IN THE SUPREME COURT OF FLORIDA
CASE NO. SC07-2258

Samuel L. Smithers
Appellant,
v.
STATE OF FLORIDA
Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE 13th JUDICIAL CIRCUIT FOR HILLSBOROUGH COUNTY,
STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

RICHARD E. KILEY
Fla. Bar No. 0558893
STAFF ATTORNEY

JAMES VIGGIANO, JR.
Fla. Bar No. 0715336
STAFF ATTORNEY

ALI A. SHAKOOR
Fla. Bar No. 0669830
STAFF ATTORNEY
CAPITAL COLLATERAL REGIONAL COUNSEL
MIDDLE REGION
3801 Corporex Park Drive, Suite 210
Tampa, Florida 33619
(813) 740-3544

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REQUEST FOR ORAL ARGUMENT

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

STATEMENT OF THE CASE AND FACTS

I. PROCEDURAL HISTORY

A Hillsborough County grand jury returned a two-count indictment on June 12, 1996 charging Samuel Smithers with the first degree murders of Cristy Cowan and Denise Roach. (FSC ROA VOL. I p. 22-23). The murder of Cowan was alleged to have taken place May 28, 1996 and the murder of Roach sometime between May 12, 1996 and May 28, 1996. (FSC ROA Vol. I p. 22).

Prior to trial, Mr. Smithers filed motions on May 21, 1998 to sever the offenses and to suppress his confession. (FSC ROA Vol. I p. 64-67). The court issued an order denying the motion to suppress confession on July 22, 1998. (FSC ROA Vol. I p. 69-73A). After hearing additional argument concerning the motion to sever on August 13, 1998 (FSC ROA Vol. SII 235-71), the judge entered a written order denying severance August 24, 1998. (FSC ROA Vol. I p. 81-85).

The case proceeded to trial before Judge Fuente and a jury. The jury returned verdicts of guilty as charged on both counts. (FSC ROA Vol. II p. 164-5; Vol. XI p. 1338). Mr. Smithers filed a motion for new trial which was heard and denied by the court on January 23, 1999. (FSC ROA Vol. XVII p. 2235-8).

The penalty phase commenced on January 22, 1999. (FSC ROA Vol. II p. 193 XII p.1357). The jury recommended that Mr. Smithers be sentenced to death for both murders. (FSC ROA Vol. II p. 209; XVIII p. 2351). A Spencer hearing was held on April 15 and 16, 1999. (FSC ROA Vol. SIII p. 425-541; SVI p.759-79). Sentencing was held June 25, 1999, at which time the court read his sentencing order. (FSC ROA Vol. II pl 245-61; XIX p. 2362-82). The court concluded that as to both homicides, the aggravating circumstances outweighed the mitigating circumstances. (FSC ROA Vol. II p. 259-60; XIX p. 2381-2; A 15-16). Two sentences of death were imposed. (FSC ROA Vol. II p. 260, 264-74; XIX p. 2382, A 16). Mr. Smithers' notice of appeal was filed July 19, 1999. (FSC ROA Vol. II p. 275-6).

The Florida Supreme Court affirmed the conviction and sentences on May 16, 2002 in Smithers v. State, 826 So.2d 916 (Fla.2002). The mandate was issued on September 13, 2002. A petition for certiorari was filed with the United States Supreme Court and denied on February 24, 2003.

On December 22, 2003, Mr. Smithers filed a 3.851 Motion for Postconviction Relief With Special Request For Leave To Amend before he had received the public

records to which he was entitled under 3.853(e) and the records that were the subject of his Demand. Mr. Smithers filed the 3.852 at that time to comply with Florida Rule of Criminal Procedure 3.851 and preserve his rights to federal review. At the same time, Mr. Smithers filed a Motion to Amend once the public records acquisition process was complete.

On January 28, 2004, the Court issued an Order, directing the State to respond to both motions within 60 days of December 22, 2003. On February 20, 2004, the State filed a response to the 3.851 motion. On February 26, 2004, Mr. Smithers filed a Request for Additional Public Records, directed to the Office of the State Attorney. The Court denied the request for additional public records at a hearing on March 17, 2004.

Mr. Smithers filed on July 13, 2004 his Renewed Motion For Incamera Review Of Records The State Attorney Marked Exempt From Disclosure Under Florida Rule Of Criminal Procedure 3.852. The hearing on the motion was held on July 22, 2004. The court, on October 12, 2004, entered an Order Denying Renewed Motion For In Camera Review Of Records The State Attorney Marked Exempt From Disclosure Under Florida Rule Of Criminal Procedure 3.852.

Status reviews were held on December 13, 2004 and on March 7, 2005. The Defendant's Second Renewed Motion for In Camera Review of Records the State Attorney Marked Exempt from Disclosure Under Florida Rule of Criminal Procedure

3.852 was filed on March 4, 2005 and heard on April 20, 2005. On April 25, 2005, The court issued an Order For In Camera Review Of Records The State Attorney Marked Exempt From Disclosure Under Florida Rule Of Criminal Procedure 3.852.

Status reviews were set on July 11, 2005, July 20, 2005, August 24, 2005, and November 3, 2005. The Defendant's last Amended Motion to Vacate Judgement of Conviction and Sentence was filed on April 5, 2006. An evidentiary hearing was held on the 16th and 17th of August, 2007. Both the State and the Defendant waived oral and written closing arguments. The trial court issued a written denial of the Amended Motion To Vacate Judgment Of Conviction And Sentence on October 24, 2007. This appeal follows.

EVIDENTIARY HEARING FACTS

A. Testimony of Ronald Keith Wright, M.D.

Dr. Wright was a forensic pathologist and testified at the evidentiary hearing telephonically. Dr. Wright was tendered as an expert in the field of forensic pathology. (PCR Vol. VII p. 1015). Dr. Wright was retained to render an opinion as to the cause of death of Christy Cowan. He reviewed the police report, the autopsy report, photographs taken at the scene and autopsy, and the testimony of Dr. Hair at the trial of Mr. Smithers. (PCR Vol. VII p. 1016). Dr. Wright opined that Christy Cowan was asphyxiated; her neck was compressed with internal hemorrhage and consistent with manual strangulation. (PCR Vol. VII p. 1018). Dr. Wright further opined that

Cowan's lungs were "relatively light" in that a normal drowning victim's lungs would weigh 1.000 grams or more and in Cowan's case her lung weights were down in the 400 to 500 gram range, which while not completely disproving drowning, it's certainly inconsistent with drowning. (PCR Vol. VII p. 1019). There was no hemorrhaging to the mastoid air sinuses which is seen in people who struggle when they drown. (PCR Vol. VII p. 1019).

Dr. Wright testified that when a person drowns in freshwater, the blood volume goes up remarkably and the result is acute right-heart fibrillation. It is seen in almost all drowning cases and was absent in this case. (PCR Vol. VII p.1020).

Dr. Wright detailed the blunt impact blows. All of the wounds appear to either be perimortem or postmortem. (PCR Vol. VII p. 1020-21). Dr. Wright testified that in all probability, Cowan was manually strangled first and then hit after she was strangled. (PCR Vol. VII p. 1023).

B. Testimony of Cereesa "Mikey" Snyder

Ms. Snyder was a neighbor of Mr. Smithers and had been for ten years prior to his arrest. (PCR Vol. VII p. 1033). Ms. Snyder described Mr. Smithers as being "a little slow", friendly, sweet and good to her children. Then she began to see a change. (PCR Vol. VII p. 1034). There was an occasion in 1996 when she and her husband went to California for their 20th anniversary and her mother babysat their children. (PCR Vol. VII p. 1034). While in California, Ms. Snyder received a call from her

mother who was babysitting the Snyder children. (PCR Vol. VII p. 1034). This phone call took place in May of 1996; between the first murder and the second murder. (PCR Vol. VII p. 1035). Caresa Snyder learned through her mother, that Smithers had been "ranting and raving." Smithers looked wild eyed and made statements about "killing niggers" in Tennessee. (PCR Vol. VII 1035).

Prior to the initial murders, Ms. Snyder had taken a youth group to ski and had asked Mr. Smithers and his wife Sharon to watch their home; they had been given a key for that purpose. The couple came home from the ski trip on New Year's Eve day. (PCR Vol. VII p. 1035). The Snyders returned a day earlier than expected. When they arrived home, they found that every drawer was pulled out and the contents scattered. Every small appliance was put on the kitchen table as if the burglar was going to come back later. Cereal had been eaten. Someone had gone in the garage and "messed around." In Ms. Snyder's bedroom, all of her underwear was out of the drawer and laying on her side of the bed. The police were called. (PCR Vol. VII p. 1036). The only item that was missing was a Black and Decker electric screwdriver. Later, when Sharon Smithers and her son Jonathan were moving out of their home, Ms. Snyder's son went over to help. In the garage, the Black and Decker screwdriver that had been taken from the Snyder home was found. (PCR Vol. VII p. 1037). Ms. Snyder testified that she had never been contacted by trial counsel and would have been willing to testify at Mr. Smithers' trial. (PCR Vol. VII p. 1042).

