IN THE SUPREME COURT OF FLORIDA

SC05-632

WYDELL EVANS

Appellant

v.

STATE OF FLORIDA

Appellee

ON APPEAL FROM THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT FOR BREVARD COUNTY, STATE OF FLORIDA

INITIAL BRIEF

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Preliminary Statement

This proceeding involves an appeal by Wydell Evans of the circuit court=s denial of Rule 3.850 relief as to Mr. Evans= sentence of death. The following symbols will be used to designate references to the record in this appeal: AR@ (followed by page number) B record on appeal to this Court; APCR@ [vol.} (followed by page number) B record on post-conviction appeal. All other citations, such as those to exhibits introduced during the evidentiary hearing are self explanatory.

Standard of Review

Mr. Evans= appeal involves claims of ineffective assistance of counsel. As such these claims present mixed issues of law and fact and are to be reviewed de novo by this Court. Stephens v. State, 748 So.2d 1028 (1999).

Request for Oral Argument

Mr. Evans has been sentenced to death. The resolution of the issues in this action will determine whether Mr. Evans lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Mr. Evans, through counsel, accordingly urges that the Court permit oral argument.

Statement of the Case and Facts

Wydell Evans was born to Lilly Evans on May 19, 1971 in Macon, Georgia. Wydell=s father was killed when Wydell was three years old. Shortly after Wydell was born, Lilly Evans and Wydell moved to Brevard County in 1973. Lilly Evans moved in with her mother where they stayed until Wydell was about twelve years old.

Lilly Evans was employed at Collins Avionic, Rockwell but lost her job because she became involved in drugs. Lilly was not more than a physical presence in Wydell=s life because she had become addicted to crack cocaine. Wydell=s grandmother assumed responsibility for raising Wydell. He lived with his grandmother, with his brother, Oren Javon Evans, and his aunts.

When Wydell was three years old, on September 5, 1974, he saw his aunt, Sandra Evans returning home. Wydell became excited at the return of his aunt and ran into the street. He was struck by a car and thrown about six to eight feet. Wydell hit the ground, rolled up, fell back down and became stiff. He stopped breathing and became unconscious. Wydell was not breathing for about one minute. Wydell=s aunt, who was nearby, ran to assist and began reviving him. Wydell was brought to Brevard Hospital in Melbourne, Florida where he was admitted.

At the hospital, Wydell was combative and somnolent. He was diagnosed as having a closed head injury and a probable concussion of the brain. He was discharged two days later.

The closed head injury affected Wydell throughout his school years. Wydell had a

speech pattern change and he received speech and language services until the fifth grade. He had a stuttering problem until the fifth grade.

Wydell grew up in a household of females and without a father figure. The lack of a father figure affected Wydell deeply. He often asked about his father and was jealous of other children who did have fathers. Wydell was ashamed that he had no father. The lack of a father figure was compounded by the abuse of his mother at the hands of men in her life. Wydell witnessed his mother being physically abused and would often sleep at the foot of his mother=s bed believing he could protect her. Wydell longed for the day when he would be strong enough to protect his mother.

During school years, Wydell was placed in the emotionally handicapped and slow learning disability programs at school. The emotionally handicapped or EH program was designed for students who had difficulties managing their emotions and behavior. Students in the program may be extremely withdrawn or extremely aggressive. The curriculum attempts to teach social personal skills and is based on a continuum of emotionally handicapped to severely emotionally disturbed. Wydell was being recommended for the severely emotionally disturbed level on the continuum when he was removed from class.

Wydell had such a quick temper that his teacher in the EH program stayed seven or eight feet from Wydell - more than the normal three feet from the other EH students. His teacher believed that Wydell was capable of violence. He seemed more disturbed than the other students in the EH program and was one of the two most disturbed

students to come through the program at that time. When Wydell became of high school age, as a ninth grade student, he was placed with students in the tenth, eleventh, and twelfth grade students in an effort to have the older students control Wydell. Wydell was only one of four or five students where this program was implemented.

Wydell, because he was learning disabled, was also placed in specific learning disabilities class or SLD. As a student, Wydell was very restless, hyperactive, unable to concentrate, and constantly looking around. Wydell rarely if ever completed an entire piece of academic work. He had no planning skills and reacted to what ever was going on around him at the moment.

Wydell=s mother took him to the CPC Hospital in Palm Bay because of behavior problems. Wydell had an explosive fuse temper, was disobedient, and was having tantrums. She felt that Wydell really needed help. He was observed for four days but discharged because the facility served only those with drug and alcohol problems or those who were suicidal. After Wydell was discharged, his mother did not pursue further mental health counseling.

Wydell spent a large portion of his adult life in and out of jail. In October of 1998, Wydell was in jail and was released on October 19, 1998. Upon release, Wydell began drinking alcohol and visiting people. He met with Angel Johnson who was the fiancé of his brother, Oren Javon Evans. Angel braided Wydell=s hair while they were alone. Later, Wydell continued drinking beer and liquor.

On October 21, 1998, Sammy Hogan picked up Wydell and Lino Odenat to give

them a ride to Cocoa. As they drove, they passed a car on the side of the road in which Angel Johnson, Erica Foster, and April Holmes were sitting. Sammy stopped his car and Wydell got out and spoke with Angel. Angel and Erica agreed to ride along to Cocoa.

Sammy was driving the car and Wydell was sitting in the front passenger side with Lino sitting directly behind Wydell, Erica sitting in the middle of the back seat and Angel sitting directly behind the driver. Lino had a gun in his lap which was normal for him. Wydell also had a gun. After getting gas and continuing on their trip to Cocoa, there was laughing and joking going on in the car. An argument began between Wydell and Angel about Angel cheating on Wydell=s brother. Sammy told Wydell that Angel was not cheating. Wydell, who was very intoxicated, became angry and punched and cracked the car windshield. At some point Angel began to laugh and Wydell said Ayou think it=s funny?@ and shot Angel once. Wydell then told Sammy to drive to ABig Dick=s@ in Eau Gallie. Wydell got out of the car at ABig Dick=s@ then got back in the car, traveled a short distance, and then again got out of the car. Wydell then told Erica and Sammy to take Angel to the hospital where she died.

Wydell Evans was charged with first degree murder and kidnapping. At trial, an Edward Rogers, who read about the shooting in the newspaper and who contacted law enforcement from the jail, testified that when Wydell Evans was in jail, he heard Wydell on the phone very angry. He said he heard Wydell say if he ever got his hands on her he=d Akill the bitch.@ Rogers said Wydell was talking about Angel Johnson.

Wydell Evans was convicted of first degree murder and kidnapping. At the penalty

phase the state presented evidence supporting two statutory aggravators. The state presented copies of judgments and sentences which showed that Wydell Evans had two prior convictions for battery on a law enforcement officer and a prior conviction for aggravated battery. The state also presented evidence that Wydell was on probation when Angel was shot.

Defense counsel presented no statutory mitigation. Counsel did present nonstatutory mitigation. The jury recommended death by a vote of 10-2. The trial court found nonstatutory mitigation that Wydell had an abused or deprived childhood as a result of his mother=s crack addiction, that he contributed to society through his work habits, he performed charitable or humanitarian deeds, he counseled youth to avoid crime and stay in school, and he had good behavior in prison. Wydell Evans was sentenced to death.

Wydell Evans appealed the conviction to this Court. Evans v. State, 838 So.2d 1090 (Fla. 2003) This Court rejected Evans= appeal and affirmed the trial court decision with four Justices concurring and three Justices concurring in part and dissenting in part. Wydell Evans challenged his conviction and sentence by filing a Motion to Vacate Judgments of Conviction and Sentence With Special Request for Leave to Amend. An evidentiary hearing was held on October 19 and 20, 2004 and December 16, 2004. The trial court issued its Order Denying Motion for Postconviction Relief on February 14, 2005. This appeal follows.

Evidentiary Hearing Facts

Testimony of Barbara McFadden

The testimony of Ms. McFadden established that Wydell=s emotional problems and impulse control issues were long standing and firmly embedded in his psychological make up when he entered Ms. McFadden=s class for the emotionally handicapped, he was sixteen years of age.

McFadden=s qualifications for the evaluation and teaching of emotionally handicapped students were impeccable. (PCR Vol. I-8). Regarding a specific incident, Ms. McFadden testified that ASo I think he really didn=t want to lose his temper with me but didn=t trust himself.@ (PCR Vol.I-14). Ms. McFadden did not take this as a threat, but rather a realization by Wydell of an inability to control himself. (PCR Vol. I-15). She described Wydell as angry and Aexplosive@. (PCR Vol. I-19) and that he was beyond her control in the program. (PCR Vol.I-21). Most significantly, Ms. McFadden testified that Mr. Evans= never demonstrated a high level of planning skills.(PCR Vol.I-27-28)

Testimony of Margaret O=Shaughnessy

This witness= testimony further documents and explains the mental problems which plagued Wydell Evans throughout his school years. Ms. O=Shaughnessy testified that she felt that Wydell had Aa violent, short trigger,@ that he was capable of Avery great violence@ and A It was like he was at a higher plane or level or more disturbed than the other students that we had in the emotional education.@ (PCR Vol. I-33). Ms. O=Shaughnessy was aware of that Wydell was involved in an accident when he was three years old. She was aware of Wydell=s head injury and speech impediment. She was concerned that Wydell never received medical treatment and opined that if Wydell had stayed longer, a

neurologist could have been consulted and his condition could have been addressed medically. (PCR Vol. I-41). O=Shaughnessy, as did McFadden described Wydell as someone who often acted before he thought, Avery impulsive@. (PCR Vol. I-43). On re-cross examination, the State tried to infer that Wydell was manipulative. O=Shaughnessy testified: AThis is my reality. It doesn=t make it right or wrong. In my reality, when I worked with him, he never thought it through. I wish I could have gotten him to think something through. He was just a short fuse that exploded, and I don=t BI wish he did what you said, that he would think it through to be manipulative; but, unfortunately, he just blows.@ (PCR Vol. I-44).

Kenneth Studstill

Attorney Studstill testified at the evidentiary hearing on October 19, 2004. (PCR Vol. I - 45) Attorney Studstill represented Wydell Evans as a conflict attorney. (PCR. Vol. I - 46) Attorney Studstill testified that he spent four point two hours preparing for the guilt phase of Wydell Evans= trial, two hours in conference with Wydell Evans, and nine hours on the first day of trial including one hour of research in the library. (PCR. Vol. I - 48-50)

Attorney Studstill did not engage another attorney for the preparation of the penalty phase contrary to American Bar Association (ABA) standards for representation in capital cases. Attorney Studstill was neither aware of the ABA standards standards nor had he attained the requisite amount of CLE credit hours regarding the representation of capital defendants. (PCR. Vol. - 68-69) Attorney Studstill proceeded to trial as counsel in both

the guilt and penalty phases. (PCR. Vol. I - 71) He did not hire an investigator to assist him in preparation of the penalty phase of the trial. (PCR. Vol. I - 136)

Attorney Studstill was aware that Wydell Evans was a life-long resident in the jurisdiction where the trial took place. (PCR. Vol. I - 71) Attorney Studstill never had Wydell Evans evaluated by a psychologist or a psychiatrist and he did not obtain Wydell=s medical or school records. (PCR. Vol. I - 58 -59) No psychologist or psychiatrist was retained to explore any mental health issues. (PCR. Vol. I - 72) Attorney Studstill did not know that Wydell Evans sustained a head injury when he was three years old. (PCR. Vol. I - 75, 78) He did not know and was unaware that Wydell had brain damage or any significant thing about his school records other than he quit school in the tenth grade. (PCR. Vol. I - 86) He acknowledged that brain damage should have been looked into. (PCR. Vol. I -86) Attorney Studstill was not aware that Wydell Evans was placed in special learning disabled classes and was designated emotionally handicapped as a child. (PCR. Vol. I - 76) Attorney Studstill did not believe he had any statutory mitigating circumstances to present. (PCR. Vol. I - 76) The non-statutory mitigating instruction of any aspect of the defendants character, record, or background, and any other circumstance of the offense was the only instruction requested by counsel. (PCR. Vol. I - 77) Attorney Studstill, in preparation of the penalty phase, mailed letters to various people in an effort to secure character witnesses. (PCR. Vol. I - 84) Counsel was trying to establish that Wydell Evans was generally known as a good person irrespective of his criminal record. (PCR. Vol. I - 85)

Attorney Studstill testified that he was aware that Wydell Evans was drinking before the crime took place. (PCR. Vol. I - 89) No statutory mitigation instruction was requested by Attorney Studstill. (PCR. Vol. I - 90) In preparation for penalty phase, Attorney Studstill was looking for witnesses who would testify about characteristics of Wydell Evans that were admirable. (PCR. Vol. I - 92) He wanted to impress a jury that Wydell may not be all bad and he had some redeeming qualities and perhaps they would give him life in prison as opposed to the death sentence. (PCR. Vol. I - 92) Studstill said other than redeeming qualities, he did not know exactly what kind of mitigation he would be looking for. (PCR. Vol. I - 93) Studstill never investigated any mental incapacity on Wydell=s part. (PCR. Vol. I - 95) He did not believe he had any grounds to look for statutory mitigation. (PCR. Vol. I - 95, 96) He was unaware of Wydell=s school records. (PCR. Vol. I - 96) Had he known about the head injury that Wydell sustained as a child, he would have done something. (PCR. Vol. I - 97) Had he known about the head injury and the school behavior he might have presented it to the Court at the Spencer hearing. (PCR. Vol. I - 141)

