

IN THE SUPREME COURT OF FLORIDA

SAMUEL L. SMITHERS

Appellant,

v.

Case No. SC07-2258

Lower Tribunal No. 96-8093

STATE OF FLORIDA,

Appellee.

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ON APPEAL FROM THE CIRCUIT COURT  
OF THE THIRTEENTH JUDICIAL CIRCUIT,  
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

BILL McCOLLUM  
ATTORNEY GENERAL

CANDANCE M. SABELLA  
Chief Assistant Attorney General  
Capital Appeals Bureau Chief  
Florida Bar No. 0445071  
Concourse Center 4  
3507 E. Frontage Road, Suite 200  
Tampa, Florida 33607-7013  
Telephone: (813) 287-7910  
Facsimile: (813) 281-5501

COUNSEL FOR APPELLEE

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**PRELIMINARY STATEMENT**

References to the record:

References to the record on direct appeal will be designated as (DR Vol. #/page #). References to the trial transcript will be referred to as (DT Vol. #/page #). References to the supplemental record will be designated as (DSR Vol. #/page #). References to the postconviction record will be designated as (PCR Vol. #/page #).

## STATEMENT OF THE CASE AND FACTS

In its opinion affirming Smithers' convictions and death sentences, the Florida Supreme Court set forth the salient facts as follows:

[I]n 1995, Sam Smithers agreed to mow the grass at a vacant Plant City house owned by Marion Whitehurst. Whitehurst and Smithers attended the same church. Whitehurst was attempting to sell the house and therefore needed the landscape to be maintained by Smithers. There are three ponds surrounding the house and the twenty-seven acre property is enclosed by a fence with a gate at the front. Whitehurst gave Smithers a key to the gate but not the house.

In 1996, Smithers and Whitehurst renewed their agreement. Smithers mowed the lawn the week of May 20 and Whitehurst paid Smithers on May 26. At approximately 7 p.m. on May 28, Whitehurst decided to stop by the property. The gate was locked when she arrived, but after opening the gate and driving to the house, Whitehurst found Smithers' truck parked just outside the carport. Smithers was sitting in the carport cleaning an axe. Smithers told Whitehurst that he had returned to the property to cut down some tree limbs. During the conversation, Whitehurst noticed a pool of blood in the carport. Smithers told her that someone must have come by and killed a small animal. He assured her that he would clean up the mess.

Although Whitehurst left the house, she was bothered by the pool of blood, and therefore she contacted the Sheriff's Department. Later that night, Deputy Skolnik met Whitehurst at the property. The pool of blood had been cleaned up, but the deputy noticed what appeared to be drag marks in the grass leading towards one of the ponds. The deputy followed the drag marks down to the pond and discovered a dead female body floating in the water. The woman was later identified as Cristy Cowan. A dive team subsequently discovered a second dead female body in another part of the pond. She was later identified as Denise Roach.

A search of the Whitehurst house revealed a condom wrapper in one of the bedrooms and a semen stain on the

carpet. Test results established that Cowan could not have contributed to this stain, but Roach and Smithers could not be excluded. A fingerprint taken from the kitchen was identified as having been made by Smithers. Roach's DNA was consistent with a blood stain found in the carport. Shoe prints by the pond matched the shoes found in Smithers' home. Also, Smithers and Cowan were seen on a convenience store videotape about an hour before Whitehurst arrived at the property on May 26. The videotape depicted Smithers and Cowan entering and leaving the store together.

On the night of May 26, two detectives went to Smithers' home and Smithers agreed to accompany them to the Sheriff's Office for an interview. Smithers requested that his wife join them. Smithers was questioned for almost three hours. Detective Flair read Smithers his Miranda rights and Smithers waived his rights. At the end of the interview, Smithers agreed to return the next morning and take a polygraph test.

Upon returning the following morning, Smithers was given a written version of his Miranda rights. Smithers signed a waiver of rights form and proceeded to take the polygraph test. Afterwards, Detective Metzgar explained to Smithers that the polygraph test indicated that he was not telling the truth and Smithers responded by making some incriminating statements. Metzgar called Detectives Flair and Blake into the room and Flair and Blake continued the interview. Smithers again insisted that his wife be present during the interview. Smithers subsequently admitted that he killed Cristy Cowan and Denise Roach.

Smithers told the detectives the following version of events regarding the Cowan murder. Smithers was coming home from work when he spotted a car on the side of the road. He stopped to assist the driver (Cowan) and drove her to a convenience store. Once back in his truck, Cowan demanded money and threatened to accuse him of rape if he did not give her money. Smithers drove Cowan to the Whitehurst property. Smithers gave Cowan all the money that he had but she still was not satisfied and she threw a drink at him. In response, he picked up an axe and struck Cowan in the head. She fell down unconscious and he dragged her to the pond. He returned to the carport to rinse off the axe when Whitehurst arrived. During the time that Whitehurst was there, he could hear Cowan

making noises from the pond (Whitehurst testified that she never heard any sounds). When Whitehurst left, he went back to the pond and hit Cowan in the head "to shut her up." He also threw some tree limbs at her.

Later in the interview, Smithers explained to the detectives his involvement with the Roach murder. On May 7, Smithers was at the Whitehurst property mowing the lawn when Roach approached him. Roach told him that she had permission to be on the property. When Smithers returned to the Whitehurst property on May 13, Roach was still there. Smithers asked her to leave and she refused. Roach then hit Smithers on the arm and Smithers punched Roach in the face. Smithers said that Roach picked up a planter in the carport and threw it at Smithers' truck, causing a dent. Smithers shoved Roach against the wall, causing a piece of wood to fall down from a shelf and hit her on the head. Roach fell to the ground unconscious. Smithers left the property, but he returned the next day and dragged her body to the pond. He cleaned up the blood with mop and a bucket of water.

At the conclusion of the interview, Smithers was arrested and subsequently charged with two counts of murder. Prior to trial, the trial court denied Smithers' motion to sever the two charges and Smithers' motion to suppress his confession.

At trial, the medical examiner testified that at the time Cowan's body was discovered, she had not been dead for more than a couple of hours. There was a foam cone around her mouth which suggested that she might have drowned. Cowan had an injury to her eye, a laceration under her lip, a blunt impact injury to her jaw, a chop wound on the top of her head which penetrated her brain, and a chop wound behind her ear. She also had injuries consistent with manual strangulation. The medical examiner stated that death was caused by strangulation combined with the chop wounds.

Regarding Roach, the medical examiner testified that the body had been in the pond seven to ten days and was therefore very decomposed. There were two slits in Roach's clothing which were caused by a sharp instrument. Her face and skull were fractured. There were also sixteen puncture wounds to her skull, several of which penetrated the skull. Finally, she had injuries consistent with manual strangulation (the hyoid bone was

fractured). The medical examiner stated that death was caused by the combined effects of strangulation, stab wounds, and blunt impact to the head.

The State presented the testimony of several witnesses who stated that both Cowan and Roach were prostitutes and worked in the same location (the Luxury Motel area). Prostitute Bonnie Kruse testified that she had previously "dated" Smithers at the Luxury Motel. Smithers offered Kruse extra money to go with him to Seffner, but she refused. Another prostitute testified that on the day Cowan disappeared, she gave her a condom. This condom was similar to the condom wrapper found inside the Whitehurst property.

Smithers testified during the guilt phase. His story at trial was different from the story he initially told the detectives. Smithers said that he lied to the detectives because he was scared that his family would be harmed if he told the truth. Smithers told the jury that the incident actually began months earlier when he was a deacon at his church. A girl named Mimi was on probation and was fulfilling her community service requirement at the church. Smithers was Mimi's supervisor. Mimi, however, could not complete her hours and she therefore offered to have sex with Smithers if he would alter her records. He agreed. Weeks later, Smithers was approached by a man who was aware that Smithers was a caretaker at the Whitehurst property. Smithers did not know the man or his name (hereinafter Mr. X). Mr. X asked Smithers if he could use the property for a drug transaction. Mr. X had a picture of Smithers and Mimi. Mr. X said he would go public with the picture if Smithers did not cooperate. Smithers agreed to let Mr. X use the property. On two separate occasions, Mr. X contacted Smithers and asked Smithers to meet him at the property to unlock the gate. Several people were present during the first visit to the property, including Denise Roach. Roach got into an argument with Mr. X and Mr. X hit Roach in the head with a hatchet. Smithers claimed that he just stood and watched. Mr. X then approached Smithers and hit him with a tire tool. He ordered Smithers to drag Roach's body to the pond. Mr. X told Smithers that he would kill his family if he did not keep quiet. A week and a half later, Mr. X again asked Smithers to meet him at the Whitehurst property. This time Cristy Cowan was present. Several people went inside the house to conduct business. Afterwards, Mr. X ordered Smithers to go inside the house



and clean up. When Smithers returned outside, Cowan's dead body was lying in the carport. Mr. X and his cohorts left and Smithers dragged the body to the pond and returned to clean up the carport. It was at this time that Mrs. Whitehurst arrived at the property.