C. Testimony of Gerald Dean Snyder

Gerald Dean Snyder testified at the evidentiary hearing. (PCR Vol. VII p.1047-1057). Mr. Snyder testified that he knew Samuel Smithers for approximately ten years before Smithers' arrest. (PCR Vol. VII p. 1047). Mr. Snyder did not enjoy socializing with Mr. Smithers because Mr. Snyder felt that the dialogue sometimes was somewhat difficult for Sam Smithers due to the fact that Mr. Snyder considered Sam Smithers to be "somewhat slow". (PCR Vol. VII p. 1048). Mr. Snyder was aware of the influence of Mr. Bill Powell, father-in-law to Sam Smithers. (PCR Vol. VII p. 1049). Mr. Snyder described Mr. Powell's relationship to the Smithers family as very close. Mr. & Mrs. Powell were always there at Christmastime and they had an ongoing relationship with Sam's son Jonathan. Mr. Powell was very active in their church and community. Mr. Powell became ill and he progressed to the point to where he was in a nursing home. (PCR Vol. VII p. 1049). Mr. Snyder testified that this had a large impact on Sam Smithers because Mr. Powell was the stabilizer of the family and also provided supplemental income at times. Mr. Powell also provided work opportunities for Sam Smithers. (PCR Vol. VII p. 1049). After Mr. Powell became ill, Mr. Snyder noticed that Sam lost a couple of jobs and the stress level for Sam became increasing larger than where it was before. Obviously, Mr. Powell was a large influence on Sam. (PCR Vol. VII p. 1049-50). Mr. Snyder testified that he had seen a Bentley before and would have recognized a Bentley if he had seen one outside of his home in 1996.

(PCR Vol. VII p. 1050).

Mr. Snyder testified that he never saw a Bentley pull up in front of his house while he was talking to Sam Smithers. There was no man in his 40s with a salt and pepper beard who allegedly got out of the Bentley while Mr. Snyder and Sam Smithers were talking, and he certainly would have remembered it if the incident happened. (PCR Vol. VII p. 1050-1). Mr. Snyder testified that if he was contacted at the time of trial he would have been willing to testify. (PCR Vol. VII p. 1052). On cross examination, Mr. Snyder testified that upon Mr. Powell's entry into the nursing home, Mr. Snyder noticed that Sam had "glassy eyes" and was withdrawn. (PCR Vol. VII p. 1055).

D. Testimony of Dr. Michael Scott Maher, M. D.

Dr. Michael Scott Maher, M.D. testified at Mr. Smithers' trial and at the evidentiary hearing. Dr. Maher was qualified as a medical doctor and an expert in the field of forensic psychiatry. (PCR Vol. VII p. 1058). Dr. Maher was retained by trial counsel to evaluate Mr. Smithers for his original trial. (PCR Vol. VII p. 1059).

At his original trial, Dr. Maher evaluated Mr. Smithers by reviewing records including police investigation records. He interviewed Mr. Smithers, and performed a mental status examination on him. Dr. Maher also reviewed a number of depositions of significant case witnesses. (PCR Vol. VII p. 1060).

Dr. Maher also interviewed Mr. Smithers' then wife, Sharon and consulted with

Dr. Wood and Dr. Berland, and eventually recommended that Mr. Smithers get a PET scan. (PCR Vol. VII p. 1061). Dr. Maher also performed some psychological tests on Mr. Smithers and reviewed his school records. (PCR Vol. VII p. 1061-62). It was clear to Dr. Maher that early on in the investigation and evaluation, and after meeting Mr. Smithers, it was extremely important for Mr. Smithers to appear psychologically normal. (PCR Vol. VII p. 1062). The importance of appearing psychologically normal is prevalent in clinical as well as forensic patients. Dr. Maher opined that seriously mentally ill people do not want others to know that they have a serious mental illness. (PCR Vol. VII p. 1063).

Dr. Maher described his clinical interview with Mr. Smithers as talking to him about general matters related to his life background and circumstances. (PCR Vol. VII p. 1064). Dr. Maher also spoke to Smithers about his present-day situation. At the initial evaluation the circumstances were focused on Mr. Smithers being incarcerated and charged with two counts of murder. Dr. Maher observed his emotions and his inner actions. He asked Mr. Smithers some specific kinds of questions to try to get at underlying psychological issues and problems. Dr. Maher repeated those procedures a number of occasions in order to attempt to reveal and enlighten himself with regard to any factors that Mr. Smithers may be reluctant to reveal. (PCR Vol. VII p. 1065). Dr. Maher remembered testifying at trial that:

> The most striking aspect of the mental status exam with Mr.

> Smithers he uses tremendous amounts of what is called psychological denial. We need to be careful here because psychological denial is not the same kind of denial you think of when someone takes something from a cookie jar and you ask them did they steal something from a cookie jar and they say no, I didn't take it. Psychological denial is something that traits on a much more unconscious level. A person who using a great deal of psychological denial is a person who tends to say to an examiner or someone in their life when asked how are things going, they tend to say, everything is fine. Well, are you having problems at work? No, I'm not having any problems with work. Well, do you have any problems with your family life? No, everything is fine, even when there are things that are a problem. (FSC ROA Vol XV p. 1866-67)

Dr. Maher opined that if he did not have extra information from an outside source regarding Mr. Smithers' habits and actions, an examiner such as himself would have nothing to contradict a statement that "everything is fine". (PCR Vol. VII p. 1066). Both Dr. Berland and Dr. Maher gave Mr. Smithers the MMPI 2 test. The eighth scale; the psychosis scale, was elevated. (PCR Vol. VII p. 1067). Dr. Maher described psychosis as a condition of brain dysfunction which often is associated with hallucinations that are false perceptions as well as delusions those being grotesquely and bizarrely false thoughts, and also apparent of illogical thinking where things that are not mutually compatible might be believed to be true. In layman's terms, a break with reality. (PCR Vol. VII p. 1067). Dr. Maher distinguished psychosis from dissociative disorder in that a dissociative disorder exists in anywhere from a very mild to a rather extreme form. A dissociative disorder is a distortion of reality in most

instances. In the most extreme form it may be a break with reality. However, it is generally a distortion of reality and generally does not include hallucinations or delusions. (PCR Vol. VII p. 1068). Dr. Maher explained the difference between a delusion and a hallucination in this manner:

> A "hallucination" is a perception of a false belief. For example, auditory hallucinations may be in the form of hearing voices of people who are not really there and believing their external voices, not some internal dialogue. A "delusion" is a false belief such as the belief that if I clap my hands three times and stand on my head I can buy a lottery ticket and win the lottery. (PCR Vol. VII p. 1068).

Dr. Maher testified that during the mental status test done at the time of trial, he observed no indications of hallucinations or delusions. (PCR Vol. VII p. 1068-9). However, Dr. Maher conceded that just because he did not observe any direct indications of delusions while he was talking to Mr. Smithers, that automatically does not exclude the possibility that Mr. Smithers did suffer from hallucinations or delusions. Dr. Maher by and large agreed with Dr. Berland's assessment of Mr. Smithers with the exception that where Dr. Berland felt psychosis was present, Dr. Maher did not see sufficient evidence that he felt comfortable testifying that it was present. (PCR Vol. VII p. 1069). Dr. Maher testified that he had previously reviewed Defense exhibit 6, which was an investigative report given to attorney Scott Robbins by Ms. Diane Fernandez regarding Dean Snyder and "Mr. X". (PCR Vol. VII p. 1071). Dr. Maher opined that this report was significant in that it's an event that

occurred during - shortly before a particularly unusual time in Mr.Smithers' life. This event which on one hand might seem trivial, but, on the other hand, it's a pretty clear and objective event that is someone stopping in an expensive car having some interaction or conversation and then driving away. And it's an event which Mr. Smithers reported and also reported that someone else observed the event. The person who he reported to have observed the event indicates very clearly and categorically that it did not occur. That is a pretty strong suggestion of psychosis or a drug-induced delirium or some other very substantial disturbance of perception and reality. (PCR Vol VII p. 1072-73).

Dr. Maher testified that the fact that Dean Snyder never saw a man in a Bentley, and never saw him engage in conversation with Mr. Smithers, would be a documented incident of a psychotic episode. (PCR Vol. VII p. 1074-75). Dr. Maher testified that an incident such as this which is clear and definite would have led him to conclude that Mr. Smithers was psychotic previously (at the time of the offense). (PCR Vol. VII p. 1075).

Dr. Maher was read a portion of a police report which detailed Mr. Smithers' confession; in particular, the issue of whether or not Christy Cowan was alive when Smithers dragged her to the pond at the time Marion Whitehurst arrived at the crime scene. Dr. Maher also had reviewed the autopsy report of Christy Cowan and had reviewed the report of Dr. Ronald K. Wright. (PCR Vol. VII p. 1076-78). Based on

the testimony of Marion Whitehurst, when Whitehurst was standing nearer to the pond than Mr. Smithers and yet still did not hear anything, Dr. Maher opined that Mr. Smithers was hearing things that a person standing nearer to the pond did not hear at all; this would be further evidence of psychosis. (PCR Vol. VII p. 1081).

As to Mr. Smithers' identity structure, Dr. Maher testified as follows:

> Mr. Smithers has a simplistic and rather rigid identity structure, rather of an immature adolescent who arrives at an identity without much sophistication. It is a type of identity structure which tends to include all or nothing thinking, black and white thinking. Yes or no thinking. Not a lot of gray areas. It is a type of identity structure which when such an individual is under stress or is distressed or functions in an ineffective way they tend to break rather than bend. So that is the type of individual who is likely to decompensate severely and behave in a manner which is out of character when they are severely ill or under stress. And then potentially decompensate under other circumstances and appear to be their normal self. So in this case where there is substantial evidence of psychosis and this personality structure present this is the type of an individual who is likely to do something very much out of character when he's psychotic rather than something which is simply a little peculiar. (PCR Vol. VII p. 1082).

Dr. Maher was unaware that defense trial counsel had not talked to Dean Snyder and that information was critical information which was not available at trial. Furthermore, Dr. Maher testified that Ms. Whitehurst's testimony, where she was standing closer to the pond than was Mr. Smithers was also critical and would have documented another incident of psychosis, and this information was also unknown to Dr. Maher. (PCR

Vol. VII p. 1083). Dr. Maher, upon cross-examination, admitted that his original diagnosis at the time of Mr. Smithers' trial was dissociative episode disorder. (PCR Vol. VII p. 1084). Due to the evidence adduced at the evidentiary hearing, the observations of the Snyders and the testimony of Ms. Whitehurst regarding hearing the victim holler from the direction of the pond, Dr. Maher is changing his diagnosis from the original trial. (PCR Vol. VII p. 1085). Based on this new information, Dr. Maher changed his diagnosis from dissociative episodes to psychotic episode recurrent. (PCR Vol. VII p. 1086). During cross examination, the State tried to infer that Mr. Smithers' testimony was nothing but a "big fat lie", Maher opined that: "[W]hat is more likely is that it is an indication of being out of touch with reality and therefore consistent with a psychotic episode." (PCR Vol. VII p. 1089).