Testimony of Sandra Evans

Sandra Evans testified that she is Wydell Evans= aunt. (PCR Vol. I - 143) She has known Wydell all of his life and has lived in the same household. (PCR Vol. I - 143)

Sandra was never contacted by Wydell=s trial counsel either by letter or telephone. She only came to the courthouse during the trial at the beginning of the penalty phase. She never thought the death penalty was a possibility and Wydell=s mother was

sequestered as a witness and couldn=t go in the courtroom so she came to court. (PCR Vol. I - 143) While at the courthouse, Mr. Studstill said he wanted to use her as a character witness. When Sandra asked what a character witness was, she was told to let everybody know what type of a person Wydell was - how good he was. She was told by Mr. Studstill to say only good things about Wydell.
(PCR Vol. I - 144) She spoke with Mr. Studstill for only about five minutes and took the stand shortly thereafter. (PCR Vol. I - 145)

At the evidentiary hearing Sandra recounted the accident where Wydell was struck by a car when he was three years old. She was driving home when Wydell jumped from her sister=s arms and ran toward the street. Wydell was struck by a car and thrown to the ground. He rolled up, fell back, and became stiff. (PCR Vol. I - 146) Wydell was not breathing and her sister was giving Wydell mouth to mouth and was pumping him. Sandra picked Wydell up and tried to take Wydell to the hospital but she had lost her keys. (PCR Vol. I - 146) An ambulance came and Sandra rode in the ambulance. Wydell was administered oxygen on the way to the hospital. (PCR Vol. I - 147)

After the accident, Wydell had scars on his head. He also continuously stuttered while speaking. (PCR Vol. I - 148) Wydell had no speech problems before the accident. (PCR Vol. I - 147)

Sandra testified that Wydell was picked on as a child. She believed Wydell suffered because there was no father figure in the household. Wydell often asked about his father but his father was killed when Wydell was young.(PCR Vol. I - 149)

Sandra testified that Mr. Studstill never asked her any questions that would lead to her talking about the car accident and head injury. She said Mr. Studstill told her to say good things about Wydell - anything good about him to save his life. (PCR Vol. I - 150)

Testimony of Lilly Evans

Lilly Evans testified at the evidentiary hearing. She is the mother of Wydell Evans. She was contacted by letter and asked to come to Mr. Studstill=s office. (PCR Vol. I - 156) She met with him for about thirty minutes. Lilly was told by Mr. Studstill to gather as many character witnesses as she could. She should get people that could say good things about Wydell to save him from the death penalty. (PCR Vol. I - 156) Lilly recalls that Mr. Studstill told her that he had a good closing argument. (PCR Vol. I - 159)

Lilly recounted the accident where Wydell was knocked to the ground and rendered unconscious. She remembered Wydell jumping from her lap when her sister was coming home and Wydell being struck by a car. Wydell stopped breathing and Lilly attempted to give Wydell mount to mouth resuscitation and heart massage. Wydell was not breathing for about one minute. Lilly was overwhelmed and her sister picked Wydell up and put him down before an ambulance came. Wydell was kept in the hospital for observation. (PCR Vol. I - 162, 163)

After Wydell was released from the hospital he had speech problems and he stuttered. He was placed in speech classes up until the fifth grade. Wydell was often picked on by other children because of his speech problem. (PCR Vol. I - 164, 165)

Wydell also had a bad temper. He would loose his temper sometimes five or six

times a week. (PCR Vol. I - 166)

Lilly believed Wydell also suffered because he had no father and seemed jealous of other children because they had fathers and Wydell did not as his father died when Wydell was three years old. Wydell asked many questions about his father and it was obvious to Lilly that having no father bothered Wydell. (PCR Vol. I - 167)

From the time Wydell was six or seven years old through adulthood, Lilly was an absentee parent as she became addicted to cocaine. (PCR Vol. I - 168) Lilly was aware that Wydell was having problems in school but just wasn=t the mother that she should have been. Wydell was aware that his mother was on drugs and would become angry and ashamed.

Wydell saw Lilly abused by men. (PCR Vol. I - 170) When Wydell was young, there was little he could do. He would sleep at the foot of Lilly=s bed to protect her from abuse. Later, when Wydell was older, he told Lilly that he was now able to protect her and he would act out, often being overprotective of her. (PCR Vol. I - 171)

Wydell=s trial attorney Mr. Studstill never asked Lilly about the difficulties that Wydell endured. Mr. Studstill only dwelled on the Agood stuff@ about Wydell to keep him off death row. (PCR Vol. I - 172)

Testimony of Oren Javon Evans

O. J. Evans described his brother as having a very bad temper problem and proceeded to give some graphic examples of Wydell=s explosive yet senseless temper. (PCR Vol II-205-209). O. J. Evans also testified that Wydell was the kind of person who

would be sensitive to people laughing at him, disagreeing with him or making fun of him. (PCR Vol II-208). He described Wydell as the angriest, most aggressive person he ever met. (PCR Vol. II-209). He testified that Wydell Agets so angry, he can=t control himself@. (PCR Vol. II-210).

Testimony of Dr. Richard Carpenter

Dr. Richard Carpenter testified at the evidentiary hearing on October 20, 2004. Dr. Carpenter reviewed medicals records from Brevard Hospital and Holmes Medical Regional Hospital, school records, police reports, witness statements, Department of Correction records, and pleadings. (PCR. Vol. II - p. 241) Dr. Carpenter also reviewed the reports generated by Dr. Dee and Dr. McClaren. (PCR. Vol. II - p. 241) Dr. Carpenter did an interview of Mr. Evans and learned that at age three Mr. Evans was struck by an automobile and suffered a closed head injury. (PCR. Vol. II - p. 244) The medical records of Brevard Hospital dated 9/5/74 confirmed to Dr. Carpenter that Mr. Evans suffered a closed head injury and was hospitalized for approximately two days. (PCR. Vol. II - p. 245) Mr. Evans also reported that he was placed in specific learning disability classes in the second grade and later placed in emotionally handicapped classes. (PCR. Vol. II - p. 245) This was confirmed to Dr. Carpenter through the school records. (PCR. Vol. II - p. 245) Mr. Evans also reported to Dr. Carpenter that he began using alcohol at age twelve. (PCR. Vol. II - p. 248)

Dr. Carpenter was looking for any behavioral aberration in Mr. Evans as a result of the closed head injury. (PCR. Vol. II - p. 247) Dr. Carpenter noted that, at age seven,

Mr. Evans came to the attention of the school psychologist. (PCR. Vol. II - p. 247) Mr. Evans was administered the Bender-Gestalt test for young children and the Bender Visual Motor Gestalt test. (PCR. Vol. II - p. 247) Dr. Carpenter noted that Mr. Evans barely passed the test which suggested that there was very likely some neurological impairment. (PCR. Vol. II - p. 248)

Dr. Carpenter opined that the head injury suffered by Mr. Evans at age three was significant taken in the context of all the data reviewed because it appeared to be the origin of his Aclicking behavior@ or inability to manage and control very strong levels of anger and rage that he historically exhibited. (PCR. Vol. II - p. 253) There was sufficient evidence to believe that there was an underlying neurological disorder based on the head injury, the psychological evaluations, the diagnosis of specific learning disability, his behavior in school, and his report of clicking. (PCR. Vol. II - p. 266)

Regarding Mr. Evans= lack of control, Dr. Carpenter testified that the fact that Mr. Evans shot Ms. Johnson in front of three people is an example of a loss of control of himself and not premeditation. (PCR. Vol. II - p. 260) Dr. Carpenter testified that Mr. Evans has an impulse disorder and has a tendency to be impulsive and do things without control. This specific form of impulse disorder is that Mr. Evans snaps and exhibits extreme anger or rage. (PCR. Vol. II - p. 264) Dr. Carpenter concluded that Mr. Evans= impulse disorder and rage reaction was brought about by the closed-head injury. (PCR. Vol. II - p. 265)

Alcohol would only exacerbate Mr. Evan= problem with impulse control. (PCR.

Vol. II - p. 267) Alcohol, as a disinhibiting sedating chemical, would simply magnify his impulse-control disorder and further disinhibit him. (PCR. Vol. II - p. 267)

Dr. Carpenter opined that Mr. Evans was under the influence of extreme mental or emotional disturbance at the time Angel Johnson was shot. (PCR. Vol. II - p. 269) Dr. Carpenter further opined that Mr. Evans did not have the capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law. (PCR. Vol. II - p. 271) Dr. Carpenter agreed with Dr. McClaren that Mr. Evans had tendencies toward paranoia and the alcohol combined with the paranoid ideation reduced his ability to appreciate the criminality of his conduct. (PCR. Vol. II - p. 271) Dr. Carpenter also agreed with Dr. McClaren in that Mr. Evans also had antisocial personality disorder and a narcissistic personality. (PCR. Vol. II - p. 284) However, Dr. Carpenter opined that Dr. McClaren ignored the clicking or impulse disorder. (PCR. Vol. II - p. 286)

Testimony of Dr. Harry McClaren

Dr. Harry McClaren, a State retained expert, was called by the defense on behalf of Mr. Evans at the evidentiary hearing on December 16, 2004. Dr. McClaren testified that he reviewed records from: (1) the Department of Corrections; (2) medical records regarding a head injury sustained by Mr. Evans as a child age three; (3) medical records dated September 4, 1989 where Mr. Evans was treated for a lacerated hand and under the influence of alcohol; and (4) school records indicating that, as a child, Mr. Evans was in emotionally handicapped and specific learning disabilities classes. (PCR. Vol. III - p. 331-333) Dr. McClaren also testified that he conducted an evaluation and learned that

Mr. Evans had numerous law violations beginning at age thirteen. (PCR. Vol. III - p. 333-334) Dr. McClaren also noted that Mr. Evans was referred for psychological evaluation in 1976 because he was easily angered, argued, was excitable, and had speech deficits. (PCR. Vol. III - p. 339)

Regarding brain damage, Dr. McClaren testified that Mr. Evans took a Bender Visual Motor Gestalt test for young children which was not normal. (PCR. Vol. III - p. 339) There were indications for aggressiveness, hostility, poor planning ability, acting out, and impulsive tendencies. (PCR. Vol. III - p. 343) One of the goals of the school system was to control angry outbursts and aggressive behavior. School records indicated that Mr. Evans was administratively passed because his grades were poor. (PCR. Vol. III - p. 342) The school records showed that Mr. Evans left school in the tenth grade due to behavioral problems. Mr. Evans had taken an IQ test and there was a significant split between his verbal and performance IQ which could indicate brain damage. (PCR. Vol. III - p. 346-347) This pattern was also detected in the Wechsler Adult Intelligence Scale Three. (PCR. Vol. III - p. 346-347)

Dr. McClaren, based upon a review of the records and tests, agreed that Mr. Evans showed poor impulse control, poor anger control, excessive aggressiveness, and excessive resistance. (PCR. Vol. III - p. 344) Dr. McClaren noted that Mr. Evans got worse as he got older and it came to the attention of the psychology or guidance people at school. (PCR. Vol. III - p. 344)

Based upon the test results combined with the history of the closed head injury and

probable concussion, the alcohol abuse, and other reported blows to the head, Dr. McClaren agreed that there was an increased probability that Mr. Evans suffered some sort of a brain injury - probably an brain injury of diffuse type. (PCR. Vol. III - p. 348) The condition could only worsen with the use of alcohol. (PCR. Vol. III - p. 348)

The Minnesota Multiphasic Personality Inventory - 2 indicated a type of profile likely to display acting out behavior, to be energetic, and to engage in antisocial behavior. (PCR. Vol. III - p. 358-59) Dr. McClaren also did a Millon Clinical Mutiaxial Inventory - 3 which was designed to measure personality disorders, personality traits, and severe personality pathology. (PCR. Vol. III - p. 360) On this test, the results suggested that Mr. Evans had alcohol dependence. (PCR. Vol. III - p. 361) Mr. Evans reported to Dr. McClaren that upon immediate release from jail he began consuming alcohol and on the day of the offense he continued to consume alcohol. (PCR. Vol. III - p. 361-362)

Dr. McClaren also reviewed the reports prepared by retained defense experts Dr. Henry Dee and Dr. Richard Carpenter. (PCR. Vol. III - p. 386) Based upon the medical records and school records, Dr. McClaren diagnosed Mr. Evans with antisocial personality disorder and cognitive impairment. (PCR. Vol. III - p. 388-390) Although Dr. McClaren believed that Mr. Evans suffered brain damage, he did not conclude that at the time of this incident, Mr. Evans suffered from an extreme mental or emotional disturbance. (PCR. Vol. III - p. 398-399) Dr. McClaren did not believe that Mr. Evans was unable to conform his behavior to the requirements of the law. (PCR. Vol. III - p. 398-399) Dr. McClaren also did not believe that Mr. Evans suffered from a mental illness

that involves a loss of contact with reality or extreme mood disorder, or extreme cognitive impairment from a gunshot wound to the head or some significant brain insult. (PCR. Vol. III - p. 399) Dr. McClaren did acknowledge that the frontal lobe brain damage suffered by Mr. Evans could be exacerbated by alcohol consumption resulting in a loss of impulse control at the time Angel Johnson was shot. (PCR. Vol. III - p. 408)

Testimony of Wydell Evans

Wydell Evans testified that he began drinking alcohol immediately upon his release from jail. He purchased a six pack of beer from a store nearby the jail and then went home. (PCR Vol. III- 410)

The next day he called a friend and Angel Johnson called him. He told Angel that he was out of jail but she at first did not believe him. (PCR Vol. III- 410) After he hung up the phone, Wydell purchased more liquor and continued to drink by himself. Wydell called his friend Lino, got another bottle, continued to drink, went to Lino=s house, and then back to Wydell=s house. Wydell also drank Seagram=s Seven that night, had about a liter, and was intoxicated. After Wydell was arrested, he told the police he was not intoxicated because he did not want to tell them he was drunk. (PCR Vol. III- 412)

The next day Wydell met with Angel Johnson. Wydell and Angel were alone after someone dropped Angel off with Wydell. Angel then plaited Wydell=s hair. (PCR Vol. III- 413)

Wydell testified that he had no intent of killing Angel Johnson**.** (PCR Vol. III- 414)

When asked about Edward Rogers, Wydell said he was a cell mate with Rogers.

