickly. (PCR

Vol. I, 178)

Wydell was beat up by neighborhood children. (PCR Vol. I, 165) He was not Amuch of a fighter at first.@ Later on in school there were problems because Ahis temper was pretty quick.@ (PCR Vol. I, 166)

Lily became addicted to cocaine for approximately 15 years. It started when Wydell was six years old. (PCR Vol. I, 168, 169) She told the penalty phase jury about her addiction and that she was not a good role model for Wydell. (PCR Vol. I, 180) As a teen, he fought quite a bit. He did not like the men she dated, and he saw her abused. (PCR Vol. I, 170) At times, he would sleep at the foot of her bed to protect her. (PCR Vol. I, 171) Wydell=s trial attorney did not explore these issues with her. She would have testified to these matters at trial. (PCR Vol. I, 172-73)

Lily testified at the penalty phase that Wydell was obedient; Aa normal child.@ (PCR Vol. I, 175) He was not a good student but he enjoyed music and liked to sing. She said, AI did bring out every good thing I could think about my child.@ (PCR Vol. I, 176) Wydell tried to get her to stop using cocaine. (PCR Vol. I, 177)

During his teen years, Lily was aware appellant started selling drugs and carrying guns. (PCR Vol. I, 179)

Wydell was in emotionally handicapped and slow learning programs in school. (PCR Vol. I, 181) She took her son to a mental health facility for anger management and was told he had a behavior problem. (PCR Vol. I, 182) He had an Aexplosive temper ... a short fuse.@ He would hit the walls and throw things. AAny little thing would set it off ... @ (PCR Vol. I, 183) She believes her son is a good person. (PCR Vol. I, 184)

Although she did not want the jury to think her son was a bad person, she now realizes it would have been good if they knew her child had problems. AThey would have been more understanding ... @ (PCR Vol. I, 186) Throughout this process, she did not know what would have been helpful to Wydell or what would have been harmful. (PCR Vol. I, 188) She does not believe the jury got an accurate picture of Wydell=s problems. (PCR Vol. I, 189) Wydell cared for Angel, the victim; she was his younger brother=s fiancé. AThe family was close.@ (PCR Vol. I, 189)

Wydell had an explosive temper with many people, not just women. (PCR Vol. I, 190)

Oren Javon Evans, Wydell=s brother, lived in a separate household growing up, except when the murder of Angel occurred (PCR Vol. II, 204-05) Wydell has Aa very bad temper problem.@ (PCR Vol. II, 205) An incident occurred during which he told Wydell his girlfriend had to get out their house. Wydell told

him, Aif she has to go, my girlfriend has to go, which is Angel. Then, he pulled a gun on me.@ (PCR Vol. II, 206) There were several incidents where Wydell lost his temper; Ahe would just click, just break stuff.@ (PCR Vol. II, 208) He said, Ahe=s like the angriest, most aggressive person I ever met ... @ (PCR Vol. II, 209) Wydell was angry because he did not have a father. (PCR Vol. II, 209)

Oren is still upset with Wydell because he never should have killed his girlfriend, Angel. AIt=s just a sad situation. It could have been avoided. It makes no sense ... It goes back to his temper problem ... I think he just pulled the gun, and he gets so angry, some way the gun just went off ... @ (PCR Vol. II, 210) He did not testify on Wydell=s behalf at trial because he was incarcerated at the time. (PCR Vol. II, 210)

There is a four year age difference between the brothers. They saw each other every day while growing up. (PCR Vol. II, 211) They lived in Aregular@ neighborhood. Wydell was Aalways fighting.@ Wydell would throw rocks at windows (Amost kids do that@) and even threw a rock at a police officer. Wydell drank alcohol at a young age. (PCR Vol. II, 212)

Wydell never attacked their mother=s boyfriends in his presence. Wydell was frequently in and out of juvenile facilities. (PCR Vol. II, 213) He sold drugs at a young age and

has six children (PCR Vol. II, 214)

Wydell played football at two different high schools. He did not play for very long. He was frequently expelled for fighting. (PCR Vol. II, 214-15) There were incidents where he hit women. (PCR Vol. II, 216) Wydell did not last at jobs for very long. (PCR Vol. II, 218)

Wydell started carrying guns when he got older. When he was young, he just liked to fight. (PCR Vol. II, 221) Wydell and Oren only spoke about Angel's murder through a letter. Wydell explained it was an accident. (PCR Vol. II, 221) Oren said AI didn=t agree with it. It didn=t make a lot of sense to me.@ (PCR Vol. II, 222)

Oren recalled that Wydell stuttered but Athis was a real long time ago.@ (PCR Vol. II, 222) He did not recall whether trial counsel contacted him at the time of Wydell=s trial, but he would have testified. (PCR Vol. II, 224)

Dr. Richard Carpenter, Ph.D., a licensed psychologist, has a particular knowledge of learning disabled children, young adults, and emotionally handicapped adults. (PCR Vol. II, 225-26, 227) Basically, he does AJimmy Ryce cases@ and the Aentire range of forensic psychological work.@ (PCR Vol. II, 228-29) He has worked on approximately 20-30 capital cases for the defense and has never testified in a penalty phase. (PCR Vol. II, 229-

30) This was his first mental health exam for a death row inmate. (PCR Vol. II, 230) Regarding the evaluation of a person with a history of violence, Athere is no standard or mandate for psychologists to conduct psychological testing in this sort of evaluation.@ (PCR Vol. II, 231)

Dr. Carpenter prepared a report based on two visits and subsequent examinations of Evans. (PCR Vol. II, 239) He reviewed a vast amount of material including the State=s mental health expert=s report (Dr. McClaren), school and medical records, police reports, transcribed interviews of various witnesses, and Evans= interview with police. In addition, he reviewed a report prepared by Dr. Henry Dee. (PCR Vol. II, 239-42) By age seven, Evans needed a psychological evaluation. (PCR Vol. II, 247)

Evans told him that he started abusing alcohol at age 12. (PCR Vol. II, 249) On the day of the murder, witness interviews indicated Evans had been drinking heavily all day. (PCR Vol. II, 250) Schools records are Areplete@ with indications of anger problems and poor impulse control. (PCR Vol. II, 252) It is significant that medical records indicate Evans was combative upon waking from his Acoma@ at age three. (PCR Vol. II, 253)

In the African-American culture, Aclicking@ is a common term for rage reaction. (PCR Vol. II, 254) Evans had a life-long problem with uncontrolled rage reactions. (PCR Vol. II, 255)

Evan's history indicates Aextreme anger,@ Asevere alcohol abuse,@ and that he is Aextremely thin skinned.@ (PCR Vol. II, 256)

Prior to shooting Angel in the car, Evans punched the car=s windshield after hearing that Angel had not been faithful to his brother, O.J. (PCR Vol. II, 258) Dr. Carpenter knew of all the comments made between the occupants of the car. (PCR Vol. II, 258-59) Even though Evans had been alone with Angel the day before her murder, A... he didn=t shoot her.@ (PCR Vol. II, 260) Because Evans shot Angel in front of three witnesses, it was Aan example of a loss of control ... if it was premeditated, you wouldn=t do it in front of three people.@ (PCR Vol. II, 260)

Dr. Carpenter=s report indicated alcohol abuse, impulse disorder, and rage reaction secondary to closed-head injury. (PCR Vol. II, 263) In his opinion, Evans= impulse control disorder and rage reaction were brought on by the closed head injury. (PCR Vol. II, 265) Alcohol would exacerbate an impulse control problem in a brain-damaged person. (PCR Vol. II, 267) Evans could not have formed the intent to murder Angel. (PCR Vol. II, 268) He was under extreme emotional disturbance and was impaired in following the requirements of the law. (PCR Vol. II, 270, 271)

After reading Dr. McClaren=s report (the State=s expert), it appeared Evans was paranoid at times. (PCR Vol. II, 273)

Although Dr. Carpenter did not make this finding, he believed Evans was hypersensitive. (PCR Vol. II, 274)

Evans told Dr. McClaren he was so drunk he couldn=t remember what happened. (PCR Vol. II, 279) Dr. Carpenter agreed with Amuch of@ Dr. McClaren=s report (PCR Vol. II, 282, 288) Dr. McClaren=s diagnosis of alcohol abuse and antisocial personality disorder are correct. (PCR Vol. II, 284) Dr. McClaren=s report ignored Evans' impulse disorder. (PCR Vol. II, 286) Evans is bad, and commits criminal acts when he is drunk. (PCR Vol. II, 287)

Dr. McClaren=s report indicated there is a brain dysfunction. Dr. Dee=s report indicated Evans had brain damage. (PCR Vol. II, 292) Dr. Carpenter believes Evans has a brain injury Athat is the root of his anger clicking problem ... @ (PCR Vol. II, 292) Evans has an antisocial personality disorder. (PCR Vol. II, 294-95) The medical records from the hospital (at age three) indicated there was a closed head injury, no fracture or damage. (PCR Vol. II, 295) He was neurologically intact and there were no intracranial bruises. (PCR Vol. II, 297)

Evans' capacity to appreciate the criminality of his conduct was diminished. (PCR Vol. III, 304) He has a narcissistic personality. Evans would not want to admit anything that puts him in a bad light. (PCR Vol. III, 307)

Dr. Carpenter was aware that Evans claimed the shooting was

an accident but AI don=t think that it was.@ (PCR Vol. III, 309) He knew of the events leading up to the murder where Evans claimed he would kill Angel. (PCR Vol. III, 309-10) In addition, he knew Evans threatened the occupants of the car after he shot Angel. (PCR Vol. III, 310)

Dr. Carpenter was aware that Evans told a jailhouse informant that he was going to @kill the bitch.@ Evans denied ever making that statement. (PCR Vol. III, 314) Evans' post-murder actions had nothing to do with his Astate of mind@ prior to the murder. (PCR Vol. III, 316)

Dr. Harry McClaren reviewed a vast amount of material received from the State Attorney=s Office, the Attorney General=s office, and the Department of Corrections. (PCR Vol. III, 331) He reviewed Evans= medical records, which indicated a head injury at age three. The report also indicated treatment for a lacerated hand when he was older and Aapparently was quite under the influence of alcohol at the time.@ (PCR Vol. III, 332) He reviewed Evans school records. In addition, there were indications in various records that Evans= abused alcohol at a young age. (PCR Vol. III, 332-33, 334) Evans told him he was under the influence of alcohol every time he was arrested and that his criminal activity began at age thirteen. (PCR Vol. III, 334) He had Aearly behavioral difficulties at school, was in and

out of school.@ He was placed in SLD, ASpecific Learning Disability@ classes and EH, AEmotional Handicap.@ At age seven, he was referred for a psychological evaluation because he was having learning disabilities, was easily angered, argued, and had speech defects. (PCR Vol. III, 338-39) Evans was given the Bender-Gestalt test for young children. AIt was not normal, but there were some indications ... for aggressiveness or hostility.@ (PCR Vol. III, 339) This test was used to determine brain damage and as a test of personality. Evans had a very short attention span. There were numerous instances of aggressive behavior. (PCR Vol. III, 340) He was frequently in fights. The school contacted his mother, who told them, Ayou all take care of it.@ (PCR Vol. III, 342) Evans showed poor impulse control, poor anger control, excessive aggressiveness, and excessive resistance. (PCR Vol. III, 344) He left school in the tenth grade due to behavioral problems. (PCR Vol. III, 336)

In reviewing the medical records, Dr. McClaren saw that Evans had been knocked unconscious by a car (at age three) and was not breathing for approximately one minute. His mother and aunt had given him mouth-to-mouth resuscitation. (PCR Vol. III, 344-45) The attending physician diagnosed a Aclosed-head injury with probably concussion of the brain.@ (PCR Vol. III, 346)