At the close of all the evidence, the jury convicted Smithers of two counts of first-degree murder. During the penalty phase, the State presented Smithers' time card on the day of the Cowan murder, which showed that he left work at 5:23 p.m. The convenience store videotape from that same day indicated that Smithers and Cowan were present at 6:19 p.m. Detective Iverson testified that he was assigned to drive the distance from Smithers' place of work to the Whitehurst property, stopping in between at the place where Cowan was picked up (the Luxury Motel) and at the convenience store where Smithers and Cowan were seen on videotape. Detective Iverson left Smithers' place of work at 5:25 p.m. He arrived at the convenience store at 6:10 p.m. and arrived at the Whitehurst property at 6:17 p.m.

The defense presented the testimony of Smithers' two brothers, his former wife, his son, a local school principal, and a deputy from the detention facility where Smithers was housed during the trial. Smithers' brothers explained that Smithers was physically abused growing up. Smithers' mother would often hit her boys with a belt to "beat the devil out of them." Other witnesses explained that Smithers was a wonderful husband and father and that he never lost his temper with anyone. The deputy testified that Smithers was a model inmate. The defense also presented the testimony of three mental health experts. Apparently when Smithers was an infant, he fell out of his crib and landed on his head. When Smithers was twenty-seven, he was hit in the head with the butt of a shotgun during a robbery at a gas station where he worked. Dr. Wood testified that a PET scan of Smithers' head was abnormal and was consistent with brain damage due to head trauma. Dr. Berland testified that Smithers has a chronic mental illness and was suffering from extreme mental or emotional disturbance at the time of the murders. Dr. Berland also said that Smithers had a substantial impairment in his ability to conform his conduct to the requirements of the law. Dr. Maher testified that Smithers was suffering from extreme mental or emotional disturbance at the time of the murders, that Smithers had a substantial impairment in his ability to

conform his conduct to the requirements of the law, and that Smithers had a decreased ability to appreciate the criminality of his conduct.

In rebuttal, the State presented three mental health experts. Dr. Ikeman testified that the PET scan photographs were insufficient to diagnose whether Smithers' brain was functioning properly. Dr. Taylor stated that although Smithers had head injuries, the injuries did not cause brain damage. Dr. Taylor also testified that Smithers is not psychotic. Dr. Stein agreed that Smithers does not have a psychiatric disorder.

The jury ultimately recommended death sentences by a vote of twelve to zero. At the *Spencer* hearing, John Cowan (Cristy Cowan's father) asked the trial court to impose a life sentence. Smithers' former wife made a similar request.

*Smithers v. State*, 826 So. 2d 916, 918-922 (Fla. 2002)(footnotes omitted).

**A. Trial Court Proceedings**

Smithers was convicted and sentenced to death on June 25, 1999, for the first degree murders of Cristy Cowan and Denise Roach. (DR 2/164-5; DT 11/1338) (DR 2/45-61; DT 19/2362-82). In the sentencing order, the trial court found the following three aggravators for the Cowan murder: (1) previous violent felony (contemporaneous murder), (2) the murder was especially heinous, atrocious, or cruel (HAC), and (3) the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification (CCP); and two aggravators for the Roach murder: (1) previous violent felony (contemporaneous murder) and (2) HAC. (DR 2/246-53; DT 19/2366-73). The trial court found

the following two statutory mitigators: (1) the murder was committed while Smithers was under the influence of extreme mental or emotional disturbance (moderate weight) and (2) Smithers' capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of the law was substantially impaired (moderate weight). The trial court also found the following nonstatutory mitigators: (1) Smithers was a good husband and father, (2) Smithers enjoyed a close relationship with his siblings, (3) Smithers was physically and emotionally abused by his mother as a child, (4) Smithers regularly attended church and was devoted religiously, (5) since being arrested, Smithers has been a model inmate and he would conduct himself appropriately in a prison setting, (6) Smithers has made several contributions to the community, and (7) Smithers confessed to the crimes, but his trial testimony was in conflict with his statements to the detectives. All of the nonstatutory mitigators were given moderate weight. Finally, the court gave great weight to John Cowan's request that Smithers be given a life sentence. The trial court concluded that the aggravators outweighed the mitigators and therefore sentenced Smithers to death for both murders. (DR 2/254-60; DT 19/2375-82)

**B. Appellate Proceedings**

Smithers' judgments and death sentences were affirmed by the Florida Supreme Court in *Smithers v. State*, 826 So. 2d 916 (Fla. 2002). A petition for writ of certiorari was then taken to the

United States Supreme Court and denied on February 24, 2003. *Smithers v. Florida*, 537 U.S. 1203 (2003).

**C. Postconviction Proceedings**

Smithers' initial 3.851 motion was filed on December 29, 2003. (PCR 1/2003) The motion alleged the following seven claims: 1) public records; 2) ineffective assistance of guilt phase counsel; 3) ineffective assistance of penalty phase counsel; 4) prohibition against juror interviews; 5) ineffective for failing to litigate the following claims: a) jury was unconstitutionally relieved of its responsibility to determine the appropriateness of Smithers' death sentence; b) jury instructions unconstitutionally relieved the state of its burden to prove an element of the death penalty eligible offense; c) heinous, atrocious or cruel jury instruction was unconstitutionally vague and broad; d) cold, calculated and premeditated jury instruction was unconstitutionally vague and broad; 6) Florida's capital sentencing scheme was unconstitutional as applied under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. Smithers also contended that to the extent trial counsel failed to litigate these issues, he was denied his Sixth and Fourteenth Amendment rights to counsel; 7) cumulative error (numbered claim VI in motion). (PCR 1/69-136)

The Amended Motion to Vacate was filed on April 07, 2006 and the state responded on June 2, 2006. (PCR 1/137-200, 2/201-239,

240-277) A case management conference was held on January 12, 2007. (PCR 1/26-27) The court subsequently ordered an evidentiary hearing on Claims I and II. (PCR 2/278-79) The evidentiary hearing was held on August 16 and 17, 2007.

At the evidentiary hearing, Smithers presented six witnesses. First, Dr Ronald Keith Wright, a forensic pathologist, testified that he was retained to render an opinion as to Christy Cowan's cause of death. (PCR 7/1013-16) He testified that it was his opinion that Ms. Cowan died of asphyxiation as a result of manual strangulation, but conceded that it was possible that she died of drowning. (PCR 7/1018) He opined that the blunt force injuries to her body were inflicted postmortem or perimortem, but probably perimortem. (PCR 7/1020-21) He noted that in the medical examiner, Dr. Laura Hair's report, she originally found that the cause of death was chop wounds to the head and manual strangulation. (PCR 7/1023) At trial, however, she opined that Cowan had died from drowning. (PCR 7/1024) On cross-examination, Dr. Wright stated the basis for his opinion that the head injuries were inflicted postmortem or perimortem was based on the lack of bleeding. (PCR 7/1026) He was not sure if he knew that a large pool of blood was found on the floor of the garage, but opined that it would be consistent with the injuries to her mouth and head. He also conceded that the foaming in Cowan's mouth would be consistent with Ms. Cowan being dragged to the lake and then kept underwater

for a short period of time. (PCR 7/1027-28)