Wydell knew Rogers to be a crack addict when on the street. Regarding statements that he allegedly made and which were overheard by Rogers, Wydell testified he recalled being very upset with Tamico Williams, the mother of two of Wydell=s children. Wydell became upset because he learned that Williams went back on crack cocaine and HRS had to take custody of his children. (PCR Vol. III- 415) Wydell was speaking to his mother and told his mother that he would break Williams= neck when he got out. When asked if he would actually break the neck of Williams, Wydell said no, he never touched Williams, even on other occasions when Williams had wasted his money on crack cocaine. (PCR Vol. III- 416)

Wydell Evans testified that in the past he robbed drug dealers for money. Even when he did not rob drug dealers, he felt the need to carry a gun for protection in the neighborhood. (PCR Vol. III- 417) He always carried a gun. Wydell had a gun with him when he went out in a car that night with Sammy Hogan, Lino Odenat, Angel Johnson, and Erica Foster. (PCR Vol. III- 417)

Wydell recalls avoiding a convenience store because police were known to frequent convenience stores and Wydell referred to the 7-11 stores as Asubstations.@ (PCR Vol. III- 420) As the five occupants were driving around in the car, Wydell recalled that there was laughing going on in the car. (PCR Vol. III- 423) Wydell remembers that he at times was laughing with the

others. He remembered that something was said and he became angry. (PCR Vol. III- 423) He remembered that something was said about Angel and his brother. (PCR Vol.

III- 424) He believed he became angry over something. He did not remember breaking the windshield of the car. (PCR Vol. III- 423) He must have punched the windshield out of anger. (PCR Vol. III- 422) Wydell testified that he did not intend to shoot Angel Johnson. (PCR Vol. III- 414, 424)

Testimony of Dr. Henry Dee

Dr. Henry Dee testified at the evidentiary hearing on December 16, 2004. Dr. Dee is a clinical neurologist and is an expert in both psychology and neuropsychology. (PCR. Vol. III - p. 103) An additional five years of training are required to become a neuropsychologist beyond that of a psychologist. (PCR. Vol. III - p. 429)

Dr. Dee evaluated Mr. Evans and reviewed various documents including school records, police reports, and portions of the trial transcript. (PCR. Vol. III - p. 430) Dr. Dee also reviewed the Brevard Hospital Records and learned that Mr. Evans, at age three, was hit by a car, thrown six to eight feet, had a spastic and paralyzed left arm and right leg, and was unconscious for about a minute. At admission, Mr. Evans was somnolent but combative. B(PCR. Vol. III - p. 432-433) Dr. Dee characterized the accident as a serious event.B (PCR. Vol. III - p. 433) The school records subsequent to the head injury showed evidence of language and speech problems. Mr. Evans, as a child, was aggressive, uncooperative, defiant, under controlled, and showed a lack of inhibition in his behavior. (PCR. Vol. III - p. 434)

Dr. Dee noted that Mr. Evans was placed in emotionally handicapped classes and later in learning disability classes. He had both language and speech problems which you

would expect of a person with a left-hemisphere lesion someplace adjacent to the language area of the brain. (PCR. Vol. III - p. 435) Putting all the evidence together, Dr. Dee opined that Mr. Evans suffered 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. Mr. Evans shows the kind of problems and difficulties with impulse control seen in patients with frontal-lobe injuries. (PCR. Vol. III - p. 437)

The incident at the Holmes Medical Center in 1989 demonstrates the kinds of problems with inhibition Mr. Evans had shown throughout his life and also demonstrates the effect alcohol on a person who has this type of problem. (PCR. Vol. III - p. 439) Intoxicants affect first the frontal lobe and people who are brain damaged are more sensitive to intoxicants. (PCR. Vol. III - p. 440)

On the full scale IQ test, there was an eighteen point difference between verbal and performance IQ which is a pattern seen in people having learning disabilities. (PCR. Vol. III - p. 442-443) On the Booklet Categories Test, Mr. Evans scored in the brain damage range, with difficulties in the frontal lobe. (PCR. Vol. III - p. 447) The frontal lobe is the area most implicated in planning, inhibition of responding, what many people would think of as self-control. (PCR. Vol. III - p. 447) In Dr. Dee=s opinion, Mr. Evans is brain damaged. (PCR. Vol. III - p. 450) A person with Mr. Evans= findings would likely have very disorganized effects on his life, problems with planning, lack of follow through, poor education, and behavior marked by impulsivity and lack of inhibition. (PCR. Vol. III - p.

451)

Dr. Dee opined that Mr. Evans was under an extreme mental or emotional disturbance at the time of the offense. (PCR. Vol. III - p. 451) He also testified that Mr. Evans= capacity to conform his conduct to the requirements of the law was substantially impaired. (PCR. Vol. III - p. 454)

Summary of Argument

Wydell Evans was denied his right to effective assistance of counsel at both phases of his capital trial, when evidence of his mental state was not provided to the jury and judge in violation of his rights to Due Process and Equal Protection under the Fourteenth Amendment to the U.S. Constitution, as well as his rights under the Fifth, Sixth, and Eighth Amendments.

Trial counsel failed to secure a competent penalty phase counsel and failed to conduct an investigation which would have revealed that Wydell Evans suffered a brain injury at three years old after being involved in a car accident. Trial counsel was without knowledge that Wydell Evans, after the accident, had a speech impediment. Trial counsel did not know that Wydell, during his early school years was placed in emotionally handicapped (EH) classes and was also a specific learning disabilities (SLD) student.

The information was not discovered because trial counsel failed to adequately prepare and investigate mitigating evidence. Due to counsel=s failure to investigate, retain experts, and have his client evaluated, the jury never learned that Wydell Evans suffered from a mental defect.

Trial counsel, due to his failure to investigate and prepare, could have, but did not present in the guilt phase of the trial, evidence of diminished capacity in that Wydell Evans was extremely intoxicated at the time of the offense. The level of intoxication exacerbated Wydell Evans= mental defect. The evidence could have negated the specific intent required to establish first degree murder.

Trial counsel failed to investigate and prepare an adequate penalty phase. Had counsel investigated and prepared, counsel could have presented to the jury both statutory and nonstatutory mitigation. The jury could have learned that Wydell Evans was under an extreme mental or emotional disturbance at the time of the offense and that he failed to appreciate the criminality of his conduct. The failure of trial counsel to investigate and prepare left the jury with the impression that Wydell Evans was a good student in school when he actually was an emotionally handicapped and special learning disabled student. Trial counsel failed to request the court instruct the jury on statutory mitigation although there was evidence in the record to support the request.

ISSUE I

THE LOWER COURT ERRED IN HOLDING THAT MR. EVANS WAS NOT DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT /INNOCENCE PHASE TO HIS CAPITAL TRIAL, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION, TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO INVESTIGATE, PREPARE AND PRESENT THE DEFENSE OF DIMINISHED CAPACITY, AND AS A RESULT, MR. EVANS= CONVICTIONS AND DEATH SENTENCE ARE UNRELIABLE.

THE STANDARD OF REVIEW

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

THE LOWER COURT=S ERROR

The lower court held in its order that the Defendant told his attorney that he was functioning fine and aware of all the events on that night. Furthermore, the Defendant=s family did not give the defense attorney any information on any possible brain damage. The court held that Ajust 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.@ The court also found 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 Aaccidental@ 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-839). This was error.

Trial counsel testified at the 3.851 hearing that he was aware that Mr. Evans began celebrating his release from prison by imbibing in the consumption of alcoholic beverages and before the crime was committed. (PCR Vol. VII-1087)The assumption that any strategy was Aforced A on trial counsel is belied by the testimony elicited by trial counsel at the 3.851 hearing.

> Q. How about the facts of the crime? I mean, this wasn=t a couple of shots to the chest. This was, bang, one shot; correct, sir?
> A. One Shot.
> Q. Did you explore in your preparation for trial and in your research B did you explore all possible defenses to the charges?
> A. Well, I don=t B that is a difficult question. You always think you do. 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.
> Q. But did you explore any other possible defenses?
> A. Not that I recall.
> Q. Did you do any research into the law?
> A. A don=t recall having done any except as to maybe powder residue and that sort of thing, and I can=t figure out now why I did that.
> Q. Are you telling this Court that you didn=t research the law in the guilt B in regards to the guilt phase of this trial?
> A. Well, I might probably didn=t have to, I mean.
> Q. Didn=t have to, sir?
> A. The law is there and B

> Q. Well, did you review Wise v. State, 580 So.2d 329, Florida 1st DCA 1991?
> A. I don=t recall that case.
> Q. How about Bunney V State. 603 So.2d 1270, Florida Supreme Court 1992, sir?
> A. I don=t recall that case.
> Q. Sir, do you keep **B** this is a crime that happened in 1998, sir?
> A. Yes.
> Q. Do you keep up in new developments of criminal law, sir?
> A. I have a book in my office that=s supposedly a criminal law book. I try to keep abreast of it, yes.
> Q. And this criminal law book, what is it? I mean, is it an update of the case law that comes out every month?
> A. Yeah, I calendar it from time to time in the courtroom: and it seems like every time I go to the courthouse these days, I have to reinvent the wheel sometimes. But I don=t have to read all the cases in the world to prepare myself to try a case ordinarily. That doesn=t mean I am not caught by surprise on occasion. But in his case, whatever I did, I accounted for it. I don=t recall anything particularly extraordinary about this case that required me to go see there is an issue here that=s extremely uncommon.
> Q. Well, sir, did you ever **B** do you make it a point to keep abreast of the changes of the new case law in criminal law?
> A. Try to.
> Q. So you were not aware of these cases which came out in 1991 and 1992?
> A. I=m not aware of them, huh-uh, not by name. I might be aware of what they say. I don=t know. (PCR Vol. VII 1094-1096).

It is clear from the testimony that trial counsel=s decision to raise the defense of accident was based on ignorance in that trial counsel made no effort to research the law as it applied to diminished capacity. There was no Aforcing@ involved in the case; trial counsel was ignorant of the law and trial counsel was unaware of the mental condition of his own client. The crime occurred on October 21st 1998, and the trial began on November 3rd

1999,yet within that time span, counsel did no research into the defenses available to his client nor did he obtain any records that would support a defense of diminished capacity. However, Studstill had attempted to negotiate a plea for ten years to manslaughter. (PCR Vol. VII -1093). Amazingly, Studstill admitted that it was not his usual practice to investigate every aspect of his client=s life, he did not obtain any medical or school records and was unaware of his client=s closed head injury. (PCR Vol. VII - 1105-06). Just as amazingly, trial counsel testified that if he had known about Mr. Evans= closed head injury, he would not have ignored it. (PCR Vol. VII -1108).

The 3.851 court erred when it completely ignored this evidence of ineffectiveness and essentially held that Studstill could not be faulted for relying on his client=s self reporting. The 3.851 court erred when it held that trial counsel had no reason to doubt Evans= contention that the shooting was completely accidental and not the result of Evans= diminished capacity when it ignored the following testimony:

> Q. You, in fact, deposed Erica Foster who was present at the shooting of Angel Johnson; right?
> A. Yes, I did.
> Q. You, in fact, deposed Sammy Hogan who was present at the shooting of Angel Johnson?
> A. Yes, I did.
> Q. You, in fact, deposed Lino Odenat who was present in the car when Angel Johnson was shot?
> A. Yes, I did.
> Q. And didn=t they all testify that Wydell punched a windshield **B** do you remember that testimony, Wydell punched a windshield?
> A. I remember something about him cracking the windshield.
> Q. Well, do you remember the State bringing in exhibits and showing the jury pictures of the cracked windshield?

A. I remember something about him cracking the windshield.
Q. And do you remember live testimony where the people said the witnesses Lino Odenat, Sammy Hogan, Erica Foster, testified that he punched the windshield, the women laughed at him, and Wydell Evans turned around an said, quote, you think it=s funny, bitch, and bang, Angel Johnson was shot?

