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THE “DOUBLE-EDGED” DILEMMA: THE ELEVENTH CIRCUIT’S DEVALUATION OF MENTAL HEALTH MITIGATORS IN EVANS v. SECRETARY, DEPARTMENT OF CORRECTIONS

ERIK THOMPSON*

Abstract: In Evans v. Secretary, Department of Corrections, the United States Court of Appeals for the Eleventh Circuit denied habeas corpus relief to a death row inmate who claimed that ineffective assistance of counsel prejudiced his death sentence hearing. Despite the defense counsel’s omission of evidence suggesting that the inmate suffered from various mental disabilities, the court resolved that such evidence would not have affected the jury’s ultimate recommendation of the death sentence because some of the evidence was stigmatized. This standard creates a burden that is far too great for individuals facing the death penalty and significantly minimizes the mitigating value of mental disabilities. The Eleventh Circuit should have adopted the “probing and fact-specific” analysis proposed by Judge Martin in her dissenting opinion, which examines whether a lower court properly gauged the value of the mental health evidence. This analysis would better protect prisoners suffering from mental disorders from undeserved death sentences.

INTRODUCTION

On October 19, 2010, Wydell Evans, a convicted murderer on death row, challenged his death sentence before the U.S. Court of Appeals for the Eleventh Circuit, seeking habeas corpus relief on the grounds of ineffective assistance of counsel. Evans claimed that his defense counsel made no effort to investigate, discover, or present mitigating evidence of his mental

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1 See Evans v. Sec’y, Dep’t of Corrs. (Evans III), 703 F.3d 1316, 1325 (11th Cir. 2013), cert. denied, 133 S. Ct. 2742 (May 28, 2013); Notice of Appeal at 1–2, Evans v. Sec’y, Dep’t of Corrs. (Evans I), No. 6:07-cv-897-Orl-28KRS, 2010 BL 228274, at *10, 12 (M.D. Fla. Sept. 29, 2010), rev’d, 681 F.3d 1241 (11th Cir. 2012), rev’d en banc, 703 F.3d 1316 (11th Cir. 2013); see also Antiterrorism and Effective Death Penalty Act, 28 U.S.C. § 2254 (2006) (providing the standard of review for a habeas corpus application); Strickland v. Washington, 466 U.S. 668, 694 (1984) (stating that a claim of ineffective assistance of counsel during a death sentencing hearing raises a habeas claim).
and behavioral disorders to the sentencing jury. In conjunction with the allegation of ineffective assistance of counsel, Evans purported to show that he was prejudiced by the defense counsel’s failures at sentencing. Evans argued that the omitted evidence confirmed that he suffered from anti-social personality disorder, a mental illness that may have dissuaded the jury from recommending the death penalty.

The majority of the Eleventh Circuit, sitting en banc, denied Evans’ habeas petition, agreeing with Florida state courts that Evans was not prejudiced because the mental health evidence, weighed cumulatively, would have been more harmful than helpful before a jury. One circuit judge dissented, stating that the majority’s reading of the more harmful than helpful standard was erroneous because the jury was already aware of Evans’ impulsive and violent history, but had no knowledge of his mental health disorders. The absent mental health evidence may have formed the crux of a statutory mitigator. This could have reduced the death sentence to a more prudent life sentence under Florida law. Accordingly, the dissenting judge concluded that the majority failed to recognize that the defense counsel’s error entirely precluded relevant evidence from reaching the jury during a death sentence hearing.

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2 See Evans III, 703 F.3d at 1322, 1325. Evans suffered from cognitive disorders including anti-social personality disorder and a severe impulse control disorder. Id. at 1322. The Florida death penalty statute mandates that the defendant have an opportunity at the sentencing hearing to present the jury with “mitigating circumstances,” including mental disturbances, which weigh against the death sentence. See FLA. STAT. § 921.141(1), (6)(b) (2010).

3 See Evans III, 703 F.3d at 1326 (explaining that in an ineffective assistance of counsel claim, the challenger must prove both an error in counsel and prejudice resulting from such an error).

4 See id. at 1348 n.10 (Martin, J., dissenting); Evans I, 2010 BL 228274, at *10, 12.

5 Evans III, 703 F.3d at 1332–33 (majority opinion). The majority determined that because the mental health evidence included evidence of Evans’ violent and criminal history, it would have been more damaging to his case and would not have had any ameliorating effects. Id.