Next, the defense called Caresa Snyder who testified that she had been a neighbor of Smithers for ten years prior to his arrest. (PCR 7/1033) She described the defendant as friendly, sweet, and good to her boys. She felt like Smithers was a little slow or just had a lower IQ. At one point, in May of 1996, while she was on vacation, she received a call from her mother that Smithers had brought the Snyder children homemade ice cream and while he was there he was ranting and raving, looked wild-eyed and made statements about "killing some niggers in Tennessee." (PCR 7/1035) In 1995 they had given Smithers a key while they were out of town. They returned home early to discover the house in disarray and the small appliances stacked on the kitchen table. A Black and Decker screwdriver, like the one that was missing from her house, was later found at Smithers' home. (PCR 7/1036-37)

Gerald Dean Snyder then testified that he did not enjoy socializing with Smithers because the dialogue was somewhat difficult for Smithers as he was somewhat slow. (PCR 7/1048) He believed Smithers was very close to his father-in-law, Mr. Powell, who later became ill and was put in a nursing home. (PCR 7/104) Mr. Powell was a stabilizing influence on Smithers and provided financial support. (PCR 7/1053) Although Smithers worked at Borrell Electric for several months, he believed Smithers lost a few jobs and the stress level became increasingly larger. He

disputed Smithers' testimony that while they were talking one day a Bentley rolled up in front of Smithers' house. (PCR 7/1050, 1054) The only stress-related changes he could identify were that Smithers had "glassy eyes, became standoffish and was not as close to their children as he had been. (PCR 7/1055)

The defense next presented Dr. Michael Scott Maher, M.D. who was accepted as a medical doctor and an expert in the field of forensic psychiatry. (PCR 7/1058) He testified that he was retained by trial counsel in 1997 to do a mental status examination on Smithers. (PCR 7/1059-60) Toward that end, he did testing, he reviewed school records, he interviewed family members and he consulted with Drs. Wood and Berland. He recommended and Judge Fuente granted the motion to obtain one. (PCR 7/1060-62) Both he and Dr. Berland gave Smithers an MMPI2 on which Smithers scored high on the psychosis scale. He defined psychosis as a break with reality. (PCR 7/1067) At the time he did not diagnose Smithers as psychotic although Dr. Berland did. He also explained that he found no direct indications of hallucinations or delusions but there was a possibility that Smithers may have suffered with hallucinations or delusions. (PCR 7/1069) Now, however, he believed that Smithers' claim that he was talking to Snyder when a Bentley rolled up was significant. (PCR 7/1072) Because Snyder denied it happened, it was a strong suggestion of psychosis or a drug-induced delirium or some other very substantial disturbance of

perception and reality. (PCR 7/ 1074) Including Snyder in the story either showed 1) intellectual impairment, which is not present in this case, to think that no one would contact Snyder or 2) that he was out of touch with reality and believed what he was saying was true. (PCR 7/1074) This action coupled with his prior information now led him to concur with Dr. Berland. (PCR 7/1075) Dr. Maher also opined that Christy Cowan died as a result of blows to the head and strangulation. (PCR 7/ 1079) He also found that Smithers hearing things no one else reported hearing was evidence of psychosis. (PCR 7/1081) He was unaware previously that Whitehurst denied hearing any noise from the pond. (PCR 7/1083)

On cross-examination Dr. Maher testified that his diagnosis at the time of trial was dissociative disorder. (PCR 7/1084) The basis of his change in diagnosis to psychotic episode recurrent, was the Snyder and Whitehurst statements with possible presence of auditory hallucinations. (PCR 7/1085-86) He agreed that the burglary of the Snyder house was an antisocial act and consistent with a diagnosis of antisocial personality disorder. (PCR 7/1087) Dr. Maher agreed that during his original five interviews with the defendant, Smithers admitted killing Ms. Cowan and Ms. Roach; taking both to the property to have sex with them; dragging Ms. Roach's body to the pond to hide the body; that they had a conflict over money; he took an axe to her and killed her in the garage and then was in the process of cleaning the axe when Mrs. Whitehurst



arrived. (PCR 7/1091-94) During the five separate times he saw Smithers, the defendant never told him about the "mystery man." Prior to the penalty phase he was given Smithers' trial testimony where he testified about the mystery man at the Whitehurst estate. (PCR 7/1094) Even though this story of the mystery man was totally contrary to what the defendant told Dr. Maher, Dr. Berland and law enforcement, his conclusion at the penalty phase was that Smithers was dissociative. (PCR 7/1095) Now with the Snyder statement he changed it to psychosis. (PCR 7/1097) He did not recall if he knew at the time of trial that Whitehurst said she heard nothing. (PCR 7/1098) The state then introduced his testimony at the penalty phase where he acknowledged knowing that the defendant heard voices that Ms. Whitehurst did not hear and finding that it was evidence of auditory hallucination. (PCR 7/1100)

Daniel Mario Hernandez testified that he represented Smithers at the guilt phase of his trial in the instant cause. He testified that he had been practicing law for thirty years and that during his thirty years a majority of his practice was in criminal law. He is on the limited list of approved attorneys to handle first degree murder cases and death cases in Hillsborough County. (PCR 8/1134) Hernandez testified that he had probably handled 25 to 30 murder cases. (PCR 8/1135) He filed a motion to suppress Smithers' statements which was denied. (PCR 8/1116) He had not seen his file in years nor had he read a trial transcript. (PCR

8/1117) Hernandez identified motions in limine he filed to exclude testimony that the defendant was hanging out with prostitutes and to exclude crime scene video. (PCR 8/1118-21) Hernandez did not recall that he did not file a motion to exclude Detective Flair's testimony that Smithers told him that Ms. Roach was a black girl and he guessed some prejudice set in so he hit her again. (PCR 8/1124) He opined that the problem with filing such a motion was that the fact that she was black and that the defendant may have had some prejudice towards a black victim was inextricably intertwined. (PCR 8/1125) Moreover, the statement diminished the premeditation aspect to reduce it to second degree murder. (PCR 8/1140) He also noted that he requested an instruction on accessory after the fact and that it was later denied by Judge Fuente. (PCR 8/1128) He also filed all of the motions that he felt were necessary to protect his client's rights. (PCR 8/1135) He testified that he does not file motions that he thinks are absolutely frivolous. (PCR 8/1136) No burglary instruction was given and the state's theory was that since there was no legitimate explanation for his fingerprint being in the house, it was evidence of his guilt for the instant crime. (PCR 8/1141) Counsel did not think that the evidence that Smithers may have entered the Whitehurst residence without permission had anything to do with the finding of guilt. (PCR 8/1143) In his opinion evidence of a burglary and/or racial bias were inconsequential considering

overwhelming evidence against Smithers and he would have been convicted without either. (PCR 8/1149)

The defense next presented trial counsel Scott Lyon Robbins. (PCR 8/1152) He was in charge of the penalty phase and he death-qualified the Smithers' jury. (PCR 8/1155) In response to questioning about the colloquy with respective juror Collins at volume 4, page 232-33, Robbins had no memory of the juror. (PCR 8/1155-57) He later testified, however, that after reviewing the colloquy he thought the juror's responses reflected an ability to consider mitigating factors and he did not think there would have been a for-cause objection. (PCR 8/ 1174-75) With regard to Mr. Snyder, he recollected that his investigator, Diane Fernandez, contacted Mr. Snyder by phone, but that he personally had not spoken to him. (PCR 8/1160) In response to questioning regarding why they did not obtain an independent medical examiner, he noted that they were able to make the same argument based on the M.E.'s report. (PCR 8/1168)