In reviewing IQ testing, there was a significant difference

between verbal and performance IQ. (PCR Vol. III, 346) Although this can be an indication of brain damage, Ayou want to see what other factors might be there.@ Further, A ... a lot of people that turn out being delinquent or criminal often don=t do well in school, are in and out of school, and don=t have nurturing backgrounds. For whatever reason, they don=t learn a lot of things they are taught in school.@ (PCR Vol. III, 347) However, the closed-head injury, probably concussion, along with the alcohol abuse, would increase the probability that Evans had some sort of brain injury. (PCR Vol. III, 348)

While interviewing Evans, Ahe was able to speak with me coherently.@ (PCR Vol. III, 348) Alcohol was a significant factor in contributing to Evans= behavior problems. When Dr. McClaren spoke with personnel on death row, Evans had not been characterized as an Aexplosive, impulsive person@ due to the fact that he was in an alcohol-free environment. His aggressive behavior had more to do with alcohol intoxication Athan it did with just the effects of whatever neurological impairment he might have ...@ (PCR Vol. III, 349)

Evans was under the influence of alcohol when he was arrested for Angel=s murder. However, Ait was hard to know the degree of it.@ (PCR Vol. III, 350) Further, AEvans has said himself that he was fine, he controlled himself.@ Due to the fact

that Evans had been incarcerated prior to Angel=s murder, Ahis tolerance was probably decreased from when he had been a free person and drinking routinely every day.@(PCR Vol. III, 351)

Evans told Dr. McClaren that his culture and lack of a father figure contributed to his bad behavior. He saw his mother physically abused and he, himself, was a victim of physical abuse at an early age. He abused crack cocaine and Aif you=re born in the hood, you=re labeled.@ Evans reported that his mother abused crack cocaine but that he was in perfect Amental health@ and Aphysical health.@ (PCR Vol. III, 352-53)

During his evaluation, Evans got quite angry when Dr. McClaren confronted him with the statements made by the jailhouse informant. (PCR Vol. III, 354) In addition, Asocial injustices@ and Apolitical corruption@ angered Evans. (PCR Vol. III, 355)

Evans told him that he stuttered at an early age; however, he did not stutter in Dr. McClaren=s presence. (PCR Vol. III, 357-58) Evans admitted he had a temper problem, but said that he could not control it. (PCR Vol. III, 358) There was no evidence that Evans was malingering during the testing. (PCR Vol. III, 358) Testing indicated an elevated paranoia scale. (PCR Vol. III, 359) Evans tried to present himself in a good light. (PCR Vol. III, 361)

The night Evans got out of jail, prior to Angel=s murder, he purchased a six pack of beer and Astarted to reconnect with people that he has associated with in the community ... quasi family ... people that were in the drug trade.@ (PCR Vol. III, 361) On the day of the murder, he continued to drink at home and at his friend=s house. He still felt he was in control of himself. (PCR Vol. III, 362)

The day of the murder, Evans had Aill feeling@ toward the people in the car. He was intoxicated and irritated, Aespecially by Sammy.@[5] (PCR Vol. III, 363, 406) Evans said he armed himself. He did not like Sammy, nor Erica Foster. (PCR Vol. III, 364) He described the murder as Aan accident.@ (PCR Vol. III, 364) Although Evans= punching the car windshield before he shot Angel could be construed as Apoor control of behavior,@ it could also have been instrumental, Aas far as getting the attention of someone to do what you want them to do.@ (PCR Vol. III, 365) The atmosphere in the car was chaotic, Amusic was up loud, people were joking ... being loud.@

Evans told Dr. McClaren that he loved Angel and told her Athere were these rumors going around in jail that is having a bad effect on his brother and she needed to watch what she was

[5] Evans was irritated at Sammy because he was gay; Sammy also had a gun in the car, which would have caused problems for Evans as he was just released from jail. (R363, 407, 418).

doing.@ (PCR Vol. III, 366)

Dr. McClaren believed it would be a good idea to have all the information of a client readily available, but, AI=m not sure that if I had had all of this information that my advice would be to use it.@ (PCR Vol. III, 370)

Dr. McClaren has worked in the field of forensic psychology for thirty years. (PCR Vol. III, 381) Prior to evaluating Evans during a three-day period, he reviewed a vast amount of documentation that included the pleadings, Evans= classification file, statements and testimony from various witnesses, and school and psychological records. (PCR Vol. III, 385-86) He reviewed the evaluations conducted by Dr. Dee and Dr. Carpenter. (PCR Vol. III, 386) Dr. McClaren agreed with Dr. Carpenter that Evans has an antisocial personality disorder. (PCR Vol. III, 388) He has Alearning disabilities, was poorly controlled as a child, never able to do well in school.@ (PCR Vol. III, 389-90) Due to Evans= head injury at age three, Amost likely he=s got a degree of cognitive impairment.@ (PCR Vol. III, 390, 401, 403) People on death row commonly have antisocial personality disorder. (PCR Vol. III, 391) This disorder does not prohibit an individual from forming an intent or making a conscious decision to do something. (PCR Vol. III, 391)

Alcohol was a significant factor in Evans= behavior. It was

not clear how much alcohol Evans had consumed when this crime occurred. Evans had indicated he knew what he was doing at the time and he was under control. (PCR Vol. III, 392) Evans told him he did not drink alcohol during the car ride when the murder occurred. (PCR Vol. III, 394) Evans' actions during the car ride and after the shooting were indicative of Evans being in control and making the decisions. (PCR Vol. III, 394-95)

Evans suffers from some degree of brain damage but it does not result in any particular type of behavior. (PCR Vol. III, 396) It is Aprobably overshadowed by personality characteristics and the effect of alcohol.@ (PCR Vol. III, 396)

Although Evans had a closed-head injury at age three, Athere are millions of people out there that in their lives have had closed-head injuries.@ (PCR Vol. III, 397) It was difficult to know the effect Evans= closed-head injury had on him, as he was so young. (PCR Vol. III, 398) Evans did not suffer from extreme mental or emotional disturbance at the time of this murder. (PCR Vol. III, 398-99) He was Ain control of the goings on in that car before, during, and after the actual homicide.@ (PCR Vol. III, 399) His actions were very controlled and he understood the criminality of his conduct. (PCR Vol. III, 399)

Evans told Dr. McClaren that he was glad to be out of jail and had Ano beef with the victim, and had been partying since he

was out of jail.@ (PCR Vol. III, 402)

Evans told him that he was handing the gun to the people in the back of the car in order to prevent police from seeing it, if they had gotten pulled over. (PCR Vol. III, 405) Later on, when Dr. McClaren questioned him further, Evans said, AI just don=t really remember.@ (PCR Vol. III, 406)

Evans starting drinking the night he got released from jail. (PCR Vol. III, 409) The following day he called a friend and told him he had been released. Angel also called him. (PCR Vol. III, 410) Evans drank at least a liter of alcohol the rest of that day. He was definitely intoxicated, Afor sure.@ (PCR Vol. III, 411-12) After the murder, when questioned by police, he told them he was in control because of Asurvival instincts.@ He Atold them what they wanted to hear.@ (PCR Vol. III, 412)

The day before Angel=s murder, she had come to Evans= house and fixed his hair. She had been dropped off so it was only the two of them. (PCR Vol. III, 413) He said, AI didn=t have no desire to kill her at all.@ (PCR Vol. III, 414)

Evans testified that the day witness Edward Rogers claims he threatened to kill Angel (on the phone in jail) he was really telling his mother he was angry at his baby=s mother and AI=m going to break her God damn neck when I get out of here. I was

hot at her and her family.@[6] (PCR Vol. III, 415-16)

Evans earned a living by robbing drug dealers. (PCR Vol. III, 416) Owing to the dangerousness of his profession, he carried a gun, Aall the time.@ (PCR Vol. III, 416) The day of the murder, he was carrying his gun Ain his waist.@ Sammy also had a gun on the front seat. (PCR Vol. III, 417) Since Sammy was a homosexual, Aviolence wasn=t his lifestyle. Lying and doing dope was his lifestyle.@ (PCR Vol. III, 418)

Lino (Odenat) had been holding Evans= gun for him. Evans was trying to get his life on the right track but Athere are too many dudes trying to knock me off.@ When Lino handed him the gun in the car, he said, AI=m ready now, let=s roll.@ This was meant as a slang statement, meaning AI=m ready to roll. Let=s roll. Let=s pull up. You know, I=m ready now. I=m set. I=m strapped. I=m protected.@ (PCR Vol. III, 419-20)

Evans directed the occupants of the car not to stop at a local 7/11 shop because the police are prone to frequent those stores. Sammy did not have a license and Evans was carrying a gun. Erica and Sammy were Ahigh.@ (PCR Vol. III, 420-21) Had he been caught carrying a weapon, he would have been sent Astraight to the joint, quick.@ (PCR Vol. III, 421)

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[6]Evans claimed Tamiko Williams, the mother of two of his children, had taken his young daughters from his own mother, was Asmoking dope again@ and HRS was going to take custody. (R415).

Evans did not recall punching the windshield of the car. He does not believe in intimidating people. He gets Astraight to the point.@ (PCR Vol. III, 421-22) He was angry at the occupants in the car, mostly Sammy and Erica. The only ones he cared for were Lino and Angel. (PCR Vol. III, 422) He remembered the women laughing at him and it angered him. (PCR Vol. III, 424) Although Angel and he had been discussing Athe situation with my brother and her@ she Anever did nothing to me. That was my hard deal. That was my partner.@ (PCR Vol. III, 424)

Dr. Henry Dee, a clinical neuropsychologist, evaluated Evans and prepared a report. (PCR Vol. III, 427, 430) He believes it is important not simply to rely on the defendant's memory or rendition of the facts as he recalls them. (PCR Vol. III, 431)

Dr. Dee reviewed the medical records related to Evans= head trauma at age three, Aa serious event.@ (PCR Vol. III, 432, 433) Evans= aggressive behavior at school could be related to his head trauma and the fact that he was combative upon waking in the hospital. (PCR Vol. III, 433-434) During the next few years, Evans misbehaved, Awas aggressive, defiant, under controlled and showed a lack of inhibition in his behavior.@ (PCR Vol. III, 434) He was placed in emotionally handicapped classes and special learning disability classes. (PCR Vol. III, 434-35) He had language and speech problems and problems with impulse control.

(PCR Vol. III, 435, 436) He was disruptive and aggressive. His problems were indicative of patients with Afrontal-lobe injuries.@(PCR Vol. III, 437)

During one incident, Evans injured his hand by punching a window. He sought treatment at the hospital.[7](PCR Vol. III, 438) Evans did not believe hospital staff was attending to him quickly enough. AHe showed a lack of control and excessive emotionality and anger ...@ He got so angry he left the hospital. (PCR Vol. III, 438-39) Medical records indicated he was drunk at the time. (PCR Vol. III, 439) Dr. Dee said, APeople with brain damage are known to be more sensitive to intoxicants than people not brain damaged.@ (PCR Vol. III, 440)

Dr. Dee is Asure@ that Evans is brain damaged. AI don=t see any evidence that that=s disappeared. In fact, the test results would certainly be consistent with his having brain damage.@ (PCR Vol. III, 440-41) Dr. Dee gave Evans the Wechsler Adult Intelligence Scale test to determine his IQ. (PCR Vol. III, 441) Evans full scale IQ was in the average range but there was an eighteen point difference between the verbal IQ score and performance IQ, A a very large difference.@[8] (PCR Vol. III, 442)

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[7]This was a separate incident from the punching of the car windshield before Angel's murder.

