IN THE SUPREME COURT OF FLORIDA

CASE NO. SC01-1153

CHADWICK D. BANKS,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

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POINT ON APPEAL

WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR POST-CONVICTION RELIEF FOR INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL IN THE PENALTY PHASE OF HIS CAPITAL TRIAL.

PRELIMINARY STATEMENT

This is an appeal of an Order denying post-conviction Motion to Vacate and Set Aside Death Sentence rendered April 30, 1994, by The Honorable William Gary, Circuit Judge, Second Judicial Circuit in and for Gadsden County, Florida. The appellant was the defendant below and will be referred to herein as Banks or appellant. The appellee is the plaintiff and will be referred to herein as the State or Appellee. The record on appeal of this post-conviction motion consists of three consecutively-paginated volumes and designations to the record on appeal will be by the symbol PCR- followed by the appropriate page number in parenthesis. The trial transcript of the November 15, 2000, hearing on the post-conviction Motion consists of one volume. Designations to the transcript of the November 15, 2000, hearing will be by the symbol PCT- followed by the appropriate page number in parenthesis. The record on appeal of this matter also includes the original trial proceedings which consists of nine consecutively-paginated volumes which will be designated by the symbol R- followed by the appropriate page number in parenthesis. This record includes six volumes of trial transcript, volumes one through five are consecutively paginated and will be designated by the symbol T- followed by the appropriate page number in parenthesis. The sentencing transcript consists of one volume and will be designated by the

symbol ST- followed by the appropriate page number in parenthesis.

PROCEDURAL HISTORY

On October 2, 1992, the Petitioner was indicted by a Gadsden County, Florida Grand Jury and charged with the following crimes: Count I, First degree murder in that on or about September 24, 1992, Defendant, Chadwick Banks, did unlawfully kill a human being, Sandra Banks, by shooting with a firearm; Count II, on or about September 24, 1992, Defendant, Chadwick Banks, did unlawfully kill a human being, Melody Cooper, by shooting with a firearm; Count III, on or about September 24, 1992, Chadwick Banks, did unlawfully commit a sexual battery on Melody Cooper, a person less than twelve years of age.

On March 13, 1994, Petitioner, Chadwick Banks, changed his plea from not guilty to a plea of no contest as to Count I, the first degree murder of Cassandra Banks, and Count III, the sexual battery of Melody Cooper, with an agreed upon life-sentence in prison with a twenty-five year, minimum mandatory period. Petitioner also pled no contest to Count II, the murder of Melody Cooper, without an agreement as to what the sentence would be on that count. The trial court adjudicated defendant guilty on that date.

On March 13, 1994, jury selection for the penalty phase of the trial commenced.

A penalty phase proceeding followed jury selection per the provisions of section 921.141, Fla. Stat. On or about March 17, 1994, the jury, by a vote of nine-to-three, recommended the death sentence as to the first degree murder in Count II as to Melody Cooper (T-899). The trial court followed the jury's advisory recommendation and on April 18, 1994, sentenced Banks to death for the murder of Melody Cooper under the provisions of section 775.082, Fla. Stat. (ST-1-14). The trial court, on the same date, sentenced Banks to life in prison on the remaining counts. Thus, as to each count, the defendant was sentenced as follows:

Count I:	Life in prison, with a minimum, mandatory sentence of 25 years;
Count II:	Death;
Count III:	Life in prison, with a minimum, mandatory sentence of 25 years.

The death sentence is the only sentence under attack by this Motion.

The trial judge imposing the sentence was the Honorable William Gary, Circuit Judge, Second Judicial Circuit of Florida.

Appellant filed a Notice of Appeal was filed on April 29, 1994 (R. 207). There was a direct appeal of the judgment and sentence to the Supreme Count of Florida in Case No. 83,774.

Appellant was represented by Teresa Sopp of Jacksonville, Florida. The appeal was denied and the defendant's judgment and sentence affirmed on August 28, 1997. See Banks v. State, 700 So. 2d 363 (Fla. 1997). Rehearing was denied on October 13, 1997. The mandate was issued on November 13, 1997.

On September 2, 1998, the undersigned was appointed counsel. On September 9, 1998, the undersigned filed his appearance in this matter. On March 9, 1999, Appellant filed a Motion for Extension of Time. On March 22, 1999, the trial court entered an Order granting the extension of time. On June 10, 1999, Appellant filed the Motion for Post-conviction Relief and to Set Aside Death Sentences. On November 15, 2000, the court held the evidentiary hearing on Appellant's Motion for Post-conviction Relief. On April 30, 2001, an Order was entered denying post-conviction Motion to Vacate and Set Aside death sentence. On May 10, 2001, Appellant filed his Notice of Appeal. On September 13, 2001, the Order setting the briefing scheduled was entered requiring Appellant's Brief be served on or before January 11, 2002.