On cross-examination, counsel testified that he had been a criminal defense attorney since 1982. (PCR 8/1170) He worked for the Public Defender for eleven years before going into private practice and had handled approximately ten first degree murder cases. (PCR 8/1171-72) He also noted that although Dr. Maher diagnosed Smithers as having dissociative disorder, he did recognize that his description of hearing voices was a

hallucination. (PCR 8/1182) Although they had initially prepared for trial based on Smithers' description of the events as given to the police, Smithers later gave them a completely different version which was memorialized by Diane Fernandez in a memo. (PCR 8/ 1183) He noted that Diane Fernandez was an experienced investigator and was particularly good in capital cases collecting mitigation evidence. (PCR 8/1184) Ms. Fernandez worked closely with Mrs. Smithers who was very useful in providing introductions so that Ms. Fernandez could get closer to some of the witnesses. (PCR 8/ 1185) Ms. Fernandez checked with Snyder and learned he could not corroborate Smithers story. (PCR 8/1186) Further, at trial Smithers did not mention that Snyder was present for the meeting. Additionally, he provided copies of Smithers' testimony to his experts, as well as information he received prior to trial. (PCR 8/ 1189) Dr. Maher testified about Smithers testimony about Mr. X; he believed Smithers was lying. (PCR 8/ 1190; DR 2015) He did not have information that Smithers had allegedly committed a prior burglary on the Snyder's home. (PCR 8/1191-92) With regard to Dr. Hair, he received her report where she found that the cause of death was blunt head trauma and strangulation, that the foam cone could be indicative of drowning or other things. (PCR 8/1195) After hearing her testimony he still did not think he needed another expert because Dr. Hair's opinion was still that cause of death was strangulation and blunt head trauma with a possibility

the foam cone was from drowning. (PCR 8/1196) They tried to refute evidence of strangulation with the argument that injury to throat area was caused by a blow to show that death occurred quickly because a slow strangulation was bad for his client. Dr. Hair conceded that was possible and that the cone could be from a drug overdose or heart attack. (PCR 8/1198-1200) He also got her to concede that she could have been unconscious which was helpful as to the heinous, atrocious or cruel aggravator. (PCR 8/1201) Dr. Hair's finding that the cause of death was by blunt instrument was helpful in arguing to jury that the victim did not die of strangulation. (PCR 8/1202) Hiring an expert who opined that strangulation was definitely the cause of death would have undermined the blunt trauma argument but would have helped with the drowning argument. (PCR 8/1203)

He testified that when he came onboard Drs. Maher and Berland had already been brought into the case. He was aware that Smithers confessed to both doctors. He was surprised when Smithers changed his story to say that Mr. X committed the crime. (PCR 8/1210) He then investigated the story. (PCR 8/ 1211) He had serious concerns that after having made so many statements essentially confessing to these aspects of the crime, the jury would have problems finding him credible. (PCR 8/1212) Additionally, his recollection is different from the memorandum; he did not recall him saying that Dean Snyder had actually interacted with Mr. X, only that he was

outside and Smithers had been talking to him. (PCR 8/1213) He did not perceive Smithers' statement to be evidence of a hallucination. (PCR 8/1217) With regard to Dr. Maher, counsel testified that he believed Dr. Maher was aware of Diane Fernandez' report that Smithers said Dean Snyder was there when Mr. X drove up and he thought it was factored into Dr. Maher's diagnosis. (PCR 8/1217) He thought it could be just a bad detail or a bad lie on Smithers' part; he did not think it evidence of psychosis. (PCR 8/1218) He also recalled that they disputed the state's argument that Cristy Cowan was gasping for breath. (PCR 8/1225) On recross he confirmed that in the sentencing order, the trial court did not mention drowning. (PCR 8/1227-28)

On October 26, 2007, the circuit court filed a written order denying the motion to vacate. (PCR 2/310-402, 3/403-603, 4/604-804) This appeal ensued.

## SUMMARY OF THE ARGUMENT

ISSUE I: The trial court correctly denied Smithers' claim of ineffective assistance of guilt phase counsel. Counsel's explanation of how he selected jurors and why he would not have removed juror Collins establishes that this is not a case where counsel simply overlooked a potentially biased juror's response but, rather, reflects a reasonable strategic decision based on his considerable expertise with jury trials. *Strickland v. Washington*, 466 U.S. 668, 690 (U.S. 1984) (strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable.) The trial court's factual findings were supported by competent substantial evidence and should be affirmed. Moreover, even if defense counsel's conclusion that he did not have grounds to strike juror Collins for cause was unreasonable, appellant must still establish prejudice, i.e. that there is a reasonable probability that the result of the proceeding would have been different. Where a postconviction motion alleges that trial counsel was ineffective for failing to raise or preserve a cause challenge, "the defendant must demonstrate that a juror was actually biased to be entitled to relief." The state maintains that for the same reasons the trial court denied relief on the deficiency prong, the evidence in the instant case does not support a conclusion that a truly biased juror actually sat on the jury.

Smithers next claims that counsel should have sought the

exclusion of the portion of his confession where he claimed that prejudice because she was black may have set in. He provides absolutely no legal basis for excluding this statement. He only asserts that as the state's theory did not rest on race as a motive for the killing, it was not relevant. The state's theory did, however, include intent and identity and this statement is evidence of both. More importantly, the issue before this Court is not whether the prejudicial impact outweighed the probative impact, but, rather, whether Smithers' counsel's performance was constitutionally deficient for failing to file a motion in limine to exclude a relevant part of the defendant's own confession and whether the failure to do so prejudiced the defendant that the outcome of the proceeding would have been different but for the failure to file the motion in limine.

ISSUE II: Appellant next contends that his counsel was ineffective during the penalty phase for 1) failing to provide more information to the mental health experts and 2) failing to hire an independent medical examiner to refute the possibility that Christy Cowan drowned. Evidence on both claims was taken at the evidentiary hearing and relief was properly denied. With regard to the preparation of the expert, Smithers had two mental health experts who did extensive testing and preparation and experienced defense counsel gave them comprehensive information upon which their analysis was based. The postconviction court properly found



no deficient performance. Further, even if counsel were deficient, appellant must still establish prejudice, i.e. that there is a reasonable probability that the result of the proceeding would have been different. A review of the trial court's sentencing order alone refutes any contention that this minor change in diagnosis would have altered the outcome.

Smithers' next sub-claim is that counsel was ineffective for failing to hire an independent medical examiner to refute evidence that Cristy Cowan may have drowned. As the court correctly noted, Smithers' assertion that a defense expert would have been able to refute evidence which established that Cowan was alive when she was put in the pond undermining two aggravating factors - HAC & CCP, is not supported by the evidence as neither court relied on the drowning to support either factor. Further, Smithers has failed to show that he was prejudiced. Given the fact that the drowning was not the primary basis of either factor and in light of the weighty aggravators found in the Cowan murder, including a second virtually identical homicide, there is no reasonable probability that the outcome would have been different.

## ARGUMENT

### ISSUE I

#### **WHETHER THE LOWER COURT CORRECTLY FOUND THAT DEFENDANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL DURING THE GUILT PHASE OF HIS CAPITAL TRIAL.**

Smithers urges on appeal that his guilt phase counsel was ineffective for a) failing to move to strike prospective juror Collins and b) failing to move to keep the racial bias portion of Smithers' confession from the jury.<sup>1</sup> Both issues were the subject matter of the evidentiary hearing below and relief was denied. In reviewing a trial court's application of the law to a rule 3.851 motion following an evidentiary hearing, this Court applies the following standard of review: As long as the trial court's findings are supported by competent substantial evidence, this Court will not substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of the witnesses as well as the weight to be given to the evidence by the trial court. *Riechmann v. State*, 966 So. 2d 298, 316 (Fla. 2007) As with rulings on other postconviction claims, this Court reviews the trial court's application of the law to the facts *de novo*. *Reichmann*, citing, *Hendrix v. State*, 908 So. 2d 412, 423 (Fla.

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<sup>1</sup> Smithers has not attempted to seek review of the underlying claims on the merits. The state notes, however, that such review is procedurally barred as they are issues that could have been raised on direct appeal.

2005) (reviewing *de novo* the trial court's application of the law to the facts in ruling on a postconviction claim that the government withheld material evidence); *Gore v. State*, 846 So. 2d 461, 468 (Fla. 2003) (reviewing *de novo* the application of the law to the facts on a claim of ineffective assistance of trial counsel).

As the following will show, the lower court's denial of relief was supported by competent substantial evidence and should be affirmed.

**A) Failure to Move to Strike Prospective Juror Collins**

Smithers' first claim is that counsel was ineffective for failing to move to strike juror Collins. In order to establish an ineffective assistance of counsel claim, defendant has the burden of showing that counsel's performance was deficient and that he was prejudiced by that deficient performance such that the results of the proceedings would have been different. *Strickland v. Washington*, 466 U.S. 668, 686-687 and 694 (1984). If a defendant fails to establish either prong, relief must be denied.

