IN THE SUPREME COURT OF FLORIDA

CHADWICK D. BANKS,

Appellant,

v. CASE NO. SCO1-1153

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR GADSDEN COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE/PROCEDURAL HISTORY

The State accepts Banks' rendition of the procedural history of this case. As noted, by plea agreement Banks avoided a death sentence for the murder of his wife, but a sentencing hearing was conducted before a jury as to the murder of his stepdaughter Melody Cooper. The jury penalty phase began with jury selection on March 13, 1993, and concluded on 17, 1993, when the jury recommended death by a vote of 9-3. The trial court imposed a death sentence, finding three aggravators (prior violent felony convictions, the murder was committed while offender was engaged in commission of the felony of sexual battery, and the murder was HAC), one statutory mitigator (age) and several nonstatutory mitigators (2R 177-84).

STATEMENT OF THE FACTS

The State will offer its own statement of the facts. Noticeably missing from Banks' statement of facts is any mention of the evidence presented at trial. Such facts are critical to any evaluation of trial counsel's performance. The State will therefore first summarize what the record from the original sentencing proceeding shows, and then address the evidence presented at the postconviction evidentiary hearing.

A. THE FACT AND CIRCUMSTANCES SHOWN BY THE TRIAL RECORD

The basic facts of the crime are set out in this Court's opinion on direct appeal:

> Appellant entered Cassandra Banks' trailer with a gun at approximately 2:50 a.m. on September 24, 1992. He shot Cassandra Banks in the head while she was asleep. Ms. Banks died without ever gaining consciousness. Appellant then went to Melody Cooper's bedroom at the other end of the trailer. He set the gun down and sexually battered her for approximately twenty minutes before shooting her in the top of the head, killing her.

Banks v. State, 700 So.2d 363, 365 (Fla. 1997).

Banks was arrested later that morning, at work (3TR 656-57).[1] He was evaluated by psychologist Dr. Harry McClaren that same day, according to allegations set out in a defense motion to suppress (1R 16-19). The State's Amended Answer to Demand for Discovery shows that Dr. McClaren's summary of information provided to him by Banks, along with his psychological report, were furnished to defense counsel on December 1, 1993 (1R 138).

In addition, the trial court granted Banks' request for a confidential defense expert, appointing Dr. James Brown by order dated September 29, 1992 (1R 8).[2]

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[1] Like Banks, the State will cite to the trial record as "R," to the trial transcript as "TR," to the to the postconviction record as "PCR" and to the postconviction transcript as "PCT."

[2] Banks initially was represented by assistant public defender Ed Harvey, who filed the aforementioned motion to

Neither Dr. McClaren nor Dr. Brown testified at the penalty phase.

1. ***The State's evidence.*** The State presented eight witnesses at the penalty phase, whose testimony may be summarized as follows:

Chadwick Banks was married to Cassandra Banks (3TR 527). Cassandra had one child from a previous relationship, Melody Cooper, who was not quite 11 years old at the time she was murdered (3TR 539). They lived in a trailer near Dut's place, a nightclub owned by Cassandra's grandmother Bernice Collins and run by her son (and Cassandra's uncle) Leonard Collins (3TR 537, 4TR 773-74).

The evening before the murder, Banks was at Dut's, drinking malt liquor and shooting pool (3TR 529-30). Cassandra was there for a while, but left sometime before 2:15-2:30 a.m. (3TR 530).

Just before 3:00 a.m., Bernice Collins saw Banks drive to the trailer he and the victims shared, and sit in his car for a few minutes (3TR 548). Then he went "onto the front" of the trailer (3TR 548). About an hour later, Collins heard a car "spin off" in front of her house (3TR 550). The next morning,

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suppress and motion for appointment of a confidential defense mental health expert. The record indicates that Steven L. Seliger was appointed to represent Banks on October 26, 1992 (1R 50).

Collins sent her son (and Cassandra's father) Buddy Black to the trailer to check on Cassandra. He discovered the bodies of Cassandra and Melody Cooper (3TR 552).

Cassandra had been shot in the head while she lay sleeping (4TR 712-14). Melody had been sexually battered and then shot in the top of her head (4TR 721-24).

Following his arrest, Banks admitted to police that, after shooting his wife, he had gone to his stepdaughter Melody Cooper's bedroom (4TR 678). She was awake, and asked his what he was doing (4TR 678-79). Banks admitted that he "spanked" her, "molested" her for "about twenty minutes," and then shot her (4TR 678-80). He denied having anal sex with her and claimed that she had not tried to get away or to fight him (4TR 675, 680). The physical evidence was to the contrary, however.

Melody Cooper's body had been found face down, on her knees, on the floor beside her bed. She was nude below her waist, and her posterior and genitalia were exposed (4TR 587, 724). Her underpants had been torn and lay under a T-shirt that had what appeared to be a footprint on it (4TR 605). A pubic hair deep inside her vagina was microscopically consistent with Banks' pubic hair (4TR 648, 720). In addition, her anus was "widely dilated and relaxed," and the lining of her anus was torn,

indicating the victim had been sodomized (4TR 721-22). Banks' semen was found in the victim's anus, on her t-shirt, on her inner thigh, on the floor, and in Banks' own underwear (4TR 639-42, 647).

Melody's bedroom and her bed were in disarray (4TR 586, 592). She had a bad bruise on the right side of her forehead and an abrasion on her right eyebrow (4TR 720-21). There was a blood stain on the bed sheet. Blood identified as Banks' was found under Melody's fingernails and on the pillowcase, while blood on her t-shirt was identified as hers (4TR 639-40).