STATEMENT OF THE FACTS

Chadwick Banks was represented by Steven Seliger. Mr. Seliger has been a member of the Florida Bar since 1977 and has practiced criminal law for the past fifteen years. In the fall of 1992, Mr. Seliger was appointed to represent Chadwick Banks. Mr. Seliger had previously participated in the representation of somewhere between five and seven capital cases. Prior to 1992, Mr. Seliger had participated in representing three capital defendants where there was an actual trial and penalty phase. These capital cases were Charles Burr, Darrell Barwick and Kenny Foster (3.850 PCT-10). Chadwick Banks's case is the penalty phase proceeding that Mr. Seliger handled in Gadsden County (PCT-12). Seliger remembered acquiring Banks's school records, military records, employment records, medical records and interviewing family members and other people (PCT-13). Mr. Seliger did not make any of these records which he obtained available to the court-appointed psychologist, Dr. James Brown of Tallahassee. Seliger remembers providing some of the records–specifically the medical records and school records–to the state's court-appointed mental-health expert, Dr. Harry McClaren (PCT-13). Mr. Seliger concluded that the capital penalty phase would be about the murder of the child, not the death of the child's mother. He made a strategic choice to

focus the attention of the case on the death of the child (PCT-14).

Seliger did not remember any discussions with Chadwick Banks about a plea until the specific offer was made late in the game, right before trial (PCT-15). Mr. Seliger testified that he was assisted by another attorney, Armando Garcia. At the time of the penalty phase proceeding in Mr. Banks's case, Mr. Garcia was not connected with Seliger's office (PCT-16). Seliger could not remember if he had paid Mr. Garcia for his involvement in the case (PCT-16). Also, Seliger had some discussions with a psychologist/lawyer out of Marianna, Florida, about the mitigation evidence in Banks's case; however, Seliger did not make any records available to that individual. His recollection was that he had had an informal conversation with this other psychologist/attorney. Seliger, himself, has no training in psychology (PCT-17). Seliger remembered reviewing the records of family doctor, Pat Woodward, M.D. These records reflected that Chadwick Banks had been the victim of physical child abuse at home as early as three years of age. These records reflected possible physical abuse to Chadwick Banks as a child.

Seliger testified that it was his strategic decision to present Chadwick Banks as a member of an intact family with two parents who were hardworking people with accomplishments in their lives who were known in the community. He concluded that the presentation of child abuse evidence, particularly against

Chadwick Banks's father and committed by Mr. Banks's father, would be inconsistent with that theory (PCT-18). Mr. Seliger was aware of the effect this childhood abuse may have had on Chadwick Banks and the role it may have played in his eventual commission of this double murder (PCT-18-19). Seliger chose not to present this child-abuse evidence in a Spencer hearing because he thought it would be inconsistent with his argument that he made to the jury that this was a life worth saving. When asked whether or not he had discussed the effect of alcohol on abused-child personality with any mental-health expert prior to making the decision not to present any of this evidence, he answered he did not have a memory (PCT-19). Seliger did not bring Mr. Garcia into the case to prepare for the penalty phase (PCT-20). Garcia had not reviewed the materials, school records and other documents in the Chadwick Banks's file prior to participating in the trial (PCT-20). Mr. Garcia had not spoken with Dr. Harry McClaren or any other mental-health advisors. Seliger testified that it was his job to speak with these individuals. Seliger discussed the decision on who would the closing argument was made either right before trial or at the beginning of the week of trial (PCT-21). Mr. Seliger did not remember what Mr. Garcia's experience in capital cases was in 1994. He did know that Garcia had not argued any capital cases. Seliger had argued three cases to capital juries (PCT-22).

Seliger stated that he thought Mr. Garcia could be more emotional with the jury than he could in telling this story of Chadwick Banks. Seliger had hired Harry McClaren as an expert witness in death penalty cases on prior occasions (PCT-25). He had not had any dealings with James Brown (PCT-25-26) and was not familiar with his reputation (PCT-26). Seliger did not remember asking McClaren if he knew James Brown's reputation as a psychologist (PCT-26). On cross-examination, Seliger stated he had probably tried seventy-five jury trials in Gadsden County. Seliger discussed the child-abuse history with Mr. Banks's parents who were very defensive about that (PCT-34). Seliger stated the record from Dr. Woodward's office was that there were physical marks on Chadwick Banks as a young child. There was an explanation that Chadwick Banks's father beat him with some kind of an electrical cord over a period of a number of years. This eventually stopped at some point. Seliger said no one ever came up with an explanation for him as to why Banks would kill the child, but some of the mental-health testimony could explain why he killed the wife (PCT-36). If Seliger presented a defense that Chadwick Banks was a life worth saving, it would be inconsistent with his defense to present evidence that he had committed other crimes while drinking (PCT-37). Presenting evidence of his criminal history would be inconsistent with the defense Seliger presented (PCT-38). Mr.