[8] Approximately 6 **2**% of the population would have this kind of point difference. (R470).

He is not retarded but of Aaverage intelligence.@ (PCR Vol. III, 442-43) He scored 93 on his verbal IQ and 107 on his nonverbal IQ. This is a pattern that is seen in people with learning disabilities. The scores should be equal. (PCR Vol. III, 443) The discrepancy in the score was present back in the first grade. (PCR Vol. III, 444) His general overall memory functioning was comparable to his general intellectual functioning. (PCR Vol. III, 445) His verbal memory was 84 and his non-verbal score was 106. (PCR Vol. III, 446) His performance on the Facial Recognition Test was normal as well as his scores on the Wisconsin Card Sorting Test, Categories Test, and Judgment of Line Orientation Test. (PCR Vol. III, 446) The score on the Booklet Categories Test indicated brain damage. (PCR Vol. III, 446-47) After reviewing school and medical records, interviews of people who witnesses the crime, and administering tests, Dr. Dee's opinion was that Evans suffers from brain damage. (PCR Vol. III, 450) Evans' behavior was indicative of an impulsive act, rather than premeditation.

In Dr. Dee's opinion, because Evans was alone with Angel during the days preceding her murder and did not kill her, the fact that he shot her in a car with three witnesses showed he was under the extreme influence of mental or emotional disturbance. (PCR Vol. III, 452-3) It further showed his

capacity to appreciate the criminality of his conduct was impaired. (PCR Vol. III, 454)

Dr. Dee said it is not Apossible to identify the presence or absence of frontal lobe symptoms from a person=s behavior before or after an impulsive act.@ (PCR Vol. III, 457) Evans' subsequent actions after the shooting were not a valid criteria for determining his state of mind at the instant he fired the fatal shot. (PCR Vol. III, 457-58) Evans= alcohol use and brain damage interacted that night and affected parts of his brain. He felt instantaneous rage and Aclicked.@ (PCR Vol. III, 461)

Evans' behaviors are indicative of antisocial personality disorder. (PCR Vol. III, 463) Dr. Dee did not disagree with Dr. McClaren=s or Dr. Carpenter=s opinions. (PCR Vol. III, 464) He does not recognize the DSM-IV-TR[9] as authoritative. (PCR Vol. III, 464) The finding of a score difference between the verbal and non-verbal IQ=s was indicative Aof a greater impairment of the left-hemisphere functioning than the right-hemisphere functioning.@ (PCR Vol. III, 464-65) Evans does not suffer from a Acerebral progressive disease.@ (PCR Vol. III, 468)

Although Evans did not tell Dr. Dee the shooting was an

[9]American Psychiatric Association: *Diagnostic and Statistical Manual of Mental Disorders*, Fourth Edition, Text Revision. Washington, DC, American Psychiatric Association, 2000.

accident, AIt seems he shot her without question, and he was very angry at the time.@ (PCR Vol. III, 473-74) His diagnoses of Evans is consistent with Dr. McClaren=s and Dr. Carpenter=s. (PCR Vol. III, 477)

SUMMARY OF ARGUMENT

Claim I: Trial counsel did not render ineffective assistance of counsel at the guilt phase by failing to raise a diminished-capacity defense. This defense is not recognized in Florida as an affirmative defense. Even if it were, the facts do not support a mental-state defense. Evans was cognizant of what he was doing, was in control of his actions, and intentionally shot Angel Johnson in the head because he thought she was laughing at him. Evans does not come within the "exceptions" to the rule that diminished capacity is not an affirmative defense. Evans was not experiencing an epileptic seizure or black-out at the time he murdered Angel Johnson. Evans testified at trial that the shooting was an accident; a defense inconsistent with diminished capacity. The trial court findings are supported by competent, substantial evidence.

Claim II: Trial counsel was not ineffective at the penalty phase. At the time of this trial, co-counsel was not appointed in Brevard County. The rules on which Evans relies were enacted subsequent to this trial. The trial judge findings that counsel was not ineffective, nor did he require co-counsel, are supported by the record.

Trial counsel was not ineffective for failing to present mental health evidence. The evidence presented at the

evidentiary hearing contradicted that which was presented at the penalty phase. Trial counsel's strategy was to show Evans in a positive light. The testimony at the evidentiary showed Evans in a very negative light and established anti-social personality disorder. The fact that Evans robbed people for a living, considered himself a "Jack boy" and had a penchant for violence would hardly have persuaded a jury to recommend life. The trial judge findings on this issue are supported by competent, substantial evidence.

Claim III. Trial counsel was not ineffective for failing to request a jury instruction on statutory mitigating circumstances. There was no evidence to support the instruction. Although Evans now claims excessive alcohol consumption, he denied this in his testimony at trial. The trial court findings are supported by competent, substantial evidence.

ARGUMENT

CLAIM I

TRIAL COUNSEL DID NOT RENDER INEFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE BY FAILING TO RAISE A DIMINISHED CAPACITY DEFENSE.

Evans claims that counsel provided ineffective assistance during the guilt phase of his trial for failing to discover brain damage and for failing to raise a defense of diminished capacity rather than accident. The trial court first added the following to the facts found by this Court:

> The Court also adds to the above facts additional evidence adduced at trial. Sammy Hogan testified at trial that the Defendant had earlier directed him not to stop at a Mobil station or a 7-11 station, as there were too many police around. He further testified that the victim and the Defendant were arguing, and the Defendant reached out and punched the windshield of Sammy's car. After the victim laughed, the Defendant pulled out a gun, turned around and aimed it at the victim and shot her point blank. He then commandeered the car and threatened the occupants, and ordered Sammy to drive him to James Davis's house. The Defendant told them not to leave while he spoke with Mr. Davis. The Defendant then got back in the car and had Sammy drive him down a little ways and let him out. The Defendant then threatened Sammy and Erica that if they told what happened, he would harm them and their families. (Exhibit E, Trial transcript, pp. 228-258.)
>
> Sammy Hogan's testimony was in sharp contrast to the Defendant's trial testimony - that it was an accident and not a murder.

> (Exhibit E, Trial transcript, pp. 963-1000.) The Defendant testified to the events leading up to the murder. He stated he had been drinking. His attorney asked him what did he think his state of sobriety was when he got in Sammy's car, and he replied, "I was - I mean I was focused on everything I was doing." Describing the incident, he stated that he started to hand the gun into the backseat. His attorney asked him if he was drunk, and he said "I was drunk, yes." However, his attorney then asked him, "everybody was high and you were drunk?" The Defendant replied, "Not drunk but just, you know, slightly intoxicated. You know, I wasn't." His attorney then asked him if he had a clear recollection of what happened at the time, to which he relied, "Yes, I do." (Exhibit E, Trial transcript, pp. 987-988.) He testified that when he was trying to hand the gun into the backseat it accidentally went off. Although in his original statement to the police the Defendant denied having anything to do with the murder, he agreed he eventually told the police that it was an accident. His attorney asked him if that was what he was telling the jury now, and he agreed - his version of events was that it was an accident. (Exhibit E, Trial transcript, pp. 996-997, 1022.) On cross-examination, he was asked, "and you knew what was going on and you were perfectly aware of everything and you were functioning fine," to which he replied, "Oh yes." (Exhibit E, Trial transcript, pp. 1000)

(PCR Vol. VI, 829-830). The trial court then recognized the controlling authority of *Strickland* (PCR Vol. VI, 830-832).

Regarding the diminished capacity defense, the trial court found:

> In his second claim, the Defendant alleges he was denied the effective assistance of

counsel at the guilt/innocence phase of trial because his attorney was ineffective in failing to investigate, prepare and present the defense of diminished capacity. He claims that trial counsel should have investigated the Defendant's past medical history. In particular, the defense focuses on a car accident that happened when the Defendant was three years old. He was struck by a car and knocked approximately six to eight feet. He was diagnosed as having a closed head injury, probable concussion of the brain. He remained in the hospital a few days and was released with no further care or follow up recommended. (Exhibit I, Medical records from Brevard Hospital.) According to the Defendant, this head injury affected him throughout his school years and caused numerous incidents of disruptive (and violent) behavior. The Defendant also injured his hand by punching a window and when he went to the emergency room, he became combative and left. (Exhibit J, Medical records from Holmes Regional Medical Center.) The Defendant describes his inability to control his anger as "clicking" and claims that these "clicking" episodes show he has diminished capacity. He claims his attorney was ineffective for failing to investigate his diminished capacity and failing to present this testimony at the guilt/innocence phase of the trial.

The Defendant claims that this head injury at age three adversely affected him his whole life. He presented the testimony of Dr. Richard Carpenter, who stated the Defendant had an impulse disorder and rage reaction brought about by the closed head injury. (Exhibit G, Evidentiary transcript, p. 265.) He stated the consensus was that the Defendant had a closed-head injury and that excessive amounts of alcohol could exacerbate this problem. (Exhibit G, Evidentiary transcript, p. 267.) Dr. Carpenter also testified that he had

reviewed the medical records from the childhood accident, and that the records showed no fractures, subluxations or other significant abnormalities. Skull, cervical spine, pelvic and chest x-rays were taken, and all were normal. (Exhibit G, Evidentiary transcript, pp. 298-299; Exhibit 1, Medical records.) Dr. Carpenter further testified that when he prepared his report, he was unaware of the trial testimony of the Defendant that although he had been drinking, he was focused on everything he was doing. (Exhibit G, Evidentiary transcript, pp. 305-308.)

Dr. Dee testified for the defense. He reviewed the medical and school records. He opined that the Defendant "had a brain injury with probably some specific areas of damage and some diffuse damage that left him with speech and language problems and also problems with impulse control. And we're not talking here about a boy who is just disruptive. He's extremely disruptive. He's extremely aggressive." (Exhibit H, Evidentiary transcript December 16, 2004, pp. 112-113.) Dr. Dee opined that the Defendant had brain damage. He based his assessment in part on the difference in the Defendant's verbal IQ and performance IQ. (Exhibit H, Evidentiary transcript December 16, 2004, pp. 117-127.) Dr. Dee felt that his frontal-lobe syndrome or the kinds of behavior discontrol the Defendant had shown meant that the Defendant was under the influence of extreme mental or emotional disturbance when the crime was committed. (Exhibit H, Evidentiary transcript December 16, 2004, p. 129.) He further opined that the Defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired at the time of the crime. Exhibit H, Evidentiary transcript December 16, 2004, pp. 130-131.

Dr. Harry McClaren testified that the Defendant probably had a brain injury of some type. However, he noted that the Defendant has been in control of himself on death row. If he had a bad impulse control disorder, he would have poor behavior in prison - and he has not had such behavior in prison. Dr. McClaren testified this led him to believe that a lot of the reason for the Defendant's explosive behavior may be more related to alcohol intoxication rather than the effects of any neurologic impairment he might have. (Exhibit H, Evidentiary transcript December 16, 2004, pp. 23-25.) He also noted the difference in the verbal IQ and performance IQ, but stated that while that difference is seen in brain damaged individuals, it might also be caused by other factors. (Exhibit H, Evidentiary transcript December 16, 2004, pp. 23-24.) In an aside, he opined that it would be a hard choice at trial, if the material had been available to present brain dysfunction as a mitigator, subject to having it rebutted by the Defendant's aggressive acts and long history of violence. (Exhibit H, Evidentiary transcript December 16, 2004, p. 45.) Dr. McClaren's opinion was that the Defendant was under control at the time of the shooting and that his actions after the murder show he was in control and not impaired. (Exhibit H, Evidentiary transcript December 16, 2004, pp. 69-71.) He stated that he believed the Defendant probably suffers from a degree of brain damage, but he could not say that damage resulted in any particular behavior "in isolation." He stated that, "In combination with other factors I talked about, maybe being brought up in a toxic environment, developing antisocial personality style, being involved in the drug trade, having to do what you've got to do to make it in that business, the use of alcohol, so it may be a factor. But it's probably overshadowed by personality characteristics and the effect of alcohol,

in my opinion." (Exhibit H, Evidentiary transcript December 16, 2004, pp. 71-72.) He found it hard to say what effect the concussion had on the Defendant since it happened so young, and that the brain injury may have nothing to do with his behavior. (Exhibit H, Evidentiary transcript December 16, 2004, pp. 74.) His opinion was that at the time of the incident the Defendant did not suffer from an extreme mental or emotional disturbance, and that he was able to conform his behavior to the requirements of law. He based his opinion on the events of the evening, before and after the murder. (Exhibit H, Evidentiary transcript December 16, 2004, pp. 74-75.)