Dr. Maher testified that Mr. Smithers admitted to him that Mr.Smithers had indeed killed Ms. Cowan and Ms. Roach. (PCR Vol. VII p. 1091). Pre-trial, Dr. Maher testified that he had seen Mr. Smithers at least 5 times and at no time did Mr. Smithers mention "Mr. X". (PCR Vol. VII p. 1094). Dr. Maher also testified on cross examination that he had considered the murders themselves as a possible indication of psychosis. However, he could not make the diagnosis of a psychotic condition based solely on that, because he could not find other incidences which were outside of the direct time frame of the offenses which supported the diagnosis of psychosis. (PCR Vol. VII p. 1098). He now has that evidence.

E. Testimony of Daniel Mario Hernandez

Daniel Hernandez represented Mr. Smithers in his capital trial; he was the guilt phase attorney on the case. (PCR Vol. VIII p. 1116). Trial counsel testified that he had filed a motion to suppress Mr. Smithers' confession. (PCR Vol. VIII p. 1116-7). Mr. Hernandez also filed motions in limine which are listed as exhibits 9 and10. (PCR Vol. VIII p. 1118). One motion sought the exclusion of evidence that Mr. Smithers was known to consort with prostitutes. Mr. Hernandez testified that he would consider the evidence that Mr. Smithers consorted with prostitutes to be prejudicial to his client if brought before the jury. (PCR Vol. VIII p. 1120). Exhibit 10 was a video of the crime scene which showed the partially decomposed body of Denise Roach, the first victim. Attorney Hernandez opined that any probative value was outweighed by the undue prejudice. (PCR Vol. VIII p. 1121). Mr. Hernandez testified that as part of the discovery materials, he had in his possession the police report of Detective Dorothy Martinez, formally known as Detective Flair. (PCR Vol. VIII p. 1122). Regarding the police report of Detective Flair, Mr. Hernandez noted that Mr. Smithers told Detective Flair that Denise Roach was a black girl and that Mr. Smithers had hit Roach four or five times and that Mr. Smithers guessed that a little prejudice kicked in. (PCR Vol. VIII p. 1123).

Mr. Hernandez also recalled that Detective Flair testified at trial that Mr. Smithers hit Roach again because some prejudice set in and that was because Roach

was black. Mr. Hernandez did not file a motion in limine to exclude the testimony that Mr. Smithers hit Reach again because she was black. (PCR Vol. VIII p. 1124). Mr. Hernandez testified that as a criminal defense attorney he would wish to keep racial bias as a motive for battery away from the jury. (PCR Vol. VIII p. 1125). Trial counsel further agreed that racial bias as a motive in this particular case might have been prejudicial to Mr. Smithers. (PCR Vol. VIII p. 1125-26). Mr. Hernandez testified that he was interested in having the lesser included offense of accessory after the fact read to the jury, because if the jury had believed Mr. Smithers' testimony they could have found Mr. Smithers guilty of accessory after the fact instead of first-degree murder. (PCR Vol. VIII p. 1127-28). That request was denied by the trial judge. During the Spencer hearing on April 16, 1999, the prosecutor argued to the trial court that Mr. Smithers did not have permission of Marion Whitehurst to go in the house. Mr. Smithers was not charged with burglary. No objection was made to the prosecutor's comments. (PCR Vol. VIII p. 1131). When asked about uncharged collateral crimes, Mr. Hernandez opined that an example would be like the burglary in this case where the facts of the murder case relate to other crimes that were not charged. (PCR Vol. VII p. 1133). Mr. Hernandez testified that no burglary instruction was ever given. (PCR Vol. VIII p. 1141). Mr. Hernandez further testified that filing a motion in limine trying to exclude the jury from hearing evidence of racial bias as a motive for murder would not be a frivolous motion. (PCR Vol. VIII p. 1146).

Mr. Hernandez testified that it was possible that he overlooked the racial bias aspect as an effort to diminish the premeditation down to a lesser on a murder charge. (PCR Vol. VII p. 1147). Mr. Hernandez also testified that as a defense attorney he would have rather had the jury not hear the racial comment, nor hear any statements regarding burglary or possible commission of the crime of burglary in this case. He would also rather the jury heard the accessory after the fact instruction. (PCR Vol. VIII p. 1150).

F. Testimony of Scott Lyon Robbins

Scott Robbins represented Mr. Smithers in his original trial. (PCR Vol. VIII p. 1152). Mr. Robbins had reviewed Dr. Ronald K. Wright's report. (PCR Vol. VIII p. 1153). Mr. Robbins was aware of Morgan v. Illinois, 504 U.S. 719, (1992). (PCR Vol. VIII p. 1154). Mr. Robbins was the penalty phase attorney and had death qualified the jury. (PCR Vol. VIII p. 1155). In spite of the holding in Morgan, prospective Juror Collins was not stricken for cause. He was allowed to sit on the jury. (PCR Vol. VIII p. 1156-57). Mr. Robbins retained two experts, in addition to Dr. Wood, who administered the PET scan, to evaluate Mr. Smithers; Drs. Berland and Maher. Dr. Berland had a diagnosis of psychosis, while Dr. Maher had a diagnosis of dissociative disorder. (PCR Vol. VIII p. 1157). At the original trial (see FSC ROA Vol. XV p. 1979-1982), Dr. Maher testified that there are no other particular instances that he felt are particularly suspicious or that he was aware of. (PCR Vol. VIII p.

1158-59). Mr. Robbins had employed an investigator in the case. (PCR Vol. VIII p. 1159). Mr. Robbins testified that an investigator from the defense team tried to contact Dean Snyder in person; however, she was only able to speak to Mr. Snyder on the telephone. (PCR Vol. VIII 1161). Mr. Robbins was read the following at the evidentiary hearing regarding Dr. Hair, a medical examiner:

> MR. SCHMOLL: Given the fact or finding in the circumstances that the individual was found in a body of water and if there were other testimony given to you hypothetically, someone heard this victim hollering while she was in the water, would that be consistent then a finding that the foam cone came from the possibility of drowning?
> ANSWER: Yes.
> QUESTION: Doctor – well, let me move on and then I'll finally get to your opinions as to the potential causes of death. Were there in this case a number of causes of death that could have or did you come to the opinion that there were several entries that could have caused the death of Christy Cowan?
> ANSWER: Yes, I did.
> QUESTION: And upon reviewing your autopsy report, getting extra information, looking at all the photos were one of them possibly drowning?
> ANSWER: Yes. I did not put drowning on the death certificate, but in my opinion, summary opinion, I didn't mention – I believe that my summary – that was a possibility. Oh, no, I didn't do a summary opinion in this case. Sorry. (See FSC ROA Vol. VII p. 701-03).

Mr. Robbins, upon being read the closing of Mr. Schmoll, recalled the State's capitalizing on the foam cone and inferring that Christy Cowan died of drowning. Mr. Robbins did not retain an independent expert to refute the heinous, atrocious and cruel

aggravator. Mr. Robbins also testified that he had plenty of time to do so. (PCR Vol. VIII p. 1163-65).

Mr. Robbins testified that a second expert would have helped on the above cited issue. (PCR Vol. VIII p. 1163). Mr. Robbins also opined that if Christy Cowan was dead before she went into the pond; it would have been impossible for her to holler either in the presence of Marion Whitehurst or when Ms. Whitehurst had left. (PCR Vol. VIII p. 1169). Regarding the Whitehurst incident, Mr. Robbins characterized it as an auditory hallucination manifestation of psychotic episode. (PCR Vol. VIII p. 1179-80). Upon reading the affidavit of Dean Snyder, Mr. Robbins testified that if Dr. Maher testified that this was a documented incident of auditory and visual hallucination he would not have any reason to doubt his own expert. (PCR Vol. VIII p. 1218). Mr. Robbins testified that after reading the affidavit of the Snyders, many of the incidents described in the affidavit, (the call from Ceresa's mother saying Sam was talking and acting crazy) would be considered aberrant behavior. (PCR Vol. VIII p. 1219-1221). Mr. Robbins acknowledged that the standard of proof for an aggravator was beyond a reasonable doubt and the standard of proof for a mitigator is a preponderance of the evidence. (PCR Vol. VIII p. 1221). Mr. Robbins testified that a reasonable doubt can arise from the evidence, the lack of the evidence and the conflict of the evidence. And when we have the possibility of drowning to support an HAC aggravator, a second expert could have presented a conflict in the evidence. (PCR Vol.

VIII p. 1223). Mr. Robbins testified that he could not say that a second expert would not have been helpful. (PCR Vol. VIII p. 1225). Although the State argued drowning in its closing, Mr. Robbins did not hire a second expert for the Spencer hearing. (PCR Vol. VIII p. 1226).

THE LOWER COURT'S ORDER

In its Order Denying Amended 3.851 Motion for Postconviction Relief dated October 24, 2007, the lower court denied all relief after the evidentiary hearing which was held on August 16 and 17, 2007.

Claim IA. Counsel's failure to strike an impartial juror deprived Mr. Smithers of his rights to a fair trial and capital sentencing under the Fifth, Sixth, Eighth, and Fourteenth Amendments of United States Constitution.