6 Id. at 1342–43 (Martin, J., dissenting); see also Strickland, 466 U.S. at 700 (ruling that the “more harmful than helpful” standard precludes habeas relief to a petitioner when the omitted evidence simply inculpates the petitioner further). The dissenting judge in Evans III understood that given the jury’s knowledge of Evans’ criminal past, the mental evidence only served a mitigating purpose. Evans III, 703 F.3d at 1342–43 (Martin, J., dissenting).

7 The Eleventh Circuit uses the term “mitigator” to refer to mitigating circumstances. See Evans III, 703 F.3d at 1321. A “statutory mitigator” is a mitigating circumstance specifically enumerated in the Florida death penalty statute. See id.; see also § 921.141(6)(b)–(f) (including mental disorders as mitigating circumstances).

8 See Evans III, 703 F.3d at 1338, 1345 (Martin, J., dissenting) (citing to § 921.141(6)(b)–(f), which define the requirements for mental health statutory mitigators); see also § 921.141(2)(a)–(c) (stating that the jury is to determine whether the mitigating circumstances outweigh the aggravating circumstances, warranting a life sentence over death sentence).

9 Evans III, 703 F.3d at 1348 (Martin, J., dissenting).
As a result of the majority’s decision, a prisoner’s constitutional guarantee of a thorough investigation into any legitimate mitigating factor during a death sentence hearing may be compromised. The court should have adopted the dissenting judge’s analysis, which tests whether the state courts provided adequate weight to the mitigating evidence under the particular circumstances of the individual offender. Such an approach would prevent state courts from unreasonably preventing mitigating mental health evidence with subjectively negative characteristics from reaching a jury, especially when such evidence might reasonably save the lives of prisoners undeserving of the death penalty.

I. THE CONVICTION, DEATH SENTENCE, AND EVANS’ STATE COURT PREJUDICE ALLEGATION

On October 21, 1998, Wydell Evans fatally shot Angel Johnson, his brother’s seventeen-year-old girlfriend. The slaying occurred just two days after Evans was released from prison for an earlier parole violation and also while Evans was on probation for a different conviction. Evans and Johnson were passengers in a car driven by a mutual friend when they engaged in a heated argument over Johnson’s fidelity to Evans’ brother. As the dispute escalated, Evans brandished a firearm and shot Johnson in the chest. Evans then threatened the driver and other passengers, forcing them

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10 See Eddings v. Oklahoma, 455 U.S. 104, 112 (1982) (holding that the Constitution requires that the sentencing jury be aware of all relevant mitigating circumstances); Evans III, 703 F.3d at 1338, 1348 (Martin, J., dissenting) (“[The] Supreme Court has interpreted the U.S. Constitution to guarantee a prisoner facing a death sentence a real investigation into his own life . . . .”).

11 See Evans III, 703 F.3d at 1339, 1348-49 (Martin, J., dissenting); see also Evans v. Sec’y, Dep’t of Corrs. (Evans II), 681 F.3d 1241, 1254 (11th Cir.) (“Strickland requires a 'probing and fact-specific analysis' in evaluating the totality of the available evidence.”), vacated, reh’g granted en banc, 686 F.3d 1321, 1322 (11th Cir. 2012), rev’d en banc, 703 F.3d 1316 (11th Cir. 2013). The “probing and fact-specific analysis” is a threshold examination of the lower court’s prejudice rationale. See Evans II, 682 F.3d at 1254. The analysis investigates whether the lower court unreasonably discounted or failed to appreciate the mitigating value of the evidence in question under the totality of circumstances. See Evans III, 703 F.3d at 1344 (Martin, J., dissenting).

12 See Evans III, 703 F.3d at 1342-43 (Martin, J., dissenting); Evans II, 681 F.3d at 1254 (laying the framework for the “probing and fact-specific analysis”).

13 Evans v. Sec’y, Dep’t of Corrs. (Evans II), 681 F.3d 1241, 1244 (11th Cir.), vacated, reh’g granted en banc, 686 F.3d 1321, 1322 (11th Cir. 2012), rev’d en banc, 703 F.3d 1316 (11th Cir. 2013).

14 See Evans v. Sec’y, Dep’t of Corrs. (Evans III), 703 F.3d 1316, 1319 (11th Cir. 2013), cert. denied, 133 S. Ct. 2742 (May 28, 2013); id. at 1342 (Martin, J., dissenting); Evans II, 681 F.3d at 1244. Evans was on probation at this time for a previous conviction of felony possession of a firearm. Evans III, 703 F.3d at 1320 (majority opinion).