The medical examiner testified that, given the position of Melody's body, which had not moved after the shot, her head must have been "pulled back real far . . . to get the gun to shoot in the top of the head" (4TR 724-25).

The State presented an information, plea and adjudication of guilt for the murder of Cassandra Banks and, as well, two prior aggravated assaults which Banks had committed a little more than a year before he murdered Cassandra and Melody. State's Exhibit 40. He was on probation for these crimes when he committed the two murders in the instant case.

2. ***The defendant's evidence.*** Banks presented the testimony of seven witnesses in mitigation, whose testimony may be summarized as follows:

Banks was 21 years old at the time of the murders (5TR 817). He worked at Fiberstone Quarries in Quincy. Eric Weitzlaben, production manager, testified that he had hired Banks in 1991 (4TR 765). Banks' application was neat and filled out completely; he was polite and courteous in the job interview (4TR 765). He was hired as a production worker, but was ultimately promoted to production crew leader, supervising four other employees (4TR 766). Banks came to work on time, and did a good job (4TR 766). He had been given a raise the Wednesday before the murders (4TR 766). Weitzlaben testified that when Banks came in the morning after the murders, he looked as if he had been out "all night drinking" (4TR 767). He had never come to work looking like that before (4TR 768). Banks told him he and his wife had fought (4TR 768).

Banks' cousin Docell Strong also worked at Fiberstone; in fact, Banks had helped him get his job there (4TR 732). Strong testified that Banks and his wife loved each other very much (4TR 735). Strong had never seen them argue in public, and Banks was the kind of guy who would give his "last cent to whoever asked for it" (4TR 738).

Michael Figgers, band instructor at Shanks High School, testified that Banks had belonged to the band all through high school (4TR 746). He was one of the band's better players, and

was section leader his last two years (4TR 747). Figgers testified that Banks was "the one to serve as the example to the other persons . . . as to the kind of person you should be . . . having good character, having high goals, being a good student academically as well as musically" (4TR 747). Figgers recalled no instances of negative reports about Banks from any other faculty member, and never personally observed any abusive or derogatory behavior by Banks towards other students (4TR 749). Banks was always respectful towards teachers and students (4TR 751). His father had been very supportive of Banks' school activities, and was always there for him (4TR 750-51). Even after his graduation, Banks remained in touch with Figgers (4TR 754).

Genevieve Everett, now Curriculum Assistant at Havana Northside High School, testified that she knew Banks from Shanks High School and before that from Carter Parramore School (4TR 756-57). She described Banks as a typical student who was in the middle of his class academically (4TR 758). Banks was in a class she took on a field trip to Washington, D.C. (4TR 759). Only students with no behavior problems were allowed to go, and Banks was one of those students (4TR 760).

Banks' father Dennis Banks, a long-time corrections officer for the State of Florida, testified that the defendant was the

oldest of seven children (5TR 790). They had always lived in Gadsden County (5TR 791). The defendant had been a leader at home, and presented a "fatherly" image to other kids (5TR 792). Theirs was a church-going family, and the defendant would often take responsibility for getting other kids to church and school activities (5TR 792). The defendant took care of his grandmother, who lived next door, sometimes spending nights with her so she would not be alone (5TR 794).

The elder Banks testified that when he visited his son in jail after his arrest, his son's "sluggish" behavior led him to believe he had been drinking (5TR 798, 800). He described his relationship with his son in glowing terms:

> Our relationship was one that no man could imagine. As a matter of fact, the whole family structure - I mean, it's just - what can you say about a son that was there for his father, and vice-a-versa? Chadwick and I spent - I think we spent more time together than anybody else in this country. We just did numerous things together. From the point of conception I was there up, until he graduated from high school. And we just did everything together. We participated in over - I don't know the number, but ever since my son was in the 4th or 5th grade, there wasn't a game somewhere Friday night we weren't going to. We would to out-of-town a lot. We went to Atlanta on numerous trips, we went [to] Gainesville and this was school activities. And if he went on 400 trips, I was there with him.

(5TR 801-02).

Banks' mother Rosemary also testified. She is the coordinator of the State Housing Initiative Program in Gadsden County. Before that, she had been the Assistant Financial Director to the Clerk of Court (5T 814). Mrs. Banks testified that she had kept a family history of her family, and had prepared a photo album of family photographs, showing activities from Christmas to summer vacations to various graduations. This album was admitted in evidence as Defense Exhibit 1 (5TR 815-21). Mrs. Banks also testified about various awards and certificates the defendant had earned (5TR 821). Mrs. Banks testified that on the morning following the murders, she had gone to her mother-in-law's trailer, where she found the defendant sleeping (5TR 835). She had to shake her son several times to awaken him, and she could tell he had been drinking (5TR 837). She made him get up and go to work, thinking that if he could stay out all night, he could work (5TR 837). Because she was concerned about the way he looked, she followed him to work (5TR 837).

B. THE EVIDENCE PRESENTED AT THE POSTCONVICTION HEARING

Banks presented the testimony of four witnesses - lead trial counsel Steve Seliger, co-counsel Armando Garcia, Dr. David Partyka, and Dr. James Larson.