"Defendant claims trial Counsel Robbins failed to strike an impartial juror during voir dire. (See amended motion, page 6) He asserts counsel Robbins did not strike prospective juror Collins whose responses he asserts revealed Collins was not impartial." (See amended motion, page 7, attached)

"It is clear from the record that juror Collins would not have recommended 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 the 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."

Claim 1B. Counsel's failure to move to keep the racial bias portion of Mr. Smithers' confession from the jury was deficient performance which deprived Mr. Smithers of his right to a fair capital trial in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and the corresponding provisions of the Florida Constitution.

"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 judgement 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 deficient in their performance."

Claim 1C. Counsel's failure to ensure that the jury was instructed on the crime of accessory after the fact was deficient performance which prejudiced Mr. Smithers.

"Counsel Hernandez was not deficient for failing to pursue a jury instruction which had been previously denied by the Court. Regardless, a defendant charged with

first degree murder is ***not entitled to an instruction on accessory after the fact"***. See Palmes v. State, 397 So.2d 648, 652 (Fla. 1981) (emphasis added).

Claim 1D. **Counsel's failure to investigate and present evidence that would establish a reasonable doubt of Mr. Smithers' guilt was deficient performance which prejudiced Mr. Smithers.**

"After investigating, both counsel determined the information provided would not be helpful. (See 17 August 2007 transcript, page 182, attached). Counsel were not deficient in sending their investigator to investigate Defendant's theory. Further, counsel made a reasonable, professional decision based on the information provided by his investigator that the information would not be helpful."

Claim 1E. **Counsel's failure to present relevant evidence at the suppression hearing was deficient performance which prejudiced Mr. Smithers.**

Defendant contends counsel Hernandez did not conduct an adequate investigation which would have revealed that due to Defendant's mental illness, brain damage, learning disability and bizarre religious upbringing, his confession was involuntary." (See amended motion, pages 13-14, attached).

"Defendant does not demonstrate either counsel deficient, or prejudice resulting from the alleged deficiency."

Claim 1F. **Trial counsel was ineffective in failing to object to improper introduction of evidence of an uncharged crime, Williams rule evidence that was not noticed, and improper prosecutorial comments in opening and closing arguments.**

"In this case Defendant's presence in the house was inextricably linked to the

crimes that occurred on the property. The evidence presented at trial was that Defendant took both victims inside the house to have sex with them before committing the murders outside of the house. Counsel Hernandez testified he did not think he would have been successful in arguing Defendant had not been in the house because the State had a fingerprint belonging to Defendant taken from inside the home. (See 17 August 2007 transcript pages 137-138, attached) In addition, he testified I don't think that the evidence that Mr. Smithers may have entered into Mrs. Whitehurst's residence without permission **had anything to do with the finding of guilt**. (See 17 August 2007 transcript, page 139, attached) (emphasis added) See Dawkins, 605 So.2d at 1329. Counsel Hernandez was not ineffective for failing to object to references of the burglary."

Claim 1H. Cumulatively, counsels ineffective assistance deprived Mr. Smithers of his right to a fair trial and penalty phase.

"Defendant has not proven ineffective assistance of counsel on the individual claims. His claim for cumulative error must fail. Belcher v. State, 961 So.2d 239, 252 (Fla. 2007) (citations omitted)."

PENALTY PHASE

Claim II: MR. SMITHERS DID NOT RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE OF HIS CAPITAL TRIAL, VIOLATING HIS FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION, AND HIS CORRESPONDING RIGHTS UNDER THE FLORIDA

CONSTITUTION.

A. Counsel's failure to litigate the issue that Mr. Smithers could not legally be convicted of death-penalty-eligible first degree murder was deficient performance which prejudiced Mr. Smithers.

"Defendant asserts counsel Robbins was ineffective for failing to raise the defense that as an ordained deacon he was not eligible to be convicted of death penalty eligible first degree murder. (See amended motion, page 20, attached). There is no support for this contention in Florida law."

B. Counsel's decision to present an expert who had not finished his evaluation was deficient performance which prejudiced Mr. Smithers.

"Defendant asserts Dr. Robert Berland was not properly prepared to testify during the penalty phase, thus counsel Robbins' decision to present him as an expert prejudiced him."

"CCRC counsel did not call Dr. Berland to testify at the evidentiary hearing to establish that the additional information he did not know or was unaware of at the time of trial would have changed his opinion. Further, Defendant fails to establish these facts would have made Dr. Berland's testimony more favorable or credible. Defendant fails established prejudiced."

C. Counsel's failure to request that the jury be given separate instructions regarding the aggravating circumstances that could apply to each victim was deficient performance which prejudiced Mr. Smithers.

"Defendant asserts counsel's failure to request a separate instruction as to the

cold, calculated, and premeditated (CCP) aggravating element for each victim was deficient performance, which prejudiced him." (See amended motion, page 23-24, attached).

"There is no evidence in the record the jury was improperly instructed on the CCP aggravating factor. (V16/2329-2339). In addition to giving the aggravating factor instructions, the Court included the instruction that the evidence and circumstances you find applicable to **each count** must be considered **separately** and a separate advisory sentence must be returned as to each count. There was no error in failing to give separate instructions for each charge."

F. Counsel's failure to investigate and present evidence that corroborated Mr. Smithers' trial testimony was deficient performance which prejudiced Mr. Smithers.

"Defendant claims counsel was deficient for failing to investigate leads that other individuals could have been on the Whitehurst property, thus producing evidence to affect the balance of mitigating versus aggravating factors. (See amended motion, pages 25-26, attached). Neither counsel was deficient for failing to present a theory that others had been on the property as a mitigating factor."

G. Counsel was ineffective for failure to provide Mr. Smithers' mental health expert with adequate background information to permit a meaningful evaluation of Mr. Smithers for the presence of mitigation in violation of Defendant's right to due process and equal protection under the Fourteenth Amendment of the United States Constitution and the corresponding provisions to the Florida Constitution.

"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."

H. Counsel's failure to consult an independent expert to refute the testimony of the Medical Examiner was deficient performance which prejudiced Mr. Smithers.

"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).

"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. 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."

I. Cumulatively, counsel's ineffective assistance deprived Mr. Smithers of his rights to a fair trial and penalty phase.

"Defendant claims counsel Robbins' deficient performance throughout the penalty phase deprived him of his right to an adversarial testing." (See amended motion, page 38, attached).

"Defendant does not prove ineffective assistance of counsel on the individual claims. His claim for cumulative error must fail. Belcher v. State**,** 961 So.2d 239, 252 (Fla. 2007) (citations omitted)"

NON-EVIDENTIARY CLAIMS

Claim IV. The rules prohibiting Defendant's lawyers from interviewing jurors violates Equal Protection principles, the First, Sixth, Eighth, and Fourteenth Amendments of the Unites States Constitution and corresponding portions of the Florida Constitution, and denied him adequate assistance of counsel in pursuing his post conviction remedies.

"Claim IV is denied."

Claim V. The jury did not receive adequate guidance in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and corresponding provisions of the Florida Constitution. Mr. Smithers' death sentences are premised on fundamental error which must be corrected. To the extent trial counsel failed to litigate these issues, Mr. Smithers was denied his rights to counsel under the Sixth and Fourteenth Amendments to the

United States Constitution and the corresponding provisions of the Florida Constitution.

"Claim V is denied."

Claim VI. Florida's capital sentencing scheme was unconstitutional as applied, denying Mr. Smithers his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. To the extent that trial counsel failed to litigate these issues, Mr. Smithers was denied his Sixth and Fourteenth Amendment Rights to counsel.

"Claim VI is denied."

Claim VII. Defendant's Eighth Amendment right against cruel and unusual punishment will be violated as Defendant may be incompetent at that time of execution.

"Claim VII is denied."

Claim VIII. Cumulatively the combination of procedural and substantive errors deprived Defendant of a fundamentally fair trial.

"Claim VIII is denied."

ORDER

"DEFENDANT'S AMENDED MOTION TO VACATE JUDGEMENT OF CONVICTION AND SENTENCE IS, DENIED."

Summary of the Argument

IA. Mr. Smithers did not receive effective assistance of counsel throughout his capital trial. Trial counsel failed to strike a prospective juror whose answers to voir dire questions clearly demonstrated that if Mr. Smithers were found guilty, that prospective juror was going to recommend death. The juror was predisposed to

recommend the death penalty and was unable to perform duties in accordance with law.

IB. Trial counsel failed to object or move to preclude racially charged statements coming before the jury. Trial counsel was ineffective for failing to file a motion in limine or to object to the introduction of Detective Flair's testimony that Mr. Smithers hit Roach because she was black. The statement was not inextricably intertwined with the crime and was not relevant to any element of the crime charged. Introduction of the statement merely inflamed the passions of the jury. The danger of the prejudicial effect far outweighed any probative value of the statement coming before the jury.

IIG. Mr. Smithers did not receive effective assistance of counsel at the penalty phase of his trial. Trial counsel failed to provide Mr. Smithers' expert witness with adequate background information to permit a meaningful evaluation of Mr. Smithers for the presence of mitigation. Trial counsel failed to provide to Mr. Smithers' mental health expert a documented incident of Mr. Smithers' psychosis. Had the report been provided to the mental health expert, the jury would have heard that Mr. Smithers was suffering from psychosis when the crime was committed. Furthermore, trial counsel's deficient performance allowed the State in closing argument to argue that there was a lack of evidence concerning Mr. Smithers' episodes of psychotic behavior.

IIH. Trial counsel failed to consult an independent expert to refute testimony of

the medical examiner. At trial, the State argued, based upon the medical examiner's report and testimony, that Cristy Cowan's foaming at the mouth indicated that she had drowned, thus supporting the heinous, atrocious, or cruel and the cold, calculated, and premeditated aggravators. An independent forensic pathologist would have testified that the cause of death of Cristy Cowan was not drowning but asphyxiation with blunt force trauma sustained either perimortem or postmortem. The testimony of an independent medical examiner would have created a reasonable doubt as to the validity of the aggravators. Had Mr. Smithers refuted the aggravators he would have been sentenced to life in prison instead of death.