The opinions of the defense mental health experts are in sharp contrast to the Defendant's own testimony of his mental health. The Defendant had stated in his pre-sentence investigation report that his mental health was perfect. At the evidentiary hearing, his attorney testified that he tells his clients, "if you tell me something, I'm going to believe it. . . I didn't have any reason in the world to think there was anything wrong with Wydell Evans' mind in the sense it would be a mitigating factor of any kind, and certainly not a defense in the guilt or innocence phase of the trial." (Exhibit F, Evidentiary transcript, p. 87.) Attorney Studstill admitted that the Defendant had talked about drinking, but the Defendant also said that he knew what he was doing at the time. (Exhibit F, Evidentiary transcript, p. 89.) His attorney testified that the Defendant was competent, there was nothing to indicate he was out of touch with reality. The Defendant had emphasized to him that he knew what happened and that it was an accident. (Exhibit F, Evidentiary transcript, pp. 106-108.)

The Court finds more credence in the

testimony of Dr. McClaren than in the testimony of the defense doctors presented. Although all the doctors agree that he had some type of brain injury, the Court finds the defense has not established a sufficient "link" between the Defendant's behavior and his actions the night of the murder, such that it could be considered a mitigator.

The Court finds Mr. Studstill did not perform deficiently by failing to discover this "mitigating" evidence. The Defendant told his attorney that he was functioning fine and aware of all the events on that night. The Defendant's family did not give the defense attorney any information on any possible brain damage. Counsel cannot be deemed ineffective. "Just as counsel will not be considered ineffective for honoring his client's wishes, he cannot be deemed ineffective for relying on his client's statements when he had no reason to doubt his client's veracity." *Fotopoulos v. State*, 838 So. 2d 1122 (Fla. 2002). The Court also finds that a claim of diminished capacity would be inconsistent with the defense presented at trial, that there was no murder and it was an accident. This "accidental" strategy was forced upon the defense attorney by the Defendant. Counsel cannot be faulted for failing to investigate and to present evidence when his client has insisted on a certain course of action - in this case, that it was an accident.

(PCR Vol. VI, 834-839).

The court continued:

School records

The Defendant presented testimony of his prior teachers, based on his premise that his head injury caused his misbehavior at school, and that his attorney should have investigated his school performance. Ms. Barbara McFadden testified that the

Defendant was in her class because he was emotionally handicapped. She stated that he never had any kind of positive interaction with the other students, "It just seemed like we were just waiting for the other shoe to drop all the time." (Exhibit F, Evidentiary transcript, pp. 12-13.) She recalled an incident when the Defendant left the class and she followed him to talk to him. - He told her that "you need to get back. I don't want to hurt you." (Exhibit F, Evidentiary transcript, pp. 13-14.) She noted that "little things just seemed to set him off where at any moment you thought there was going to be an explosion all the time." (Exhibit F, Evidentiaiy transcript, p. 16.)

Ms. Margaret O'Shaughnessy, a special needs counselor, testified that she felt the Defendant "had such a violent short trigger... I felt with all of my heart that he was capable of very great violence." (Exhibit F, Evidentiary transcript, p. 33.) She recalled an incident when the Defendant was angry at a female student and he pushed her. (Exhibit F, Evidentiary transcript, p. 32.) The Defendant had also attacked a teacher, Gloria Allen. The teacher had turned him in for something and he went after her and pushed her. He also told the teacher that "he would get her." (Exhibit F, Evidentiary transcript, pp. 35, 40.)

The present defense evidence concerning the Defendant's poor performance in school is in stark contrast to the evidence presented at the sentencing hearing. At sentencing, the Defendant testified that he made A's, B's and C's in the early parts of his school years. (Exhibit O, Penalty phase transcript, p. 178.) His mother, Lillian Evans, testified that he went to school, and "he was very good in school." She agreed that he did well in school. (Exhibit O, Penalty phase transcript, p. 116.) She admitted that

he dropped out of school in the tenth grade, but said she didn't know why. (Exhibit O, Penalty phase transcript, p. 122.)

The Defendant's attorney was not ineffective for failing to investigate and present the school records. The Defendant and his witnesses testified at sentencing that he was a good student. The school records would have shown that the Defendant had learning disabilities. They also would have shown that the Defendant had been violent, disruptive and unruly throughout his school career. The Court finds it was reasonable to attempt to portray the Defendant in a positive manner, not in a negative light. The Court finds no prejudice, as it cannot be said that the results of the proceeding would have been different if this evidence had been introduced. As his attorney stated at the evidentiary hearing, he wouldn't want to present the prior violence to the jury, "Because all you're going to do is have 12 people on the jury all ready to pull the switch telling them how mean your man is and then tell them not to." He was hesitant to present this prior violence to the judge at sentencing, and he knew that his client had stated that his mental health was perfect. (Exhibit F, Post Conviction transcript, pp. 137-141.)

The Court recognizes that a strategic decision is not reasonable when an attorney fails to investigate his options and make a reasonable choice. However, Attorney Studstill knew his options were to either present the Defendant as a good person who deserved to live, or to open the door to all the prior acts of violence the Defendant had committed. The Court finds the strategy to present the Defendant in a good light did not fall below the standard of reasonable representation, and did not prejudice the Defendant.

> The Court finds the failure to present a defense of diminished capacity does not show that the attorney's conduct fell below the reasonableness standard, nor has the Defendant shown prejudice. Diminished capacity is not available as a defense to negate specific intent. Chestnut v. State, 538 So. 2d 820 (Fla. 1989). "Evidence of an abnormal mental condition not constituting legal insanity is inadmissible to negate specific intent." Hodges v. State, 885 So. 2d 338, 352 (Fla. 2003). The Court finds that the cases relied upon by the defense are not factually similar to the case at bar. The defense cites Bunney v. State, 603 So. 2d 1270 (Fla. 1992), as authority that trial counsel could have used diminished capacity as a viable defense. However, the Defendant's mental claims herein do not fit any of the categories Bunney set forth as admissible affirmative defenses. Id. at 1273. These conditions include intoxication (no longer recognized as an affirmative defense), epilepsy, infancy or senility. Id. None of those exceptions apply herein. Similarly, in Wise v. State, 580 So. 2d 329, 330 (Fla. 1st DCA 1991), the Defendant claimed he had a sudden loss of consciousness, comparable to a defendant in a vehicular homicide case claiming as a defense that a stroke, seizure or heart attack caused unconsciousness prior to a fatal accident. There was no lack of consciousness in this case - instead the Defendant stated all through trial that he was aware of his surrounding circumstances and that it was an accident.
>
> Attorney Studstill was not deficient for failing to present a diminished capacity defense, as this was not a viable defense. Therefore, no prejudice has been shown by the failure to present such a defense.

(PCR Vol. VI, 839-841). These findings are supported by

competent, substantial evidence. In fact, the trial judge attached each section of testimony to his order. Mr. Studstill testified that the theory of defense was that the shooting was an accident. (PCR Vol. I, 101). Evans insisted the shooting was an accident. (PCR Vol. I, 83). He told the police it was an accident. (PCR Vol. I, 99). He told the jury it was an accident. (PCR Vol. I, 100). Evans clearly recounted the events of the incident to counsel and to the jury. (PCR Vol. I, 100). He said that he had been drinking but clearly remembered the circumstances. (PCR Vol. I, 101). Counsel made a strategic decision to focus on the inconsistencies in eye-witness testimony. (PCR Vol. I, 101). Lino Odenat:s testimony supported the theory the shooting was an accident. (PCR Vol. I, 101). There was no evidence Evans did not know exactly what he was doing, and this strategy was reasonable. Mr. Studstill had no reason to question Evans:s version of events or believe Evans was out of touch with reality when the shooting occurred. (PCR Vol. I, 106). Evans never recounted any situation in which he had a black out or epileptic seizure or lost consciousness. (PCR Vol. I, 107). In fact, Evans told Mr. Studstill that he knew exactly what he did and that it was an accident. (PCR Vol. I, 107).

Evans testified at the evidentiary hearing that he knew

there was a round in the chamber of his gun when they got in the car. (PCR VOL. III, 419). Evans does not believe in intimidating people; he believes in Agetting straight to the point.@ (PCR VOL. III, 422). Evans was Apissed off@ about the people in the car. (PCR VOL. III, 422). The women laughing at him angered him further. (PCR VOL. III, 424). Evans continues to maintain the shooting was an accident (PCR VOL. III, 364, 472). Evans wrote Oren a letter about shooting Angel. He told Oren Athe gun just went off.@ (PCR Vol. II, 222).

Second, even if Evans could establish diminished capacity at the time of the offense, diminished capacity defenses are not recognized as an affirmative defense in Florida; therefore, counsel cannot be ineffective. In ***Hodges v. State***, 885 So. 2d 338 (Fla. 2003), this Court addressed a similar situation and found that there was no nexus between the school/medical records and the claim Hodges was suffering from brain damage or mental health problems. Hodges= military records showed he was discharged due to Adefective attitude@ and inability to adjust to a disciplined environment. ***Id.*** at 349. This Court also noted that:

> On a related topic, we decline to address Hodges' contention that guilt and penalty phase counsel were ineffective for failing to present evidence showing that Hodges' mental capacity prevented him from acting in a manner that is cold, calculated, and

> premeditated. This Court has held on numerous occasions that evidence of an abnormal mental condition not constituting legal insanity is inadmissible to negate specific intent. *See, e.g., Spencer v. State,* 842 So. 2d 52, 63 (Fla. 2003) (holding that evidence of Evans' disassociative state would not have been admissible during the guilt phase); *Bunney v. State,* 603 So. 2d 1270, 1273 (Fla.1992) (reiterating that commission of a crime during an epileptic seizure constitutes an exception to the broad prohibition against diminished capacity defenses); *Chestnut v. State,* 538 So. 2d 820, 821 (Fla.1989) (rejecting the argument that the Evans did not have the requisite mental state for premeditated murder as a result of extremely low intelligence, a seizure disorder, diminished cognitive skills, and a passive and dependent personality).

Id. at 352, n. 8. Evans relied on *Bunney v. State*, 603 So. 2d 1270 (Fla. 1992), the exception to the rule that diminished capacity defenses are not viable. In *Bunney*, the Florida Supreme Court noted that not all mental affirmative defenses were inadmissible per *Chestnut v. State*, 538 So.2d 820 (Fla. 1989). However, this Court specifically delineated several exceptions to the *Chestnut* rule, such as voluntary intoxication (no longer an affirmative defense), epilepsy, infancy, or senility.