15 Evans III, 703 F.3d at 1319. Evans accused Johnson of cheating on his brother. Id.

16 Id. During the argument, Evans became infuriated and punched the windshield of the car, cracking it. Id. Johnson laughed, Evans pulled the gun and ultimately shot her. Id.
to take him to another friend’s home where Evans acquired money and attempted to wipe his fingerprints from the vehicle. 17 Evans finally permitted the others to take Johnson to the hospital, though Johnson had already succumbed to the gunshot wound. 18 The other individuals in the car identified Evans as Johnson’s killer. 19 Evans stood trial in October of 1999 and was convicted of one count of kidnapping, one count of aggravated assault, and one count of first-degree pre-meditated murder. 20

During the death penalty hearing, both parties had opportunities to present the sentencing jury with evidence of factors that would weigh for or against a death sentence. 21 The state provided evidence of aggravating factors, including a previous conviction for aggravated battery, two previous convictions for battery on a law enforcement officer, and the fact that Evans was on probation for a previous felony at the time of the murder. 22 Based on the evidence presented, the jury was aware of Evans’ multiple convictions, his violent tendencies, and his propensity to carry a gun. 23 The trial court found two statutory aggravating circumstances based upon Evans’ history of violent criminal activity and probationary status at the time of the murder. 24

The defense attempted to mitigate the sentence by presenting the jury with testimony from family and friends who described Evans as a loving father, caring son, and a valuable contributor to society who counseled

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17 Id. at 1320. Evans threatened the other passengers that he would kill them and their families if they were to notify the police. See id.
18 Id. at 1319–20.
19 Id. at 1320.
20 Id.; Evans II, 681 F.3d at 1245. Evans premised his defense on the gun accidentally discharging. Evans III, 703 F.3d at 1320. The jury, however, found convincing evidence to convict Evans of first-degree pre-meditated murder from the testimony of the other passengers, Evans’ previous threats to kill Johnson, and Evans’ attempts to cover up the crime. See id. at 1319–20.

21 See Evans III, 703 F.3d at 1320. The Florida death penalty statute provides that during the penalty phase, the sentencing jury must make findings of fact and weigh the aggravating and mitigating circumstances presented by both parties. See Fla. Stat. § 921.141(1)–(3) (2010).
22 Evans III, 703 F.3d at 1320. One conviction related to an incident in which Evans kicked a law enforcement officer in the groin, while another conviction involved Evans striking an officer in the throat. Id. at 1321. Under the Florida statute, “aggravating circumstances” weighing in favor of the death penalty include “(a) The capital felony was committed by a person previously convicted of a felony and under sentence of imprisonment or placed on community control or on felony probation” and “(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.” § 921.141(5)(a)–(b).

23 See Evans III, 703 F.3d at 1342 (Martin, J., dissenting). During the sentencing phase, the jury received a copy of Evans’ six prior convictions, including his previous conviction for felony possession of a firearm. Id.
24 § 921.141(5)(a)–(b); Evans III, 703 F.3d at 1321. One aggravating circumstance was Evans’ previous assault convictions. § 921.141(5)(a). The second was Evans’ probationary status at the time of the slaying. § 921.141(5)(b).
youth to stay in school. The defense, however, failed to investigate, prepare, or present to the jury any evidence of Evans’ mental condition. Instead, the defense counsel relied exclusively on the positive aspects of Evans’ character, primarily because the defense counsel did not believe that Evans suffered from any mental disorder, despite evidence to the contrary. The trial court found five non-statutory mitigators from the character testimony of defense witnesses, but did not find any statutory mitigators. The jury ultimately recommended the death sentence by a vote of ten to two.

Evans filed for post-conviction relief, seeking a stay of his death sentence due to ineffective assistance of counsel at sentencing. To support his claim, Evans presented the Florida trial court with new mitigating evidence concerning his mental health and possible brain damage, which his defense counsel had failed to introduce. Lay witnesses for the defense testified that Evans had sustained a head injury when he was three years old and was struck by a car, resulting in learning and cognitive impairments. The witness’ testimony further demonstrated that Evans had a lengthy history of impulse control problems, violence towards women and authority figures, and substance and alcohol abuse. Two mental health experts for the defense analyzed Evans’ behavioral history and concluded that it proved that Evans suffered from an aggressive impulse control disorder and other learn-

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25 See Evans III, 703 F.3d at 1320. Testimony from Evans’ friends and family established that Evans was very close to his children and supported his elderly grandmother. Id. at 1320–21. The defense also presented evidence that Evans counseled children in programs to keep them away from trouble by staying in school. Id. at 1320.

26 See id. at 1341 (Martin, J., dissenting). The defense counsel relied on Evans’ own assertion that he was in “perfect” mental health. Id. At the time, there was a record indicating that Evans received a mental health review as a child, but the defense counsel did not investigate it further. Id.