Do you remember those circumstances of the offense, sir?

A. Basically **B** there was a lot **B** not a lot. There was some conflict in the testimony and it all conflicted with his testimony, because he said he didn=t crack a windshield.
Q. He also said it was an accident; right?
A. Yeah.
Q. Now, if you were to weigh this evidence and the credibility of the witnesses, would you or would you not agree that Lino Odenat, Sammy Hogan, and Erica Foster=s testimony was consistent with each other=s testimony but inconsistent with Wydell Evans= testimony; right?
A. Right.
Q. Lino Odenat, Sammy Hogan, and Erica Foster testified that Wydell punched the windshield, the women laughed at him, and Mr. Evans said, you think it=s funny, bitch, turned around, bang, Angel was shot? Isn=t that what they testified to?
A. Essentially, yes.
Q. Wasn=t that an aspect of the case, a circumstance of the offense, if you will?
A. Well, it was evidence of what happened. (PCR Vol. VII 1110-12).

It is clear from the testimony of the other witnesses, that trial counsel had every reason to doubt the veracity of his client=s statement that the shooting of Angel Johnson was an accident. The following testimony elicited at the 3.851 hearing also indicates that Studstill doubted the veracity of his client:

Q. Mr. Studstill, let me clear up a couple of points. You had been practicing law for thirty-five years?
A. Since 1966.

Q. And you have a lot of experience with defendants?
A. Yes.
Q. Represented a lot of people; have you?
A. Yes.
Q. Sir, have you ever known **B** how shall I put this delicately **B** a criminal client to not be entirely truthful with you, sir?
A. Well, yes. I have.
Q. And is it usually our practice, or have you ever noticed a criminal client to actually minimize his involvement in the crime
A. Sure.
Q. Either to gain your approval or to maybe fight harder for him? Have you ever known that to happen, sir?
A. It=s happened.
Q. It happens a lot; doesn=t it?
A. It=s happened. I might add one thing, though. We sort of seem to be having a colloquy here. Most criminal defense **B** defendants, when it comes down to it, they may lie to me, but they won=t lie to the Judge, and they won=t take the stand.
Q. Well, sir, let=s go back and say **B**
A. I just say that, because **B**
Q. Well, I appreciate that, sir. But let me focus on you have known them to minimize their involvement in the crime, not necessarily lie, but kind of portray themselves in a better light? Have you known that to happen, sir?
A. Oh, yeah. (PCR Vol. VII 1159-60).

Studstill testified that if he had known about Wydell=s accident, his brain damage, his problems in school, his anger problems, he would have explored any kind of serious brain damage. (PCR Vol. VII 1118).

Dr. McClaren testified that Wydell Evans probably suffered from a brain injury. (PCR Vol. VIII 1378).

Dr. Henry Dee was a clinical neuropsychologist and stated that in order to do a complete, reliable evaluation of a person, it is necessary to review collateral information,

and not to just rely on the self reporting of the patient. (PCR Vol. IX- 1461). Upon review of Wydell Evans= records, and testing done by Dr. Dee, Dr. Dee concluded that Evans had problems with impulse control that are consistent with frontal-lobe damage. He simply could not control himself. (PCR Vol. IX 1465-67). The effect of alcohol is magnified by the brain damage. (PCR Vol. IX 1470). Dr. Dee testified that brain damage is not something esoteric, it is accepted in the scientific community and Mr. Evans= brain damage is a commonly understood condition. (PCR Vol. IX 1481).

Legal Argument

No tactical motive can be ascribed to an attorney whose omissions are based on ignorance, Brewer v. Aiken, 935 F.2d 850 (7th Cir. 1991), or on the failure to properly investigate or prepare.

An effective attorney must present Aan intelligent and knowledgeable defense@ on behalf of his client. Caraway v. Beto, 421 F.2d 636, 637 (5th Cir. 1970); see also Chambers v. Armontrout, 907 F.2d 825 (8th Cir. 1990) (en banc) (ineffective assistance in failure to present theory of self-defense); Gaines v. Hopper, 575 F.2d 1147 (5th Cir. 1978). This error also violates defendant=s right to present a meaningful defense. See Crane v. Kentucky, 476 U.S. 683 (1986). Failure to present a defense that could result in a conviction of a lesser charge can be ineffective and prejudicial. Chambers v. Armontrout, 907 F.2d 825 (8th Cir. 1990). The failure of trial counsel to present the above defense is the result of his failure, by his own admission, to research the law and to investigate his client=s past medical history. Had trial counsel done a rudimentary

investigation of his client=s background and had competent counsel retained the services of a mental health professional to evaluate his client, a viable defense in guilt phase would have been discovered and important statutory and non statutory mitigation would have been presented to the jury in the penalty phase.

In Helton v. Secretary for the Department of Corrections, 233 F.3d 1322, 1327 (11th Cir. 2000). The court held:

> The defense provided by the gastric evidence had the potential of being persuasive proof of Helton=s innocence. Counsel incorrectly believed that advancing this theory would derogate from the other theories he was offering. At bar was a purely circumstantial evidence conviction. The prosecution had no inculpatory physical evidence against Helton. The gastric evidence defense could have provided Helton with exculpatory physical evidence. Defense counsel=s uninformed decision to ignore this issue at trial manifestly falls below any objective standard of reasonableness. There was a failure herein to meet the sixth amendment minimal standard for the performance of defense counsel. We agree with the district court that Helton has met the first prong of the *Strickland* analysis. Helton likewise easily satisfies the second prong of this analysis. At trial, a criminal defendant need only submit evidence sufficient to create a reasonable doubt. As the district court noted, the gastric evidence could have provided that doubt. Counsel=s failure, therefore, to even investigate, much less present the gastric evidence, obviously prejudiced Helton=s trial. Accordingly, the district court did not err in holding that Helton received ineffective assistance of counsel at the trial stage and it properly granted Helton=s petition for a writ of habeas corpus.
> Id. at 1327.

It should be noted that the above cited case was reversed in Helton v. Secretary for the Department of Corrections, 259 F.3d 1310 (11th Cir. 2001), however, the reversal was

based on petitioner=s failure to timely file the petition for Habeas Corpus and was time barred. Mr. Evans contends that the merits of the legal argument were unchanged and should be considered by this court. In Putman v. Head, 268 F.3d 1223, 1243 (11th Cir. 2001), the court discussed the standard of reviewing strategic decisions by counsel:

> For performance to be deficient, it must be established that, in light of all the circumstances, counsel=s performance was outside the wide range of professional competency. *See Strickland*, 466 U.S. at 690, 104 S.Ct. at 2066. In other words, when reviewing counsel=s decisions, Athe issue is not what is possible or >what is prudent or appropriate, but only what is constitutionally compelled.= A *Chandler v. United States* 218 F.3d 1305, 1313 (11th Cir. 2000) (en banc) (quoting *Burger v. Kemp* 483 U.S. 776, 107 S.Ct. 3114, 3126, 97 L.Ed.2d 638 (1987 *cert. denied* 531 U.S. 1204, 121 S.Ct. 1217, 149 L.Ed.2d 129 (2001). Furthermore, A[t]he burden of persuasion is on a petitioner to prove, by a preponderance of competent evidence, that counsel=s performance was unreasonable. *Id.* (citing, *Strickland* 104 S.Ct. at 2064). This burden of persuasion, though not insurmountable, is a heavy one. Therefore, Acounsel cannot be adjudged incompetent for performing in a particular way in a case, as long as the approach taken >might be considered sound trial strategy= Id.

The Putman court further stated on page 1244: A For a petitioner show deficient performance, he Amust establish that no competent counsel would have taken the action that his counsel did take.@

Mr. Evans contends that no competent counsel in a capital case, would neglect to investigate his client=s past medical and school history. Mr Evans further contends that a complete failure to investigate can never be considered sound trial strategy.

The issue of Mr. Evans= head injury and subsequent Aclicking@ episodes merited

presentation to the jury. In Wise v.State, 580 So.2d 329 (Fla. 1st DCA 1991), the court held:

> Wise sought to present the expert testimony of Dr. Walker, a forensic psychiatrist, that a blow to the head can cause a seizure, including the type known as Athe running fit,@ which Ais the psychomotor, partial complex epilepsy in which people will continue to engage in what appears to be purposeful behavior but they don=t know what it is that they are doing.@ Wise would have amnesia concerning his behavior during the seizure, although he may have had a subconscious awareness of his surroundings, and would vomit once the seizure was over. Dr. Walker opined that within a reasonable degree of medical certainty, Wise experienced this type of seizure when he was struck in the head during the brawl. Dr. Walker based this opinion on Wise=s history of seizures and stated he was Aconfident@ that Wise suffered this type of injury. The court ruled that unless Wise was planning an insanity defense, this testimony was inadmissable under *Chestnut v. State,* 538 So.2d 820 (Fla. 1989). In doing so the court erred. Id. at 329.

The similarities between Wise and the circumstances surrounding the death of Angel Johnson are noteworthy. In the case at bar, Mr. Evans had a documented history of a serious head injury. There is documented evidence that this head injury had affected Mr. Evans at times during his school years and adult life. Dr. Richard Carpenter testified at the 3.851 hearing that Wydell had been drinking all day. (PCR Vol. VIII-1280). Dr. Carpenter also testified that due to Wydell=s history of impulse control problems and history of a head injury, Wydell was already suffering from an irrepressible rage reaction. (PCR Vol. VIII-1284-85) Dr. Carpenter also stated that the women laughing at Wydell acted as a partial trigger of his rage. (PCR Vol. VIII-1286-1289). Regarding the actual shooting and the apparent lack of premeditation, Carpenter stated: AIt=s an example of a

loss of control, because, obviously, if it was premeditated, you wouldn=t do it in front of three people. The only way I can imagine someone doing it in front of three people in a car such as this is if the person had lost control of themselves. (PCR Vol. VIII-1290-1291) Dr. Carpenter further opined that Wydell=s impulse disorder and rage reaction was brought about by his closed head injury. (PCR Vol. VIII-1294-1295). Furthermore, Dr. Carpenter testified that Mr. Evans= condition is further exacerbated by the ingestion of alcohol. (PCR Vol. VIII-1297). In light of the facts of the case, the history of a head injury and the ingestion of alcohol, Dr. Carpenter could not say that Mr. Evans was able to form the requisite intent to premeditatively shoot Angel Johnson (PCR Vol. VIII-1298).

Mr. Studstill=s failure to research the law deprived Mr. Evans of a defense to first degree murder. Studstill=s failure to investigate Mr. Evans= mental state made it impossible to apply the relevant case law to the facts. Had counsel investigated, prepared, and presented this viable defense, the outcome of Mr. Evans= trial would have been different. Mr. Evans would have been found not guilty or convicted of a lesser included offense.

In Bunney v. State, 603 So.2d 1270 (Fla. 1992) the Florida Supreme Court held:

> Although this Court did not expressly rule in *Chestnut* that evidence of any particular condition is admissible, it is beyond dispute that evidence of voluntary intoxication or use of medication is admissible to show lack of specific intent. *See Gurganus v. State*, 451 So2d 817 (Fla. 1984). If evidence of these self-induced conditions is admissible, it stands to reason that evidence of certain commonly understood conditions that

> are beyond one=s control, such as those noted in *Chestnut* (epilepsy, infancy, or senility), should also be admissible. In the present case, Bunney simply sought to show that he committed the crime during the course of a minor epileptic seizure. A jury is eminently qualified to consider this. Id. at 1273.

At the evidentiary hearing, Wydell Evans testified that he did not remember punching the windshield. (PCR Vol.IX-1451) He further testified that the laughter of the women probably angered him further because AI get hot quick. I snap@ and had been getting upset quickly ASince I was a child.@ Dr. Henry Dee was a qualified neuropsychologist and had evaluated Mr. Evans for brain damage. Records of Mr. Evans= head injury and school records were reviewed by Dr. Dee and tests were given. (PCR Vol. IX-1471-1480). The ultimate conclusion after reviewing the relevant records and the testing was that APutting all the evidence together, the most part of the explanation certainly is that he 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.@ (PCR Vol. IX-1466) Furthermore, Wydell=s alcohol consumption would exacerbate his already existing medical condition. (PCR Vol. IX-1470) Dr. Dee characterized Mr. Evans= brain damage as a condition commonly understood within the mental health field, not esoteric, but concrete, accepted and obvious. (PCR Vol. IX-1481-82) This condition was beyond Mr. Evans= control. Mr. Evans= condition is not self induced, rather it was brought about as a result of a head injury when he was three years old. Because of this injury, Mr. Evans suffered from an

inability to control his impulses. He simply sought to show, pursuant to *Bunney*, that he committed this crime during the course of a Aclicking@ episode which was brought about by his brain injury, exacerbated by alcohol consumption. The anticipated State argument that frontal lobe damage is not specifically noted in Chestnut (epilepsy, infancy, or senility)fails when the Bunney court held on page 1273 AIf evidence of these self-induced conditions is admissible, it stands to reason that evidence of certain commonly understood conditions that are beyond one=s control, such as those noted in *Chestnut* (epilepsy, infancy, or senility), should also be admissible.@ Clearly, Evans= brain injury as a result of his accident was beyond his control. His frontal lobe damage was a condition commonly understood within the mental health field, not esoteric, but concrete, accepted and obvious. A jury was eminently qualified to consider this. Effective counsel would have investigated his client=s past and would have retained a mental health professional to fully communicate the defense to the jury. Had he done so, Mr. Evans would have been convicted of a lesser included offense or would have been found not guilty of first degree murder. The verdict of guilt is the prejudice. A new trial is the remedy pursuant to Bunney and Wise.