Evans also relied on *Wise v. State*, 580 So. 2d 329 (Fla. 1st DCA 1991), a case which is inapposite. In *Wise*, the defendant was struck in the head, lost consciousness, and was standing over a corpse when he regained consciousness. The court

observed that Wise=s situation:

> [i]nvolves a physical defect or condition which has as a potential result, loss of consciousness. This is a situation wholly distinguishable from one involving a diminished capacity defense. A diminished capacity defense concerns the defendant's ability to understand the wrongfulness of his acts. The instant case presents a question of the defendant's consciousness of his acts themselves, not of his understanding of their wrongful nature. Wise did not seek to prove the existence of any mental illness or psychiatric condition, but instead that a physical condition may have caused him to blackout at the time of the assault in question. *Chestnut* itself notes that one of the primary cases the court relied upon, *Bethea v. U.S.,* 365 A.2d 64 (D.C.App.1976), distinguishes between "partial or relative insanity" (i.e. diminished capacity) and "conditions such as intoxication, medication, epilepsy, infancy or senility" which are "in varying degrees, susceptible to quantification or objective demonstration, and to lay understanding." *Id.* at 823.
>
> Here Wise's proffered defense does not involve mental illness, but a purely physical condition which affects his consciousness, not his mental state. As such it is comparable to a defendant in a vehicular homicide case asserting as a defense that a stroke, seizure or heart attack rendered him unconscious prior to the fatal accident.

Wise v. State. 580 So. 2d 329, 330 (Fla. 1st DCA 1991). *See also*, *Jones v. State*, 845 So. 2d 55, 70, n. 29 (Fla. 2003).

Counsel was not deficient for presenting the reasonable defense of accident **B** a defense which Evans insisted was the true sequence of events. Further, diminished capacity is not a viable defense. Even if it were, the defense is inconsistent with Evans= testimony at both the trial and motion to suppress that he

was perfectly aware of what he was doing and that the gun accidentally went off. Counsel's strategy of presenting an "accident" defense was reasonable.

A strategic or tactical decision is not a valid basis for an ineffective claim unless a defendant is able to show that no competent trial counsel would have utilized the tactics employed by trial counsel. *See White v. State*, 729 So. 2d 909, 912 (Fla. 1999) (citing *Provenzano v. Singletary*, 148 F.3d 1327, 1332 (11th Cir. 1998)). Strategic choices are Avirtually unchallengeable." *Strickland v. Washington*, 466 U.S. 688, 690 (1984). *See also Occhicone v. State*, 768 So. 2d 1037, 1048 (Fla. 2000); *Spencer v. State*, 842 So. 2d 52, 61-62 (Fla. 2003). In *Strickland*, the Court stated:

> A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the Evans must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy.@

Furthermore, as previously argued, Evans cannot establish prejudice under *Strickland* because diminished capacity is not a viable defense.

CLAIM II

TRIAL COUNSEL DID NOT RENDER INEFFECTIVE ASSISTANCE AT THE PENALTY PHASE

Evans claims trial counsel was ineffective at the penalty phase for the following reasons:

(A) Failure to request co-counsel for the penalty phase;
(B) Failure to investigate and present mental health evidence;
(C) Failure to present evidence of brain damage in support of the statutory mitigation of extreme emotional disturbance; and
(D) Failure to investigate and present evidence Evans was unable to appreciate the criminality of his conduct or was substantially impaired.

Penalty Phase testimony: Trial counsel presented the testimony of five witnesses[10] at the penalty phase as follows:

Mrs. Evans was disabled. (T Vol. XVI, 2275) Evans' father died when Evans was three years old. (T Vol. XVI, 2277) Evans had one brother, Oren John. The Evans' lived with Evans grandmother until Evans was two years old. (T Vol. XVI, 2277-78) When Evans was nine years old, Mrs. Evans moved out and Evans lived with his grandmother. (T Vol. XVI, 2278) Mrs. Evans had become a crack addict. Her behavior affected the children and troubled them a lot. Evans began getting in a lot of trouble because she was not there for him; however, he was a great inspiration in her stopping drugs. Evans prayed for her and

[10]Lilly Evans, mother; Patty Walker, cousin; Minnie Jarrett, cousin; Sandra Evans, aunt; and Linda Key, family friend.

stuck by her no matter what. (T Vol. XVI, 2281) Evans was a normal child, obedient and interested in music, writing and art. He was very good in school and did well. (T Vol. XVI, 2279) When Evans was 16 years old, he had a child which was given to foster parents. (T Vol. XVI, 2281-82) Evans found the child, which was a drug baby. Mrs. Evans raised the child, who was 11 at the time of trial. (T Vol. XVI, 2282) Evans loved children and loves his child, Crystal, who was in counseling because of the murder charges Evans was facing. (T Vol. XVI, 2283)

Evans made good grades in school until he was a teenager in junior high Alike a lot of teenagers.@ Evans was in 4-H and performed in talent shows because he liked music. (T Vol. XVI, 2284) He played football. His friends would always be at the house practicing songs and dancing. (T Vol. XVI, 2286) Evans completed 10th grade then dropped out like Akids just drop out sometimes.@ Mrs. Evans felt he probably dropped out because of her (T Vol. XVI, 2285) During that time, Evans would work to help with the kids. (T Vol. XVI, 2286) He worked in construction and landscaping, but mostly liked landscaping. (T Vol. XVI, 2286) He would give money to his mom. He was a very giving person and would even help other people. (T Vol. XVI, 2287) He helped with his grandmother when she had Alzheimer's. That was very stressful, but Evans loved his grandmother and

was raised by her. (T Vol. XVI, 2292) Evans= kids always received his attention and valuable time. They were very close to Evans. (T Vol. XVI, 2287) Evans has five children. (T Vol. XVI, 2288) He would always gather the children together and was good with the children. (T Vol. XVI, 2289) Evans even counseled some of the neighborhood children. (T Vol. XVI, 2290)

When Evans was not in prison, he lived with Mrs. Evans. Evans was never deprived of anything: he had a home to live in and food to eat. (T Vol. XVI, 2284) Although he was deprived of Mrs. Evans= care and comfort during several years, he had his grandmother and aunt. (T Vol. XVI, 2285, 2307, 2328) He was always a respectful child. (T Vol. XVI, 2292) He has a lot of love in his heart, is a good friend, and shows a lot of sympathy. He has a very soft heart and even cries over movies on TV. (T Vol. XVI, 2292) Mrs. Evans blamed herself for Asome of what is going wrong in his life.@ (T Vol. XVI, 2292)

Mrs. Jarrett knew Evans and Mrs. Evans all her life. (T Vol. XVI, 2301) She would see Evans on a daily basis. (T Vol. XVI, 2301) The grandmother raised Evans as a Christian. Evans would talk to Jarrett=s son and grandson about staying out of trouble and off the street. (T Vol. XVI, 2302) He really helped them. (T Vol. XVI, 2304) Evans loves kids and tries to help everybody he sees going the wrong way so they don=t get into trouble like he

did. (T Vol. XVI, 2305) Evans had hard times when he was a little boy, but was obedient and respectful nevertheless. (T Vol. XVI, 2302-2303) When his mother moved out, Evans lived with his grandmother. (T Vol. XVI, 2303)

As a family friend, Linda Key knew Evans since the age of three. (T Vol. XVI, 2309) Evans was Ajust like any other child.@ He got into no more trouble than any other kid. (T Vol. XVI, 2310) Evans had a loving family which supported him emotionally and financially. (T Vol. XVI, 2314) When Evans was older and had his own child, he was a good father. (T Vol. XVI, 2310) He would always try to steer children the right way. He took a lot of time with his children. (T Vol. XVI, 2311) Evans was a good person around the kids and always tried to encourage Key=s boys to do the right thing. (T Vol. XVI, 2313)

Having known Evans for 12 or 13 years, Patty Walker described him as Aa good person. He=s gentle, sweet, kind, loving. He=s a family person.@ (T Vol. XVI, 2317) Evans had helped Walker in her time of need. He lent her money to pay rent. He paid $200 on her wedding gown. He paid for her son to go to a football game. He paid $85.00 for her son to play football. (T Vol. XVI, 2317-2318) Evans worked in construction. (T Vol. XVI, 2318) Evans was good with his kids. He loves them, talks to them, and won=t let them watch violent movies or

anything else. They go to the park and do other things. (T Vol. XVI, 2319) Evans spends time with his children, reading to them or watching cartoons. He feeds and bathes them, taking care of every need. Walker described Evans as Aa really good person. He really is. He=s done good a lot. He=s real family oriented. He loves his family a lot.@ (T Vol. XVI, 2320)

The defense=s last witness, Sandra Evans, lived with Evans and his mother in Melbourne from the time Evans was about three years old. (T Vol. XVI, 2324) The environment was very religious because the grandmother was religious and taught them the Aright way to go.@ Evans was Aalways a good kid.@ Mrs. Evans was always a good mother to Evans when she worked at Collins Avionics and a nurses= aide. (T Vol. XVI, 2325)However, she left the family home when Evans was about eleven years old. Mrs. Evans had become addicted to crack cocaine and became slack in her care of the children. Neither Evans nor his brother finished school because they didn=t have the proper school clothes. In Sandra Evans= opinion: AYou know, you get ready to go to school, everybody else got good clothes and you don=t. Anyway your mother=s really not taking you down to get registered properly like you=re supposed to do.@ (T Vol. XVI, 2326)

Evans and his brother would hear from other kids that their mother was on crack or had been seen walking around with a

bottle of Old English 800. Evans was picked on a lot. His father was killed when Evans was two years old. He would get into trouble, but nothing serious. (T Vol. XVI, 2327) When Mrs. Evans was taking drugs, it bothered Evans. He was always talking to his mother. (T Vol. XVI, 2329)

Evans was an excellent father. He always got his kids together and would tell them about his grandmother. They were not allowed to watch violence on TV. (T Vol. XVI, 2329) The children are very close to Evans. He would take them everywhere and buy food and clothes. He made sure the children knew about the Bible and knew to stay out of trouble. (T Vol. XVI, 2332) He would tell the children to stay in school because Evans didn't finish school. He would tell the children to stay in school and do good work because he didn't have those opportunities. (T Vol. XVI, 2332)

Evans testified on his own behalf at the penalty phase. He spent a total of eight years in prison on three cases, one of which was a parole violation. (T Vol. XVI, 2339-2349) During his time in prison, Evans only received one disciplinary report. (T Vol. XVI, 2340) He remembered living with his mother, grandmother and aunt. He made A's, B's and C's in the early years of school. (T Vol. XVI, 2341) When he was around 14-15 years old, when his mother was on crack cocaine, Evans started

skipping school a lot. He got suspended for certain reasons, just like every other kid. (T Vol. XVI, 2342, 2343) When Evans's mother moved out, his brother stayed with the grandmother. (T Vol. XVI, 2342) Evans slept at his mother's house, but he lived both with her and with his grandmother. (T Vol. XVI, 2343) It upset Evans that his mother was on crack. She had always kept a clean house, clothed the children, and fed them. (T Vol. XVI, 2343) Mrs. Evans was a good woman with a high-paying job as a team leader at Collins Rockwell. (T Vol. XVI, 2344)