27 See id. at 1321 (majority opinion); see also § 921.141(6) (defining the requirements for statutory mitigators). Good character evidence constitutes “non-statutory” mitigating factors, which do not weigh heavily against statutory aggravating factors. See Evans III, 703 F.3d at 1340 (Martin, J., dissenting); Evans v. State, 838 So. 2d 1090, 1097 (Fla. 2002).

28 See id. at 1321 (majority opinion).

29 See id. at 1321–22.

30 See id. The new evidence was necessary to satisfy the two-pronged Strickland test for ineffective assistance of counsel, which requires the defendant to show that the counsel erred and that the petitioner was prejudiced by the error. See Strickland v. Washington, 466 U.S. 668, 687 (1984); Evans III, 703 F.3d at 1324. Both the Florida trial court and the Florida Supreme Court applied the Strickland prejudice analysis to Evans’ ineffective assistance of counsel claim; the same standard was applicable for Evans’ federal habeas claim. See Evans III, 703 F.3d at 1324.

31 See id. at 1322–23. Evans’ mother testified that he had an “explosive temper.” Id. at 1323. Evans’ brother characterized him as “the angriest, most aggressive person [he had] ever met.” Id. Witnesses also testified that Evans, on occasion, had beaten up his girlfriends and pulled weapons on several friends. See id. Former special education teachers and counselors stated that as a child he was “more disturbed than the other students . . . .” Id.
ing disabilities, directly attributable to the brain damage caused by the car accident. 34

Although the state’s mental health expert agreed with the defense’s proposition that Evans sustained brain damage as a result of the accident, the state’s expert testified that the injury did not affect Evans’ decision making when he killed Johnson. 35 Both the defense and state experts agreed, however, that Evans likely suffered from anti-social personality disorder. 36 The defense experts insisted that Evans’ impulse control disorder and his anti-social personality disorder met the criteria for two statutory mitigators in the state of Florida. 37

Despite the new evidence, the Florida trial court denied Evans relief on the grounds that the defense counsel was not ineffective during the penalty phase and that Evans had not established prejudice. 38 On appeal, the Florida Supreme Court applied the Strickland rule, which requires the challenger to demonstrate that, but for his attorney’s error, there is a reasonable probability that the outcome would have been different. 39 Under the Strickland framework, the Florida Supreme Court determined that there was no prejudice because the evidence created a “double-edged sword.” 40 That is, the Florida Supreme Court recognized that Evans suffered from mental health disorders, but the court also found that the evidence proving such disorders would introduce to the jury additional evidence of Evans’ history of vio-

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34 See id. at 1322.
35 See id.
36 Id. at 1322. Anti-social Personality Disorder is defined by a person’s persistent acts of delinquency and failure to conform to social norms. See Stéphane A. De Brito & Sheilagh Hodgins, Antisocial Personality Disorder, in PERSONALITY, PERSONALITY DISORDER AND VIOLENCE 133 (Mary McMurran & Richard Howard eds., 2009).
37 Evans III, 703 F.3d at 1322; see FLA. STAT. § 921.141(6)(b)–(f) (2010); Evans III, 703 F.3d at 1345 (Martin, J., dissenting). For a mental health mitigator to exist under the Florida statute, the individual must have committed the crime under extreme mental or emotional disturbance, or the individual must have been in such a state that he or she could not appreciate the criminality of the conduct. § 921.141(6)(b)–(f). If the jury determined that Evans indeed met the criteria for two statutory mitigators, the jury could have reasonably weighed the statutory mitigating circumstances more favorably against the two aggravating circumstances. See Evans III, 703 F.3d at 1348–49 (Martin, J., dissenting). The effect may have been a life sentence rather than the death penalty. See § 921.141(3); Evans III, 703 F.3d at 1349 (Martin, J., dissenting).
38 Evans III, 703 F.3d at 1324. The Florida trial court found that the defense counsel performed within American Bar Association standards for assistance and that there was no prejudice due to the multitude of harmful evidence presented during the initial sentencing and post-conviction proceedings. See Evans v. State, 946 So. 2d at 12.
39 See Strickland, 466 U.S. at 694; Evans III, 703 F.3d at 1326.
40 See Evans III, 703 F.3d at 1324; Evans v. State, 946 So. 2d at 13. The “double-edged sword” metaphor refers to evidence that is mitigating in some regard, but is equally or more harmful to the defendant’s case. See Evans v. State, 946 So. 2d at 13 (quoting Reed v. State, 875 So. 2d 415, 437 (Fla. 2004)).
lence towards women, outbursts against authority figures, and apparent pride in being a “jack-boy.” According to the Florida Supreme Court, the trial court’s decision, stating that the mental health evidence would likely be more aggravating than mitigating before a jury. Evans subsequently petitioned the U.S. District Court for the Southern District of Florida for a writ of habeas corpus on multiple claims, including ineffective assistance of counsel.