ISSUE II

THE LOWER COURT ERRED IN HOLDING THAT MR. EVANS WAS NOT DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE SENTENCING PHASE OF HIS CAPITAL TRIAL, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING

PROVISIONS OF THE FLORIDA CONSTITUTION. TRIAL COUNSEL FAILED TO ADEQUATELY CHALLENGE THE STATE=S CASE. COUNSEL=S PERFORMANCE WAS DEFICIENT, AND AS A RESULT, THE DEATH SENTENCE IS UNRELIABLE.

THE STANDARD OF REVIEW

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

A. Counsel was ineffective for failure to request a penalty phase attorney to assist in presenting a case in mitigation during penalty phase

Attorney Studstill, upon being appointed to represent Mr. Evans, failed to request or secure a second phase counsel to assist in penalty phase. Attorney Studstill recognized that it would be difficult, if not impossible, to effectively argue on behalf of Mr. Evans in both the guilt and penalty phases of the trial. Attorney Studstill=s recognition of the futility of one attorney trying to provide effective representation in both the guilt and penalty phases of a murder case, where the State is seeking the death penalty, is evidenced by his filing a Motion For Separate Juries. Attorney Studstill knew it was almost impossible for him to effectively handle both the guilt and penalty phases when he argued to the Court and said:

> THE COURT: From the Defense, Mr. Studstill?
>
> MR. STUDSTILL: Judge, I would renew my motion now, which I argued before Judge Silvernail at an earlier time and he denied it, and that is a motion for separate juries. If

this thing ends up in a conviction for first degree murder then I'll move now for a separate jury to do the penalty phase.

And I know what the case authority is, Judge, and I expect this Court to deny that, and I just say that up front. But there's a provision for a separate jury and the cases get reversed all the time in the Supreme Court to come back and sentence for a new penalty phase.

So I - - **it's just almost impossible for a defense lawyer to argue the case on the guilt or innocence phase one way and then have to argue for the same jury**, Well, now that you found my client guilty let me tell you why you ought not put him in the electric chair. It just makes it almost impossible to do.

And I think it's a constitutional problem on the fairness of the trial and the fairness of the due process that it, certainly due process would be better served to have two separate juries.

Anyway, that's my motion.

THE COURT: All right. I'm going to deny the motion without prejudice. And the without prejudice part of it is if there is something - - and I can't imagine what it might be but I don't want to preclude you from renewing this at the conclusion of the trial or guilt phase of the case - - if something occurs during that phase which would make it inappropriate for the same jury to consider the penalty phase then I'll reconsider the motion.

Absent that, I think that the law is pretty clear at this time that the same jury is to hear both ends of this procedure.

Any further motions then in limine from the Defense?

MR. STUDSTILL: None.

(R Vol. V - 53) (emphasis added)

Even though Attorney Studstill had knowledge that he could not effectively represent Mr. Evans in both the guilt and penalty phases, he failed to secure penalty phase counsel. He did not request the appointment of penalty phase counsel either before

he filed his Motion For Separate Juries or after the motion was denied. After Attorney Studstill=s motion was denied, he was then on notice that he would be arguing both the guilt phase and penalty phase before the same jury. With full knowledge of the difficulties of one attorney arguing both the guilt and penalty phases in a capital murder case, and being denied separate juries to hear the respective phases, Attorney Studstill attempted to do what he knew was almost impossible; he handled both the guilt and penalty phases of Mr. Evans= trial.

At the evidentiary hearing, Attorney Studstill admitted that although he handled twelve or thirteen death cases, it has not been his practice to have two attorneys represent a death-penalty client. (PCR. Vol. I - p. 68) He admitted that he doubted he read the American Bar Association standards addressing minimum standards for representation of criminal defendants in capital cases. (PCR. Vol. I - p. 68) He said he probably glanced at them and that he doesn=t read them with any true concern. (PCR. Vol. I - p. 69) Regarding the ABA standards, Attorney Studstill said A[w]ell, the ABA has got their standards and then Brevard County, I guess, has got its standards; and I have to go by Brevard County standards.@ (PCR. Vol. I - p. 68) He was not aware of the minimum standards for representing criminal defendants in capital cases that call for two qualified trial attorneys. (PCR. Vol. I - p. 69)

The effects of Studstill=s lack of knowledge of the minimum standards and decision to proceed to trial without penalty phase counsel was disastrous to Mr. Evans. Had Attorney Studstill moved for penalty phase counsel, Mr. Evans would have had a

qualified attorney to prepare an effective penalty phase so as to avoid a death recommendation. Mr. Evans suffered prejudice because he was denied the representation of qualified counsel to prepare and present to the jury mitigation evidence at penalty phase.

Legal Argument:

The representation of Wydell Evans by Attorney Studstill fell well below constitutional standards for representation of people charged with capital offenses. Attorney Studstill=s representation fell below the standards set in Strickland v. Washington, 466 U.S. 668 (1994) where the United States Supreme Court held that counsel has Aa duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial process.@ Strickland requires a defendant to plead and demonstrate (1) unreasonable attorney performance, and (2) prejudice. Attorney Studstill=s representation failed to meet both prongs of the Strickland test.

Attorney Studstill, from the beginning of representation, failed to move to retain a penalty phase counsel. This failure placed Studstill and Mr. Evans at an extreme disadvantage. Attorney Studstill, by his own acknowledgment, could not adequately represent Mr. Evans at both the guilt and penalty phases of the trial. Studstill=s assessment that he could not effectively represent Evans in both the guilt and penalty phases of the trial was borne out by his performance in the penalty phase. Studstill failed to investigate and discover mitigation evidence of mental and emotional disturbance; failed to retain an expert; and failed to present evidence of mitigation, both statutory and non

statutory. His performance was unreasonable and failed to meet the first requirement of the Strickland test.

Counsel=s failure to secure or even motion the Court for a penalty phase attorney fell below the American Bar Association Guidelines for Appointment of Counsel In Death Penalty Cases. Guideline 2.1, Number of Attorneys Per Case, states that AIn cases where the death penalty is sought, two qualified trial attorneys should be assigned to represent the defendant.@ Mr. Evans faced the death penalty - and was sentenced to death - with one trial attorney.

The minimum standards for representing criminal defendants in non-capital cases are not sufficient in capital cases. Guideline 11.2, Minimum Standards Not Sufficient state:

> A. Minimum standards that have been promulgated concerning representation of defendants in criminal cases generally, and the level of adherence to such standards required for non-capital cases, should not be adopted as sufficient for death penalty cases.
>
> B. Counsel in death penalty cases should be required to perform at the level of an attorney reasonably skilled in the specialized practice of capital representation, zealously committed to the capital case, who has adequate time and resources for preparation.

The commentary to 11.2 of the ABA standards elucidates why the minimum standards are insufficient in death cases. The commentary states:

> ADeath is different@, and all rules established for the protection of the capital defendant should be strictly enforced. The defense of death penalty cases is an evolving practice and counsel should refer to state and federal death penalty training and practice manuals for preparation and trial of death penalty cases. When the courts are not likely to provide the proper enforcement of the rules sua sponte, attorneys must seek to enforce the rules, or their clients will die. The minimal level of attorney competence that may be accepted as sufficient in some jurisdictions in non-capital cases can be fatally inadequate in death penalty cases.

Attorney Studstill=s did not meet the ABA standards for representation in a capital case. Studstill=s penalty phase representation might have met the standards for a low level, non-capital criminal case - but it did not meet the higher standards set for death penalty cases.

The American Bar Association also set standards for investigation in death penalty cases. Guideline 11.4.1, Investigation, states:

> A. Counsel should conduct independent investigations relating to the guilt/innocence phase and to the penalty phase of a capital trial. Both investigations should begin immediately upon counsel=s entry into the case and should be pursued expeditiously.
>
> B. The investigation for preparation of the guilt/innocence

> phase of the trial should be conducted regardless of any admission or statement by the client concerning facts constituting guilt.
>
> C. The investigation for preparation of the sentencing phase should be conducted regardless of any initial assertion by the client that mitigation is not to be offered. This investigation should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.

The trial court was incorrect in denying this claim when the trial court, in the Order Denying Defendant=s 3.851 Motion For Postconviction Relief, stated A[t]he Defendant has failed to show his attorney=s performance was deficient in failing to request co-counsel for this trial.@ Attorney Studstill did not conduct a reasonable investigation because a wealth of mitigating evidence was available to him by simply obtaining Wydell Evans= school and medical records. Had Studstill taken the initial step of obtaining the school records - or asking family members about Wydell=s background - the case in mitigation would have begun to crystalize. If a competent penalty phase attorney had been requested by Attorney Studstill, the jury would not have been deprived of valuable mitigation evidence and would have recommended a life sentence and not death.

B. Counsel was ineffective for failing to conduct adequate investigation into Mr. Evans= mental health background to prove mental mitigation which was available for presentation to the judge and jury

Attorney Studstill conducted little investigation in preparation for the penalty phase of Mr. Evans= trial. Attorney Studstill was unprepared for the penalty phase of Mr. Evans= trial. During a pre-trial hearing, Attorney Studstill telegraphed his lack of

preparation when he made comments to the trial court that he did not anticipate a penalty phase in Mr. Evans= case or to call expert witnesses on behalf of Mr. Evans. Attorney Studstill said:

> MR. STUDSTILL: So we=re prepared to go to trial, Judge.
> **There is not going to be any expert witnesses if we get to the penalty phase of the case. No reason or any that I can think of at this point in time. And I=m not going to be able to think of any between now and then I don=t think**.
> We=re ready for trial. Obviously, Judge, I don=t think - - I think if you rule on this motion that is pending before you.
>
> I don=t think it will change anything, but it might.
>
> (R. Vol. II - 12) (emphasis added)
>
> When asked by the Court if there were any expert witnesses for the defense, the following exchange took place:
>
> MS. TUCKER: We still have additional discovery to do. I=ve been provided a witness list but I=ve been told are death penalty witnesses but I always like to do that before we do the trial.
>
> MR. STUDSTILL: That=s true.
>
> MS. TUCKER: Those are, I believe have been scheduled because - -
>
> THE COURT: Do you have any experts in that group, Mr. Studstill?
>
> MR. STUDSTILL: **No, sir, the only witnesses testify [sic] is for the penalty phase, that=s all I have, all I expect**

to have.

(R. Vol. II- 271) (emphasis added)

Attorney Studstill never planned on doing any significant penalty phase investigation as further evidenced by his comment that there be no need for a break between the guilt and penalty phases. The following exchange took place:

> THE COURT: All right. If we get that far, Mr. Studstill, is there - - and I know - - I'm not trying to bind you or anything, I'm just trying to get an idea from a scheduling standpoint - - is there going to be any appreciable need or need for an appreciable break between the guilt phase and the penalty phase, if we get that far?
>
> MR. STUDSTILL: **There shouldn't be any need at all**.
>
> THE COURT: okay.

(R. Vol. II - 272 -273) (emphasis added)

Apparently, Attorney Studstill was anticipating a favorable ruling by the Court on a pre-trial motion that would effectively preclude the need for a penalty phase. Unfortunately for Mr. Evans, Attorney Studstill miscalculated. Mr. Evans was left with an attorney woefully unprepared for the penalty phase of his trial. Attorney Studstill had not done a modicum of investigation into Mr. Evans' past.

Had Studstill conducted investigation, he would have discovered powerful evidence that Mr. Evans, as a child of three years old, suffered a severe head injury from an accident when he was hit by a car. The accident caused Wydell Evans to be thrown six to eight feet and to the ground. Wydell hit his head, was knocked unconscious, and

stopped breathing for about one minute. He was taken to the emergency room and was somnolent which is indicative of suffering a concussion. Wydell was diagnosed with a closed head injury with a probable concussion of the brain. The accident injuries were so severe that Wydell Evans= mother noticed that he had a slight change in speech after the accident. A school psychological evaluation done on May 8, 1978, when Wydell was 7 years old, revealed a speech defect which could have resulted from the car accident. Had Attorney Studstill obtained Mr. Evans= school records, he would have learned of this accident and the resulting brain injury to Mr. Evans, and would have presented statutory mitigation evidence. Attorney Studstill did not plan on a penalty phase and did not prepare.

Had Attorney Studstill conducted investigation he would have obtained Mr. Evans= school records and learned that Wydell Evans, while attending Stone Middle School in September of 1985, was referred to Psychological Services because he had a long history of behavioral problems. Wydell was placed in a resource learning disabilities class, however he was recommended for a program where he could be more closely monitored and additional services be given for his behavioral difficulties. Wydell was subsequently placed in the emotionally handicapped program while in school. Counsel would have learned that as of October 7, 1987, Wydell Evans was to remain in home instruction until further evaluation of his functioning could be assessed to determine if Specific Learning Disabilities (SLD) would be an appropriate placement. Counsel would have learned that Wydell Evans was placed in the SLD program. Counsel would have learned that Wydell

Evans did not qualify for a regular diploma in high school and was working toward a Aspecial diploma@ which was issued to emotionally handicapped. Attorney Studstill, had he conducted investigation in preparation for penalty phase, would have learned that Mr. Evans received exceptional student educational services and was on homebound instruction as of December 3, 1987. Counsel, had he conducted investigation, would have learned that Wydell Evans was in a behavior management system because he had angry outbursts and he used inappropriate language in class. Counsel would have also learned that Wydell=s academic record was poor with failing grades.