Evans was 17 when his first child was born. (T Vol. XVI, 2344) He was in prison and HRS had the baby. The day Evans was released from prison, he called HRS. (T Vol. XVI, 2345) After paperwork and blood tests, Evans gained custody of Crystal. He and his mom had raised the child because Evans was so young. (T Vol. XVI, 2347) Evans supported his five children both with money and with love. (T Vol. XVI, 2347) Because his children had different mothers, Evans would call their mothers and make sure they would all be together for birthdays and to go places. (T Vol. XVI, 2348) Evans counseled Ms. Jarrett's children. One of them was suspended from school, and Evans offered them a dollar for each good grade. (T Vol. XVI, 2349) When Evans was 21-22, his grandmother became ill. They had a hospital setup at the house and had to feed her through tubes. He changed diapers

and would help with the lifting. (T Vol. XVI, 2351) Grandmother became ill when Evans was in prison. Before he went to prison, she was always telling him to be good. It affected Evans a lot when she became sick. When he went to the nursing home to see her, she couldn=t talk. (T Vol. XVI, 2352) Evans took care of his grandmother for a long time. He was working in construction and landscaping.(T Vol. XVI, 2353) When his grandmother died in 1994, Evans got a tattoo on his arm. (T Vol. XVI, 2364) Evans never graduated from high school because he went to prison. (T Vol. XVI, 2354) The first time he went to prison, Evans was 17 years old. He was released at age 18. (T Vol. XVI, 2355) Less than a year later, he was returned to prison where he stayed two years. (T Vol. XVI, 2356) Less than a year after he was released from custody, Evans was arrested on a violation and spent about 2 **2** to 3 years in prison. (T Vol. XVI, 2357)

Evidentiary Hearing testimony:

The testimony at the evidentiary hearing would have been devastating. Evans' brother, Oren, testified that Evans had a very bad temper and would slap people over such trivial issues as whether Michael Jordan or Scotty Pippin was the best basketball player. (PCR Vol. II, 205) The reason Evans slapped the two men was AHe wanted to be like the man. He wanted to run the show. He was like king of the world, the hardest guy in the

world, gangster.@ (PCR Vol. II, 207) Evans felt as though the two men were laughing at him. (PCR Vol. II, 208) Evans did not like people Anot looking up to him as being the man.@ (PCR Vol. II, 208) Evans had a reputation for being the big man. (PCR Vol. II, 218)

Oren had been around a lot of angry people, but Evans was the Aangriest, most aggressive person I ever met.@ (PCR Vol. II, 209) As a child, Evans was always fighting and very aggressive. (PCR Vol. II, 212) Oren remembered him throwing a rock at a police officer. (PCR Vol. II, 212) Evans was in and out of juvenile facilities frequently. (PCR Vol. II, 213) He was frequently expelled from school (PCR Vol. II, 219) He began selling crack cocaine at age 16. Evans fathered five or six children with four different mothers. (PCR Vol. II, 214) He never worked for very long. (PCR Vol. II, 218)

Evans started carrying guns around 1998. When he was younger, he said he=d rather fight than carry a gun. (PCR Vol. II, 221)

When Evans got out of jail in 1998, he was riding around town kicking in people=s doors looking for the mother of one of his children. (PCR Vol. II, 205-206) When he found her, he just beat her to the point she was screaming. (PCR Vol. II, 206) When Oren asked Evans why he was doing that, Evans started

fighting with Oren and pulled a gun on him. (PCR Vol. II, 206) When Evans was younger, he had to go to speech classes. The problem disappeared when he got older. (PCR Vol. II, 219)

Barbara McFadden would have told the jury that Evans was so disruptive at Palm Bay High, which only had a learning disorder program (ASLD@), that he was referred to Melbourne High, which had an emotionally handicapped (AEH@) program (PCR Vol. I, 10). Children who are emotionally disturbed usually have learning disorders. (PCR Vol. I, 12) Evans never had positive interaction with the other students. (PCR Vol. I, 12) One time, Evans jumped out of his seat and walked out of the class. (PCR Vol. I, 13) When Ms. McFadden went outside to talk to him, Evans told her to get back so he didn=t hurt her. (PCR Vol. I, 14) At one point, there was a meeting with Evans= probation officer and he was recommended for the severely emotionally disturbed program. (PCR Vol. I, 22) When Ms. McFadden read in the newspaper that Evans was on trial for murder, she Awas surprised it didn=t happen sooner.@ (PCR Vol. I, 17).

Margaret O=Shaughnessy was the teacher at Melbourne High that had Evans in SLD classes. (PCR Vol. I, 31) At one point, Evans got mad at a female student. Ms. O=Shaughnessy learned of the problem and followed Evans and the female student to the bus stop. Evans pushed the student, but Ms. O=Shaughnessy was able

to talk him out of further violence. (PCR Vol. I, 32) She felt that Evans was capable of great violence and was more disturbed than the other students in her classes. (PCR Vol. I, 33) One time Evans attacked a teacher, Gloria Allen. (PCR Vol. I, 35) The teacher turned Evans in for something, and Evans retaliated by pushing her. (PCR Vol. I, 40) He also told Allen AI will get you.@ (PCR Vol. I, 40) Eventually, he was taken out of school and placed on Ahomebound@, a program for very violent students which is very expensive for the County. (PCR Vol. I, 34) The ASED@ (severely emotionally disturbed) placement is the most advanced placement. Evans never completed the program. (PCR Vol. I, 34)

Perhaps the most telling testimony of all was that of Evans himself. Evans said he was a Arobber. I was a Jack boy.@ (PCR Vol. III, 416) He robbed drug dealers. He carried a gun all the time. He had drug dealers trying to kill him. (PCR Vol. III, 416) Evans admitted yelling and threatening someone on the phone, but claimed it was about Tamiko Williams, the mother of one of his children. (PCR Vol. III, 415) Evans said AI=m going to break her God damn neck when I get out of here.@ (PCR Vol. III, 415-416) Evans knew there was a round in the gun when in got into Lino=s car the night he shot Angel. (PCR Vol. III, 419) He was Aready@ because he was Astrapped.@ (PCR Vol. III, 419,

420) Evans does not believe in intimidation. He believes in Agetting straight to the point.@ If you Agot a problem, all that rah, rah, rah, it=s wasted." (PCR Vol. III, 422)

A. <u>Failure to request co-counsel for the penalty phase.</u>

Evans argues counsel was ineffective for failing to secure a second attorney to conduct the penalty phase. Mr. Studstill had tried approximately twelve to thirteen death penalty cases by the time he was appointed to Evans= case. (PCR Vol. I, 67) At the time of Evans= trial, the practice was that one attorney was appointed. Mr. Studstill had never known of two attorneys being appointed. (PCR Vol. I, 68) The standard in Brevard County was to appoint one attorney. (PCR Vol. I, 69)

The trial court held:

> In Claim IIIA, the defense claims counsel was ineffective for failure to request a penalty phase attorney to assist in presenting a case in mitigation during the penalty phase. At the time of this trial, Attorney Studstill had taken twelve or thirteen death penalty cases to a verdict. (Exhibit F, Evidentiary hearing transcript. p. 67.) Attorney Studstill also stated that it was not his practice or anything he had observed in the courtroom, to have two attorneys for a death penalty client, one for the guilt/innocence phase and another for the penalty phase. He noted that "[t]he ABA has got their standards and then Brevard County, I guess, has got its standards, and I have to go by Brevard County standards." (Exhibit F, Evidentiary hearing transcript. p. 68.)

> The Defendant has failed to show his attorney's performance was deficient in failing to request co-counsel for this trial. As explained by Attorney Studstill, two attorneys was not the standard practice in Brevard County. The Court notes that Rule 3.112, Florida Rules of Criminal Procedure, which provides that a judge may appoint a second attorney in a capital case, was enacted after this trial. The Defendant herein has not shown how counsel's sole representation affected his attorney's trial performance. The mere fact that a Defendant has been represented by one attorney alone is insufficient to establish a claim of ineffective assistance of counsel. *State v. Riechmann*, 777 So. 2d 342 (Fla. 2000). See also *Cole v. State*, 841 So. 2d 409, 428(Fla. 2003) (General allegation that mitigating evidence could have been better presented if defense attorney would have hired co-counsel is an insufficient allegation of prejudice.)

(PCR Vol. VI, 843-844).

The trial court order is supported by competent, substantial evidence. Evans has failed to show counsel was deficient for not requesting a second attorney. The standard at the time was to appoint one attorney. Evans cannot show prejudice. In order to establish prejudice, Evans would have had to present evidence that a motion requesting a separate penalty phase attorney had some chance of success.

In *State v. Riechmann*, 777 So. 2d 342, 359 (Fla. 2000), this Court held:

> **5. Failing to Request Appointment of Second Counsel**
> Finally, Riechmann alleges that counsel provided

> ineffective assistance because his attorney did not request, and the trial judge did not appoint, two attorneys to represent him in the case. However, Riechmann has not specifically shown how counsel's solo representation affected his performance at trial; therefore, the trial court correctly found this claim to be without merit based on our decision in *Armstrong v. State,* 642 So. 2d 730, 737 (Fla.1994), wherein we held that a defendant is not denied effective assistance of counsel merely because he has only one attorney.

Further, Rule 3.112, Florida Rules of Criminal Procedure, was enacted October 28, 1999, effective July 1, 2000, ***after*** the date of Evans' trial. That rule provides that the judge *may* upon a good showing, appoint co-counsel. The American Bar Association rules cited by Evans are distinguished in the Committee Comments to Rule 3.112. Therefore, under Florida authority, counsel was not ineffective.

B. Failure to investigate and present mental health Evidence;
C. Failure to present evidence of brain damage in support of the statutory mitigation of extreme emotional disturbance;
D. Failure to investigate and present evidence Evans was unable to appreciate the criminality of his conduct or was substantially impaired.

These claims allege that Mr. Studstill conducted little investigation in preparation for the penalty phase and, had he conducted such an investigation, he would have found Evans' school records and other mental health evidence to establish statutory mitigating circumstances. The testimony presented by

Mr. Studstill portrayed Evans as a good person, a dutiful son and grandson, and a loving father. The school records now offered by Evans show his sworn testimony at the penalty phase regarding his grades was a lie. They show that in 1971, seventeen years before this murder, Evans made poor grades. They show Evans as emotionally handicapped, unable to maintain appropriate school behavior, and a Along history of behavioral difficulties@ with a penchant for Adisruptive behavior.@ The Stanford Binet test showed an I.Q. of 103. The Wechsler Intelligence Scale for Children showed a full scale I.Q. of 91. What the school records show is that Evans was of low average intelligence with behavior problems. Although Evans claims Mr. Studstill was deficient for failing to present this evidence, he has failed to explain how this would benefit the otherwise favorable portrayal as a decent person.

The mental health experts for both the defense and State agreed Evans was antisocial, (PCR Vol. II 284, 290 295; Vol. III, 388) The experts also agreed there was some type of brain damage due to either the accident at age three or subsequent accidents. (PCR Vol. II, 273, 292; Vol. III, 396, 477) However, there are hundreds of thousands of closed-head injuries in America every year. (PCR Vol. III, 397) A closed-head injury does not necessarily relate to committing a homicide. (PCR Vol.

I, 74) Whatever brain damage Evans sustained may or may not have had anything to do with his behavior at the time of the shooting. (PCR Vol. I, 74) The experts differed on whether Evans was under the influence of extreme emotional disturbance or had the capacity to conform his behavior to the requirement of law at the time of the shooting. (PCR Vol. III, 398-99, 453) As Dr. McClaren testified, the events before, during and after the homicide showed Evans was in complete control of the situation. (PCR Vol. III, 399) Evans was indubitably aware of the criminality of his conduct. (PCR Vol. III, 399) Dr. Dee believed that the Afrontal-lobe syndrome or the kinds of behavioral discontrol he has shown throughout his life@ necessarily meant Evans was under the influence of extreme emotional disturbance. (PCR Vol. III, 453) The frontal-lobe impairment also necessarily meant his ability to appreciate the criminality of the crime was impaired. (PCR Vol. III, 455) Dr. Carpenter did not explain his reasons for believing Evans was extremely emotionally disturbed. (PCR Vol. II, 270) Dr. Carpenter believed Evans= ability to appreciate the criminality of his conduct was impaired because he was Avery intoxicated,[11]@ extremely thin skinned,@ and has paranoid ideation. (PCR Vol. II,

[11]This opinion is contrary to Evans= statement to the police and trial testimony.