II. THE DISTRICT COURT AND ELEVENTH CIRCUIT RECITE THE “MORE HARMFUL THAN HELPFUL” PREJUDICE STANDARD

In order to analyze Evans’ habeas claim, both the district court and the Eleventh Circuit applied the deferential standard of review set out in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). Under AEDPA, the federal court must provide deference to issues reasonably adjudicated in state court. Both courts found that the prejudice issue was reasonably adjudicated on the merits because the Florida Supreme Court correctly identified and applied the “more harmful than helpful” analysis to Evans’ ineffective assistance of counsel claim. Therefore, the federal courts placed a heavy burden on Evans to show that the Florida Supreme Court committed a flagrant error.

A. The District Court Concurs with the Florida Supreme Court’s Application of the Strickland Framework

The district court concluded that Evans failed to show a reasonable probability that the outcome of his sentencing would have been different

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41 See Evans III, 703 F.3d at 1324; Evans v. Sec’y, Dep’t of Corrs. (Evans I), No. 6:07-cv-897-Orl-28KRS, 2010 BL 228274, at *18 (M.D. Fla. Sept. 29, 2010), rev’d, 681 F.3d 1241 (11th Cir. 2012), rev’d en banc, 703 F.3d 1316 (11th Cir. 2013). A “jack-boy” is a slang term for a person who commits armed robbery. See Evans III, 703 F.3d at 1324. Allegedly, Evans frequently robbed drug dealers. Id.

42 See Evans III, 703 F.3d at 1324; Evans v. State, 946 So. 2d at 13.

43 See Evans III, 703 F.3d at 1324; Evans I, 2010 BL 228274, at *9.

44 See Evans v. Sec’y, Dep’t of Corrs. (Evans III), 703 F.3d 1316, 1325 (11th Cir. 2013), cert. denied, 133 S. Ct. 2742 (May 28, 2013); Evans v. Sec’y, Dep’t of Corrs. (Evans I), No. 6:07-cv-897-Orl-28KRS, 2010 BL 228274, at *2–3 (M.D. Fla. Sept. 29, 2010), rev’d, 681 F.3d 1241 (11th Cir. 2012), rev’d en banc, 703 F.3d 1316 (11th Cir. 2013); see also Antiterrorism and Effective Death Penalty Act, 28 U.S.C. § 2254(d) (2006). The relevant portion of the Act provides that there shall be deference to the judgment of a state court, unless the decision was “contrary to, or involved an unreasonable application of” federal law. See 28 U.S.C. § 2254(d).


46 See Evans III, 703 F.3d at 1327; Evans I, 2010 BL 228274, at *19.

47 See Evans III, 703 F.3d at 1327 (stating that the court must be “highly deferential” to the state court, and the burden on the challenger is “substantial”); Evans I, 2010 BL 228274, at *19.
had the jury reviewed the mental health evidence. Although the district court admitted that the evidence presented during the post-conviction proceedings likely established that Evans suffered from mental health disorders, the district court determined that the jury would have nevertheless recommended the death sentence. The district court reasoned that the jury would not have been swayed by the mental incapacity assertion because Evans testified that he was wholly aware of his surroundings and relatively in control of himself when he shot Johnson. Additionally, the district court cited the multitude of aggravating evidence against Evans, including his assault convictions, history of violence, and affinity for guns. The district court also emphasized the “more harmful than helpful” paradigm and held that the effect of the new evidence was more aggravating than mitigating. Evans appealed the district court’s decision to the U.S. Court of Appeals for the Eleventh Circuit.