Seliger was aware that Dr. McClaren had pretty strong feelings about this case and later became aware of a letter that McClaren had written to the state attorney expressing his views on Chadwick Banks's crime (PCT-39).

On re-direct examination, Seliger admitted he was not aware of Chadwick Banks's prior arrest for DUI. He knew Banks had suffered a head injury, but he did not know it was related to the DUI (PCT-41). Banks never discussed the DUI with Seliger (PCT-42). Banks did discuss his aggravated assault case with Seliger and Seliger reviewed the police reports (PCT-42). The only arrest Seliger knew of was the aggravated assault. Seliger agreed Banks had been drinking a lot on the night of the murders (PCT-43). He was probably drinking when he committed the DUI (PCT-44). Seliger could not remember if Banks had told him he had consumed more alcohol after leaving Dutt's. Seliger agreed that the fact that Banks carried a gun could have made the crime seem more spontaneous as opposed to premeditated.

The next witness was Armando Garcia. Armando Garcia is a 1977 graduate of Florida State University College of Law. He had been practicing for about seventeen years at the time of this trial. His first two years were with a civil-practice law firm. He practiced in the area of family law, transportation law and criminal defense. In 1986, he became an Assistant Federal Public Defender and represented federal defendants in

1990. In 1990 and 1992, he was in private practice. In 1992 to 1994, he worked at the Volunteer Lawyers Research Center in Tallahassee and worked on post-conviction proceedings in capital cases. In 1995, after this trial, Garcia went into practice with Seliger under the name of Garcia and Seliger. Garcia has known Seliger since 1974 or 1975. The Chadwick Banks death-penalty case was the first criminal case that Garcia had ever worked together with Seliger. The Center provided assistance to volunteer lawyers representing death-row inmates. Garcia never appeared as a lead counsel in a post-conviction proceeding, but he did provide support (PCT-51-52). In 1994, Garcia was in the process of separating from the Volunteer Lawyer Resource Center due to congressional cutbacks. In the interim period while he was unemployed and prior to setting up his own practice, Garcia talked to Seliger about the Banks case. Garcia agreed to participate in the representation of Banks. Garcia never filed a formal notice of appearance in the case and did not get paid for his services. He was volunteering to help in a very tragic case (PCT-52-53). Garcia's participation in the case included interviewing a witness named Michael Figgers, who was the band director. Garcia conducted the direct examination of Mr. Figgers in the penalty phase. Garcia did not have any discussions with any mental-health professional in this case (PCT-54). Garcia learned he would do the closing argument a day

or two before the closing argument (PCT-54). Garcia had never made a closing argument in a death-penalty case prior to that closing argument and has not made one since (PCT-54). This was his only closing argument in a death penalty case (PCT-55). Garcia did not discuss strategy regarding mental-health testimony with Mr. Seliger (PCT-55). Mr. Garcia never had any substantive conversation or discussions with Banks about his case (PCT-56). Garcia was not part of a discussion as to whether or not Banks would testify (PCT-56).

Defendant called Dr. David Partyka, licensed practicing psychologist. Partyka was qualified as an expert witness in the area of child development, sex crimes as relates to juveniles and child abuse (PCT-61). Partyka testified he had reviewed records obtained by Banks's original trial counsel, Steven Seliger, in addition to the notes and records of Drs. Harry McClaren and James Brown. Partyka listened to a tape recording of Chadwick Banks's confession made on September 24, 1992. According to Partyka, Dr. Brown's notes do not indicate any record of Brown speaking with defense counsel, Seliger (PCT-63). Partyka's review of Dr. McClaren's notes and file materials do not indicate McClaren was provided with any of the background record materials gathered by Seliger. McClaren appears to have met Banks and reviewed his case one time, September 24, 1992 (PCT-64). Ed Harvey, Assistant Public Defender originally

appointed to represent Banks, did speak with McClaren on September 29, 1992, according to record materials in McClaren's file (PCT-64).