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What the school records show and what Evans did present at the evidentiary hearing was testimony of two teachers that he had a penchant for violence, attacked and threatened teachers and students, and was a bully. His brother placed everything into context when he summarized that Evans just wanted to be Athe man@ and a Agangster.@ Evans quite proudly announced he was a AJack boy,@ his profession was robbing drug dealers, and he only felt Aready@ when he was Astrapped@ with a gun. He did not believe in intimidating people, he just got right down to business. This evidence is hardly sympathetic to a jury.

Mr. Studstill tried to present Evans as a salvageable person. (PCR Vol. I, 92) As he testified, there was no reason to believe Evans had any serious mental problems. (PCR Vol. I, 87) The testimony on mental health that is now presented is a double-edged sword. Telling the jury that Evans has antisocial personality disorder, threatened and pushed the teachers trying to help him with his behavioral problems, bullied and fought his way through school, had repeated contact with the criminal justice system, would get out and kick in people=s doors in order to beat the mother of one of his children, was a AJack boy,@ thought of himself as a gangster, and had some aspect of diffuse brain damage due to head injuries, would hardly be productive.

The trial judge found:

> In Claim IIIB, the Defendant claims that his attorney was ineffective for failing to conduct an adequate investigation into the Defendant's mental health background to prove mental mitigation. He claims his attorney should have discovered and presented evidence of his prior head injury at age three and his prior school records. The Court incorporates by reference the preceding section failure to investigate and present this "mitigating" evidence at the guilt/innocence phase.
>
> The Defendant's school records would have shown a long history of behavioral problems and violent incidents. As shown by his teachers' testimony, he was diagnosed as emotionally handicapped and he was unable to function properly in a school setting. He had a violent temper and had attacked teachers and other students. The Defendant's brother, Oren, also testified about the Defendant's violent temper. Oren described the Defendant as the "angriest, most aggressive person I ever met." He further described acts of violence perpetrated by the Defendant, over trivial issues. (Exhibit. F, Evidentiary transcript, pp. 205-209.) This testimony would not have assisted the defense.
>
> The defense posits that defense counsel's strategy to paint the Defendant as a good man worth saving was error - in hindsight. The Defendant claims his attorney should have introduced testimony about his accident, his speech defect, emotional problems and his difficulties in school. Instead, his attorney attempted to present evidence that he had "some redeeming qualities." (Exhibit F, evidentiary transcript, p. 92.) As summarized by the State's Response, the penalty phase testimony put a positive spin to the

Defendant's life.

His mother, Lilly Evans, testified that he was an obedient child, and was very good in school. She further testified that she became a crack addict, and saw a difference in her children's behavior. She stated that the Defendant was a great inspiration in her stopping her crack addiction. She talked about how he tracked down a child of his that the mother had given up for adoption, and he had his mother take in the child. Ms. Evans testified about the great relationship he had with his children. She testified that the Defendant always had a home to live in and food to eat, and that while she may not have always been around, he had his grandmother. She stated that he was a very generous person and gave of his money and time to others. Ms. Evans testified that the Defendant was a respectful child, very loving. (Exhibit O, Penalty phase transcript, pp. 112-130.)

Ms. Minnie Jarrett, a cousin, testified in support of the Defendant. She said he was respectful as a child and obeyed. She stated that he spoke to her grandchildren about not getting in trouble, giving them guidance. (Exhibit O, Penalty phase transcript, pp. 137-144.)

Ms. Linda Ivey, a life long friend, testified. She stated that he was a good father, spent time with his kids and tried to steer them the right way. He always tried to encourage kids to do the right thing. (Exhibit O, Penalty phase transcript, pp. 146152.) Patty Walker testified on the Defendant's behalf. She testified she had known him twelve or thirteen years, and that he was a good person - gentle, sweet, kind, loving. Ms. Walker testified that the Defendant had lent her money, helped her pay for her wedding, and paid for her son to play football. She stated he loved his kids,

and spent time with them. (Exhibit O, Penalty phase transcript, pp. 152-158.)

The Defendant's aunt, Sandra Evans, testified on his behalf. She had known him since his birth. She stated that he was a good child, he got in a little trouble but nothing serious. In her opinion, he was an excellent father. When his grandmother became ill, he helped in her care, even changing her diapers. (Exhibit O, Penalty phase transcript, pp. 159-172.)

Mr. Evans himself testified. He stated that his mother's addiction to crack adversely affected him. The Defendant testified that he tracked down his oldest daughter in foster care, and supported her. He loved having his kids around, and counseled children to stay out of trouble. He testified about caring for his ill grandmother. (Exhibit O, Penalty phase transcript, pp. 176-190.)

The Defendant has not shown that his attorney was ineffective for failing to further investigate his mental health and to present this information in mitigation.

Penalty phase counsel testified that he was aware of Mr. Evans' prior criminal record. He was also aware there was another case of violence pending at the time of this trial. He was well aware of the violent tendencies that had brought the Defendant into contact with the criminal justice system. He elected to present good evidence about his background. Attorney Studstill did not want the jury to hear from him about any other evidence of violence by Mr. Evans against anyone. (Exhibit F, Evidentiary transcript, p. 126.) Attorney Studstill was also aware that the Defendant had stated his mental health was perfect.

The Court finds that Attorney Studstill's

actions in investigating mental mitigation were not deficient. He conducted a reasonable investigation into the Defendant's background and made a strategic decision to focus on the positive aspects of the Defendant's character - and not open the door to all the prior acts of violence perpetrated by the Defendant since his teenage years. At the penalty phase, defense counsel "humanized" the Defendant with the testimony of the Defendant's friends and family. (Exhibit O, Penalty phase transcript, pp. 111-200; Exhibit P, Penalty phase transcript, pp. 206-207.) Even though Mr. Studstill failed to persuade the jury and Judge Lober to sentence the Defendant to life imprisonment, this Court cannot conclude Mr. Studstill was ineffective. Mr. Studstill had a legitimate concern that presenting the Defendant's mental history and past actions might have left the jury with the impression that the Defendant was a dangerous man; thus, acting as an aggravator instead of a mitigator. See *Banks v. State*, 842 So. 2d 788 (Fla. 2003); *Rose v. State*, 617 So. 2d 291 (Fla. 1993); *Reed v. State*, 875 So. 2d 415, 437 (Fla. 2003). "The issue is not what present counsel or this Court might now view as the best strategy, but rather whether the strategy was within the broad range of discretion afforded to counsel actually responsible for the defense." *Occhicone v. State*, 768 So. 2d 1037, 1049 (Fla. 2000). Humanizing the Defendant is an accepted strategy that falls within the broad range of reasonably competent performance under prevailing professional standards. See *Haliburton v. Singletary*, 691 So. 2d 466, 471 (Fla. 1997) (penalty phase counsel employed the strategy of humanizing defendant); *Bryan v. Dugger,* 641 So. 2d 61, 64 (Fla. 1994) (defendant's penalty phase counsel's strategy of humanizing the defendant was upheld). Mr. Studstill's strategy allowed the jury to

hear about the positive aspects of Defendant's life, without opening the door for extremely damaging testimony on cross-examination regarding the Defendant's violent behavior. See *Windom v. State*, 886 So. 2d 915 (Fla. 2004) (trial counsel was not deficient for failing to present additional testimony that would have informed the jury of negative information about the defendant); *Breedlove v. State*, 692 So. 2d 874, 877-78 (Fla. 1997) (finding Breedlove not prejudiced by failure to present witnesses at penalty phase where State would then be able to cross-exam witnesses and present rebuttal evidence that would have countered any value Breedlove might have gained from the evidence.) The mental mitigation evidence would have opened the door to testimony about the Defendant's violence at school, and throughout his life.

The Defendant's attorney conducted a reasonable investigation, under the circumstances presented by this case. Attorney Studstill testified that, "I didn't think Mr. Evans was nuts. I didn't think he was crazy. From what he told me the thing was an accident, and the defense would be to try and go in that direction." (Exhibit F, Evidentiary hearing transcript, p. 64.) He was aware of the Defendant's criminal record, and that, "He was a violent person as far as his criminal record goes . . . pretty much random violence as I recall." (Exhibit F, Evidentiary hearing transcript, p. 79.) In his investigation, he sent letters to various people, asking them if they would be character witnesses for the defense. (Exhibit F, Evidentiary hearing transcript, pp. 8586.) The Defendant's mother had told him that, "he made pretty good grades, A's, B's, and C's," and the Defendant testified to the same at the penalty phase. (Exhibit F, Evidentiary hearing transcript, p. 86-87.) He knew that the Defendant had been drinking before the

murder, but the Defendant said, "that he knew what he was doing at the time." (Exhibit F, Evidentiary hearing transcript, p. 89.) During his penalty phase investigation, he asked Wydell Evans, his family members and the other witnesses "what they could testify to that would be helpful to Mr. Evans," He was looking for some testimony of "some characteristics that were admirable and they had some characteristics that would impress a jury that he may not be all bad and he had some redeeming qualities and perhaps they would give him life in prison as opposed to a death sentence." (Exhibit F, Evidentiary hearing transcript, p. 92.) Attorney Studstill testified that, "The folks told me, though, that he was a pretty good guy when he was around his own family. He helped his grandmother and all those kinds of things. And that was confirmed by more than one witness, and I thought it sounded pretty good." (Exhibit F, Evidentiary hearing transcript, p. 93.) On cross, Attorney Studstill agreed that the Defendant had told him he was drinking, but that he had a clear recollection of what occurred. (Exhibit F, Evidentiary hearing transcript, p. 100-101.) He stated that the Defendant was competent, that there was nothing to indicate that he was out of touch with reality. Mr. Evans emphasized that he knew what he did and that it was an accident. (Exhibit F, Evidentiary hearing transcript, p. 106-107.) Attorney Studstill knew the Defendant had been in prison about eight or nine years, between the ages of fifteen and twenty- eight. The Defendant told him about his association with his grandmother and aunts, and they were willing to come to court to confirm that. As a boy in high school, he had helped his crippled grandmother, even changing her diapers. He further knew Mr. Evans' family thought he was a good father. He was generous with his time and money, some redeeming qualities, but obviously his attorney couldn't erase

his criminal record. (Exhibit F, Evidentiary hearing transcript, p. 111-112.) In preparation for the penalty phase, he spoke to the Defendant, his mother, and an aunt. (Exhibit F, Evidentiary hearing transcript, p. 112113.) An attorney is entitled to rely upon the information his client gives him. *Fotopoulos v. State*, 838 So. 2d 1122 (Fla. 2002).

Attorney Studstill knew about his prior criminal violence cases, and he elected to present evidence good about his background. He did not want the jury to hear from him about any other evidence of violence by Mr. Evans against anyone. (Exhibit F, Evidentiary hearing transcript, p. 126.) His attorney did not want to present the violence, "Because all you're going to do is have twelve people on the jury all ready to pull the switch telling them how mean your man is and then tell them not to. You'd be out of our (sic) mind." (Exhibit F, Evidentiary hearing transcript, p. 137.) Mr. Studstill testified on cross that he was aware of the presentence investigation, and that the Defendant stated his mental health was perfect. (Exhibit F, Evidentiary hearing transcript, p. 141.)