ARGUMENT I

THE LOWER COURT ERRED IN HOLDING THAT MR. SMITHERS DID NOT RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL THROUGHOUT HIS CAPITAL TRIAL VIOLATING HIS FOURTH, FIFTH, SIXTH EIGHTH AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION, AND HIS CORRESPONDING RIGHTS UNDER THE FLORIDA CONSTITUTION

A. Counsel's failure to strike a prospective juror deprived Mr. Smithers of his rights to a fair trial and capital sentencing under the Fifth, Sixth, Eighth, and Fourteenth amendments of 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, in its ORDER DENYING AMENDED MOTION TO VACATE JUDGEMENT OF CONVICTION AND SENTENCE, held : The instant case is distinguishable from Morgan because juror Collins did not state he would ***automatically*** vote for the death penalty. (PCR Vol. II p. 314). This was error. During the jury selection, the following exchange took place between Prospective Juror Collins and trial counsel:

> MR ROBBINS: Okay, I guess the same questions, can you conceive of circumstances that you think might be worth considering as far as mitigating circumstances, things involving either people's mental or physical circumstances, upbringing, those sorts of things?
> PROSPECTIVE JUROR COLLINS: I guess it depends if the person is abused as a kid or something, I don't know. But if they are guilty without a doubt they should get the death penalty.
> MR. ROBBINS: If someone is found guilty and you are totally convinced they are guilty of the offense whatever that particular murder case is about, do you feel that there could ever be any other sentence except the death penalty for first degree murder?
> PROSPECTIVE JUROR COLLINS: Maybe life without parole.
> MR. ROBBINS: Those are the two choices by the way, life

> without parole or the death penalty. But what I'm asking is do you feel there could be circumstances where you vote for a recommendation for life?
> PROSPECTIVE JUROR COLLINS: Yes, if I have to. (FSC ROA Vol. II 232-33).

Prospective Juror Collins' response that: "But if they are guilty without a doubt they should get the death penalty", clearly demonstrates that if Mr. Smithers was found guilty; without a doubt he should get the death penalty. Collins' response that: "I guess it depends if the person is abused as a kid or something, I don't know," indicates a lack of understanding of what mitigation can or can not be considered. Collins' statement of: "Yes, if I have to" indicates a reluctance to consider the mitigation. The reality of the situation was that once the door to the jury room closed, Juror Collins didn't have to do anything. Trial counsel was ineffective in failing to question Collins about specific examples of mitigation that would have been presented in this case. The arbitrary rating system imposed by trial counsel, where jurors would rate themselves on a scale of one to ten with ten representing the feeling that the death penalty should be imposed in every case, Collins ranked at 7. (FSC ROA Vol. II p. 220-221). Clearly this juror was predisposed to impose death.

LEGAL ARGUMENT

In Morgan v. Illinois, 504 U.S. 719, 729, 112 S.Ct. 222, 2229-30, (1992), the Supreme Court of the United States held:

> We reiterate this view today. 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. Indeed, because such a juror has already formed an opinion on the merits, the presence or absence of either aggravating or mitigation circumstances is entirely irrelevant to such a juror. Therefore, based on the requirement of impartiality embodied in the Due Process Clause of the Fourteenth Amendment, a capital defendant may challenge for cause any prospective juror who maintains such views. If even one such juror is empaneled and the death sentence is imposed, the State is disentitled to execute the sentence.
> Id. At 729 *2229-30.

Juror Collins was going to recommend death upon a finding of guilt. No amount of If I have to's would have cured this jurors propensity to ignore the penalty phase presentation of either aggravation or mitigation.

The Morgan Court went on to hold:

> The only issue remaining is whether the questions propounded by the trial court were sufficient to satisfy petitioner's right to make inquiry. As noted above, Illinois suggest that general fairness and follow the law questions, of the like employed by the trial court here, are enough to detect those in the venire who automatically would vote for the death penalty. The State's own request for questioning under *Witherspoon* and *Witt* of course belies this argument. *Witherspoon* and its succeeding cases would be in large measure superfluous were this Court convinced that such general inquires could detect those jurors with views preventing or substantially impairing their duties in accordance with their instructions and oath. But such jurors-whether they be unalterably in favor of, or opposed to, the death penalty in every case-by definition are ones who cannot perform their duties in accordance with law, their protestations to the contrary notwithstanding.
> Id. At 734-735, *2232-2233.

Juror Collins' statement "But if they are guilty without a doubt they should get the death penalty," makes it clear that Juror Collins was one of the jurors who cannot perform their duties in accordance with law. Juror Collins' statements, "Maybe life without parole" and "yes, if I have to," are protestations to the contrary. Pursuant to Morgan, these protestations to the contrary should not stand.

In Bertolotti v. Dugger, 883 F.2d 1503, 1519 (C.A. 11(Fla.), 1989), the court reflected the argument that analysis of the reasonable probability of a different verdict should vary according to the number of jurors voting to impose the death penalty: if there is a reasonable probability that one juror would change his or her vote, there is a reasonable probability that a jury would change its recommendation. It matters not how many jurors voted for death over life, only a reasonable probability that one juror would change his or her vote.

Trial counsel was ineffective for not striking for cause Juror Collins. Because the inadequacy of *voir dire* raises serious doubt that Mr. Smithers was sentenced to death by a jury empaneled in compliance with the Fourteenth Amendment, his sentence should not stand. Relief is proper.

B. Counsel's failure to move to keep the racial bias portion of Mr. Smithers' confession from the jury was deficient performance which deprived Mr. Smithers of his right to a fair capital trial in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments of 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.

FACTS

Trial counsel moved to suppress Mr. Smithers' confession on the grounds that the confession was not given voluntarily. The motion was denied. Counsel did not then move to suppress or otherwise object to the portions of the confession that were unfairly prejudicial and not relevant to a material issue in the case.

At trial, Detective Flair testified that a part of Mr. Smithers' attack of Denise Roach was motivated by racial bias. Detective Flair testified:

> Q. Did he tell you whether or not he hit her in any part of the body?
> A. He said he hit her several times with a fist, with his fist.
> Q. And did he tell you where on the body?
> A. In her face and head.
> Q. Did he tell you - Did he make any comments as to whether or not he had hit her again?
> A. After that, yes.
> Q. Yes. 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.

(Vol. IX, 1056-57).

EVIDENTIARY HEARING TESTIMONY

At the evidentiary hearing, trial counsel recalled filing and arguing a motion to suppress Mr. Smithers' statement. (PCR. Vol. I p.119). Trial counsel recalled Detective Flair testifying that Mr. Smithers said he hit the victim again because some prejudice set in and that because she was black. (PCR. Vol. I p.120). Trial counsel did not remember filing a motion in limine to exclude the testimony that Mr. Smithers hit Roach again because she was black. (PCR. Vol. I p.120).

Trial counsel agreed that racial bias is something that a defense attorney would want to keep from the jury testifying:

> Q Is racial bias something that you as a criminal defense attorney would want to keep from the jury or keep the jury from hearing?
>
> A If it was possible, certainly. I think the problem - - and certainly I could have filed a motion in limine or I could have objected and argued that the probative value was outweighed by the undue prejudice. The problem I think we had in this case was is that there was a - - the facts that the victim was black and that the defendant may have had some prejudice towards a black victim was part of the facts in the murder. In my mind it inextricably intertwined with the facts of the case. But if you're asking me could I have filed one, in retrospect I certainly could have.
>
> Q Well, why would you as a criminal defense attorney wish to keep racial bias as a motive for battery from the jury?
>
> A I would like to keep any motive away from the jury, whether it's racial bias or anything else. If it was legally possible I would, of course, like to keep any evidence that is prejudicial towards my

client.

Q Would you agree that racial bias as a motive in this particular case might have been prejudical to Mr. Smithers?

A I agree with that.

Q And could there have been a prejudicial effect upon the jury by hearing about the racial bias?

MS. CARMONA: Objection, Judge, calls for speculation.

THE COURT: Overruled. Answer if you can.

A I think it could have.

(PCR. Vol. I p.121).

THE LOWER COURT'S ERROR

The lower court, in its ORDER DENYING AMENDED MOTION TO VACATE JUDGEMENT OF CONVICTION AND SENTENCE, held:

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. (PCR Vol. II p. 317-318). The lower court further held:

> 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. (PCR Vol. II p. 318-9)

This was error by the trial court.

The test for the admissibility of evidence is relevance. Section 90.402, Fla.Stat.(2003). Relevant evidence is defined as evidence tending to prove or disprove

a material fact. Section 90.401, Fla.Stat.(2003). Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence. Section 90.403, Fla.Stat.(2003).

Trial counsel should have objected to the introduction of the portion of Mr. Smithers' statement that he struck the victim because prejudice set in because she was black. (Vol. XI, 1056-57). Introduction of that comment was outweighed by the danger of unfair prejudice to Mr. Smithers. Proof of motive is not an element of the charge of murder and it was absolutely unnecessary for the Assistant State Attorney to introduce the comment into evidence. The sole purpose of introducing the comment was to inflame the passions of the jury.

Even if there were some marginal relevance of Mr. Smithers' statement to the issue of motive, the prejudicial impact of the statement overwhelmingly outweighed its probative value, so the statement was inadmissible under Section 90.403, Fla.Stat.(2003). See Gore v. State, 719 So.2d 1197, 1199-1200 (Fla.1998) (in capital murder case, marginal probative value of evidence of child abuse was outweighed by tremendous prejudice).