In the instant case, the postconviction court conducted an evidentiary hearing on the issue. Subsequently, the court denied relief based on a finding that counsel's performance was not deficient and, therefore, did not reach the prejudice prong. The court stated:

Defendant asserts counsel should have exercised a cause challenge or a peremptory challenge to remove juror

Collins. (See amended motion, page 7) He cites Morgan v. Illinois, 504 U.S. 719 (1992). In Morgan, the Supreme Court held, *inter alia*, that "[a] juror who will **automatically** vote for the death penalty in every case will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do." Id. at 729 (emphasis added).

The instant case is distinguishable from Morgan because juror Collins did not state he would **automatically** vote for the death penalty. In fact, during voir dire counsel Robbins asked the jurors to rate on a scale of "one to ten" how they felt about the death penalty, with "one" representing the feeling that under no circumstances should the death penalty be imposed, and "ten" representing the feeling the death penalty should be imposed in every case. (V2/220-221) In response, juror Collins stated he felt he was a "seven" on the scale. (V2/221) He agreed that in some circumstances, even if a person had been convicted of first degree murder, the death penalty might not be warranted. (V2/221-222) In contrast to being "automatically" in favor of the death penalty, juror Collins stated he understood that the death penalty is not to be considered in every case, and that he was "not totally for it or against it."

It is clear from the record that juror Collins would not recommend death regardless of the facts and circumstances of a conviction. Counsel Robbins testified he would almost always challenge jurors who were at "nines and tens" for cause, but that juror Collins did not meet that category. (See 17 August 2007 transcript, page 171) He testified he took into account juror Collins' opinions regarding childhood abuse as a factor that could be given weight when determining whether to recommend the death penalty, and believed that could work in Defendant's favor. (See 17 August 2007 transcript, page 172-173) Ultimately, defense counsel Robbins concluded he did not have grounds to strike juror Collins for cause.

Defense counsel Robbins was not deficient in his performance.

(PCR 2/314-16)(emphasis in original)(footnotes omitted)

Counsel's explanation of how he selected jurors and why he would not have removed juror Collins establishes that this is not a case where counsel simply overlooked a potentially biased juror's response but, rather, reflects a reasonable strategic decision based on his considerable expertise with jury trials. *Strickland v. Washington*, 466 U.S. 668, 690 (U.S. 1984) (strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable.) The trial court's factual findings were supported by competent substantial evidence and should be affirmed. *Riechmann*, supra.

Moreover, even if defense counsel's conclusion that he did not have grounds to strike juror Collins for cause was unreasonable, appellant must still establish prejudice, i.e. that there is a reasonable probability that the result of the proceeding would have been different. Where a postconviction motion alleges that trial counsel was ineffective for failing to raise or preserve a cause challenge, "the defendant must demonstrate that a juror was actually biased to be entitled to relief." *Carratelli v. State*, 961 So. 2d 312, 321 (Fla. 2007). Following *Caratelli*, this Court in *Owen v. State*, rejected a jury challenge based on the jurors' responses concerning the death penalty, stating:

Owen argues that trial counsel should have removed two jurors, jurors Matousek and Griffin, because those jurors indicated a personal belief that the death penalty should be automatically imposed under certain circumstances. This argument is without merit. The record demonstrates that despite her personal viewpoint, juror Matousek

stated a willingness and ability to lay aside her possible bias and follow the trial court's instructions. Juror Matousek never equivocated as to whether she could follow the law, and accordingly, Owen has not shown her to be actually biased. Juror Griffin's responses during voir dire created some doubt as to whether she could lay aside her belief and apply the law in the circumstance of multiple victims. However, as set forth in *Carratelli*, while the standard for obtaining a reversal upon the erroneous denial of a cause challenge on direct appeal is relatively lenient, consideration of a postconviction claim must be more restrictive. 961 So. 2d at 320. To be entitled to postconviction relief, Owen must demonstrate that juror Griffin was actually biased, not merely that there was doubt about her impartiality. While Griffin answered that she "[p]robably" would vote for the death penalty in the circumstance of multiple victims and gave confusing answers regarding how she would consider mitigating evidence, she ultimately stated that she would consider mental health testimony and that such testimony could influence her toward a life sentence. No "evidence of bias" is "plain on the face of the record." *Id.* at 324. [fn12] Thus, Owen did not demonstrate that juror Griffin was actually biased.

*Owen v. State*, 2008 Fla. LEXIS 809, 27-28  
(Fla. May 8, 2008)(footnote omitted)

The state maintains that for the same reasons the trial court denied relief on the deficiency prong, the evidence in the instant case does not support a conclusion that a truly biased juror actually sat on the jury. As the trial court found, "[i]t is clear from the record that juror Collins would not recommend death regardless of the facts and circumstances of a conviction." In contrast to the contention that the juror was "automatically" in favor of the death penalty, the trial court found that "juror Collins stated he understood that the death penalty is not to be considered in every case, and that he was 'not totally for it or

against it.'" (PCR 2/314-16) Again, the trial court's factual findings were supported by competent substantial evidence and should be affirmed. *Riechmann*, supra. Relief was properly denied and should be affirmed.

**B) Failing to Move to Keep the Racial Bias Portion of Smithers' Confession from the Jury**

Smithers next claims that counsel should have sought the exclusion of the portion of his confession where he claimed that prejudice because she was black may have set in.<sup>2</sup> He provides absolutely no legal basis for excluding this statement. He only asserts that as the state's theory did not rest on race as a motive for the killing, it was not relevant. The state's theory did, however, include intent and identity and this statement is evidence of both. More importantly, the issue before this Court is not whether the prejudicial impact outweighed the probative impact, but, rather, whether Smithers' counsel's performance was constitutionally deficient for failing to file a motion in limine to exclude a relevant part of the defendant's own confession and

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<sup>2</sup> The full statement introduced was as follows:

Q. Did anything kick in that make her - made him hit her again?

A. He said that some prejudice may have set in so he hit her again.

Q. And that is because she was black?

A. Yes.

(DR 9/1056)

whether the failure to do so prejudiced the defendant that the outcome of the proceeding would have been different but for the failure to file the motion in limine. As the following will show, counsel's performance was neither deficient nor prejudicial.

This claim was the subject of an evidentiary hearing below. The trial court reviewed the legal argument and the evidence, including defense counsel's testimony on the issue and denied relief finding neither deficient performance nor prejudice. The court explained:

The State responds that the inclusion of the portion of his confession that prejudice towards Denise Roach may have set in during the attack was not so prejudicial that confidence in the outcome of the proceedings was undermined. (See response, page 15, attached) The State cites to Strickland, and asserts Defendant cannot show that "but for failing to object to the inclusion of this statement in the confession there is a reasonable probability" the result of the proceeding would have been different. (See response, page 15-16, attached)

This Court agrees. Defense counsel Hernandez testified he believed the fact Defendant may have had some prejudice toward the victim was "inextricably intertwined with the facts of the case." (See 17 August 2007 transcript, page 121, attached) He admitted the racial bias aspect of Defendant's confession could have been prejudicial, but in his opinion, it was not a target for a motion in limine. (See 17 August 2007 transcript page 121-122, 133-135, attached)

As cited by the State, the test for admissibility of evidence is relevancy. Smith v. State, 866 So.2d 51, 61 (Fla. 2004). In Smith, the Florida Supreme Court held admissible, testimony from an eyewitness regarding the defendant's statement that the victim was the thirteenth or fourteenth person he had shot. Id. at 62. The Court noted "[a]ll evidence that points to a defendant's commission of a crime is prejudicial." Id. at 61.



The fact that evidence of racial bias was prejudicial does not mean counsel was deficient for failing to attempt to exclude the evidence. Rather, it was the reasonable professional judgment of counsel to believe the racial bias was inextricably intertwined with the crime charged. Defendant does not establish that inclusion of the racial bias statement from his confession was so prejudicial that confidence in the outcome was undermined.

Neither defense counsel was (sic) not deficient in their performance. Claim I (B) is denied.