The Defendant has failed to prove prejudice. He admitted that he shot Angel, albeit he called it an accident. The trial court found the Defendant had two aggravators, the existence of prior violent felonies and that the current crime was committed while the Defendant was on probation. The jury recommended the death sentence by a ten to two margin. In order to undermine confidence in the outcome of the penalty phase, the Defendant would have had to "present fairly strong evidence of mental health mitigation." *Arbelaez v. State*, 30 Fla. L. Weekly S65a (Fla. Jan. 27, 2005). Such evidence has not been presented. The Court finds that there is no reasonable

probability that the investigation and presentation of this evidence would have produced a different result, i.e., there is no reasonable probability a jury would have returned a life recommendation instead of a death recommendation.

CLAIM IIIC AND CLAIM IIID

In Claim IIIC, the Defendant alleges counsel was ineffective for failing to retain any expert witness to present evidence of brain damage suffered by Mr. Evans, in support of mitigation that Mr. Evans was under the influence of extreme mental or emotional disturbance at the time of the offense. In Claim IIID, the defense claims counsel was ineffective for failing to investigate and present evidence in support of statutory mitigation that Mr. Evans capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired at the time of the offense. The Court will address these claims together.

The Court has reviewed the expert testimony presented at the evidentiary hearing, and the reports prepared by the experts and entered into evidence. The Court also incorporates the previous sections of this order dealing with this issue.

Dr. Carpenter's report discusses the Defendant's statements that he has a "clicking" reaction, described as an instantaneous rage reaction. During these episodes, the Defendant claims to act without conscious control. (Exhibit L, Forensic evaluation of Dr. Carpenter.) Dr. Carpenter noted his review of the school records and medical records, and noted that the Defendant's intellectual functioning is in the average range. After reviewing the records, Dr. Carpenter opined that the "clicking" has a neurological basis. His conclusion was that the Defendant "was

exhibiting diminished capacity as a function of brain injury and related rage reaction as well as severe alcohol intoxication. This outburst of rage caused him to be unable to control his behavior... This high level of intoxication contributes to his level of diminished capacity." (Exhibit L, Forensic evaluation of Dr. Carpenter.) At the evidentiary hearing, Dr. Carpenter testified that he believed that the Defendant was under the influence of extreme mental or emotional disturbance and that he believed his capacity to appreciate the criminality of his conduct or conform this conduct to the requirements of the law was impaired. (Exhibit G, Evidentiary transcript, pp. 269, 271.) However, Dr. Carpenter further testified that when he prepared his report, he was unaware of the trial testimony of the Defendant that although he had been drinking, he was focused on everything he was doing. (Exhibit G, Evidentiary transcript, p. 305-308.)

Dr. Henry Dee also prepared a neuropsychological evaluation. (Exhibit M, Resume of Neuropsychological Evaluation.) Dr. Dee also reviewed the school and medical records discussed above. His report concluded his review "would strongly seem to support the diagnosis of cerebral damage early in childhood, probably resulting from the accident at age 3." Id. At the evidentiary hearing, he testified that the Defendant was under the influence of extreme mental or emotional disturbance when the crime was committed, and that the Defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired at the time of the crime. (Exhibit H, Evidentiary transcript December 16, 2004, pp. 129-131.)
Dr. McClaren's report reaches a different conclusion. (Exhibit N, Forensic psychological evaluation prepared by Dr.

McClaren.) In his written opinion, "He did not appear to be suffering from extreme mental or emotional disturbance. Also, he did not appear to be unable to conform his behavior to the requirements of law or to be unable to recognize the criminality of the offenses charged given his intelligence, lack of psychotic or depressive conditions at the time of the alleged offense taken together with his reported behavior during that time period." Id.

The Court finds that Attorney Studstill was not ineffective for failing to retain an expert witness to present evidence of brain damage suffered by Mr. Evans, in support of mitigation that Mr. Evans was under the influence of extreme mental or emotional disturbance at the time of the offense. Based on the testimony of Dr. McClaren, the Court finds that any brain damage suffered by the Defendant was minimal and did not support a conclusion he had an impulse control disorder. (Exhibit H, Post Conviction transcript, p. 25.) The Court also finds that defense counsel was not ineffective for failing to investigate and present evidence in support of statutory mitigation that Mr. Evans capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired at the time of the offense. The defense experts' conclusions concerning the Defendant's mental state were completely rebutted by the State's expert. Dr. McClaren's conclusions are also supported by the facts themselves in this case, that the Defendant committed this murder, then commandeered the vehicle while he began planning a future course. The Court notes again that the present claims of extreme mental or emotional disturbance and/or an inability to appreciate the criminality of his conduct or conform his conduct to the requirements of law were impaired are inconsistent with the

> Defendant's testimony at trial - that he knew what was happening all along and the shooting was an accident. While evidence of intoxication was introduced at trial, the Defendant testified that he was not drunk, he was focused. The Court finds that even if these mitigators did exist - which this Court does not concede - they would have been inconsistent with the theory of defense. *Cherry v. State,* 781 So. 2d 1040 (Fla. 2000). The Defendant's attorney cannot be found ineffective for pursuing the course of action the Defendant insisted upon - that there was no murder, that the death of Angel was an accident. *Fotopoulos v. State*, 838 So. 2d 1122 (Fla. 2002); *Williamson v. Moore*, 221 F. 3d 1177 (11th Cir. 2000).
>
> The Defendant was not prejudiced by the failure to hire an expert in mitigation, or the failure to present evidence concerning an inability to appreciate the criminality of his conduct or conform his conduct to the requirements of law. The Court finds no reasonable probability sufficient to undermine confidence in the outcome, i.e., no reasonable probability that presentation of this evidence would have caused the Defendant to receive a life sentence. *Hodges v. State*, 885 So. 2d 338 (Fla. 2003).

(PCR Vol. VI, 844-855)

The trial court findings are supported by competent, substantial evidence. An ineffective assistance claim does not arise from the failure to present mitigation evidence where that evidence presents a double-edged sword. *See, e.g., Carroll v. State*, 815 So. 2d 601, 614-15 & n. 15 (Fla. 2002); *Asay v. State*, 769 So. 2d 974, 988 (Fla. 2000). For example, the

background testimony in *Reed v. State*, 875 So. 2d 415 (Fla. 2004), involved numerous facts that placed Reed in a very negative light, such as that he once broke his grandmother's nose, abused drugs over many years, was jailed on various occasions, continued his drug use after his brother took him in on the condition that he stop using drugs, and threatened to kill his brother's wife. This Court held that not only was this evidence negative in general, but was also particularly disadvantageous in light of the facts of the crime. Also, testimony regarding Reed's violence toward his grandmother and threats toward his brother's wife would have established a pattern of violence against women. Furthermore, the Court has acknowledged that in the past antisocial personality disorder is "a trait most jurors tend to look disfavorably upon." *Freeman v. State*, 852 So. 2d 216, 224 (Fla. 2003). *See also Breedlove v. State*, 692 So. 2d 874, 878 (Fla. 1997); *Windom v. State,* 886 So. 2d 915 (Fla. 2004) (trial counsel not deficient for failing to present additional testimony that would have informed the jury of negative information about the defendant); *Medina v. State*, 573 So. 2d 293, 298 (Fla. 1990) (holding that trial counsel was not ineffective for failing to investigate and present evidence that would have presented the defendant in an unfavorable light). As this Court recently observed in *Davis v. State*, 30

Fla. L. Weekly S709 (Fla. Oct. 20, 2005), the "mitigating" evidence presented at the evidentiary hearing demonstrates that the matters now asserted were either cumulative to that which trial counsel presented or exposed negative information -- topics trial counsel made a reasonable strategic decision to avoid. *See also, Ventura v. State*, 794 So. 2d 553, 570 (Fla. 2001) (finding that penalty phase counsel was not deficient for failing to procure the testimony of witnesses for the penalty phase whose testimony would have mirrored the testimony that was offered at that proceeding); *Downs v. State*, 740 So. 2d 506, 516 (Fla. 1999) (affirming the trial court's denial of the defendant's claims that counsel was ineffective for failing to investigate and present additional mitigating evidence where the additional evidence was cumulative to that presented during sentencing).

CLAIM III

TRIAL COUNSEL DID NOT RENDER INEFFECTIVE ASSISTANCE AT THE PENALTY/SENTENCING STATE FOR FAILURE TO REQUEST AN INSTRUCTION ON STATUTORY MITIGATION

Evans last claim of ineffective assistance of counsel involves whether an instruction should have been given on statutory mitigating factors. As previously discussed, the experts differed on whether there was statutory mitigation. The defense experts gave conclusory opinions that Evans had extreme

emotional disturbance and impaired capacity at the time of the event. Yet neither defense expert delved into the facts of the crime. The version given to them was that Evans was intoxicated, a fact which weighed heavily on their opinions. Evans told defense counsel he was not intoxicated. (PCR Vol. I, 89) He told the police when arrested and he told the jury at trial that he was not intoxicated, but now he testifies differently.

Mr. Studstill did not believe he had grounds for statutory mitigation. (PCR Vol. I, 96) There was nothing in Evans= version of events that would lead him to believe the shooting was anything other than an accident. (PCR Vol. I, 94) Evans has consistently said the incident was an accident and he was in perfect control. It is only now that Evans has come forth with the Auncontrollable rage@ version which would point to emotional disturbance. Mr. Studstill chose a reasonable trial strategy which was to present the facts as Evans insisted: that he was handing the gun to the back seat to get it away from him and the gun accidentally went off. Counsel cannot be ineffective because Evans now asserts an uncontrollable rage.

The trial court held:

> In Claim IV, the Defendant claims he was denied effective assistance of counsel at the penalty phase because his attorney was ineffective in failing to request that

> statutory mitigation jury instructions be given. He claims that instructions should have been given for reduced capacity and extreme mental or emotional disturbance. The defense claims the evidence of alcohol consumption was sufficient to support giving both instructions. However, the Defendant himself testified that he was "focused on everything he was doing," that he was, "Not drunk but just, you know, slightly intoxicated," and that he had a clear recollection of what happened. (Exhibit E, Trial transcript, pp. 987-988.)
>
> Attorney Studstill testified that he did not think he had any statutory grounds for mitigation. He stated that, "I didn't have any reason to think that I could support with any kind of evidence, any of the statutory mitigating circumstances." He stated that, "Mr. Evans told me that the incident I was defending him on was an accident." (Exhibit F, Evidentiary transcript, pp. 94-96.)
>
> The Defendant's present claim that he was intoxicated is refuted by his prior trial testimony. Intoxication is also inconsistent with his theory of defense, that it was an accident. The Defendant has not shown that his attorney's performance in not requesting these instructions was deficient, or that the alleged deficiency prejudiced him. Attorney Studstill was not deficient in "failing to present a mitigator that was not supported by the record- or would have been inconsistent with the evidence and testimony presented by the defendant." *Cherry v. State*, 781 So. 2d 1040, 1050 (Fla. 2001).

These findings are supported by competent, substantial evidence.

CONCLUSION

WHEREFORE, the State respectfully requests that this Honorable Court affirm the denial of Evans=s 3.851 Motion for Post Conviction Relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was furnished by U.S. mail to **Richard E. Kiley, and James V. Viggiano, Jr.**, CCRC - Middle, 3801 Corporex Park Dr., Suite 210, Tampa, Florida 33619, this _____ day of November, 2005.

BARBARA C. DAVIS
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Answer Brief of the Appellee was generated in a Courier New, 12 point font, pursuant to Florida Rule of Appellate Procedure 9.210.

_____
BARBARA C. DAVIS
Attorney for Appellee