Trial counsel could have filed a motion in limine to prevent the prejudicial testimony from coming before the jury. Trial counsel was ineffective in that he failed to file a motion in limine or to otherwise object to the introduction of Detective Flair's

testimony that Mr. Smithers hit Roach because she was black. A motion in limine would have been the appropriate vehicle to ensure the prejudicial testimony did not come before the jury. See Luce v. United States, 469 U.S. 38, 105 S.Ct. 460, 83 L.Ed.2d 443 (1984) (We use the term ['in limine'] in a broad sense to refer to any motion, whether made before or during trial, to exclude anticipated prejudicial evidence before the evidence is actually offered ... [T]he practice has developed pursuant to the district court's inherent authority to manage the course of trial.). Trial counsel should have filed a motion in limine pursuant to The Florida Evidence Code Section 90.104 (1)(a) (2003).

The lower court erred in ruling that the racial bias was inextricably intertwined with the crime charged. The comment by Mr. Smithers to Detective Flair was made at a time long remote from the attack on Denise Flair. The comment, conveyed to the jury by Detective Flair, that some prejudice may have set in so he hit her again was told to the detective by Mr. Smithers while at the jail. The comment was not inextricably intertwined with the crime charged in time or place.

In Porter v. State, 715 So.2d 1018 (Fla. 2d DCA 1998), the police received a call regarding an incident of domestic violence at the Porter residence. When Officer Walters arrived at the scene, Ms. Porter called out, "[h]e's trying to kill me." Walters and another officer separated the Porters, ultimately finding it necessary to put handcuffs and leg restraints on Mr. Porter. His manacles notwithstanding, Porter

continued to assault and struggle with the officers. He was charged with resisting an officer with violence and battery on a law enforcement officer. The court of appeal, relying on this Court in State v. DiGuilio, 491 So.2d 1129 (Fla. 1986) determined that the wife's cry for help was not inextricably intertwined with the crimes for which Porter was charged.

As in Porter, Mr. Smithers' statement to the police was not inextricably intertwined with the crime for which Mr. Smithers was charged. In Porter, Ms. Porter made her comment at the scene of the crime and directly to Officer Walters when he arrived at the scene. Ms. Porter's statement was made in proximity in time and place to the crime. Mr. Smithers' statement to Detective Flair was even more remote than in Porter as Mr. Smithers' statement was made at the jail long after the crime had been committed.

That Mr. Smithers stated he felt racial bias towards the victim *after* he began the attack was not relevant to whether he committed the crimes charged. The prosecution's theory *was not* that Mr. Smithers killed Denise Roach because she was African American. Consequently, the statement was not relevant to the State's theory, and was merely irrelevant bad character evidence. This bad character evidence prejudiced the jury, by revealing to them that Mr. Smithers admitted he was a racist as well as a murderer. There is a reasonable probability that this influenced at least one juror's decision to recommend death, and counsel's failure to keep it from the jury

was deficient performance.

The scourge of racism and racist comments have no place in society, let alone in a criminal trial where a man's life is at stake. To ensure fair trials, trial attorneys and judges must be ever vigilant to ensure that inflammatory racist remarks and comments do not come before impartial juries, lest the fairness of the trial process be compromised, and defendants be denied rights under the Sixth Amendment of the United States Constitution. This Court has been ever mindful of the dangers of racial influence in our justice system when in State v. Davis, 872 So.2d 250 (Fla. 2004) this Court stated:

> The necessity of vigilance against the influence of racial prejudice is particularly acute when the justice system serves as the mechanism by which a litigant is required to forfeit his or her very life. As the United States Supreme court stated more than twenty-five years ago, death is different in kind from any other punishment imposed under our system of criminal justice. Gregg v. Georgia, 428 U.S. 153, 188, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); see also State v. Dixon, 283 So.2d 1, 7 (Fla.1973) (stating that because [d]eath is a unique punishment in its finality and in its total rejection of the possibility of rehabilitation ..., the Legislature has chosen to reserve its application to only the most aggravated and unmitigated of most serious crimes). We have acknowledged that death is different in recognizing the need for effective counsel in capital proceedings from the perspective of both the sovereign state and the defending citizen. Sheppard & White, P.A. v. City of Jacksonville, 827 So.2d 925, 932 (Fla.2002).

Furthermore in Robinson v. State, 520 So.2d 1 (Fla. 1988) this Court stated that

"[r]acial prejudice has no place in our system of justice and has long been condemned by this Court." Id at 7. This Court recognized the danger of racial prejudice infecting capital trials saying "[w]e emphasize that the risk of racial prejudice infecting a criminal trial takes on greater significance in the context of a capital proceeding." Id at 7.

This Court is acutely aware of the dangers of racial prejudice infecting the fairness of our justice system. The statement by Detective Flair that Mr. Smithers said when he struck Roach some prejudice may have set in so he hit her again served only to inflame the jury and infect Mr. Smithers' capital trial. The statement had the effect upon the jury of an uncharged hate crime. Florida Statute Section 775.085(reclassifies penalties if evidencing prejudice while committing an offense); See also Apprendi v. New Jersey, 530 U.S. 466 (2000). The probative value of the statement was substantially outweighed by the danger of unfair prejudice, confusion of issues, and misleading the jury. The statement should have been objected to by trial counsel. Mr. Smithers was denied a fair trial and the prejudice to him was the conviction and sentence of death.

ARGUMENT II

MR. SMITHERS DID NOT RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE OF HIS CAPITAL TRIAL, VIOLATING HIS RIGHTS UNDER THE FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND HIS

CORRESPONDING RIGHTS UNDER THE FLORIDA CONSTITUTION.

G. Counsel was ineffective for failure to provide Mr. Smithers' mental health expert with adequate background information to permit a meaningful evaluation of Mr. Smithers for the presence of mitigation in violation of Defendant's right to due process and equal protection under the Fourteenth Amendment of the United States Constitution, as well as his rights under the Fifth, Sixth, and Eighth Amendments of the United States Constitution and the corresponding provisions to 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, in its ORDER DENYING AMENDED MOTION TO VACATE JUDGEMENT OF CONVICTION AND SENTENCE, held: "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 167-165, 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."

(PCR Vol. II p. 338-339).

Dr. Michael Maher's testimony:

Dr. Maher testified at the penalty phase of the trial that based upon his interviews with Mr. Smithers, Smithers was not psychotic. (FSC ROA Vol. XV p. 1935-36).

During the cross-examination of Dr. Maher, the following testimony was elicited:

> Q. During this interview that you conducted of the defendant, did you ever note any psychotic behavior, you yourself actually witness psychotic behavior?
> A. I think my answer is the same as before, no.
> Q. And did he ever describe specific things such as - Well, did he describe mumbling?
> A. No.
> Q. Did he mumble or talk to himself?
> A. No.
> Q. Did he ever say that he heard commands, auditory hallucinations?
> A. No.
> Q. Did he ever say that he was wiping spiders off?
> A. No.
> Q. And you spent at least ten hours with him, is that correct?
> A. Yes.
> Q. And you are a psychiatrist, is that correct?
> A. Yes.
> Q. Now, and you are trying to determine - You did determine that he has episodes of psychotic behavior. You found the diagnosis of dissociative disorder, episodes of psychotic disorder?
> A. No.
> Q. Okay.
> A. My diagnosis is that he had dissociative disorder with episodes of being out of touch with reality and that I cannot

within a reasonable medical certainty exclude the possibility of psychosis or make the diagnosis of psychosis. I have reached a diagnosis and there are some details of that diagnosis that I don't believe I can reach a clear and certain answer on.
Q. Is it your opinion that it's dissociative disorder with possible psychotic features?
A. Yes.
Q. And did you say those psychotic features could be episodes that he could be psychotic?
A. Yes.
Q. Okay. And hearing that and in your eight hours of questions, why weren't you able to ask the questions in order to get out whether he was psychotic or not or find those things out? I mean if you were trained in asking the correct questions, did you ask the correct questions to him in order to root it out or did you say any unusual behavior and he said no?
A. I'm sorry, could you ask one question. I'm still trying to think of the first question.
Q. Did you have a problem asking the right questions in order to determine if he had episodes of psychotic behavior?
A. I did not have a problem asking the questions, no.
Q. So you are trained in asking those questions to root that out?
A. Yes.
Q. Okay. And were you in the eight to ten hours able to root that answer out from the defendant?
A. No, not within a reasonable degree of certainty.
Q. But some of the questions you did ask you tried to substantiate whether they were true or not, is that correct?
A. Yes.
Q. As far as the fact that he could experience episodes of psychotic behavior, did you believe in your opinion or was your opinion that the fire that occurred in Eastridge, Tennessee could have been psychotic episodes?
A. It's possible. I think it's unlikely.
Q. Okay. But you said it is possible?

> A. Yes.
> Q. Okay. And were you able to site any other features in his history of psychotic episodes?
> A. You mean where I particularly think that a psychotic episode may have been present.
> Q. Yes.
> A. The killings themselves are suspicious incidents.
> Q. Besides the Killings.
> A. *There are no other particular instances that I feel are particularly suspicious or that I'm aware of.* (Emphasis added) (FSC ROA Vol. XV p. 1979-82)

At the evidentiary hearing, Dr Maher testified that Mr. Smithers admitted to him that Mr. Smithers had indeed killed Ms. Cowan and Ms. Roach. (PCR Vol. VII p. 1091).

Trial counsel's ineffectiveness

At the evidentiary hearing, Dr. Maher testified that he had previously reviewed Defense exhibit 6, which was an investigative report given to attorney Scott Robbins by Ms. Diane Fernandez regarding Dean Snyder and "Mr. X, " (PCR Vol. VII p. 1071). The significant portion of the exhibit begins at the third paragraph of page 2:

> He stated that his first contact with an unknown W/M (UWM) occurred at the defendant's home located at 2300 Gatewood Street, Plant City, FL. Sam was in his yard talking to his next door neighbor - Dean Snyder - when a man dressed in a suit driving a fancy foreign car - Sam referred to it as a Bentley - pulled into his front yard. This man was approximately six foot two or three, mid-to late forties, about 230 pounds, he was completely bald but had a salt and pepper beard which was well trimmed to a point. He had a gold loop earring in his left ear and two gold rings on his right hand and one on his left. And his eyes were big, blue and bulged. He asked Sam if he remembered him and told Sam you remember from Tampa Ship. And then told

> Sam that he knew Sam had worked at the church, and that he had worked at the construction site of the new Hardee Manufacturing plant that was being constructed in Plant City. Dean Snyder, at that point said that he had to go and left.