Mr. Evans was prejudiced by Attorney Studstill=s lack of preparation because both the jury and the sentencing judge did not hear testimony about the brain injury suffered by Mr. Evans as a child.

Attorney Studstill demonstrated a shocking deficiency of penalty phase knowledge and skills. What little preparation done by Attorney Studstill served solely to highlight his deficiencies and lack of understanding of penalty phase proceedings. Rather than conducting minimal investigation into Mr. Evans= background and considering retaining an expert in support of a true penalty phase, Attorney Studstill instead chose to treat Mr. Evans= penalty phase as if it were a sentencing on a third degree felony or a violation of probation.

Attorney Studstill=s preparation for penalty phase began with requests to Mr. Evans of people who could speak on his behalf. Mr. Evans gave names of people who might speak on his behalf and Attorney Studstill sent those people letters. Letters were sent to

Minnie Jarrett, Doretha Moore, Davonski Murphy, and Marion Zone. In those letters, Attorney Studstill refers to the witnesses as Apossible character@ witnesses. The letters also ask for one or two sentences about Awhat you think of Wydell Evans@ and A whether or not you feel he committed the crime.@ These letters were not intended merely as introductory letters to determine if the witness were available and cooperative. Attorney Studstill intended to present Acharacter@ evidence in penalty phase. His intentions to present character evidence in mitigation is clearly revealed by an inspection of the penalty phase that he actually presented. Mr. Evans= penalty phase trial resembled little more than what is colloquially referred to by criminal defense attorneys as a Adog and pony show@ where family members are trotted before the Court to Asay something good@ about the defendant before being sentenced. Attorney Studstill did not attempt to present statutory mitigation that was available. Instead he had family members give character testimony about Wydell Evans.

Had Attorney Studstill conducted an investigation for penalty phase he would have uncovered the school records which documented the poor grades Wydell made in school, the emotional handicap suffered by Wydell, and his assignment to the Specific Learning Disability program. Attorney Studstill failed to uncover powerful evidence of mitigation. Instead of presenting the evidence of mental mitigation which existed but was left uncovered, Studstill apparently tried to put on a case that his client was of good character, and therefore his life should be spared. The testimony elicited by Studstill from Mrs. Evans was incomplete and inaccurate. Not only was an opportunity to present powerful

mitigation evidence squandered, but the jury was left with a false impression of Wydell Evans= background.

Based on the testimony presented by witnesses and the argument given in penalty phase by Studstill, it is shockingly apparent that he did not have an understanding of the impact of mitigation evidence in a capital murder trial. In closing argument he began:

> THE COURT: Mr. Studstill?
>
> MR. STUDSTILL: Please the Court. You know, the court legislature, supposed to know the way I guess. They break these things down into little categories, mitigating, aggravating.
>
> I=m not sure that the Jury knew that, but you must follow the law as a balancing process. The Court will so instruct you on those points.
>
> But you are still a jury. If you have any doubt at all that the State=s proven what they set out to show you in this penalty phase - -
>
> MS. TUCKER: Objection, Your Honor. Improper characterization as to Aany doubt at all@.
>
> MR. STUDSTILL: Well - -
>
> THE COURT: Members of the Jury, once again, as I mentioned earlier, the Court will give you the instructions on the law that you are to apply in this case, the standards that you are to apply. And I will do that in just a few minutes.
>
> You can proceed, Mr. Studstill.
>
> MR. STUDSTILL: Well all I was going to say is - - I=ll go ahead and say it now, I guess - - is that the State has certainly proven that at the time of this offense was committed while he had been previously committed of a felony and on felony probation at that time and that he was convicted of a felony involving the use of or threat of violence

> to some person, because the crime, the Court=s going to tell you, the crime of battery on a law enforcement officer and aggravated battery are felonies involving the use of threat of violence to another person. There=s no question about that.
>
> **The real issue here is whether or not there=s been enough evidence here from the Defense to show enough about this Defendant Wydell Evans= character, record and background**. And of course we couldn=t change the facts, wouldn=t change the facts anyway.
>
> He=s been in prison since he was seventeen, in and out since then, out since >95. But you - - but you need to weigh all of that, I think, in making the determination here today about Wydell Evans.
>
> ...

(R. Vol. XVI - 2379) (emphasis added)

Every witness presented by Attorney Studstill was geared toward proving that Mr. Evans was of good character, and that his life should be spared. What is most startling is that Attorney Studstill - right from the early stages of representation - showed little knowledge or understanding of mitigation in capital proceedings. His lack of knowledge and understanding is revealed through a review of the letters he sent to potential penalty phase witnesses where he inquired as to what the potential witnesses thought of Wydell Evans. If it was not Studstill=s intent to merely present character evidence in penalty phase, the evidence which he did present belied his intent because each and every witness that testified in penalty phase were nothing more than character witnesses. None of the witnesses were questioned about the wealth of mitigation that existed in Wydell Evans= background.

Attorney Studstill called witnesses in penalty phase but neglected to elicit effective

and strong impact testimony from the witnesses.

Attorney Studstill=s penalty phase presentation did not address the accident, the speech defect, the emotional problems or the disciplinary problems that Wydell had while in school. The reason that Attorney Studstill did address these matters is because he did not investigate or prepare for penalty phase. Attorney Studstill met with Wydell Evans only briefly before trial and did not explain the purpose or objectives of a penalty phase trial. Attorney Studstill=s approach to penalty phase was to put on character evidence. He failed to present statutory mitigation evidence that was available to him.

Attorney Studstill=s failure to present statutory mitigating evidence had a significant impact on the court=s decision to concur with the jury=s recommendation. The court, in its order, even though no evidence was presented, addressed the statutory mitigator:

> (b) The capital felony was committed while the Defendant was under the influence of extreme mental or emotional disturbance: The Defendant is quoted in the PSI as stating that his mental health is Aperfect.@ There is no evidence of the existence of this statutory mitigating circumstance and the Court rejects it as a mitigator herein.

(ROA Vol. IV - p. 651)

The court was unaware that Mr. Evans had severe mental problems and thus concluded that Mr. Evans= mental health was Aperfect.@ Mr. Evans can neither be faulted nor relied upon because he reported in the PSI that his mental health is Aperfect.@ Clearly, it was not Aperfect@ as his school records show a long history of emotional and mental disturbance. Relying on the self reported mental health assessment of a person who is

mentally ill will likely yield a mis-diagnosis as their self assessment tends to be distorted. Furthermore, the mentally ill can mask and hide their illness, and present to observers normalcy. Such was the case with Wydell Evans.

The postconviction court erred in denying this claim. The court concluded first, that the mitigation would have been of no value to Mr. Evans, and secondly, assumes in its order that Attorney Studstill made a calculated decision not to present the mental mitigation evidence. The court stated:

> 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 testifed about the Defendant=s violent temper. Oren described the Defendant as the Aangriest, most aggressive person I ever met.@ He further described the Defendant as the Aangriest, 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 Asome 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.
> (PCR Vol. VI - p. 845)

The evidence delineated in the court=s order would have explained why this act of

violence was perpetrated against Angel Johnson by Wydell Evans in front of three witnesses. Wydell Evans is and was an emotionally disturbed person with behavioral problems dating back to when he was three years old. Attorney Studstill did not know of the evidence. There was only a gross lack of investigation. There was no choice being made by Attorney Studstill as the court=s order implies. Dr. McClaren=s Aaside@ mentioned in the 3.851 court=s order, (PCR Vol. VI 837)@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.@ The material *had* been available. Had Studstill done a proper investigation, Evans= long history of aggressive acts could have been explained to the jury. After all, Attorney Studstill admitted at the evidentiary hearing that if he had known about Wydell=s head injury he would have done something. (PCR. Vol. I - p. 97) Attorney Studstill=s strategy of putting on a Apositive spin@ was simply made based on ignorance of Wydell Evans= life.

Had Attorney Studstill conducted investigation he would have learned that his client had a history of emotional disturbance. He could have presented the evidence and the court would have found that the capital felony was committed while the Wydell Evans was under the influence of extreme mental or emotional disturbance and that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. Mr. Evans was prejudiced by Studstill=s failure to present the mitigation evidence. If the jury - who voted 10-2 for death - had the benefit

of the statutory mitigation, they would have voted for life instead of death. Wydell Evans was prejudiced by the representation of Attorney Studstill.

Legal argument:

The United States Supreme Court clearly enunciated the duty of a lawyer to investigate when it cited ABA standards in Rompilla v. Beard, 125 S.Ct 2456, 2466 (U.S., 2005) stating A[i]t is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction.@ Attorney Studstill did not comply with his basic duty to the detriment of Wydell Evans.

In Wiggins v. Smith, 123 S.Ct. 2527 (2003) the Supreme Court of the United States ultimately held that AThe performance of Wiggins= attorneys at sentencing violated his Sixth Amendment right to effective assistance of counsel.@ Id. at 2529. Justice O=Connor, in delivering the opinion of the Court, stated:

> We established the legal principles that govern claims of ineffective assistance of counsel in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). An ineffective assistance claim has two components: A petitioner must show that counsel=s performance was deficient, and that the deficiency prejudiced the defense. *Id.*, at 687, 104 S.Ct. 2052. To establish deficient performance, a petitioner must demonstrate that counsel=s representation Afell below an objective standard of reasonableness.@ *Id.*, at 688, 104 S.Ct. 2052. We have declined to articulate specific guidelines for appropriate attorney conduct and instead have emphasized that A[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.@ *Ibid.*

The performance of trial counsel in Mr. Evans= case fell below prevailing professional norms. The deficiencies of counsel extended to the investigative and preparation aspect of the case. Mr. Evans is entitled to relief under Wiggins. In Wiggins, the investigation regarding mitigation was abandoned, leads were not pursued. In Mr. Evans= case, Studstill failed to do even a cursory investigation. The Supreme Court of the United states further held in Wiggins:

> Counsel did not conduct a reasonable investigation. Their decision not to expand their investigation beyond a presentence investigation (PSI) report and Baltimore City Department of Social Services (DSS) records fell short of the professional standards prevailing in Maryland in 1989. Standard practice in Maryland capital cases at that time included the preparation of a social history report. Although there were funds to retain a forensic social worker, counsel chose not to commission a report. Their conduct similarly fell short of the American Bar Association=s capital defense work standards. Moreover, in light of the facts counsel discovered in the DSS records concerning Wiggins= alcoholic mother and his problems in foster care, counsel=s decision to cease investigation when they did was unreasonable. Any reasonably competent attorney would have realized that pursuing such leads was necessary to making an informed choice among possible defenses, particularly given the apparent absence of aggravating factors from Wiggins= background. Indeed, counsel discovered no evidence to suggest that a mitigation case would have been counterproductive or that further investigation would have been fruitless, thus distinguishing this case from precedents in which this Court has found limited investigations into mitigating evidence to be reasonable. Id. at 2530.

Mr. Evans was a local, lifelong resident of Brevard County. It was not unreasonable to expect that Mr. Studstill inquire into Wydell=s medical and school history. Due to trial

counsel=s ineffectiveness, he was unable to make an informed choice among possible defenses. The mitigating evidence which counsel failed to discover and which was presented at the 3.851 was powerful. The head injury suffered at age three was documented. The lack of impulse control and the anger problems and speech impediment were documented by McFadden and O=Shaugnessy.

During the cross examination of Mr. Studstill, counsel for the state attempted to ascribe Studstill=s presentation of mitigation to a tactical decision on his part. This was improper. (PCR Vol. I-113-118) The Wiggins Court further held:

> When viewed in this light, the Astrategic decision@ the state courts and respondents all invoke to justify counsel=s limited pursuit of mitigating evidence resembles more a *post-hoc* rationalization of counsel=s conduct than an accurate description of their deliberations prior to sentencing. Id. at 2538.

In assessing the reasonableness of an investigation and the Atactical decisions@ resulting from that investigation, the Wiggins Court further held:

> In assessing the reasonableness of an attorney=s investigation, however, a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further. Even assuming Schiaich and Nethercott limited the scope of their investigation for strategic reasons, *Strickland* does not establish that a cursory investigation automatically justifies a tactical decision with respect to sentencing strategy. Rather a reviewing court mist consider the reasonableness of the investigation said to support that strategy. Id. at 2538.

In Mr. Evans= case, the facts elicited at the evidentiary hearing demonstrate a

complete lack of investigation rather than an abandonment of an investigation. The lack of investigation resulted in Mr. Studstill=s ignorance of his client=s head injury, the emotional problems and anger issues which plagued Mr. Evans as indicated by Mr. Evans= school records and criminal records - records which depict a history of impulsive crimes rather than carefully planned crimes. Attorney Studstill=s attempts to portray Wydell as Aa good guy@ was based on a complete lack of investigation into his client=s history. Any suggestion that the Studstill=s penalty phase presentation was tactical is merely engaging in *post-hoc* rationalization prohibited by Wiggins.