Seliger testified that he has been a member of the Florida Bar since 1977 (PCT 9). At the time of Banks' trial, his practice consisted exclusively of criminal defense work (PST 9). He had been defense counsel in five to seven capital cases, and had been involved in additional capital cases "peripherally" (PST 9-10). However, Banks was (and still is) the only Gadsden County case of his that went to a penalty phase; Seliger had tried many other cases in Gadsden County in which there was a plea, the State waived death, or he obtained a verdict of less than first degree murder (PST 12). In addition to his trial experience, Seliger has been actively involved in numerous capital post-conviction proceedings (PCT 28).

At the time Seliger was appointed in this case, a mental health expert had already been appointed at the behest of the Public Defender's office (PST 12). Seliger obtained school records, military records, employment records, medical records, and talked to family and other people (PST 12-13). Seliger did not think he presented any of these records to the appointed mental health expert, Dr. Brown, because "he had already come to some conclusions, that he was pretty set about, that were not helpful" (PST 13).

Seliger talked to Dr. Harry McClaren, who had been appointed at the behest of the State "early on" (PST 13). Seliger knew

that Dr. McClaren had reviewed Banks' medical records (PST 13). Seliger gave him Banks' school records, and either told him about, or gave him, Banks' military records (PST 13).

Seliger also had an "informal conversation" about this case with a psychologist/lawyer out of Marianna, whose name Seliger no longer recalls (PST 16-17).

Ultimately, after obtaining records and investigating the case, Seliger decided not to use any mental-health expert witness (PST 17). He knew from reviewing the medical records of the family doctor, Pat Woodard, that Banks had been physically abused (PST 17). Seliger was aware that "[c]hildhood development has a profound affect on adult behavior" (PST 18). However, he also knew that the physical abuse had lasted for a "finite period of time," having ended some ten years before the murder (PST 19). Furthermore, the parents were defensive about the allegations of child abuse and "would not go along with the idea that this conduct had occurred" (PST 29). And in fact, the "physical abuse" appears to have been only that Banks' father had attempted to discipline him by whipping him with electrical cord, albeit hard enough to leave marks (PCT 35). In Seliger's judgment:

> [I]t's important not just to know . . . that someone has suffered some kind of childhood abuse. The important thing is making the connection between that history and why you

> do what you did. And I never could get anyone to make that connection. I mean, that fact that someone had been physically abused as a child for a finite period of time and 10 years later killed two people, there has to be some connection to that.

(PST 24). Seliger explained that it was always a goal in capital cases "to be able to tell a jury, in a language that people can understand, why someone kills someone else" (PST 31). The problem in this case was that he "never got an explanation that I could present to a jury" (PST 25). Furthermore, if he had tried to present child abuse in mitigation, it would have been countered by Dr. McClaren, who had examined Banks immediately after the murders, and who had "strong feelings" about Banks' mental competence and criminal responsibility (PCT 33). Seliger testified that nothing he could do "would make [Dr. McClaren] come to some other conclusion" and, based on Seliger's experience in a previous case, this "substantial difference of opinion" between Dr. McClaren and any hypothetical additional mental health expert the defense might have retained would have at least negated the value of the latter, or, worse, the rebuttal could have been seriously harmful to the defense (PCT 35, 39-40).

Seliger was aware that Banks had been drinking the night of the murder. In fact, he had presented evidence to that effect to support the defense theory that this murder was an aberration

in an otherwise good life and that alcohol had played a significant part in the crime (PCT 32). However, Seliger did not attempt to show that Banks had committed several violent crimes because of alcohol or that he was habitually violent when drinking; on the contrary, to the extent that he could do so, he tried to "keep out any information about prior criminal history" (PCT 23). He also wanted to keep out evidence (and was successful in doing so) that Banks always carried a gun, and that he might have been having an ongoing sexual relationship with his 10 year old stepdaughter (PCT 28).

Seliger was unaware of any documented history of alcoholism (PST 36). In fact, Banks had a good employment history; he showed up for work everyday, his employer "thought the world of him," and he had just received a raise a day or two before committing these murders (PCT 36).

Seliger's strategy was twofold. First, this case "was always about the death of the child, not the death of the adult" (PCT 14). He wanted to avoid presenting two murders to the jury for sentencing, because they could compromise by giving a death sentence for the murder of the child and a life sentence for the death of the wife. So, he negotiated a plea with the State which gave Banks a life sentence for the murder of his wife, leaving only one sentence issue for the jury (PC 14). Second,

Seliger tried to portray Banks as a person whose life was "worth saving" (PCT 19, 29, 33). Based on his experience trying some 75 cases before Gadsden County juries, Seliger knew that Banks' good family background would carry weight with a Gadsden County jury, and Seliger wanted to exploit that (PCT 34). In a county where "it is common to see single parent households, . . . children in trouble with the law, . . . [and] parents who do not work," Banks' family was "pretty remarkable" (PCT 34). In Seliger's view:

> We're a pretty small county. People know each other. The Banks family had a reputation of being a really decent family. People knew the mother. She was an accomplished employee of the county. His dad worked, as I remember, in the Department of Corrections. These are people who had made substantial efforts in raising a family under pretty tough circumstances.

(PCT 35). Given the absence of any testimony available to him that would tie any abuse Banks suffered as a child to the murders he committed, Seliger chose not to present evidence that would be inconsistent with evidence that Banks was a basically good person from a good, hardworking family (PCT 18, 24-25).