Partyka performed a rating of Banks under the Haire Psychopathy Checklist. The Haire Psychopathy Checklist is a list of twenty items which are used to score an individual by rating him as a zero, one or two for each item (PCT-66). The Haire Checklist specifically rates the individual as to whether or not they have (1) superficial charm, (2) a grandiose sense of self worth, (3) a need for stimulation or prone as to boredom, (4) pathological lying, (5) cunning or manipulative behavior, (6) lack of remorse or guilt, (7) shallow affect, (8) lack of empathy, (9) where they have a parasitic lifestyle, (10) living off others and never contributing, (11) poor behavioral skills, (12) promiscuous sexual behavior, (13) impulsivity, (14) lack of realistic long-term goals, (15) early behavioral problems, (16) irresponsibility, (17) failure to accept responsibility for their actions, (18) many short-term marital relationships, (19) history of juvenile delinquency, revocation of conditional release and (20) criminal versatility. The maximum score would be a forty and a score of thirty indicates a psychopathic personality. Banks scored an eight which suggested that he had a very small probability of future violence (PCT-68). Partyka discussed the physical child abuse which Banks endured as a

child (PCT-69). Banks's physical child abuse was not a one-time event. His father's use of an electrical cord to beat him for discipline took place on at least seven occasions. Banks also witnessed physical abuse of other family members, including his sister. There was one occasion where Banks was physically tossed to the ground with such force as to be rendered unconscious (PCT-69). The physical abuse ended at age 15. Partyka's interview of Banks also revealed a visit to the Banks's household from the HRS Child Protection Team after the school reported his sister had bruises and welts. The physical abuse led to his older sister being placed temporarily in a foster home (PCT-70).

Banks began to get secretly involved with alcohol in his high school years. His parents did not drink at all (PCT-71). Banks's drinking picked up considerably in the Army (PCT-71). There were incidents described in his military career in Korea where he would shoot pool, drink and become involved in physical altercations (PCT-72). Banks was a weekend drinker (PCT-72). This allowed him to maintain a steady job for over a year prior to this incident (PCT-72). All of Banks's incidents involving highly-aggressive behavior or criminal conduct involve alcohol, his military altercations, DUI, aggravated assault and the night of the sexual assault and murder of Melody Cooper (PCT-73). Alcohol played a major role on the night of the crimes affecting

Banks's judgment and disinhibiting his aggression (PCT-75). There is also a possibility that Banks may have suffered a black out immediately after the commission of the crime (PCT-87).

Defendant Chadwick Banks then called James D. Larson, an additional licensed psychologist, as an expert witness. Dr. Larson is a specialist in Forensic Psychology and has qualified to testify in hundreds of capital cases in the State of Florida for both the State and the defense in competency proceedings and death-penalty proceedings (PCT-91). For purposes of this hearing, Dr. Larson was admitted as an expert in the area of Forensic Psychology, especially mental mitigating criteria. Dr. Larson also reviewed the entire Chadwick Banks file including criminal records, medical records, school records, army records and the notes of evaluation performed by Dr. McClaren and Dr. Brown (PCT-93). Dr. Larson has special expertise in the area of battered child syndrome. Dr. Larson testified the status of research into the effects of child abuse, the battered child syndrome, was the same in 1992 as it was in November 2000, the time of this hearing (PCT-96). Children who are abused have higher rates for future mental illness as adults and as risk for violence as perpetrators themselves. (PCT-96-97). They are also at a higher risk for substance abuse and criminal activity in general (PCT-97). Excessive drinking is consistent with battered child syndrome (PCT-97). Also, impulse control

problems related to anger management are linked to battered child syndrome (PCT-97). There is also a connection between alcohol use and anger management problems. Child abuse victims, or battered children, often as adults are very angry people. When alcohol is combined with the battered child syndrome, there is a deadening of the usual controls which govern impulses toward anger and other inappropriate behaviors (PCT-97-98). This anger is usually directed toward an attachment figure (PCT-98) and the wife and children are the two most common attachment figures (PCT-98).

Dr. Larson also testified that, based upon his understanding of the mitigation criteria contained in Chapter 921.141, Fla. Stat., he could have testified to help the jury understand the relationship between early child abuse and adult anger and adult violence and how that violence is more likely to be released in association with alcohol and how alcohol itself is more likely to be a way of dealing with early childhood trauma (PCT-98). Dr. Larson could have testified to that in 1994, the time of Chadwick Banks's trial (PCT-99). Dr. Larson ruled out the possibility that another psychologist could have testified that there was no possible connection between alcohol and this battered child syndrome in 1994 (PCT-100). Smoking marijuana also exacerbates the effects of alcohol. In Dr. Larson's opinion, there was a significant amount of mitigation which

could have been presented (PCT-100). Dr. Larson testified the control exerted by the family during the early years through high school could prevent certain kinds of behavior, especially criminal behavior, which might surface during the early adult period when people generally get their first tastes of freedom (PCT-102). This is due to the child's adaptive response to the abuse which allows the child to keep the anger arising out of abuse in abeyance for a long period of time. Dr. Larson opined there is little likelihood of violence by Chadwick Banks while incarcerated (PCT-102-103).