(PCR 2/317-19)(footnotes omitted)

This Court has upheld the admission of racial comments contained in the defendant's confession where the statement was relevant and there is no evidence that there was any attempt to inject race as an issue in the trial, or an impermissible appeal to bias and prejudice. This issue was thoroughly discussed in *Jones v. State*, 748 So. 2d 1012, 1023 (Fla. 1999), wherein this Court affirmed the admission of racial comments made by Jones during a statement to police. Citing to the holdings in *Phillips v. State*, 476 So. 2d 194, 196 (Fla. 1985), receded from on other grounds, *Rogers v. State*, 511 So. 2d 526, 533 (Fla. 1987) (holding that admission testimony of a fellow inmate that the defendant used racial slurs when referring to the victim was relevant to discredit appellant's alibi and to explain the context of an incriminating admission and not error) and *Robinson v. State*, 574 So. 2d 108, 113 (Fla. 1991) (rejecting as "meritless" the black defendant's argument that his statement to police about shooting a "white

woman" should have been edited to avoid the risk of racial prejudice), this Court explained:

In this case the jury was informed that Jones used a racial slur when he first gave his version of events to explain the scratches on his face in an attempt to deny his involvement in the murder. The detective did not repeat the racial slur but only indicated that a racial slur was used. Therefore, in this case we do not agree that the comments constituted impermissible appeals to the biases or prejudices of the jurors.

Although we strongly caution prosecutors against eliciting testimony involving racial slurs unless absolutely necessary, we understand that there are limited circumstances where the use of such offensive terms may be directly material to the issues in the case or to the testimony being offered. In this case, although we agree that it was necessary to tell the jury of Jones' initial explanation concerning the source of the scratch marks, we question whether it was necessary for Detective Parker to mention that a racial slur was used by Jones. In circumstances such as this, we strongly suggest that prosecutors err on the side of caution by omitting these statements and that trial courts consider the danger that the prejudicial effect of such evidence will substantially outweigh any probative value. See § 90.403, Fla. Stat. (1995).

However, in this case, we do not find that there was any attempt to inject race as an issue in the trial, or an impermissible appeal to bias and prejudice. We further note that Jones was a white male charged with murdering a white female. In addition, the actual racial slur was not used before the jury and the comment was not repeated or subsequently highlighted. Based on the foregoing, we find that even if the admission of this reference to Jones using a racial slur was error, it was harmless beyond a reasonable doubt. See *DiGuilio*, 491 So. 2d at 1135.

*Jones v. State*, 748 So. 2d 1012, 1023 (Fla. 1999)

See, also, *Sliney v. State*, 699 So. 2d 662, 669-670 (Fla. 1997) (upholding admission of tape-recorded conversations of

defendant containing offensive language and racial epithets over objection that these particular portions of the transcript lacked any probative value and served only to portray Sliney in a bad light.) This statement was relevant and admissible as it was inextricably intertwined with the confession and was relevant to prove Smithers' identity and intent to commit the homicide. At trial, Smithers testified that Mr. X killed Denise Roach. He claimed that Roach got into an argument with Mr. X and Mr. X hit Roach in the head with a hatchet. Smithers testified that he just stood and watched until Mr. X ordered him to drag Roach's body to the pond after Mr. X hit Smithers with a tire tool. *Smithers v. State*, 826 So. 2d 916, 921 (Fla. 2002). The statement by Smithers that he hit Roach and continued to do so because "some prejudice may have set in because she was black" refutes that claim by establishing that not only was he the perpetrator but also that his continued beating of her was for his own reasons not at the behest of any "Mr. X." Cf. *Smith v. State*, 866 So. 2d 51, 58 and 62 (Fla. 2004) (finding comment "that was the 13th or 14th people that had been--that he had shot" was relevant to the identity of Smith as the shooter and rebutted defense); *Coolen v. State*, 696 So. 2d 738, 742 (Fla. 1997) (finding references to defendant's previous criminal convictions and prison sentences was relevant to a material issue, "state of mind"). As this statement was relevant and admissible, counsel cannot be deemed deficient for failing to

raise a nonmeritorious objection. *Asay v. Moore*, 828 So. 2d 985, 990 (Fla. 2002).

Even if this Court were to disagree with the lower court and find that no reasonable counsel would have failed to seek to exclude the challenged statement, Smithers must still satisfy the prejudice prong of *Strickland*, i.e. but for the introduction of this statement there is a reasonable probability that the result of the proceeding would have been different. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. As the lower court found, in light of the other evidence, including eyewitness testimony, the defendant's own confessions and physical evidence tying him to the crimes, the inclusion of this statement was not so prejudicial that confidence in the outcome was undermined. The lower court properly denied this claim.

## ISSUE II

### WHETHER THE LOWER COURT CORRECTLY FOUND THAT DEFENDANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL DURING THE PENALTY PHASE OF HIS CAPITAL TRIAL.

Appellant next contends that his counsel was ineffective during the penalty phase for 1) failing to provide more information to the mental health experts and 2) failing to hire an independent medical examiner to refute the possibility that Christy Cowan drowned. Evidence on both claims was taken at the evidentiary hearing and relief was properly denied.

#### A) Inadequate Information to Mental Health Experts

This is not a case where postconviction counsel produced evidence of the defendant's background and history that trial counsel failed to discover and failed to provide to his experts. Rather, in the instant case, the two incidents that Smithers now claims should have been provided to Dr. Maher were known to counsel and counsel claims, which the record supports, that they were given to Dr. Maher. Thus, the question is not whether counsel was ineffective for failing to investigate but, rather, an issue of communication and whether, if there was an absence of communication, it constitutes deficient performance which prejudiced appellant. *Philmore v. State*, 937 So. 2d 578, 586 (Fla. 2006) (concluding that even if Dr. Maher would have been more successful at establishing statutory mitigation than Dr. Berland,

the standard for assessing ineffective assistance claims "is not how present counsel would have proceeded, in hindsight, but rather whether" the defendant has established both deficient performance and prejudice under *Strickland*.) As the following will show, the postconviction court properly denied this claim of ineffective assistance of counsel.

At the evidentiary hearing Smithers presented the testimony of Dr. Maher who had testified on behalf of Smithers during the penalty phase. Dr. Maher testified that he was retained by trial counsel in 1997 to do a mental status examination on Smithers. (PCR 7/1059-60) Toward that end, he did testing, he reviewed school records, he interviewed family members and he consulted with Dr. Wood and Dr. Berland. (PCR 7/1060-62) Both he and Dr. Berland gave Smithers an MMPI2 on which Smithers scored high on the psychosis scale. He defined psychosis as a break with reality. (PCR 7/1067) At the time he did not diagnose Smithers as psychotic although Dr. Berland did. He explained that he found no direct indications of hallucinations or delusions but there was a possibility that Smithers may have suffered with hallucinations or delusions. (PCR 7/1069) At the postconviction hearing he had changed his diagnosis based on the investigator's report which documented Smithers' claim that he was talking to his neighbor Snyder when a Bentley rolled up. Dr. Maher now believes that because Snyder denied seeing a Bentley, it is a strong suggestion

of psychosis or a drug-induced delirium or some other very substantial disturbance of perception and reality on Smithers' part. (PCR 7/ 1074) He believed that including Snyder in the story either shows 1) intellectual impairment, which is not present in this case, to think that no one would contact Snyder or 2) that he was out of touch with reality and believed what he was saying was true. (PCR 7/1074) This action coupled with his prior information now led him to concur with Dr. Berland. (PCR 7/1075) He also concluded that Smithers' claim of hearing the victim calling out when Mrs. Whitehurst did not is evidence of psychosis. (PCR 7/1081) Although he now claims he was unaware at the time of trial that Mrs. Whitehurst denied hearing any noise from the pond, during the penalty phase of the trial, Dr. Maher acknowledged on the record that he knew Smithers heard voices that Ms. Whitehurst did not hear. (PCR 7/1083, 1100)

Contrary to the claim that he had not received the information, attorney Robbins testified that he provided copies of Smithers' testimony to his experts, as well as all information he received prior to trial. (PCR 8/ 1189) With regard to Dr. Maher, counsel testified that he believed Dr. Maher was aware of his investigator's memorandum that Smithers said Dean Snyder was there when Mr. X drove up and he thinks it was factored into Dr. Maher's diagnosis. (PCR 8/1217) Additionally, his recollection is different from the memorandum; he did not recall Smithers saying

that Dean Snyder had actually interacted with Mr. X, only that Snyder was outside and Smithers had been talking to him. (PCR 8/1213) He did not perceive Smithers' statement to be evidence of a hallucination. (PCR 8/1217) He thought it could be just a bad detail or a bad lie. (PCR 8/1218)