Finally, Seliger was assisted by attorney Armando Garcia (PCT 15). Garcia did little in the way of investigation; that was Seliger's "job" (PCT 20-21). However, they decided that Garcia would handle closing arguments, as he was "more

emotional" than Seliger, and this was a case "where we were trying to deal with a very horrific act and trying to, to the extent that we could, humanize Chad Banks" (PCT 23). Seliger felt that Garcia had greater "capacity to express that emotion" than did Seliger (PCT 23). While in other circumstances, it would have made sense for Seliger to make the closing argument, "in this case, with the dynamics that at least we were trying to get across to the jury, [Garcia] was the better person to tell that story" (PCT 23).

Armando Garcia testified that he was admitted to the Florida bar in 1977 (PCT 49). Two years later, he began doing "criminal defense," along with family and transportation law. In 1986, he became an assistant federal public defender (PCT 49). In 1990, he returned to the private practice of criminal law. Later, he joined the staff of the Volunteer Lawyers Resource Center in Tallahassee (PCT 49). In 1994, he again returned to the private practice of law, ultimately forming a partnership with Steve Seliger (PCT 49). Garcia was a classmate of Seliger's at law school and they have been friends and colleagues for 25 years (PCT 50).

When Banks' case came along, Garcia was in the process of leaving the Volunteer Lawyers' Resource Center. He talked to his friend Seliger about Banks' case, and began assisting him

pro bono (PCT 52-53). Seliger was lead counsel; Garcia's role was limited (PCT 56). The closing argument he gave in this case was his first (and only) closing argument at the penalty phase of a capital case (PCT 54). When asked if he was prepared to deliver the closing argument, he answered, "Well, of course I was prepared" (PCT 55).

David Partyka was the third witness. He has a doctorate in clinical psychology and has been licensed to practice psychology in the State of Florida since 1993 (PCT 58). From 1990 to 1994, he was the Chief of Psychology at the Dozier School for Boys in Marianna. He now reviews files for Social Security in Tallahassee, and has an independent practice specializing in forensic psychology, including "Jimmy Rice" evaluations of adults (PCT 59, 61). This is his first capital case (PCT 59-60). He reviewed medical records, school records and Department of Correction records (PCT 62). He also listened to the audio tape of Banks' confession to police, and read the reports of Dr. Brown and Dr. McClaren (PCT 62).

Dr. Partyka interviewed Banks on four separate occasions, took a mental status evaluation, and rated Banks on the Hair Psychopathy Checklist (PCT 65). The Haire checklist is not a "test" administered to the patient, but is filled out by the evaluator based upon his or her judgment as to whether each of

the factors on the checklist is present (PCT 65-66). Dr. Partyka testified that a high score on the Haire checklist "is known to correlate highly with future violent behavior, sexual violence, and criminal - further criminal behavior" (PCT 67). Banks scored low on this checklist (PCT 67).

One of the factors Dr. Partyka used to calculate Banks' score on this checklist was the low level of violent behavior exhibited by Banks. Dr. Partyka noted that, from the time Banks has been in prison, "he has not had any aggressive behavior other than a scuffle on a basketball court" (PCT 68). Further, the aggravated assaults Banks had committed a year before the murders, as well as the murders themselves, had occurred while Banks had been drinking heavily (PCT 68).

Dr. Partyka felt it was important to consider that Banks had been disciplined with an electric cord on at least seven occasions and once had been "tossed to the ground, I believe, by his father, where he may have been unconscious" (PCT 69). The abuse ended, according to Banks, when he confronted his father at age 15 and told him "the beatings would no longer occur" (PCT 70). Dr. Partyka was unable to meet with Banks' family to confirm any of this (PCT 71).

Banks told Dr. Partyka that his parents did not drink, but he began drinking in his late teens (PCT 71). He drank

"considerably" while serving in the army in North Korea (PCT 71). He got into several "altercations" in bars, and was "counseled on several occasions by his superiors in regard to his drinking behavior" (PCT 72). After he got out of the army, Banks was apparently a "weekend drinker" and "Wednesday nights at Dut's was also probably a drinking night" (PCT 72). However, he was able to maintain a steady job (PCT 72). In Dr. Partyka's opinion:

> [T]he only time [Banks] reports being aggressive, he also reports heavy drinking. Now I'm sure he drank heavy on other occasions that didn't include violence, but in terms of the incident in the Service, the incident of the aggravated battery, the DUI, and certainly the night of the crime, he was drinking heavily in each one of those. And so my sense is - and given the fact that he has been nonviolent in prison where, of course, he's abstinent from alcohol, there's a clear pattern of drinking and then becoming violent.

(PCT 72-73). Dr. Partyka "hypothesize[d]" that, when a child is beaten as a way of discipline, the child learns that violence is a way of dealing with conflict and anticipates "hostile intent" from others (PCT 73-74). He felt that alcohol played a "major role" in the murders that Banks committed, affecting his judgment, and "disinhibiting his aggression" (PCT 75).

On cross-examination, Dr. Partyka acknowledged that he had not talked to Dr. Brown or to Dr. McClaren (PCT 78). He felt it

was sufficient to review their notes (PCT 78). Dr. Partyka also had not discussed the case with Steve Seliger (PCT 78-79).

Dr. Partyka acknowledged that the "incident" in the military was that, while on duty, Banks had pulled a gun on a South Korean officer who was on watch with him (PCT 80). Despite his being on duty, it was Dr. Partyka's "recall" that Banks had been drinking (PCT 80). As a result of this incident, in combination with prior conduct, Banks was given a general discharge from the army (PCT 80).