STANDARD OF REVIEW

The court reviews an ineffective assistance of trial counsel claim as a mixed question of law and fact subject to plenary review under the test set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 80 L.Ed. 2d 675 (1984) and *Rose v. State*, 675 So. 2d 567 (Fla. 1996).

SUMMARY OF THE ARGUMENT

WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR POST-CONVICTION RELIEF FOR INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL IN THE PENALTY PHASE OF HIS CAPITAL TRIAL.

Appellant contends that the trial court below erred in denying Post Conviction Relief. The evidence presented in the post-conviction hearing show a trial lawyer gathered sufficient information about the background and history of this appellant and the events surrounding his offense, but failed to seek the professional assistance of a mental-health expert to evaluate that background history for statutory and non-statutory mitigation. This failure to seek such professional expertise cannot be considered a strategic choice. Therefore, appellant has met his burden under the first prong of ***Rose v. State***,675 So. 2d 567 (Fla. 1996), in that he has identified an act of counsel which was deficient and not simply a strategic choice.

The evidence below also established appellant has met his burden under the second prong of ***Strickland v. Washington***, to wit: Trial counsel's deficient performance resulted in actual prejudice to appellant. In this case, a jury made a recommendation of death by a nine-to-three vote. Three jurors were swayed to vote for life even though they were offered no

evidence of how alcohol combined with an early-childhood history of the appellant may have contributed to the tragedy that occurred in September 1992 which resulted in this horrible crime. All they heard was the appellant was a nice young man, seemingly beloved by everyone, who suddenly came home one night and murdered his wife in cold blood and brutally raped and murdered a ten-year-old stepdaughter. Neither the trial court nor this Court can say with the certainty required in a capital case that an explanation of how this crime came to be could not have swayed three jurors. There is a reasonable probability the outcome would have been different had the jury been presented with this evidence. Had defense counsel presented this evidence to a mental-health expert for full review and consultation and then, based on the expert's opinion and his own sound judgment, rejected it in favor of the course he chose, that would be understandable, but when the failure to seek that professional help is combined with assigning the closing argument in the penalty phase of the case to a lawyer conducting his first and only closing argument in a death-penalty case, there is a substantial probability of error. Appellant has met his burden of demonstrating cause and prejudice and has proven ineffective assistance of counsel occurred in this trial.

ARGUMENT

WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR POST-CONVICTION RELIEF FOR INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL IN THE PENALTY PHASE OF HIS CAPITAL TRIAL.

The trial court below stated the issue as

> whether defendant was denied his right to effective assistance of counsel guaranteed to him by the state and federal constitutions during the penalty phase of his capital trial when counsel failed to retain a mental health expert to evaluation possible statutory or non-statutory mitigating evidence which was available for presentation to the sentencing jury and judge.

In denying defendant's Motion for Post-conviction Relief, the trial court cited to this court's opinion affirming the death sentence, quoting:

> Although he [Banks] 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).

(PCR-223-224). It is precisely this point, that there was defense counsel failure to prevent sufficient evidence of the effect of alcohol in the murder which is the basis for appellant's Motion for Post-conviction Relief. Appellant, Chadwick Banks, contends he was denied his right to effective

assistance of counsel during the penalty phase of this capital trial because counsel failed to retain a mental-heath expert to evaluate possible statutory and non-statutory mitigating evidence which was available for presentation to the sentencing jury and judge, especially evidence of the role and affect of alcohol in this defendant's criminal life and in this crime.

At appellant's original sentencing proceeding, Annie Pearl Collins, a bartender at Dutt's Place and close family relative of the victims of the offense, testified that, on the evening before the double murder took place, she had served Defendant Chadwick Banks at least three, sixteen-ounce malt liquors (PCT-534). The taped confession of Defendant Chadwick Banks which was played to the jury indicated that Defendant has also consumed at least a six-pack of Colt 45 Malt Liquor and five Busch beers on that night (PCT-673). Deputy Sheriff Tommy Haire, the officer who took the recorded confession of Chadwick Banks testified that there was no Breathalyzer or blood-alcohol test given to the defendant after he was arrested (PCT-695). Deputy Sheriff Haire also testified that a urinalysis was done but there was no screening for alcohol (PCT-697).