At the evidentiary hearing, Mr. Robbins testified that Dr. Maher was provided with Mr. Smithers' trial testimony which Dr. Maher discounted as a lie. (PCR Vol. VIII p. 1189-1190). However, during the trial, Mr. Smithers did testify about this "Mr. X" but in his testimony at trial he did not mention Dean Snyder being present when this "Mr. X" drove up. (FSC ROA Vol. X p. 1108). The report mentioning Dean Snyder was written on September 11, 1998, opening statements began on December 15, 1998. Trial counsel was ineffective in not providing the report which makes mention of Dean Snyder to his expert, Dr. Maher. Due to trial counsel's ineffectiveness, Dr. Maher was deprived of a documented incident of psychosis. The prejudice is obvious. Dr. Berland was a psychologist. Dr. Maher was a psychiatrist. The penalty phase jury naturally resolved a conflict in the expert testimony in favor of the more qualified expert. Had trial counsel provided Dr. Maher with the initial report and had trial counsel interviewed Dean Snyder, a documented separate incident of psychosis would have been provided to Dr. Maher and Dr. Maher could have opined with a degree of medical certainty that Mr. Smithers was indeed suffering from psychosis. The penalty phase jury was deprived of a full adversarial testing of the evidence.

Legal argument

In Strickland v. Washington, 466 U.S. 668 (1994), the United States Supreme Court held that counsel has "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial process." Strickland requires a defendant to plead and demonstrate (1) unreasonable attorney performance, and (2) prejudice. Mr. Smithers pleads both.

Defense counsel must also discharge significant constitutional responsibilities at the sentencing phase of a capital trial. The United States Supreme Court has held that in a capital case, "accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die by a jury of people who may never before have made a sentencing decision." Gregg v. Georgia, 428 U.S. 153, 190 (1976)(plurality opinion). In Gregg and its companion cases, the Court emphasized the importance of focusing the sentencer's attention on the "particularized characteristics of the individual defendant" Id. at 206. In this case the "particularized characteristics of the individual defendant," was Mr. Smithers' mental condition of psychosis.

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. Mr. Smithers' sentence of death is the resulting prejudice. It cannot be said that there is no reasonable probability that the results of the sentencing phase of the trial would have been different if the evidence discussed had been

presented to the sentencer. The key aspect of the penalty phase is that the sentence be individualized, focusing on the particularized characteristics of the defendant. Gregg v. Georgia, 428 U.S. 153 (1976). Due to counsel's ineffective assistance, the jury and judge were incapable of making an individualized assessment of the propriety of the death sentence in this case.

State and federal courts have repeatedly held that trial counsel in capital sentencing proceedings have a duty to investigate and prepare available mitigating evidence for the sentencer's consideration. Phillips v. State, 608 So.2d 778 (Fla. 1992).

Counsel's highest duty is the duty to investigate and prepare. When counsel does not fulfill that duty, the defendant is denied a fair adversarial testing process and the proceedings' results are rendered unreliable.

Counsel here did not meet these rudimentary constitutional standards. As explained in Tyler v. Kemp, 755 F.2d 741 (11th Cir. 1985):

> In *Lockett v. Ohio*, the Court held that a defendant has the right to introduce virtually any evidence in mitigation at the penalty phase. The evolution of the nature of the penalty phase of a capital trial indicates the importance of the [sentencer] receiving accurate information regarding the defendant. Without that information, a [sentencer] cannot make the life/death decision in a rational and individualized manner. Here the [sentencer] was given no information to aid [him] in the penalty phase. The death penalty that resulted was thus robbed of the reliability essential to confidence in that decision. Id. at 743 (citations ommitted).

In Mr. Smithers'case, the documented incident of psychosis was critical in order to provide the penalty phase jury with accurate information in order to make the life/death decision in a rational and individualized manner.

Effective counsel would have realized that this statement by Smithers was prima facie evidence of a psychotic episode which should have been provided to Dr. Maher. This was not only evidence of a visual hallucination, but an auditory hallucination as well. The Bentley was not real, nor was its occupant. The conversation between the occupant of the Bentley and Smithers existed only in the psychotic mind of Sam Smithers. If this was just a story concocted by a cold calculating Sam Smithers as the State argued to the jury, Smithers would not have included Dean Snyder as a witness to this incident. Mr. Snyder could not have witnessed the incident because it existed only in Smithers' mind.

The prejudice is obvious. The State in its closing argument, was able to minimize the statutory mental mitigation by arguing that there was a lack of evidence concerning episodes of psychotic behavior. (FSC ROA Vol. XVIII p. 2260-2262). The penalty phase jury would have voted for life over death had they known how truly disturbed this man was at the time of the crime. The sentencing court also would have attached more weight to the statutory mental mitigation. Relief is proper and a new penalty phase is the remedy.

The Federal courts have addressed the failure to call witnesses 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. "The 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.ed at 1462. In assessing the reasonableness of the tactic, we consider all 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. Smithers' case, this was not the result of a tactical decision. It was the result of a failure to investigate. Counsel had called numerous witnesses to testify as to Smithers' horrendous childhood. They had simply neglected to provide witnesses, (the Snyders) to document incidents in Smithers' recent past.

In Wiggins v. Smith, 123 S.Ct. 2524 (2003) the investigation regarding mitigation was abandoned, leads were not pursued. The Supreme Court of the United States 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 pursing 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.

In Samuel Smithers' case, the investigative report indicating that there was a meeting between the occupant of the Bentley, Smithers and that Dean Snyder was present was ignored. Due to trial counsel's ineffectiveness, a documented incident of psychotic behavior was never heard by the penalty phase jury. The state, in its cross examination of Maher relied heavily that there were no other instances of psychotic behavior that Maher was aware of. An incident of psychotic behavior was ignored because trial counsel did not bother to investigate it.

Rompilla v. Beard, 125 S.Ct. 2456, 2466 (2005) states "[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." Trial counsel did not comply with his basic duty to the detriment of Samuel Smithers.

In Orme v. State, 896 So.2d 725 (Fla. 2005), this court granted Orme a new penalty phase upon a postconviction appeal. In Orme, the defendant had contended that he was deprived of a reliable penalty phase because trial counsel had not thoroughly investigated and presented evidence of his bipolar disorder. Orme had been diagnosed with bipolar disorder, and trial counsel was aware of that fact. In Mr. Smithers' case he had been diagnosed as having psychotic episodes, and trial counsel was aware of that fact. This Court stated in its opinion:

> Regarding counsel's responsibility to investigate and inquire into matters that may be helpful to his client's case, the *Strickland* Court also said that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.* At 691, 104 S.Ct. 2052; *see also Stevens v. State*, 552 So.2d 1083 (Fla. 1989). As this Court has said, "the obligation to investigate and prepare for the penalty portion of a capital case cannot be overstated." *State v. Lewis*, 838 So.2d 1102, 1113 (Fla. 2002). In determining whether the penalty phase proceedings were reliable, "[t]he failure [of counsel] to investigate and present available mitigating evidence is a relevant concern along with the reasons for not doing so." Id. At 731

In Mr. Smithers' case, counsel should have talked to Mr. Snyder, the psychotic episodes needed to be documented in order to properly bolster the statutory

mitigation. Failure to do so resulted in the State being able to rebut the statutory mitigators. Relief is proper.

H. Counsel's failure to consult an independent expert to refute the testimony of the Medical Examiner was deficient performance which prejudiced Mr. Smithers in violation of Defendant's right to due precess and equal protection under the Fourteenth Amendment of the United States Constitution, as well as his rights under the Fifth, Sixth, and Eighth Amendments of the United States Constitution and the corresponding provisions to 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, in its ORDER DENYING AMENDED MOTION TO VACATE JUDGEMENT OF CONVICTION AND SENTENCE, held: "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." (PCR Vol. II p. 340-341). This was error.

Dr. Hair's testimony:

At trial, Dr. Laura Hair, a medical examiner, testified during the guilt phase of the trial. (FSC ROA Vol. VII p. 682-763)

Dr. Hair performed the autopsies on Christy Cowan and Denise Roach. (FSC

ROA Vol. VII p. 686)**.** Christy Cowan's autopsy was performed on May 29th 1996. (FSC ROA Vol. VII p. 691). A report titled "REPORT OF AUTOPSY" listing the subject as Christy Cowan was prepared and dated 7/10/96.

The report lists the cause of death as combined effects of manual strangulation and chop wounds of the head. There is no mention of water in the lungs of Christy Cowan, however foam is listed as coming from the oral cavity.

At trial, the following testimony was elicited from Dr. Hair:

> Q. Is there anything that you were able to see or find during your autopsy or in that photo? Do you see something coming from her mouth?
> A. Yes.
> Q. And what is that?
> A. It's called a foam cone. It's a frothy foam area that can be seen around the face and mouth. In this case, it's around the mouth.
> Q. From that are you able to derive any opinions or possibilities?
> A. The suggestion would be that someone drowned from seeing a foam cone on their mouth or nose. Now that is not pathognomonic meaning specifically diagnostic of drowning because there is nothing that is specifically diagnostic of drowning. When water mixes with air you get that type of foam coming from the respiratory passages. It can be seen in a few other instances like drug overdoses, things like that. But in someone taken from the water, you would have to worry that they did take some breaths while they were in the water.
> Q. And a person taking some breaths in the water would be indicative that they were still alive?
> A. Most likely, yes.
> Q. Now, you mentioned that there are other possibilities other than drowning such as drug overdose. Drug overdose would be the cause of death, is that correct?
> A. That's correct.
> Q. But if there was other injuries - or let me ask you this, would injuries such as blunt impact or whatnot in and of itself cause that type of foaming?