Dr. Partyka was unaware of trial testimony indicating that Banks displayed no visible signs of intoxication when he left Dut's the night of the murder (PCT 81). Dr. Partyka acknowledged that his opinion as to the degree of Banks' intoxication that night was based on Banks' self-report (PCT 81), but he denied disregarding conflicting information about how much Banks had drunk that night (PCT 82). He acknowledged that he did not need to be a psychologist to know that alcohol could affect a drinker's judgment and make him more aggressive (PCT 82).

On redirect, Dr. Partyka insisted that, in his judgment, Banks had provided him with reliable information; he made no "totally conflicting statements" (PCT 84). Banks had

acknowledged his guilt both in this case and in regard to the prior aggravated assaults (PCT 84).

On recross, Dr. Partyka admitted he was unaware that Banks had denied anally sodomizing his stepdaughter (PCT 87).

Dr. Larson was the fourth and final witness at the evidentiary hearing. He is a licensed psychologist with a Ph.D degree in clinical psychology (PCT 88-89). Dr. Larson reviewed Banks' medical records, school records, army records, criminal history, and notes from evaluations by Dr. Brown, Dr. McClaren, and Dr. Partyka (PCT 93). He had not discussed the case with Steve Seliger (PCT 93-94). Dr. Larson claimed to have a special expertise in the area of battered child syndrome (PCT 94). By 1990, Dr. Larson testified, there had been almost 30 years of research into the affects of child abuse (PCT 96). Researchers have learned that children who have been abused are at higher risk for mental illness, for anger management problems, for committing violent acts themselves, for criminal activity and for abuse of drugs such as alcohol (PCT 96-97). Dr. Larson compared such persons to a "cocked gun," pointed, usually, toward an "attachment figure" (PCT 98). Dr. Larson testified that, if he had been contacted by trial counsel, he could have presented testimony to the jury that would "help the jury understand the relationship between early childhood abuse and

adult anger and adult violence and how that violence is more likely to be released in association with alcohol and how alcohol abuse itself is . . . a way of dealing with earlier childhood trauma" (PCT 98-99).

Dr. Larson testified that childhood abuse is often a form of discipline and, as such, keeps the child in control until the child grows up and goes out on his own. In a controlled environment, behavioral symptoms are less likely to manifest themselves (PCT 102). For example, Banks' behavior in the controlled environment of prison "has been fine" (PCT 102-03).

On cross-examination, Dr. Larson acknowledged that Banks had gotten into a fight even though, as a death-row inmate, he has had very little opportunity to interact with other inmates or to get in fights (PCT 103). He acknowledged that he had not talked to Steve Seliger, and did not know what Seliger might have known that was not contained within any of the written files (PCT 105). Dr. Larson also acknowledged that he might "have learned more" if he had talked to Dr. Brown and Dr. McClaren, but he "decided not to" (PCT 106). Although Dr. Larson described the whippings administered to Banks by his father as "severe discipline that left scarring," he acknowledged that he had not talked to any family member about the circumstances surrounding these whippings (PCT 107). In his view, it was "not important

to talk to the parents" (PCT 107). Dr. Larson acknowledged that some people might classify Banks' whippings as corporal punishment, not child abuse (PCT 107). He acknowledged that "the way I was raised and perhaps the way you were raised, a different standard, it was not considered child abuse," it was "considered severe physical discipline or physical discipline or not spoiling the child" (PCT 108). Moreover, various people, including 12 jurors, might disagree about what level of such discipline might be excessive, and might even take offense at characterizations of such discipline as "child abuse" (PCT 108-09). Dr. Larson acknowledged that if he had testified to child abuse at the penalty phase, he would have been attacking Banks' family, and he conceded that Banks' attorney would have had to weigh the affect of such testimony and the possibility of creating antagonism against the defendant (109-10). Moreover, testimony that Banks was prone to anger management problems and posed a higher risk of violence would in effect be characterizing Banks as a "dangerous individual" (PC 110). A jury might, Dr. Larson conceded, view death as a more appropriate sentence for such a dangerous person than for someone who had committed an aberrant act and would never be a danger again (PCT 110-11).

SUMMARY OF ARGUMENT

The one issue on this appeal is whether Banks was denied constitutionally sufficient representation by counsel at the penalty phase of his trial. Although Banks tries to argue that this is a case in which counsel failed to investigate and prepare and failed to consult mental health experts, the record clearly shows that Banks was represented by experienced counsel who investigated this case thoroughly, consulted at least three mental health experts, and decided on strategy tailored to a Gadsden County jury after carefully considering his options. Banks has not shown that his "new" mental health experts were reasonably available in 1993, but even if they were, trial counsel did not perform deficiently for failing to consult additional mental health experts, especially when he knew that the State would have at least one mental health expert to rebut any mental mitigation the defense might present. Banks has failed to show that his trial counsel's preparation fell below constitutional minimums, or that no reasonable attorney would have chosen the good-character, life-worth-saving theory of mitigation chosen by trial counsel.

Furthermore, Banks has failed to show prejudice. The mental health expert testimony he has now presented is subject to attack in several respects, given one expert's unfamiliarity

with critical facts, and the other expert's concession that the "child abuse" Banks suffered might be interpreted by at least some jurors as discipline. In addition, the presentation of a child abuse theory would have jeopardized the family's cooperation, and might have antagonized the jurors, given the Banks family's good reputation in Gadsden County. Banks has failed to demonstrate that his present theory of mitigation would have been **as** effective as the one chosen by trial counsel; he certainly has failed to show that it would have been so much more effective that in reasonable probability it would have resulted in a life sentence.