As the postconviction court found, the fact that Dr. Maher has now altered his diagnosis does not establish ineffective assistance of counsel. *Hodges v. State*, 885 So. 2d 338, 347 (Fla. 2003) (rejecting similar claim after Dr. Maher changed his diagnosis); *Davis v. State*, 928 So. 2d 1089, 1124 (Fla. 2005) (noting that the trial court was not persuaded by Dr. Maher's new diagnosis and found Dr. Merin's testimony to be more persuasive). The court explained:

Despite the change in Dr. Maher's diagnosis from trial to the evidentiary hearing, changed opinions in the post conviction proceeding do not establish ineffective assistance of counsel. *Hodges v. State*, 885 So. 2d 338, 347 (Fla. 2004). In *Hodges*, as in the instant case, Dr. Maher changed his opinion testimony at the evidentiary hearing based on additional information provided to him by post conviction counsel. *Id.* at 346. The Court held "[the] pertinent inquiry remains whether counsel's efforts fell outside the 'broad range of reasonably competent performance under prevailing professional standards.'" *Id.* (citation omitted). The Court determined *Hodges*' penalty phase counsel performed in accordance with those standards. *Id.*

The record reflects counsel Robbins was experienced with capital cases and was aware of the difference in opinions of the two mental health experts - Dr. Berland and Dr. Maher - whose testimony he presented in mitigation. (See 17 August 2007 transcript pages 167-168, 173-174, attached) In addition to the mental health experts, counsel presented testimony of family members and others



to demonstrate childhood physical and emotional abuse, religious devotion, and that he was a good, loving, and caring husband and father.

Defense counsel Robbins was not deficient in his performance. Claim II (G) is denied.

(PCR 2/338-39)

Moreover, considering that defense counsel testified that he gave all of the information to Dr. Maher as compared to Dr. Maher's failure to recall receiving the information that he previously testified about during the penalty phase, Smithers has simply failed to prove his claim that the expert was not given adequate information. The bottom line is Smithers had two mental health experts who did extensive testing and preparation and to whom experienced defense counsel gave comprehensive information. The postconviction court properly found no deficient performance.

Further, even if counsel were deficient, appellant must still establish prejudice, i.e. that there is a reasonable probability that the result of the proceeding would have been different. A review of the trial court's sentencing order alone refutes any contention that this minor change in diagnosis would have altered the outcome. As previously noted, in the sentencing order, the trial court found the following three aggravators for the Cowan murder: (1) previous violent felony (contemporaneous murder), (2) the murder was especially heinous, atrocious, or cruel (HAC), and (3) the murder was committed in a cold, calculated, and

premeditated manner without any pretense of moral or legal justification (CCP); and two aggravators for the Roach murder: (1) previous violent felony (contemporaneous murder) and (2) HAC. (DR 2/246-53; DT 19/2366-73).

These aggravators were balanced against the following which the trial court found in mitigation: (1) the murder was committed while Smithers was under the influence of extreme mental or emotional disturbance (moderate weight) and (2) Smithers' capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of the law was substantially impaired (moderate weight). The trial court also found the following nonstatutory mitigators: (1) Smithers was a good husband and father, (2) Smithers enjoyed a close relationship with his siblings, (3) Smithers was physically and emotionally abused by his mother as a child, (4) Smithers regularly attended church and was devoted religiously, (5) since being arrested, Smithers has been a model inmate and he would conduct himself appropriately in a prison setting, (6) Smithers has made several contributions to the community, and (7) Smithers confessed to the crimes, but his trial testimony was in conflict with his statements to the detectives. All of the nonstatutory mitigators were given moderate weight. Finally, the court gave great weight to John Cowan's request that Smithers be given a life sentence. (DR 2/R254-60; DT 19/2375-82)

Considering the foregoing, Smithers has not carried his burden

to establish that but for counsel's failure to obtain yet another diagnosis of psychosis the outcome of the proceeding would have been different. *Philmore v. State*, 937 So. 2d 578, 587 (Fla. 2006) (finding that even if decision not to call Dr. Maher to testify could be considered deficient performance, this failure did not "deprive[] the defendant of a reliable penalty phase proceeding" where counsel presented two experts and several lay witnesses to establish mitigation.)

As Smithers has not established either deficient performance or prejudice, relief was properly denied.

**B) Failure to Hire Independent Medical Examiner**

Smithers' next claim is that counsel was ineffective for failing to hire an independent medical examiner to refute evidence that Cristy Cowan may have drowned. The postconviction court denied this claim stating:

Defendant alleges competent counsel would have retained an independent medical examiner to refute Medical Examiner Hair's testimony at trial. (See amended motion, pages 34-37, attached) He contends that the heinous, atrocious and cruel (HAC) and cold, calculated and premeditated (CCP) aggravators would have been vitiated had an independent medical expert refuted the medical examiner's testimony that Christy Cowan was alive when she was placed in the pond. (See amended motion, page 38, attached)

The State cites to both this Court's sentencing order where drowning was not mentioned as a factor in finding CCP, and the Florida Supreme Court's opinion where drowning was not mentioned as a factor in determining the CCP aggravator. (See response, pages 27-29, citing Smithers v. State, 826 So. 2d 916, 929-930 (Fla. 2002), attached)

The State also cites to this Court's sentencing order where the HAC aggravator was based on the beating aspect of the crime rather than the potential drowning aspect. (See response, pages 30-31, see 25 June 1999 sentencing order, attached)

At the evidentiary hearing counsel Robbins testified his strategy was to use Dr. Hair's testimony to the benefit of the defense by proving there was no definitive answer as to the cause of death. [fn25]

[fn25] Q. Based on the information that you had, did you find it necessary to hire another expert?

A. My decision at the time was that we had what we needed to make the arguments we were trying to make from Dr. Hair's testimony. At that time that was what we proceeded with, that she wasn't given a definitive strangulation over the blunt trauma. She really wasn't saying which it was. . . . And so to show that there was, you know, there was a particular painful or drawn out or cruel death was something that she really didn't nail down very well. And so that was the point we were trying to make was that that wasn't prove.

Q. You believe you got that out of Dr. Hair?

A. We did our best to try to get that.  
(See 17 August 2007 transcript, page 204)

Counsel was not deficient for failing to hire another medical expert to refute the medical examiner's testimony. Neither this Court nor the Florida Supreme Court relied on drowning as a factor for finding the HAC or CCP aggravators.

Defense counsel were not deficient in their performance. Claim II (H) is denied.

(PCR 2/339-41)

As the court correctly noted, Smithers' assertion that a defense expert would have been able to refute evidence which established that Cowan was alive when she was put in the pond

undermining two aggravating factors - HAC & CCP, is not supported by the evidence as neither court relied on the drowning to support either factor. In support of the CCP factor, this Court did not rely on the drowning, stating, in pertinent part:

In claim five, Smithers challenges the trial court's finding of CCP for the Cowan murder. In order to prove the existence of the CCP aggravator, "the State must show a heightened level of premeditation establishing that the defendant had a careful plan or prearranged design to kill." *Bell v. State*, 699 So.2d 674, 677 (Fla.1997). The State attempted to prove this aggravator for the Cowan murder by establishing that Smithers murdered Roach in a similar fashion in the previous seven to ten days. The trial court stated the following in the sentencing order:

When Samuel Smithers drove Cristy Cowan to the property, he knew that he had killed Denise Roach; he knew that her body was still on the property; he knew that he had only \$26 on his person to pay for sex; he locked the gate behind him after he drove onto the property. His premeditated design to kill Cristy Cowan was heightened beyond a reasonable doubt. His actions demonstrated a cool and calm reflection.

The State's argument is strengthened by the fact that the murder was not committed during sex, as the condom wrapper that Cowan was carrying was found in the house but Mrs. Whitehurst saw a pool of blood in the carport. Thus, the case is distinguishable from those cases where the victim was killed while the victim and the defendant were engaged in sexual activity. See, e.g., *Randall v. State*, 760 So.2d 892 (Fla.2000) (holding that evidence of defendant's history of choking women to heighten sexual arousal did not prove premeditation). The State's argument is further strengthened by the identical manner in which the two murders were committed. Both women were prostitutes, both were picked up at the same location and taken to the Whitehurst property, and, after having a sexual encounter with Smithers, both were lured into the carport, seemingly murdered with tools kept in the carport, and then dragged into the same pond. The time between the murders was a matter of days. Had Smithers only intended to have sex with Cowan, there would have

been no need to leave the Luxury Motel. Rather, when Smithers picked up Cowan and asked her to come with him to the Whitehurst property, he was taking the first step towards committing the same crime that he committed just days earlier, and the same location was accessible, the same murder weapons were already in place, and the same hiding place existed for the body.