B. The Eleventh Circuit, Sitting En Banc, Heightens the Challenger’s Burden Within the Strickland Framework

On appeal, the Eleventh Circuit’s en banc majority agreed with the district court that the Florida courts reasonably and appropriately applied Strickland as the controlling law. Evans thus sustained a substantial burden of proof in demonstrating that the mitigating evidence introduced at post-conviction was “sufficient to undermine confidence in the outcome” of his sentencing. The circuit court further developed this substantially high burden by

48 See Evans III, 703 F.3d at 1324–25; Evans I, 2010 BL 228274, at *19.
49 See Evans I, 2010 BL 228274, at *19.
50 See Evans III, 703 F.3d at 1325; Evans I, 2010 BL 228274, at *19, (citing Sears v. Upton, 130 S. Ct. 3259, 3266 (2010)). The district court was “permitted to speculate how the mitigation evidence presented during the state post-conviction proceedings would have affected the outcome of the penalty phase.” Evans I, 2010 BL 228274, at *19.
51 See Evans I, 2010 BL 228274, at *19.
52 See id.
53 See Notice of Appeal at 1–2, Evans I, 2010 BL 228274. Evans initially appealed to a three-judge panel of the Eleventh Circuit. Evans v. Sec’y, Dep’t of Corrs. (Evans II), 681 F.3d 1241, 1244 (11th Cir.), vacated, reh’g granted en banc, 686 F.3d 1321, 1322 (11th Cir. 2012), rev’d en banc, 703 F.3d 1316 (11th Cir. 2013). Judge Martin, writing the panel opinion, reversed the district court ruling and granted Evans habeas relief. See id. at 1270. Judge Martin applied a threshold test and determined that under the circumstances, the Florida Supreme Court unreasonably applied Strickland in failing to recognize that the jury was already aware of the harmful aspects of the mental health evidence, but was not aware of the mitigating aspects. See id. at 1264, 1270. Upon the state’s request for a rehearing en banc, however, the Eleventh Circuit vacated the panel judgment and reviewed the case en banc. Evans v. Sec’y, Dep’t of Corrs., 686 F.3d 1321, 1322 (11th Cir. 2012) (granting a rehearing en banc).
54 See Evans III, 703 F.3d at 1327.
55 Id. at 1326.
threshold, citing a recent Supreme Court decision holding that prejudice does not exist when the evidence is “not clearly mitigating and would have opened the door to powerful rebuttal.” Thus, under the majority’s construction of the prejudice analysis, the court could only find prejudice to exist where no aggravating stigma accompanied the mental health evidence introduced at post-conviction.

Although the evidence presented at Evans’ post-conviction hearing supported mental health mitigating circumstances, the Eleventh Circuit majority explained that the evidence also introduced Evans’ long history of violence at school, aggression towards women and police, and affinity for guns and unlawful activity. The court determined that the mental disability evidence was not clearly mitigating, as it would have also introduced more damaging evidence. Thus, the circuit court determined that the Florida Supreme Court was justified in denying Evans relief.

While the Eleventh Circuit clearly established its support for the state courts’ decisions, the circuit court’s en banc majority went a step further, highlighting the nature of Evans’ mental health conditions. The court explicitly stated that evidence of Evans’ anti-social personality disorder alone would be more harmful than mitigating because jurors do not perceive the mental disorder favorably. Because there was proof a subjectively unfavorable mental disorder was accompanied by aggravating evidence, the circuit court ruled that the Florida Supreme Court was not unreasonable in holding that Evans failed to establish prejudice as a result of his counsel’s performance at sentencing.

The majority’s opinion was met with a strong dissent from Judge Martin. Though she recognized Evans’ atrocious crime, Judge Martin concluded that Evans was nonetheless entitled to a writ of habeas corpus be-

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56 See id. at 1327 (citing Cullen v. Pinholster, 131 S. Ct. 1388 (2011)).
57 See id. at 1327, 1333 (holding that it is reasonable for the state court to speculate that negative aspects of the evidence may have led a jury to believe that the defendant was beyond rehabilitation and inevitably deserving of the death sentence).
58 See id. at 1333.
59 See id. at 1328, 1332–33.
60 See id. at 1327.
61 See id. at 1328.
62 Id. at 1328 (citing Suggs v. McNeil, 609 F.3d 1218, 1231 (11th Cir. 2010) (observing that psychopathy is “‘a trait most jurors tend to look disfavorably upon.’” (quoting Reed v. State, 875 So. 2d 415, 437 (Fla. 2004)))); see De Brito & Hodgins, supra note 36, at 133 (detailing anti-social personality disorder). An individual with anti-social personality disorder cannot control his emotional impulses, which often results in aggressive and violent behavior. De Brito & Hodgins, supra note 36, at 133. The disorder is commonly confused with psychopathy, although psychopathy is a more aggressive form of anti-social personality disorder. See id.
63 See Evans III, 703 F.3d at 1327, 1333.
64 See id. at 1338 (Martin, J., dissenting).
cause the state courts unreasonably precluded the only statutorily relevant evidence from reaching the sentencing jury. Judge Martin indicated that the sentencing jury was the same jury that convicted Evans and, therefore, was aware of both Evans’ violent tendencies and his affinity for guns, in addition to his criminal history. The jury was not aware, however, of Evans’ mental health disorders or of the brain damage that resulted from a car accident when he was a child. This evidence would have only helped Evans at the sentencing phase because the jury was already well acquainted with the aggravating evidence.