ARGUMENT

THE TRIAL COURT PROPERLY FOUND THAT BANKS HAS FAILED TO ESTABLISH INEFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE OF HIS CAPITAL TRIAL

Banks contends his trial counsel were ineffective for failing to obtain additional mental health expert evaluations and to present mental health expert testimony about Banks' childhood physical abuse and his propensity to commit violent crimes while drinking. Trial counsel, he contends, should have presented expert mental health expert testimony about how alcohol, combined with Banks' personal background and characteristics, contributed to his mental state the night he murdered his wife and sexually battered and murdered his 11-year-old stepdaughter. Banks argues that this is a case "underscored by defense counsel's failure to obtain the assistance of a court-appointed mental-health consultant during the penalty phase of a capital proceeding." Initial Brief of Appellant at 20. While acknowledging that foregoing mental health expert testimony might be "a wise strategic choice," Banks argues that trial counsel should not have made that choice here without first securing the "advice and expertise of a mental-health consultant." Initial Brief of Appellant at 21. He also urges that trial counsel was ineffective for failing to "find and present" evidence of "brutal abuse" inflicted against

Banks by his father. Initial Brief of Appellant at 25. He hints, without actually clearly saying so, that trial counsel's investigation was inadequate because he did not secure the services of an investigator. Ibid. In sum, Banks argues that trial counsel's failure to present evidence of abusive childhood and violent behavior while intoxicated was not a "strategic choice," but the result of a failure to investigate and prepare. Initial Brief of Appellant at 26.

The record fails to support Banks' contention that trial counsel failed to conduct a constitutionally inadequate investigation. On the contrary, the record demonstrates that lead trial counsel Seliger was an experienced capital litigator and, just as importantly, an experienced criminal litigator *in Gadsden County*, who investigated and considered various possible defense theories and then chose the one he thought would be most appealing to a Gadsden County jury considering all the circumstances. The choice he made was not the only *possible* choice, but it was a *reasonable* choice, and one that other competent attorneys might well have chosen in the circumstances of this case. Moreover, Banks has failed to demonstrate a reasonable probability of a different result had he presented evidence at sentencing in support of the defense mitigation

theory he now posits as superior to the one that trial counsel chose.

The applicable principles of law relating to claims of ineffective assistance of counsel are well settled. This Court most recently summarized them in Spencer v. State, No. SC00-1051/2588 (Fla. April 11, 2002):

> In order to prevail on a claim of ineffective assistance of trial counsel, a defendant must demonstrate that (1) counsel's performance was deficient and (2) there is a reasonable probability that the outcome of the proceeding would have been different. See Strickland v. Washington, 466 U.S. 668, 687, 694 (1984). A reasonable probability is a probability sufficient to undermine confidence in the outcome. See id. at 694. In reviewing counsel's performance, the court must be highly deferential to counsel, and in assessing the performance, every effort must "be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Id. at 689; see also Rivera v. Dugger, 629 So. 2d 105, 107 (Fla. 1993). As to the first prong, the defendant must establish that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland, 466 U.S. at 687; see also Cherry v. State, 659 So. 2d 1069, 1072 (Fla. 1995). For the prejudice prong, the reviewing court must determine whether there is a reasonable probability that, but for the deficiency, the result of the proceeding would have been different. See Strickland, 466 U.S. at 695; see also Valle v. State, 705 So. 2d 1331,

> 1333 (Fla. 1997). "Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable." Strickland, 466 U.S. at 687.

Slip opinion at pp 8-9.

The circuit court found that trial counsel conducted "a reasonable investigation of mental health mitigation prior to trial, and made a strategic decision not to present this information" (3R 225)(p. 4 of the order denying relief). To the extent that this determination involves findings of fact, it is entitled to deference, although the ultimate legal conclusions are reviewed de novo by this Court. Hunter v. State, Case Nos. SC00-1885, SC01-836 (Fla. decided April 4, 2002). The record supports the circuit court's factual determination that trial counsel investigated mental health mitigation and made a strategic decision not to present it. Moreover, the court's legal conclusion - that counsel's investigation and strategic decisions were reasonable - is correct as a matter of law.

Two mental health experts - Dr. McClaren and Dr. Brown - had evaluated Banks before trial, the former at the behest of the State, and the latter on motion of the defendant. Seliger reviewed their reports and discussed the case with them. In addition, he consulted with an attorney/psychologist out of Marianna. The problem for Mr. Seliger was that neither Dr.

McClaren nor Dr. Brown had rendered favorable reports. On the contrary, the reports were downright unfavorable. In Seliger's judgment, neither of these two experts was able to give an explanation for Banks' conduct that a jury might find mitigating, and the Marianna attorney/psychologist could provide no workable theory of mental mitigation.