In closing argument defense counsel referred to Defendant's consumption of alcohol; however, there was no evidence presented by the Defendant as to what role alcohol, in combination with Defendant's other personal background and characteristics, would

have had in leading to this double murder. The jury was not given any evidence that would allow them to consider in mitigation "the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. § 921.121(6)(f), Fla. Stat. (1993). Likewise, the jury was not instructed on this mitigating factor. The members of jury, which voted nine to three in favor of the death penalty, were not given any professional assistance from a mental-health consultant to properly evaluate the defendant's mental state at the time of the murders.

This is not a situation where the allegation is that the mental-health experts were not provided adequate background information by the lawyer. This is a case of the inadequate investigation of potential mitigation evidence 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.

Defense counsel, may in the interest of strategic planning, fail to put on the testimony of a mental-health consultant in a capital case without rendering ineffective assistance of counsel. Here, counsel chose to accent defendant's family history, growing up on Gadsden County, attending local Gadsden County Schools, participating in school activities, joining the

army and his employment record. That may be a wise strategic choice, based on a lawyer's knowledge and understanding of the jury venire in which he practices.

However, trial counsel rejected the use of a mental-health expert from the onset of his investigation into mitigation by failing to even obtain the appointment of a mental-health expert. The presentation of mitigation was not made with the advice and expertise of a mental-health consultant, even though defendant's mental state was clearly the dominant issue. There is no value in presenting evidence of the generally good character of the defendant without some explanation as to why, on this particular day, without any prior warning, defendant acted the way he did. Trial counsel did not have mental-health opinion/evidence to present prior to the start of trial. This was not just a situation where trial counsel had a strategy not to present certain evidence. Here, trial counsel did not retain a mental-health expert to help him properly evaluate other possible mitigating evidence and chose not to present that evidence.

Dr. Harry McClaren, licensed psychologist in the states of Florida and Alabama and the state court-appointed expert in this case, has given an Affidavit regarding the role of a mental-health consultant in a capital case (PCR-114-119). Dr. McClaren states that in conducting a comprehensive, forensic

psychological evaluation in a capital case, it is optimal and sometimes critical that information such as the following, if obtainable, be reviewed by mental-health professionals testifying as expert witnesses in the penalty phase of capital proceedings. Dr. McClaren then lists medical and mental health records, school records, social records, employment records, military records, juvenile delinquency and dependency records, adult criminal records and probation and parole records. Defendant's trial counsel made the effort to obtain all of this information, but did not seek the advise or obtain the comprehensive, forensic psychological evaluation of a mental-health consultant, even though this was freely available to counsel by court appointment. Dr. McClaren also states in his Affidavit that it is optimal for the mental-heath consultant in a capital case to interview as many of the individuals as possible who have known the defendant who have had occasion to observe his behavior, such as family members and other knowledgeable about defendant's behavior–close friends, ex-girlfriends, etc. Defendant was deprived of a fundamental right and necessity of a mental-health consultant in the guilt and penalty phases of this capital case proceeding. Chad Banks was the only person ever interviewed by a defense mental-health expert at any time during counsel's representation of the appellant. Appellant was interviewed in October 1992, by Dr.

James Brown. This expert, Dr. James Brown, did not have the opportunity to review any of the appellant's records or interview any family members prior to making a report because the records were not available at the time and counsel never arranged for him to review any other evidence.

A wealth of compelling mitigation was never presented to the jury charged with the responsibility of determining whether defendant would live or die. Important, necessary and truthful information was withheld from the jury and this deprivation violated defendant's constitutional rights. *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Lockett v. Ohio*, 438 U.S. 586 (1978). There was evidence of defendant's intoxication at the time of the offense which would have been relevant both at the guilt, innocent and penalty phases of the trial.

In discussing the statutory mental health mitigating factors, this Court has recognized that "a defendant may be legally answerable for his actions and legally sane, and even though he may be capable of assisting his counsel at trial, he may still deserve some mitigation of sentence because of his mental state." *Perri v. State*, 441 So. 2d 606, 609 (Fla. 1983). Available evidence of intoxication at the time of the offense and evidence of defendant's alcoholic problem could, separately or in combination with the stress of the situation on the night

of the crime, have established statutory mitigating factors, as well as blunted the cold and calculating, premeditated, aggravating factor so strenuously argued by the state and improperly considered by the jury due to a flawed jury instruction. This evidence would have made a difference. Here, all that was required was for defense counsel to persuade three other jurors and the recommendation would have been six-to-six. Defendant was three votes from a life imprisonment recommendation. Defendant's trial counsel was deficient under the standard of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Defendant can demonstrate cause for the omission, trial counsel's failure to even obtain a mental-health consultant to assist in the guilty and penalty phase of this proceeding and the resulting actual prejudice. The failure to present this evidence to the jury, to the judge and, more importantly, to establish on the record for ultimate review by the Supreme Court of Florida. There is no justification for the decision not to obtain the assistance of a mental-heath consultant prior to trial and this omission warrants setting aside the sentence in this case.