Under this construction of the facts, the state courts could not reasonably conclude that the evidence actually posed a “double-edged sword” because the only evidence omitted at sentencing was the mitigating mental health factor. Accordingly, Judge Martin subjected the Florida Supreme Court’s holding to de novo review and found that Evans’ case satisfied both the prejudice and ineffective assistance of counsel requirements for habeas relief.

III. CIRCUIT JUDGE MARTIN’S “PROBING AND FACT SPECIFIC” REVIEW

The Eleventh Circuit’s rigid application of the “more harmful than helpful” standard in Evans v. Secretary, Department of Corrections creates an unreasonably high threshold for death row prisoners to establish prejudice. The decision leaves prisoners with the nearly impossible task of demonstrating that there is no stigma whatsoever related to the mitigating evidence that was negligently omitted during the sentencing phase. The court should have adopted the analysis set out in Judge Martin’s dissent,

65 See id. As opposed to the non-statutory character testimony presented by Evans’ trial counsel, the mental health evidence could have established a statutory mitigator to weigh heavily against the death sentence. See id. at 1340; Evans v. State, 838 So. 2d 1090, 1097 (Fla. 2002).
66 Evans III, 703 F.3d at 1342 (Martin, J., dissenting).
67 Id. at 1342–43.
68 Id.; Morton v. Sec’y, Fla. Dep’t of Corrs., 684 F.3d 1157, 1168 (11th Cir. 2012) (finding that anti-social personality disorder is a “valid mitigating circumstance for trial courts to consider” under Florida law). The jury could have reasonably weighed the statutory mitigating circumstances more favorably against the two aggravating circumstances. See Evans III, 703 F.3d at 148–49 (Martin, J., dissenting). The effect may have been a life sentence rather than the death penalty. See Fla. Stat. § 921.141(3) (2010); Evans III, 703 F.3d at 1349 (Martin, J., dissenting).
69 See Evans III, 703 F.3d at 1345, 1347 (Martin, J., dissenting).
70 Id. at 1347.
71 See Evans v. Sec’y, Dep’t of Corrs. (Evans III), 703 F.3d 1316, 1338 (11th Cir. 2013) (Martin, J., dissenting), cert. denied, 133 S. Ct. 2742 (May 28, 2013). Judge Martin criticized the majority’s decision, arguing that it neglected Evans’ right to be fully heard while facing the death penalty. Id.
72 See id. at 1348.
which tests whether the state courts provided adequate weight to the mitigating evidence under the particular circumstances of the individual offender. 73

Judge Martin’s “probing and fact specific” standard provides a reasonable balance between the governing standards of review and the prisoner’s rights during a death penalty hearing. 74 Under this analysis, the federal courts do not defer so readily to a state court’s correct citation of Strickland as controlling law. 75 Rather the courts would ask as a threshold question whether the state court gave reasonable weight to the mitigating evidence, given the particular facts. 76 In an appeal as dire as a death sentence challenge, the Eleventh Circuit should not have burdened Evans solely because of the court’s assumptions regarding his mental health disorders. 77

A review that initially tests a state court’s application of the Strickland framework is not unprecedented. 78 Judge Martin’s analysis echoes that of the Supreme Court in Porter v. McCollum. 79 Like the counsel in Evans, the defendant’s counsel in Porter failed to investigate and present mental health evidence to the sentencing jury, yet during a post-conviction proceeding, the Florida Supreme Court ruled that Porter did not prove prejudice. 80 The Su-

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73 See id. Here, the circumstances showed that the jury was well aware of a host of evidence speaking to his propensity for violence, including his criminal past. Id. The jury, however, was completely unaware of his mental disorders. Id.

74 See id. at 1338, 1348–49; Evans v. Sec’y, Dep’t of Corrs. (Evans II), 681 F.3d 1241, 1254 (11th Cir.) vacated, reh’g granted en banc, 686 F.3d 1321, 1322 (11th Cir. 2012), rev’d en banc, 703 F.3d 1316 (11th Cir. 2013).

75 Evans II, 681 F.3d at 1261 (holding that a court must also ask whether the state court adjudication of prejudice involved an unreasonable application of Strickland and explaining that an unreasonable application in light of the facts warrants granting of the writ of habeas corpus under AEDPA).