Mr. Seliger was not unaware of Banks' background or history. He took numerous statements and depositions in his preparation for trial. In addition, he obtained military records, school records, employment records and medical records. He was aware from the medical records that Banks had been subjected to whippings as a child that were severe enough to leave scars. However, he was also aware that these whippings had ended ten years before the murder. Mr. Seliger had several reasons for, ultimately, deciding not to present evidence of this child abuse: (1) first, Seliger felt that it was not enough just to have evidence of child abuse, but to make some connection between that abuse and the fact that, more than ten years later, Banks had sexually assaulted and murdered his ten year old stepdaughter; unfortunately, no such connection could be made according to the mental health experts he had consulted (2) second, presenting evidence of child abuse would have tarnished the reputation of Banks' parents and would have been

"inconsistent with trying to present the family in a good light," which Seliger thought was important with Gadsden County juries; (3) third, even if child abuse might somehow have mitigated the murder of Banks' wife, in Seliger's judgment it would not, in the eyes of the jury, have significantly diminished his culpability for murdering his stepdaughter; (4) fourth, one very practical problem with pursuing a theory of child abuse was that Banks' parents were defensive about these allegations and "would not go along with the idea that this conduct had occurred;" (5) finally, an even more serious practical problem with attempting to argue any diminished responsibility based on child abuse is that it could and would have been countered by Dr. McClaren, who had examined Banks immediately after the murders, and who had disclosed to Seliger "strong feelings" about Banks' mental competence. Regarding this last factor, Seliger testified that nothing he could do would make Dr. McClaren come off his conclusions, and Seliger thought the potential detriment to the defendant's case from rebuttal testimony by Dr. McClaren outweighed any possible usefulness of child abuse evidence, presented through an expert or otherwise.

Banks argues, however, that experts did exist who could have testified about a connection with child abuse and a violent

crime committed while the defendant was intoxicated, and that trial counsel should have found and presented them. However, this is not a case in which counsel "never attempted to meaningfully investigate mitigation," Rose v. State, 675 So.2d 567, 572 (Fla. 1996), or where counsel's investigation was "woefully inadequate." Hildwin v. Dugger, 654 So.2d 107, 109 (Fla. 1995). Seliger investigated this case, and his preparation included consideration of mental health mitigation and consultation with mental health experts. The mere fact that, many years after trial, Banks has now found arguably more favorable experts does not establish that trial counsel performed deficiently, or that his original investigation was unreasonable or constitutionally inadequate. Waters v. Thomas, 46 F.3d 1506 (11th Cir. 1995); Asay v. State, 769 So.2d 974 (Fla. 2000).

Even assuming that Dr. Partyka and Dr. Larson would have been reasonably available at the time of sentencing,[3] the fact

[3] "Merely proving that someone - years later - located an expert who will testify favorably is irrelevant unless the petitioner, the eventual expert, counsel, or some other person can establish a reasonable likelihood that a similar expert could have been found at the pertinent time by an ordinarily competent attorney using reasonably diligent effort." Elledge v. Dugger, 823 F.2d 1439 (11th Cir. 1987)(quoted in Kokal v. Dugger, 718 So.2d 138 (fn. 13) (Fla. 1998)). Dr. Partyka only became licensed to practice psychology in this State in 1993 - the year this case was tried. Moreover, he only became involved in his first capital case (this one) some *eight years after*

remains that, to the extent that their testimony might support a theory of diminished capacity, it could have been countered by testimony from Dr. McClaren, as Seliger recognized. Furthermore, any benefit from their testimony depends upon an assumption that Banks was heavily intoxicated at the time of the crime, when the evidence was to the contrary. See Walls v. State, 641 So.2d 381, 390-91 (Fla. 1994) (expert opinion testimony "gains its greatest force to the degree it is supported by the facts at hand, and its weight diminished to the degree such support is lacking"). Seliger attempted to establish that Banks was intoxicated at the time of the murder, and Banks indisputably had drunk *some* alcohol during the course of the evening; however, the evidence did *not* show that he was intoxicated at the time he murdered his wife and stepdaughter. Because **present counsel has presented absolutely no additional evidence of intoxication at the time of the crime**, Banks is bound by the finding of this Court on direct appeal:

> Testimony revealed that in the hours preceding the murders, appellant was present

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trial. There is no evidence in this record that Steve Seliger or any other capital attorney in 1993 would or could have known about Dr. Partyka or any expertise he might have. In addition, while Dr. Larson has testified in numerous capital cases, it has not been shown that he has ever testified as an expert on child abuse, or would have been known to have expertise as such by reasonable attorneys in the Gadsden County area in 1993.

> at a local bar, where he was served between five and seven sixteen-ounce servings of malt liquor over a period of approximately five or six hours. Notwithstanding his alcohol consumption, appellant won several pool games throughout the evening and displayed no visible signs of drunkenness such as slurred speech or stumbling. Also, the circumstances of the crimes themselves demonstrate that they were committed in a purposeful manner. . . . Thus, although he had ingested a considerable quantity of alcohol before the murders, appellant's actions both before and during the murders and the length of time over which the alcohol was consumed support the trial court's findings that there was insufficient evidence to establish that appellant was under the influence of alcohol when he assaulted and killed Melody Cooper.

Banks v. State, 700 So.2d 363, 368 (Fla. 1997).

Any theory of mitigation based on Dr. Partyka's testimony that Banks was violent when intoxicated could have been rebutted in several respects. First of all, Dr. Partyka was unaware of testimony presented at the penalty phase from various witnesses that Banks had displayed no visible signs of intoxication when he had left Dut's. Dr. Partyka also gave great weight to what he thought was Banks' acceptance of guilt, but was unaware that Banks had denied anally raping his stepdaughter, despite virtually irrefutable evidence to the contrary. Cross-examination by the State would have exposed Dr. Partyka's unfamiliarity with the facts of this crime. Further, it must be noted that trial counsel knew from Banks' military records that

Banks had assaulted a Korean officer with a deadly weapon *while on duty* and, thus, presumably, while sober. Dr. Partyka's assumption to the contrary was based solely on Banks' self-report, as was his assumption that Banks was intoxicated when he had committed the aggravated assaults for which he was on probation at the time of these murders. Not only could Dr. Partyka's credibility have been attacked on this basis, but, had trial counsel attempted to present Dr. Partyka's testimony that Banks was violent only when intoxicated, he would have opened the door for the State to delve into and highlight these prior violent acts, contrary to counsel's desire to minimize the jury's knowledge of Banks' violent past.