A. No.
Q. Is there also situations where a person who has a massive heart attack could cause some foaming?
A. It could, yes.
Q. Given the fact or if I give you the circumstances that the individual was found in a body of water and if there was other testimony given to you hypothetically that someone heard this victim hollering while she was in the water, would that be consistent with then a finding that that foam came from the possibility of drowning?
A. Yes.
Q. Doctor - Well, let me move on and then I'll get finally to your opinions as to the potential causes of death. Were there in this case a number of causes of death that could have or did you come to the opinion that there were several injuries that could have caused the death of Christy Cowan?
A.. Yes I did.
Q. And upon reviewing your autopsy report, getting extra information, looking at all the photos, were one of them possibly drowning?
A. Yes. I did not put drowning on the death certificate, but in my opinion, summary opinion, I did mention - I believe in my summary opinion - that that was a possibility. Oh, no I didn't do a summary opinion on this case, sorry. (FSC ROA Vol. VII p. 701-703)

Dr. Ronald K. Wright's testimony:

Dr. Wright was a forensic pathologist and testified at the evidentiary hearing telephonically. Dr. Wright was tendered as an expert in the field of forensic pathology. (PCR Vol. VII p. 1015). Dr. Wright was retained to render an opinion as to the cause of death of Christy Cowan. He reviewed the police report, the autopsy report, photographs taken at the scene and autopsy, and the testimony of Dr. Hair at the trial of Mr. Smithers. (PCR Vol. VII p. 1016). Dr. Wright opined that Christy Cowan was asphyxiated; her neck was compressed with internal hemorrhage and consistent with

manual strangulation. (PCR Vol. VII p. 1018). Dr. Wright further opined that Cowan's lungs were "relatively light" in that a normal drowning victim's lungs would weigh 1,000 grams or more and in Cowan's case her lung weights were down in the 400 to 500 gram range, which while not completely disproving drowning, it's certainly inconsistent with drowning. (PCR Vol. VII p. 1019). There was no hemorrhaging to the mastoid air sinuses which is seen in people who struggle when they drown. (PCR Vol. VII p. 1019).

Dr. Wright testified that when a person drowns in freshwater, the blood volume goes up remarkably and the result is acute right-heart fibrillation. It's seen in almost all drowning cases and was absent in this case. (PCR Vol. VII p. 1020).

Dr. Wright detailed the blunt impact blows. All of those wounds appear to either be perimortem or postmortem. (PCR Vol. VII p. 1020-21). Dr. Wright testified that in all probability, Cowan was manually strangled first and then hit after she was strangled. (PCR Vol. VII p. 1023).

Dr. Michael Maher, also qualified as a medical doctor, had reviewed Dr. Wrights work and opined: "In the context of the evidence I reviewed and the other doctors' reports that I have been presented I would have a conclusion regarding that and that is that it is certainly more likely than not. And I offer this within a reasonable degree of medical certainty that this woman died of blows to the head and strangulation." (PCR Vol. VII p. 1079).

At the evidentiary hearing Mr. Robbins testified that he had plenty of time to retain an independent medical examiner. (PCR Vol. VIII p. 1165). Mr. Robbins further testified that an additional independent medical examiner would have been a benefit. (PCR Vol. VIII p. 1169). Mr. Robbins further testified that he was trying to show that the death of Christy Cowan occurred as quickly as possible, either by blows to the head or crushing of the throat. (PCR Vol. VIII p. 1193). Mr. Robbins conceded that hiring an expert that opined that the cause of death was definitely strangulation, would have undermined the blunt trauma, but it would have helped alleviate the suggestion of drowning ; it would have hurt the State if they were going to argue drowning. (PCR Vol. VIII p. 1203).

Prejudice

At trial, the State argued to the penalty phase jury that the medical examiner's testimony that Christy Cowan's foaming of the mouth indicated she drowned and established the heinous, atrocious or cruel aggravator an the cold, calculated and premeditated aggravator in this manner:

> But there is strangulation. Why? Because we know she is still alive because we got foaming, we got many other injuries. She's getting up, she is alive, she is feeling the pain, the heinous, atrocious and cruel pain that is about to be inflicted on her and he picks her up and he strangles her, starts strangling her. There is your other injury. And now he thinks she is dead, probably because she's strangled and she loses consciousness. So he drags her by the ankles and drags her that extra 150 feet to the pond so she can be with

> her friend Denise Roach. Throws her in the pond. He is going back to the garage. He gets the axe, he goes to the water hose, he begins to wash it. Marion Whitehurst pulls up just to check to see if the lawn has been cut and doesn't expect him to be there because the gate was locked. Sam, what are you doing here? Oh, hi Ms. Whitehurst, just had to chop some limbs. What's going on now in that cold pond, Christy Cowan is now coming out of unconsciousness, she is now conscious. She starts hollaring for help. She doesn't know if anybody is there to hear or not but instinctively she starts screaming out the best she can. How do we know? Two things, the defendant said so and two she is in that water swallowing the water, gagging and foaming air with water, foaming, possible drowning. (FSC ROA Vol. XVIII p. 2280-2282).
>
> .....Backstep to Sam. Marion has already left. Just wouldn't shut up. Just wouldn't shut up. Will you shut up? Throws limbs on her. Psychotic or angry? Just got rid of the only witness that could have seen this. I'll finish her off. Wades down in the pond, she is still alive, she dies. Cold, calculated, premeditated design. Heinous atrocious cruel. 25C, the foaming. Alive. Dead 25A. (FSC ROA Vol. XVIII 2285).

Obviously, the State *did* argue drowning. An independent medical examiner would have hurt the State's impassioned drowning argument. The additional evidence of the testimony of an independent medical examiner would have created a reasonable doubt as to the validity of the aggravators. As it was, instead of the penalty phase jury knowing that Christy Cowan was killed in or near the carport; they were left with the mistaken impression that Cowan was alive when she entered the pond.

Mr. Robbins also failed to provide the trial court with focus and guidance regarding the foam cone at the Spencer hearing. (PCR Vol. VIII p. 1226-1227). Trial

counsel did nothing to establish that Cowan did not die from drowning. This was ineffective assistance of counsel and the recommendation of death and subsequent sentence of death is the prejudice.

Legal argument

In Driscoll v. Delo, 71 F.3d 701, 707 (8th Cir. 1995) the court held:

> The district granted Driscoll habeas corpus relief and ordered that he receive a new trial because his counsel was ineffective in allowing the jury to retire with the factually inaccurate impression that the victim's blood could have been present on Driscoll's knife. On appeal, the state argues that Driscoll failed to establish that defense counsel's handling of the serology evidence either constituted unreasonable performance or caused Driscoll prejudice. The state contends that the district court did not engage in the required two-part *Strickland* analysis; specifically, that the court failed to consider whether the asserted errors by counsel prejudiced the defendant. While we acknowledge the shortcomings of the district court's consideration of prejudice, we reject the state's basic argument after engaging in the full, two-part *Strickland* review de novo. Id. At 707.

In Mr. Smithers' case, trial counsel was ineffective in allowing the penalty phase jury to retire with the factually inaccurate impression that Christy Cowan was alive and drowning when she was placed in the pond. Defense counsel relied upon the cross-examination of Dr. Hair as opposed to presenting an independent review by an independent Medical Examiner. Had he done so, the State would not have been able to create the factually inaccurate impression that Cowan was alive in the pond. Relief is

proper.

CONCLUSION AND RELIEF SOUGHT

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

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

Respectfully submitted,

_____
RICHARD E. KILEY
Florida Bar No. 0558893
Assistant CCC

_____
JAMES VIGGIANO
Florida Bar No. 0715336
Assistant CCC

_____
ALI ANDREW SHAKOOR
Florida Bar No. 669830
CAPITAL COLLATERAL REGIONAL
COUNSEL-MIDDLE REGION
3801 Corporex Park Drive Suite 210
Tampa, Florida 33619

Date:_____

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing **INITIAL BRIEF** of Petitioner has been furnished by United States Mail, first class postage prepaid, to all counsel of record on May___ , 2008.

_____
RICHARD E. KILEY
Florida Bar No. 0558893
Assistant CCC

_____
JAMES VIGGIANO
Florida Bar No. 0715336
Assistant CCC

_____
ALI ANDREW SHAKOOR
Florida Bar No. 669830
CAPITAL COLLATERAL REGIONAL
COUNSEL-MIDDLE REGION
3801 Corporex Park Drive Suite 210
Tampa, Florida 33619

The Honorable William Fuente
Circuit Court Judge
800 E. Kennedy Blvd
Ste. 124
Tampa, FL 33602

Ada Carmona
Assistant State Attorney
Office of the State Attorney
800 E. Kennedy Blvd.
Ste. 124
Tampa, FL 33602

Candance Sabella
Assistant Attorney General
Office of the Attorney General
Concourse Center 4
3507 East Frontage Road
Suite 200
Tampa, FL 33607-7013

Samuel L. Smithers
DOC#124639
Union Correctional Institution
7819 N.W. 228th Street
Tampa, FL 32026

CERTIFICATE OF COMPLIANCE

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

_____
RICHARD E. KILEY
Florida Bar No. 0558893
Assistant CCC

_____
JAMES VIGGIANO
Florida Bar No. 0715336
Assistant CCC

_____
ALI ANDREW SHAKOOR
Florida Bar No. 669830
CAPITAL COLLATERAL REGIONAL
COUNSEL-MIDDLE REGION
3801 Corporex Park Drive Suite 210
Tampa, Florida 33619