This court has held that an ineffective assistance of counsel claim is a mixed question of law and fact subject to

plenary review under the test set forth in *Strickland v. Washington, supra. Rose v. State*, 675 So. 2d 567 (Fla. 1996). The defendant's burden in a post-conviction motion seeking to obtain reversal of his death sentence on the ground of ineffective assistance of counsel requires that he:

> must show both (1) that the identified acts or omissions of counsel were deficient or outside the wide range of professionally competent assistance and (2) that the deficient performance prejudiced the defense such that, without the errors, there is a reasonable probability that the balance of aggravating and mitigating circumstances would have been different.

See Rose at 571. Likewise, trial counsel has a duty to conduct a reasonable investigation including an investigation of the defendant's background and family history for possible mitigating evidence. The failure to do so "may render counsel's assistance ineffective." *See Bolender v. Singletary*, 16 F.3d 1547, 1556-57 (11th Cir. 1994).

Specifically, a defense attorney's failure to find and present evidence of brutal abuse of a defendant committed by the defendant's father has been found to be ineffective and deficient. *See State v. Lara*, 581 So. 2d 1288 (Fla. 1991). In *Lara*, the trial court granted the defendant's 3.850 Motion and this Court affirmed that decision because the defendant's trial counsel failed to put forth compelling mitigating evidence. *Id*. In *Lara*, the trial court also made a finding of actual prejudice

under the *Strickland v. Washington* standard because the death penalty recommendation had not been unanimous. *Id*. Therefore, counsel's deficient investigation and performance could have substantially increased the probability that the presentation of evidence in the defendant's case could have swayed just a few more jurors in order to have a recommendation of a life sentence.

Here, the evidence indicates that the defense trial counsel did not utilize investigators in his preparation of Defendant Banks's defense. His own personal investigations consisted of some unverifiable, informal discussions with Dr. Harry McClaren, the state mental-health expert, and a now-deceased lawyer/psychologist somewhere in the panhandle. Moreover, with respect to the evidence which Attorney Seliger did discover, such as past child abuse and the amount of alcohol which defendant had consume on the evening prior to the murders, he simply failed to utilize this evidence at the penalty phase to present compelling mitigating factors for the jury to consider. Defense counsel failed to solicit the opinion of any mental-health expert that could establish the connection between the apparent abuse Defendant Banks had suffered and his actions on September 24, 1992. Not surprisingly, given there was no development of any evidence, there was no such evidence

presented to the jury during the penalty phase or to the trial court prior to imposition of sentence.

Defense trial counsel testified and the trial court found that the decision not to present this evidence was a strategic choice. However, the evidence of the surrounding circumstances of trial counsel's performance and investigation tend to suggest that, in fact, the trial counsel did not strategically chose not to offer an explanation but failed to properly investigate and find such an explanation. Trial counsel admitted the problem with his defense was that he was unable to give the jury an explanation for the defendant's outrageous behavior. However, simply investigating and exploring the child abuse and alcohol evidence with credible mental-health experts would have given the defense a possible rational explanation that would have been mitigating in this case. Such explanation not only would have demonstrated to the jury an accurate description of the defendant's childhood and background, but also it would have supported the defense's theory that this was an unusual anomaly in this defendant's life.

This past child abuse of the defendant combined with the amount of alcohol consumption would have made the act seem less cruel and deviant and much more explainable at least to three members of the jury. Specifically though, the error in the

Order below is contained in paragraph seven of the Judge's Order (PCR-224).

Here, defense counsel reviewed the reports of two mental-health experts who examined the defendant prior to trial and consulted with a psychologist/lawyer prior to trial. However, this is simply a reference to Harry McClaren and Dr. James Brown and some unknown psychologist/lawyer, none of whom were given an opportunity to review any of the background information gathered by defense counsel. Dr. Harry McClaren's entire role in this case consisted of an hour-long interview on September 24, to determine if the confession given by the defendant would hold up in court. Even assuming this was not a tremendous abuse of the defendant's constitutional rights to have a lawyer present, Dr. McClaren simply did not have any of the evidence he would need to render advice to trial counsel regarding mitigation. In fact, as noted in the trial testimony of Steve Seliger, McClaren wrote a letter to the State Attorney describing how this was the worst murder he had ever seen. This is hardly the kind of unbiased, professional opinion the defendant was entitled to in the preparation of his defense. Trial counsel may as well have consulted Melody Cooper's close family members to render an opinion on the amount of mitigation available in this case.