\* \* \*

For all of these reasons, we find no merit to Smithers' CCP claim. There is competent, substantial evidence in the record to support the existence of the CCP aggravator for the Cowan murder.

*Smithers*, at 929 -930.

This Court's sentencing order also did not rely upon this fact in support of the finding. The court stated:

3. The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. Section 921.141(5)(i), Florida Statutes.

Seven to fourteen days later, Samuel Smithers picked up Cristy Cowan at the same Hillsborough Avenue motel at approximately 6:00 p.m. after his work day to have sex for money, and after traveling well out of his normal route to his home in Plant City. He took her to the same secluded property, locked the gate behind him, had sex with her, and then violently killed her as has been previously described, which included inflicting facial and head trauma with an axe and a hoe, strangling her, and possibly drowning her.

When Samuel Smithers drove Cristy Cowan to the property, he knew that he had killed Denise Roach; he knew that her body was still on the property; he knew that he had only \$26.00 on his person to pay for sex; he locked the gate behind him after he drove onto the property. His premeditated design to kill Cristy Cowan was heightened beyond a reasonable doubt. His actions demonstrated a cool and calm reflection, and no pretense of legal or moral justification.

The Court concludes that this aggravating circumstance was proven beyond a reasonable doubt as to the homicide of Cristy Cowan, but that heightened premeditation to kill was not proven beyond a reasonable doubt as to the homicide of Denise Roach.

The Court accorded this circumstance great weight in determining the appropriate sentence for the homicide of Cristy Cowan charged in count 1 of the Indictment.

The Court did not consider this circumstance in determining the appropriate sentence for the homicide of Denise Roach charged in count 2 of the Indictment.

(V2/250-253)

The HAC factor with regard to Cowan was not raised on direct appeal but the basis was set forth in the sentencing order as follows:

2. The capital felony was especially heinous, atrocious, or cruel. Section 921.141(5)(h), Florida Statutes.

Was the murder of Cristy Cowan or Denise Roach a conscienceless or pitiless crime and unnecessarily torturous to the victim? If so, it meets all of the constitutional standards, those of the Florida Supreme Court and those of the United States Supreme Court. Both Courts agree that "strangulation when perpetrated upon a conscious victim involves full knowledge of death, extreme anxiety and fear, and that this method of killing is one to which the factor of heinousness is applicable." *Sochro [sic] v. State*, 580 So.2d 595 (Fla. 1991) reversed on other grounds, *Sochro [sic] v. Florida*, 504 U.S. 527 (1992); *Sochro [sic] v. State*, 619 So.2d 285 (Fla. 1993); *LeCroy v. State*, 533 So.3d [sic] 750 (Fla. 1988); *Zeigler v. State*, 580 So.2d 127 (Fla. 1991); *Wasko v. State*, 505 So.2d 1314 (Fla. 1987); *Windom v. State*, 656 So.2d 432 (Fla. 1995).

The strangulation death of a conscious victim is in and of itself a crime which is heinous, atrocious, or cruel. *Orme v. State*, 677 So.2d 258 (Fla. 1996).

The evidence established beyond a reasonable doubt that the death of Cristy Cowan was caused by or involved blunt impact to her face and head, manual strangulation, and possible drowning. Medical Examiner Hair opined that the face and skull injuries were consistent with blows from an axe and a garden hoe.

Samuel Smithers confessed that during an argument over money he owed her for sex, he hit Cristy Cowan on the head with an axe and dragged her to a pond and threw her in, and that he thereafter heard her moaning, and then "finished her off" with a garden hoe.

\* \* \*

Samuel Smithers testified at trial that he watched another person murder Denise Roach. He testified that she was alive, conscious, and screaming during several of the blows she received from an axe that were inflicted by that person. He testified that he was forced to place her body in the pond, and that on a later date, he was forced to place Cristy Cowan's body in the same pond after she was killed by another person. This testimony was rejected by the jury.

As to both of the homicides, this Court notes that the Supreme Court has found the following similar homicides to be heinous, atrocious or cruel. *Bogle v. State*, 655 So.2d 1103 (Fla. 1995)(striking victim seven times with piece of concrete); *Penn v. State*, 574 So.2d 1079 (Fla 1991)(beating victim to death with hammer); *Chandler v. State*, 534 So.2d 701 (Fla. 1988)(beating victim to death with bat); *Lamb v. State*, 532 So.2d 1051 (Fla. 1988)(beating victim on head to death with hammer); *Williamson v. State*, 681 So.2d 688 (Fla. 1996); *Orme v. State*, 677 So.2d 258 (Fla. 1996); *Whitton v. State*, 649 So.2d 861 (Fla. 1994); and *Lawrence v. State*, 698 So.2d 1219 (Fla. 1997).

In every respect, the killing of each victim was done by the Defendant without conscience on his part, and without pity, and each homicide was extremely torturous to the victim.

This aggravating factor was proven beyond a reasonable doubt as to both counts and was accorded great weight by the Court in determining the appropriate sentences.

(DR 2/247-48)



As the HAC finding was based on the beating aspect of the crime, the failure to challenge the drowning aspect of the crime cannot be shown to have prejudiced appellant.

Additionally, a comparison of the testimony of the latest expert with Dr. Hair's trial testimony shows that their conclusions were very similar. Dr. Hair testified that the victim's death was caused by or involved blunt impact to her face and head, manual strangulation, and possible drowning. Medical Examiner Hair opined that the face and skull injuries were consistent with blows from an axe and a garden hoe, but that the presence of the foam cone made it possible that the victim was alive when she was thrown in the pond. (DT 7/682, 700-22) Smithers' new expert, Dr Ronald Keith Wright, testified that it was his opinion that Ms. Cowan died of asphyxiation as a result of manual strangulation, but conceded that it was possible that she died of drowning. (PCR 7/1018)

Moreover, trial counsel testified that his decision at the time was that "we had what we needed to make the arguments we were trying to make from Dr. Hair's testimony. At that time that was what we proceeded with, that she wasn't given a definitive strangulation over the blunt trauma. She really wasn't saying which it was. . . . And so to show that there was, you know, there was a particular painful or drawn out or cruel death was something that she really didn't nail down very well. And so that was the

point we were trying to make was that that wasn't proven." (PCR 8/1208) As this was a reasonable strategic decision, under *Strickland*, it is virtually unchallengeable. *Strickland v. Washington*, 466 U.S. 668, 690 (U.S. 1984) (strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable.)

Further, Smithers has failed to show that he was prejudiced. Given the fact that the drowning was not the primary basis of either factor and in light of the weighty aggravators found in the Cowan murder, including a second virtually identical homicide, there is no reasonable probability that the outcome would have been different.

The trial court properly denied the claim and this Court should affirm the denial.

#### CONCLUSION

Based on the foregoing facts, arguments and citations of authority, the state respectfully requests that this Court AFFIRM the denial of Smithers' motion for postconviction relief.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF OF APPELLEE has been furnished U.S. Regular mail to Richard E. Kiley, Assistant Capital Collateral Regional Counsel - Middle Region, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619-1136 and to Ada Carmona, Assistant State Attorney, 800 E. Kennedy Blvd., Tampa, Florida 33602-4147, this 11th day of August, 2008.

**CERTIFICATE OF FONT COMPLIANCE**

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

Respectfully submitted,

BILL McCOLLUM  
ATTORNEY GENERAL

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CANDANCE M. SABELLA  
Chief Assistant Attorney General  
Capital Appeals Bureau Chief  
Florida Bar No. 0445071  
Concourse Center 4  
3507 E. Frontage Road, Suite 200  
Tampa, Florida 33607-7013  
Telephone: (813) 287-7910  
Facsimile: (813) 281-5501

COUNSEL FOR APPELLEE