76 See Evans III, 703 F.3d at 1338, 1348–49 (Martin, J., dissenting); Evans II, 681 F.3d at 1261.

77 See Evans III, 703 F.3d at 1338, 1339 (Martin, J., dissenting) (stating that the AEDPA imposes a “difficult to meet” burden, but affords a less difficult de novo review where the state court’s application of federal law was unreasonable (quoting Harrington v. Richter, 131 S. Ct. 770, 786 (2011)). The majority imposed the “difficult to meet” burden on Evans and agreed with the Florida Supreme Court that evidence of Evans’ mental condition was more harmful than helpful. Id. at 1338. Judge Martin argued that the Eleventh Circuit majority applied this greater deference standard because it did not fully understand the value of Evans’ behavioral and impulse disorders. See id. at 1348.

78 See Porter v. McCollum, 558 U.S. 30, 39 (2009); Evans III, 703 F.3d at 1344 (Martin, J., dissenting).

79 See Porter, 558 U.S. at 39; Evans III, 703 F.3d at 1344 (Martin, J., dissenting).

80 See Porter, 558 U.S. at 43. The defense counsel in Porter failed to introduce mitigating evidence to the sentencing jury, including evidence of Porter’s military service, the mental and emotional disorders he developed as a result of his combat experience, and his abusive childhood. Id. at 43–44. The Florida Supreme Court reviewed the evidence and held that it was likely more
The Supreme Court in Porter overturned the Florida court’s decision, holding that the Florida Supreme Court irrationally applied Strickland as it “was not reasonable to discount entirely” the value of the mitigating evidence. 81 Judge Martin’s approach similarly reviews the application of the Strickland principles to the facts, particularly whether the state court’s Strickland analysis discounted the convict’s mental frailties while granting too much weight to the supposed negative impact of such evidence. 82

The Eleventh Circuit should have adopted Judge Martin’s standard for reviewing a prisoner’s habeas claim of prejudice at sentencing because it protects the prisoner’s right to a fair hearing and safeguards against unreasonable judgments that discount the value of mitigating evidence. 83 Without this analytical precaution, adjudication of prejudice based upon unreasonable character judgments will be afforded the highest deference upon review and may lead to unwarranted death sentences for persons suffering from mental illnesses. 84 Instead, the majority opinion creates a dangerous precedent that may jeopardize a convict’s life if the reviewing court cannot truly appreciate the nature of the defendant’s mental health issues. 85

CONCLUSION

The Eleventh Circuit’s en banc decision failed to protect Evans’ constitutional guarantee of a fair death sentence hearing in which all mitigating evidence reaches the jury. The majority’s decision places too great a burden on a death sentence challenger to show that the mitigating evidence omitted due to ineffective assistance of counsel was unequivocally mitigating. Because ineffective assistance of counsel at sentencing is always a substantial

81 See id. at 43–44. The Supreme Court stated that it was unreasonable for the Florida Supreme Court to conclude that the negative aspects accompanying the evidence would have nullified its mitigating value. Id. at 43. Rather, the evidence was so relevant to Porter’s plea for a life sentence that the Supreme Court determined that the evidence could have swayed the sentencing jury despite the aggravating implications. See id. at 44.

82 See Evans III, 703 F.3d at 1338, 1345, 1348–49 (Martin, J., dissenting). Judge Martin argued that the Florida Supreme Court irrationally held that the mental health evidence was inconsequential simply because the jury may have learned of other negative facts about Evans. Id. at 1345. It is important to note that the “new” negative facts the jury would have learned, including Evans’ troubled childhood, drug use, and additional illicit activity, would not have amounted to statutory aggravating factors, whereas the mental health disorders may have been statutory mitigating factors. See Fla. Stat. § 921.141 (5), (6)(b) (2010); Evans III, 703 F.3d at 1348–49 (Martin, J., dissenting).

83 See Evans III, 703 F.3d at 1344, 1348 (Martin, J., dissenting).

84 See id. at 1344, 1338–1339.

85 See id. at 1344, 1348.
threat to prisoners facing the death sentence, the standard to review prejudice should not present such an unreasonably high threshold for these challengers. This especially applies to prisoners suffering from mental health disorders because evidence of mental health mitigators may require the presentation of some undesirable qualities, as was the case in *Evans*. The Eleventh Circuit should have adopted Judge Martin’s “probing and fact specific analysis” as a threshold review of the state court’s application of the *Strickland* prejudice test. Judge Martin’s analysis would ensure that a state court does not easily dismiss the significance of mental health as a mitigating factor simply because such evidence may be accompanied by immaterial insinuations.