As for Dr. Larson's testimony, it must be noted that Dr. Larson himself conceded that jurors might have varying opinions about the parameters of proper discipline and the appropriate of corporeal punishment, and that some juror's might be offended by any testimony in effect attacking Banks' parents. He also conceded that a defendant who has "anger management problems," even if due in part to an abusive background, might be perceived by a jury as a dangerous individual from whom society needs to be protected.

At best, any theory of mitigation suggesting that Banks is a child abuse victim who can be homicidally violent when

intoxicated is a "two-edged sword," possibly helpful, but also potentially harmful. See Gorby v. State, Nos. SC95153, SC00-405 (Fla. April 11, 2002)("An attorney's reasoned tactical decision not to present evidence of dubious mitigating value does not constitute ineffective assistance."). Especially in view Dr. McClaren's opinion about Banks' mental condition, which was available to the State to use in rebuttal of any defense expert mental health expert, Mr. Seliger surely did not perform unreasonably in concluding that it was best not to attack Banks' parents and to keep out any evidence of prior criminal violence to the extent possible, while pursuing a mitigation theory that Banks was a "life worth saving" because he was basically a good person and a good, dependable worker from a good family, whose action in this case was an alcohol-induced aberration in an otherwise productive and criminally uneventful life.

"This Court has held that defense counsel's strategic choices do not constitute deficient conduct if alternative courses of action have been considered and rejected." Spencer v. State, supra, slip opinion at 10. Because trial counsel in this case did consider and decide not to present mental health or other testimony about Banks' child abuse, Banks has failed to prove the deficient-performance prong of Strickland.

Moreover, it cannot be said that a reasonable probability exists of a different sentencing recommendation had original counsel pursued the theory of mitigation favored by postconviction counsel. Notably, the present defense mitigation theory is inconsistent with the mitigation theory presented at trial. Thus, any possible benefit from child abuse evidence would be offset by the loss of good family and good character evidence. Put another way, the presentation of evidence that Banks' childhood was abusive and unpleasant, and that Banks routinely becomes violent when intoxicated, would itself be contradictory to evidence that Banks was a good child from a good family and, worse, would open the door to an exploration of Banks' violent past which would be additionally contradictory to the goal of portraying Banks as a "life worth saving." Present counsel does not present additional mitigation, but different mitigation. He cannot demonstrate that his different mitigation is at all "better" than the original, let alone that it is so much better as to establish a reasonable probability of a different sentence if only it had been presented. Present counsel simply has not demonstrated that his theory that Banks is a violent alcoholic who is deeply angry as the result of physical abuse he suffered years before this crime would have been more effective in mitigation than trial counsel's theory

that Banks is basically a good person from a good family who, for the most part, has lived a decent, productive life.

Present counsel's criticism of trial counsel's strategy is exactly the kind of after-the-fact second-guessing of trial counsel's strategy that Strickland counsels us to avoid. Strickland, supra, 466 U.S. at 689 ("It is all too tempting for a defendant to second-guess counsel's assistance after ... it has proved unsuccessful .... A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight ...."). His original theory of mitigation having failed, Banks now proffers a different one. He has not established, however, that the mitigation theory presented at trial was the product of constitutionally deficient representation, or that Banks' present theory of mitigation is any better. In short, Banks has established neither deficient attorney performance nor prejudice, and the circuit court correctly denied relief.[4]

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[4] Banks also argues (pp. 32-33) that Seliger was also ineffective for allowing co-counsel Garcia to deliver the jury closing argument in this case. Banks fails to note the circuit court's ruling during the course of this hearing that the "one issue that you raised was ineffective assistance of counsel in failing to retain a mental health expert" (PCT 22). The circuit court agreed with the State that nothing in the pleadings referenced Seliger's decision to allow Garcia to make the jury argument (PCT 22). Thus, as in Hunter v. State, supra, "this argument does not appear to be properly before this Court." Slip opinion at 18. In any event, Seliger adequately explained

CONCLUSION

Steve Seliger is an experienced capital attorney who investigated and prepared for a penalty phase in this case. The circuit court correctly rejected Banks' claim of ineffectiveness of trial counsel, and the court's denial of relief should be affirmed. Respectfully submitted,

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his tactical decision that, in this case with "horrific" facts, the more "emotional" Garcia was the "better person" to attempt to "humanize" Banks (PCT 23). Banks' suggestion that Garcia was unprepared for this argument is contradicted by Garcia's testimony (PCT 55). Seliger's tactical decision was within the broad range of reasonably effective assistance. Furthermore, Banks has not demonstrated any reasonable probability of a different result if Seliger had argued the case rather than Garcia.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Gary L. Printy, 1301 Miccosukee Road, Tallahassee, Florida 32208, this 16th day of April, 2002.

_____
CURTIS M. FRENCH
Senior Assistant Attorney General

CERTIFICATE OF TYPE SIZE AND FONT

This brief has been prepared using 12 point Courier New, a font that is not proportionately spaced.

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CURTIS M. FRENCH
Senior Assistant Attorney General