The United States Supreme Court also addressed lack of investigation in Williams v. Taylor, 529 U.S. 362 (U.S. Va., 2000) stating that Athe graphic description of Williams= childhood, filled with abuse and privation, or the realty that he was Aborderline mentally retarded,@ might well have influenced the jury=s appraisal of his moral culpability.@ In Williams the Court recognized the influence that mitigation evidence could have on a jury. In Wydell Evans= case, the postconviction court erroneously discounted any impact that the evidence might have on the jury.

In Collier v. Turpin, 177 F.3d 1184, 1199 (11th Cir. 1999) the Collier court stated:

> With regard to Collier=s claim that counsel failed to interview a number of close relatives and friends of Collier that could have provided additional evidence to be used in the sentencing phase of his trial, the district court found that counsels= failure to pursue those witnesses= testimony was the direct result of a conscious tactical decision. AThe question of whether a decision by counsel was a tactical one is a question of fact.@ *Bolender,* 16 F.3d at 1558 n. 12 (citing *Horton,* 941 F.2d at 1462). Whether the tactic was reasonable, however, is a

> question of law and is reviewed *de novo.* *See Horton,* 941 F.2d at 1462. I assessing the reasonableness of the tactic, we consider Aall the circumstances, applying a heavy measure of deference to counsel=s judgments.@ *Strickland,* 466 U.S. at 691, 104 S.Ct. at 2066. Id. at 1199.

In Mr. Evans= case, the medical and school histories could have been discovered by trial counsel. They were not. Trial counsel knew very little about his client=s background. Since a strategic decision cannot be based upon ignorance, trial counsel=s Atactic@ of presenting Wydell Evans as a Agood guy@ was not strategic, rather it was prima facie evidence of trial counsel=s ineffectiveness

The Collier court further held:

> Although Collier=s attorneys concede that their performance was deficient, they blame the trial judge rather than themselves for their poor display. We find that the trial judge was not to blame for counsels= ineffectiveness; rather, they were. In sum, counsel did not perform as objectively reasonable attorneys would have; their performance fell below the standards of the profession and therefore their assistance at the sentencing phase of the trial was ineffective. Id. at 1202.

Attorney Studstill did not perform as a reasonable attorney would as did the attorneys in Collier. In fact, Attorney Studstill routinely didn=t investigate. At the evidentiary hearing, when asked the question, A[i]n preparing the penalty phase, sir, is it your usual practice to investigate every aspect of your client=s life to see if mitigation is present?@ he responded, A[w]ell, your question is extremely broad, and my answer is no.@ (PCR Vol.I-75).

By failing to obtain the medical records and the school records of his client, trial counsel=s performance fell below the standards of the profession and therefore his assistance at the penalty phase was ineffective. The trial court was factually incorrect in suggesting that Attorney Studstill made a strategic decision to present Asome redeeming qualities@ instead of the mental mitigation. (PCR. Vol. VI - p. 845) Attorney Studstill=s statement regarding Wydell=s head injury that A[he] wasn=t aware of it. But if [he] was aware of it, if [he] had been advised that he [Wydell] had a closed-head injury when [Wydell] was three years old, [he] probably would have looked into it[]@ (PCR. Vol. 1 - p. 78) belies the trial court=s conclusion that there was strategy in mind when Attorney Studstill chose to present Asome redeeming qualities.@ (PCR. Vol. VI - p. 845)

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

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

The postconviction court in Evans= case erred in denying this claim as the trial court in Orme erred. Notably, some mental mitigation evidence in Orme was known to

counsel before trial whereas Attorney Studstill had no knowledge of Wydell=s mental history. In Wydell Evans= case the errors of trial counsel are even more egregious than those in Orme because trial counsel did not even begin a reasonable investigation.

C. 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.

Attorney Studstill was ineffective for failure to retain a mental health expert to present evidence of brain damage in support of mitigation that Mr. Evans was under the influence of extreme mental or emotional disturbance at the time of the offense. Effective trial counsel would have investigated the background and retained an expert to evaluate the background information on Mr. Evans. Such an expert would have known that Wydell Evans, on September 5, 1974, was admitted to Brevard Hospital in Melbourne, Florida, after being struck by a car and thrown six to eight feet to the ground. Wydell, who was three years old at the time, struck his head and had stopped breathing for about one minute. Upon admission to the hospital, he was combative and somnolent. The expert witness would have learned that this young child was diagnosed as having a closed head injury and a probable concussion. Wydell spent two days in the hospital before he was discharged.

Had an expert been retained, the expert would have learned that Wydell=s head injury affected him throughout his school years. A speech pattern was noted after the accident and Wydell received speech/language services until the fifth grade. Wydell=s

behavior in school was often disruptive. He frequently talked back to his teachers, was tardy for class, and had numerous detentions for disrupting the classroom. He also had detentions for fighting. The guidance committee requested an evaluation to consider placing Wydell in a class for the emotionally handicapped. In a report, dated December 4, 1988, for the exceptional student education program at Palm Bay High School, Wydell Evans= behavior patterns were rated as very significant on a behavioral rating scale. These patterns included poor attention, poor impulse control, poor anger control, excessive aggressiveness, and excessive resistance. The records are replete with incidents of Wydell taking pencils from other students, slapping classmates, cursing at teachers and their aides, fighting with other students, and his general inability to control his behavior.

Had an expert witness in mental health been retained, that mental health expert would have been able to show the jury and judge that Wydell Evans suffered from an extreme mental or emotional disturbance at the time of the offense. If the jury had the benefit of expert testimony regarding Wydell Evans= mental health background, they would have found that Wydell suffered from an extreme mental or emotional disturbance at the time of the offense. The jury would have further found that his brain injury and brain dysfunction influenced his behavior which resulted in the crime committed. Had the jury found this statutory mitigation, the jury recommendation would have one for life rather than death. The postconviction court erred in denying this claim. The court heard the testimony of three expert witnesses who all agreed that Wydell Evans suffered brain damage. The only substantial divergence among the experts review of the Wydell Evans=

mental condition is where Dr. McClaren reached a different conclusion as to whether Wydell had an impulse disorder. However, the basis for the expert opinions would support the conclusions rendered by Dr. Carpenter and Dr. Dee and not that of Dr. McClaren. Furthermore, the issue at the postconviction stage for the trial court to determine is not which of the experts would be the most credible but whether any mental health investigation was even done. The court, in denying the claim, is overlooking that Attorney Studstill failed to conduct any mental health investigation.

Legal argument:

At the evidentiary hearing, the defense called three expert witnesses: (1) Dr. Dee; (2) Dr. Carpenter; and (3) Dr. McClaren. Two of the experts were retained by the defense, and one, Dr. McClaren was retained by the State. All three experts agreed that Mr. Evans was brain damaged. The defense experts and State expert disagreed on the existence of statutory mitigation. (Even though the basis for statutory mitigation existed, Dr. McClaren inexplicably did not conclude that Mr. Evans was under an extreme mental disturbance or could conform his conduct to the law at the time of the offense) Although Dr. McClaren would not be the choice expert retained in defense of Mr. Evans, he would be acceptable in comparison to what Mr. Evans got at trial regarding mental mitigation - which was nothing.

Attorney Studsrill=s obligation at penalty phase was to present mitigation. After the mitigation is presented, then it is for the jury to decide if the mitigation had been proven by a preponderance of the evidence. The trial court erred in denying this claim as the trial

court overlooked Attorney Studstill=s initial obligation to investigate mental mitigation, retain experts, and have his client evaluated by competent mental health professionals.

Attorney Studstill=s failure to retain an expert witness to review, analyze, and present evidence of mental mitigation failed to meet the standard in Ake v. Oklahoma, 470 U.S. 68, 80-1, 105 S. Ct. 1087, 1095 (1985), where the Supreme Court of the United States held:

> [T]hat when the State has made the defendant=s mental culpability and to the punishment he might suffer, the assistance of a psychiatrist may well be crucial to the defendant=s ability to marshal his defense. In this role, psychiatrists gather facts, through professional examination, interviews, and elsewhere, that they will share with the judge or jury; they analyze the information gathered and from it draw plausible conclusions about the defendant=s mental condition, and about the effects of any disorder on behavior; and they offer opinions about how the defendant=s mental condition might have affected his behavior at the time in question. They know the probative questions to ask of the opposing party=s psychiatrists and know how to interpret their answers. Unlike lay witnesses, who can merely describe symptoms they believe might be relevant to the defendant=s mental state, psychiatrists can identify the Aelusive and often deceptive@ symptoms of insanity *Solesbee v. Balkcom*, 339 U.S. 9, 12 70 S. Ct. 457, 458, 94 L.Ed. 604 (1950), and tell the jury why their observations are relevant. Further, where permitted by evidentiary rules, psychiatrists can translate a medical diagnosis into language that will assist the trier of fact, and therefore offer evidence in a form that has meaning for the task at hand. Through this process of investigation, interpretation, and testimony, psychiatrists ideally assist lay jurors, who generally have no training in psychiatric matters, to make a sensible and educated determination about the mental condition of the defendant at the time of the offense. *Id*. at 80-1

Since Attorney Studstill failed to conduct investigation into Mr. Evans= background and to retain an expert, the jury was deprived meaningful evidence of mitigation pursuant to Ake.

In Hildwin v. Dugger, 654 So.2d 107 (Fla. 1995) this Court held that trial counsel=s performance at sentencing was deficient and woefully inadequate where trial counsel failed to unearth a large amount of mitigating evidence which could have been presented at sentencing. Counsel presented limited testimony of lay witnesses. Hildwin at 110 fn. 7. In Hildwin, at the 3.850 hearing, experts testified that the defendant was under the influence of extreme mental or emotional disturbance and that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. Hildwin=s sentence was vacated. As in Hildwin, counsel for Wydell Evans failed to unearth a large amount of mitigating evidence which could have been presented at sentencing. As in Hildwin, counsel for Wydell Evans presented limited mitigation testimony of lay witnesses. It was inexcusable that trial counsel failed to investigate mental health mitigation, retain an expert, and present the evidence that Wydell Evans was under the influence of extreme mental disturbance at the time of the offense where severe mental disturbance is a mitigating factor of the most weighty order. Hildwin at 110. Had mitigation evidence been presented, an expert could have testified that Wydell Evans was under the influence of extreme mental or emotional disturbance at the time of the offense and Mr. Evans= sentence would have been life and not death.

In Ragsdale v. State, 798 So.2d 713 (Fla. 2001) this Court held that trial counsel failed to conduct a reasonable investigation into the defendant=s background for possible mitigating evidence where counsel failed to present evidence of a head injury after childhood accidents. After the accidents, Ragsdale went through behavioral changes in which he would violently Asnap@ over anything. Experts at the postconviction hearing testified that Ragsdale was under extreme mental and emotional disturbance and was unable to conform his conduct to the requirements of the law. Ragsdale=s sentence was vacated and remanded for a new penalty phase. As in Ragsdale, Wydell Evans suffered a childhood brain injury when he was thrown to the ground after being hit by a car. After the accident, Wydell also experienced behavioral changes, a speech impediment, and violent Aclicking@ episodes where he could not control himself. Trial counsel failed to discover or present this mitigating evidence at trial. Defense counsel failed to take any steps to uncover mental health mitigating evidence that was readily available and his performance did not fall within the wide range of reasonable professional assistance. Baxter v. Thomas, 45 F.3d 1501, 1514 (C.A. 11(Ga.), 1995) Had trial counsel uncovered mental mitigation and retained an expert, the judge and jury would have known that Wydell was under an extreme mental or emotional disturbance at the time of the offense.

In Rose v. State, 675 So.2d 567 (Fla. 1996) the defendant was denied effective assistance where counsel failed to investigate the defendant=s background and to obtain school, hospital, medical and prison records which contained information as to

defendant=s extensive mental problems. The defendant was a slow learner, was retained three times, and suffered from organic brain damage. Substantial lay testimony regarding mitigation was not investigated or presented by counsel during the penalty phase proceedings. Trial counsel was totally unfamiliar with the concept of aggravating and mitigating factors. As in Rose, Wydell Evans= trial counsel failed to present to the jury similar mitigation evidence which was available. Evans= trial counsel neglected to present at penalty phase evidence of mental and emotional disturbance. If the jury had known about this mitigation they would have recommended a sentence of life and not death.

D. 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.

Trial counsel was ineffective in failing to retain a mental health expert to present evidence of brain damage in support of mitigation that Mr. Evans= capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired at the time of the offense. Effective trial counsel would have investigated Mr. Evans= background and would have retained an expert to evaluate the background information on Mr. Evans. Trial counsel would have learned of the accident Wydell Evans suffered at the age of three where he was thrown six to eight feet, to the ground, hitting his head. Counsel would have learned that Wydell Evans stopped breathing for about one minute, was taken to the hospital where he was somnolent, spent two days in the hospital, and diagnosed with a closed head injury and probable

concussion.

Trial counsel and the mental health expert would have learned about how the brain injury suffered by Wydell Evans affected his speech pattern and his ability to exercise self control in the school environment. Counsel and the expert would have noted that Wydell Evans, in September of 1985, while attending Stone Middle School, was referred to Psychological Services because he had a long history of behavioral problems. Wydell was placed in a resource learning disabilities class, however, he was recommended for a program where he could be more closely monitored and additional services be given for his behavior difficulties. Wydell was subsequently placed in the emotionally handicapped program while in school. Counsel and the expert would have learned that as of October 7, 1987, Wydell Evans was to remain in home instruction until further evaluation of his functioning could be assessed to determine if Specific Learning Disabilities (SLD) would be an appropriate placement. Counsel and the expert would have learned that Wydell Evans was placed in the SLD program. Counsel and the expert would have learned that Wydell Evans did not qualify for a regular diploma in high school and was working toward a Aspecial diploma@ which was issued to emotionally handicapped. Counsel and the expert would have learned that Mr. Evans received exceptional student educational services and was on homebound instruction as of December 3, 1987. Wydell Evans was also in a behavior management system because he had angry outbursts and he used inappropriate language in class.

Had an expert been retained, evidence could have been presented to the jury that

the capacity of Wydell Evans to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired at the time of the offense. Mr. Evans was prejudiced because the statutory mitigation was not presented to the jury. Had the mitigation been presented, the jury would have voted for life imprisonment instead of death. Mr. Evans was prejudiced due to the ineffectiveness of counsel in failing to retain an expert to present statutory mitigation. Mr. Evans should be granted a life sentence or a new penalty phase.

Legal Argument:

Had trial counsel conducted an investigation and presented evidence of mental mitigation, the judge and jury would have known that at the time of the offense Wydell Evans= capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. When a reasonable quantum of competent, uncontroverted evidence of a mitigating circumstance is present, the trial court must find that the mitigating circumstance has been proved. Nibert v. State, 574 So.2d 1059, 1062 (Fla. 1990). Trial counsel had available to him evidence that Evans was involved in an accident, struck his head, suffered a head injury, and had speech problems after the accident. Counsel also had available to him evidence that Evans did poorly in school, was retained, had learning disabilities, and had emotional problems. Had this reasonable quantum of uncontroverted evidence been presented to the judge and jury, the court would have been required to find the mitigating circumstance 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.

In Knowles v. State, 632 So.2d 62 (Fla. 1993) the trial court erred in failing to find as reasonably established mitigation two statutory mental mitigating circumstances. The court was reversed where it did not find that Knowles was intoxicated at the time of the murders and that he had organic brain damage. Wydell Evans had organic brain damage as a result of the accident he was in when he was a child. He also had been smoking marijuana and drinking at the time of the offense. (R. Vol. XIV - 1848, 1824, 1837) (R. Vol. XI - 1220) The combination of organic brain damage and intoxication at the time of the offense was sufficient to prove that Wydell Evans= capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. Had this evidence been presented, Mr. Evans would have received a sentence of life and not death.

ISSUE III

THE LOWER COURT ERRED IN HOLDING THAT MR. EVANS WAS NOT DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE BECAUSE HIS ATTORNEY WAS INEFFECTIVE IN FAILING TO REQUEST THAT STATUTORY MITIGATION JURY INSTRUCTIONS BE GIVEN IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

THE STANDARD OF REVIEW

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

THE LOWER COURT=S ERROR

The lower court held in its order:

> AThe defense claims the evidence of alcohol consumption was sufficient to support giving both instructions. However, the Defendant himself testified that he was Afocused on everything he was doing,@ that he was, ANot drunk but just, you know, slightly intoxicated,@ and that he had a clear recollection o 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, AI 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, A 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 Afailing 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).@ (PCR Vol.VI 856-857).

This was error. The lower court=s reliance on Cherry is misplaced. Cherry is a post conviction case which involves the presentation of mitigation in the penalty phase. The issue here is was there any on the record evidence in the guilt phase which would justify trial counsel requesting statutory mitigation jury instructions.

Cherry=s defense was that he was not present when the crime was committed by others. Mr. Evans= defense was that the shooting of Angel Johnson was accidental. Had Mr. Evans denied being in the car and actually pulling the trigger, his mental state would have been irrelevant. The on the record evidence that would have supported the giving of the statutory mitigation instructions is found at FSC ROA Vol. XIV-1848, FSC ROA Vol. XIV- 1824, FSC ROA Vol. XIV-1837 and FSC ROA Vol. XI-1220. It is noteworthy that three out of four of the testimonial assertions came from Evans and the last assertion came from a witness at the scene of the crime. The lower court erred when it concluded that the evidence of intoxication, Ahowever slight@ was not supported by the record. The lower court erred when it concluded that it was inconsistent with the evidence and testimony presented by the defendant. The finding of fact was clearly erroneous and

should not be given deference by this Court. See Thompson v. State, 548 So.2d 198, 204 n.5 (Fla. 1989). The 3.851 court was not the trial court and based its findings on evidence other than live testimony.

At the evidentiary hearing, attorney Studstill admitted that he was aware that there was evidence that Wydell Evans and Lino Odenat were drinking. (PCR Vol. I-89). Studstill also admitted that he was unaware of the case law cited below at the time of Evans= trial, he did not ask the trial court for statutory mitigation instructions in the interest of caution, because he did not think he had grounds to do so. (PCR Vol. I-90-91). The jury instructions should have been requested because evidence of intoxication was supported by the record at trial. Studstill was ignorant of the relevant case law. His conduct fell below the accepted standards.

Legal argument

In Bryant v. State, 601 So.2d 529 (Fla. 1992), this Court held:

> We have previously stated that the ADefendant is entitled to have the jury instructed on the rules of law applicable to this theory of the defense *if there is any evidence* to support such instructions.@ *Hooper v. State*, 476 So.2d 1253, 1256 (Fla. 1985), *cert. denied*, 475 U.S. 1098, 106 S.Ct. 1501, 89 L.Ed. 2d 901 (1986) (emphasis added) *Smith v. State*, 492 So.2d 1063 (Fla. 1986). Regarding mitigating factors dealing with extreme mental or emotional disturbance, we have stated that where a defendant has produced any evidence to support giving instructions on such mitigating factors, the trial judge should read the applicable instructions to the jury. *Toole v. State*, 479 So.2d 731 (Fla. 1985). It is clear from this record that Bryant presented sufficient evidence in the penalty phase to require the giving of these instructions to the jury. Id.at 533.

In Mr. Evans= case, evidence of alcohol consumption had been presented to the jury prior to penalty phase. Trial counsel was ineffective in not researching the law and providing this earlier case to the trial court at the time of the charge conference. The recommendation of death was the prejudice because this statutory mitigation was not tendered to the penalty phase jury for its consideration.

In Smith v. State, 492 So.2d 1063 (Fla. 1986), this Court held AThere was also some evidence, however slight, that Smith had smoked marijuana the night of the murder sufficient to justify instructions for reduced capacity and extreme emotional disturbance.@ Id. at 1066. Mr. Evans contends that if, pursuant to Smith, slight evidence of marijuana use the night of the murder justified both statutory mitigation instructions for reduced capacity and extreme emotional disturbance, then evidence that Mr. Evans had been drinking heavily all night prior to the crime justifies the giving of both statutory mitigators. Trial counsel was ineffective in not requesting both statutory mitigators.

In Stewart v. State, 558 So.2d 416 (Fla. 1990), this Court held:

> To allow an expert to decide what constitutes Asubstantial@ is to invade the province of the jury. Nor may a trial judge infect into the jury=s deliberation his views relative to the degree of impairment by wrongfully denying a requested instruction. AThe Legislature intended that the trial judge determine the sentence with advice and guidance provided by a jury, the one institution in the system of Anglo-American jurisprudence most honored for fair determinations of questions decided by balancing opposing factors. *If the advisory function were to be limited initially because the jury could only consider those mitigating and aggravating circumstances which the trial judge decided to be*

> *appropriate in a particular case, the statutory scheme would be distorted.* The jury=s advice would be preconditioned by the judge=s view of what they were allowed to know.@ *Floyd v. State,* 497 So.2d 1211, 1215 (Fla. 1986) (quoting *Cooper v. State,* 336 So.2d 1133, 1140 (Fla. 1976) (emphasis added) *cert. denied* 431 U.S. 925, 97 S.Ct. 2200, 53 L.Ed.2d 239 (1977)). We are unable to say beyond a reasonable doubt that the failure to give the requested instruction had no effect on this jury=s recommended sentence. *See State v. DiGuilio* 491 So.2d 1129 (Fla. 1986). This error mandates a new sentencing proceeding. Id. at 420-21.

In Mr. Evans= case, trial counsel, not the trial court, decided that statutory mitigation was not appropriate. This was decided by trial counsel in error because the evidence adduced at trial made the giving of the instructions necessary and proper. Just as the Florida Supreme Court in Stewart was unable to say beyond a reasonable doubt that the failure to give the requested instruction had no effect on the jury=s recommended sentence, so it is with Mr. Evans= case. The recommendation was ten to two in favor of death. At least two jurors were swayed by the meager non-statutory mitigation tendered by trial counsel. Furthermore, the proportionality analysis was split four to three and any additional mitigation would have resulted in a reversal of the recommendation on proportionality grounds. Relief is proper.

This Court Did Not Have All Facts And Circumstances

This Court did not have all the facts and circumstances when making a proportionality analysis on direct appeal.

This Court did not know that Mr. Evans, at age three, suffered a concussion after being struck to the ground by a car. The Court did not know that Mr. Evans stopped

breathing for about one minute, had to be resuscitated, and later had a speech impediment. The Court did not know that Mr. Evans suffered frontal lobe brain damage as a result of the car accident. The Court did not know that Mr. Evans was in emotional handicapped and specific learning disability classes as a child. The Court did not know Mr. Evans had impulse control problems resulting in violent outbursts throughout his school years. The Court did not know that school professionals believed Mr. Evans to be one of the two most difficult students with whom they counseled. The Court did not know that Mr. Evans had failing grades throughout school and that he was administratively passed. The Court did not know that Mr. Evans=s impulse control problems were exacerbated by alcohol consumption and that he was alcohol dependent. The Court did not know that Mr. Evans was intoxicated the night Angel Johnson was killed.

Even without all of the information about Mr. Evans= mental condition - which should have been presented pursuant to Ake - this Court affirmed the death sentence by a slim margin of 4-3. Evans v. State, 838 So.2d 1090 (Fla. 2003) If this Court had known of the mental mitigation available - but which was not presented because of Attorney Studstill=s inexcusable and gross incompetence - this Court would have found the death sentence in this case to be disproportionate.

On direct appeal, this Court reiterated the proportionality standard saying, A[i]n reviewing the proportionality of death sentences, this Court does not simply compare the number of mitigators. *See Connor v. State*, 803 So.2d 598, 612 (Fla.2001). Instead, we

must ensure uniformity in the death penalty by reviewing all the circumstances in the present case relative to other capital cases. *See Bryant v. State*, 785 So.2d 422, 436 (Fla.2001).@ Evans at 1098 This Court would not have simply tallied the aggravators against the mitigators, but would *review all the circumstances* in the present case. The problem was that this Court did not have all the circumstances because Attorney Studstill did not do his job. Had Attorney Studstill done an investigation pursuant to Ake, and retained an expert, this Court would have been able to do the analysis.

In light of the case law, the facts presented at the evidentiary hearing, and the arguments above, Mr. Evans contends that the conduct of Attorney Studstill fell far below professional norms in both the guilt and penalty phases of his trial. The defense of diminished capacity should have been raised in the guilt phase. Studstill=s refusal to research the relevant law in preparation of the guilt phase along with his lack of investigation into his client=s mental state prejudiced Mr. Evans in that a viable defense was not raised. Studstill=s guilt phase trial strategy was based on ignorance. The verdict of guilt was the prejudice. Furthermore, Attorney Studstill=s conduct fell far below professional norms in the penalty phase. Statutory mitigation was present in this case. A cursory investigation of Mr. Evans= medical history and school records would have discovered it. The standard practice of having his client evaluated by a mental health professional would have developed it and explained it to the penalty phase jury. This was not done due to trial counsel=s ineffectiveness. Mr. Studstill was both unqualified and not prepared to properly defend Mr. Evans in this capital trial. Mr. Evans respectfully moves

that this Court vacate the judgments and sentences in this case and order a new trial or in the alternative, vacate the sentence of death and order a new penalty phase.

CONCLUSION AND RELIEF SOUGHT

In light of the facts and arguments presented above, Mr. Evans contends he never received a fair adversarial testing of the evidence. Confidence in the outcome is undermined and the judgement of guilt and subsequent sentence of death is unreliable. Mr. Evans moves this Honorable Court to:

1. Vacate the convictions, judgments and sentences including the sentence of death, and order a new trial.

CERTIFICATE OF FONT SIZE AND SERVICE

I HEREBY CERTIFY that a true copy of the foregoing INITIAL BRIEF OF APPELLANT which has been typed in Font Times New Roman , size 14, has been furnished by U.S. Mail to all counsel of record on this 25TH day of October, 2005.

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CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing INITIAL BRIEF OF APPELLANT, was generated in a Times New Roman, 14 point font, pursuant to Fla. R. App. P. 9.210.

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