The same is true of psychologist, James Brown, who interviewed Banks in October of 1992. Once again, there was no

indication that defense counsel had any knowledge of James Brown's reputation and standing in the community or experience with capital cases. Moreover, Dr. James Brown was not provided with any of the background information that was available. Once again, the defendant's position is that, had all of this background information been presented to a mental-health expert for an independent review to assist the trial counsel in the presentation of mitigation, then this matter could be decided on grounds that a strategic trial choice was made. That is counsel's right based on his experience and knowledge of the case law and this locality and this defendant. However, defense counsel did nothing to document that any of the things to which he testified actually occurred and even if they did occur, they are not adequate investigation in defense of an individual who is facing the death penalty.

A thorough and competent mental-health evaluation would have developed the following potential mitigating factors: (1) Chadwick Banks was severely beaten by his father, Dennis Banks, Sr., beginning when he was three-years old. These beatings were documented by medical records of Dr. Pat Woodward in Quincy, Florida. Dr. Woodward's notes of an October 5, 1974, visit reflects swelling and bruising of the lumbar region, hips and buttocks with the note "father stays and keeps children equal battered child." (PCR-100). (2) These beatings continued and

were aggravated by the use of electrical cords and broom handles until Chadwick Banks was approximately 11 or 12 years old. Dr. McClaren's report of his September 24, 1994, interview of Chadwick Banks indicates severe scarring on the arms, back and legs from beatings administered by Chadwick Banks's father (PCR-107). Defendant also lost his right front tooth in one of these beatings. In 1982, the Department of Health and Rehabilitative Services (HRS) investigated allegations of child abuse by Defendant's father, Dennis Banks, Sr., toward the second child, Coswellan Banks. (3) Chadwick Banks often had to be held out of school to allow his cuts and bruises from these beatings to heal. Chadwick was not taken to a doctor to treat any of these injuries which left the scars on his arms, legs and back. These beatings cause a young child to learn to resolve problems by violence. The battered child also develops a low threshold of irritability. Chadwick Banks was generally able to repress the impulse toward towards violence in his high school years. Chadwick Banks's consumption of alcohol and the disinhibiting effect of alcohol. (4) A mental-health expert could have explained all prior criminal conduct involving Chadwick Banks revolved around over consumption of alcohol. For example, the March 29, 1991, incident where Chadwick Banks fired a shotgun at the Havana Heights apartment complex involved the consumption of a case of beer by Chadwick Banks and his cousin, Rendell Strong,

that evening. The altercation between Chadwick Banks and Tommy Boddison, Jr., resulted in Mr. Boddison striking Chadwick Banks. Only after being hit by Mr. Boddison did Chadwick Banks run to his car to obtain the shotgun.

(5) In June 1992, Chadwick Banks was involved in a DUI returning from a graduation party. Mr. Banks lost control of a pickup truck and crashed the vehicle. His blood alcohol was tested at .18. (6) On the night of this criminal episode, September 23 and the morning of September 24, Chadwick Banks had consumed anywhere from six, 16-ounce malt liquors, to twelve malt liquors, depending on the testimony of the bartenders at Dutt's Place and the defendant's own statement to police officer. A jury could have heard an explanation for how and why the young man, sitting before them, could have committed this double murder and the rape of a ten-year-old girl.

Instead of hearing how a very small, three-year-old child was beaten by an overbearing, domineering, abusive father, the jury heard a fairytale about an idyllic childhood where Chadwick Banks was raised by the ideal father, a father who was "the best father in the world." The only possible explanation for this murder became the inherent evil nature of Chadwick Banks. It is possible that an additional three jurors on that jury panel could have voted for life if this information had been presented to them.

The defendant was seriously and severely prejudiced by the acts and omissions of trial counsel as set out above for the following reasons, each of which is sufficient to sustain the defendant's right to relief per this motion.

Thus, Judge Gary was never made aware of the magnitude and extent of the pervasive nature of the child abuse suffered by the defendant and how this could have impacted his ability to appreciate the criminality of his conduct, a statutory mitigating factor. Second, had trial counsel properly investigated the issue defendant's background and mental state through the use of a mental health expert and properly presented that evidence to the trial judge, there is a distinct and significant likelihood or reasonable probability that the outcome of this sentencing hearing would have been different.

By failing to obtain the advice and expertise of a mental-health expert to evaluate the possible statutory and non statutory mitigation presented in this case, defense counsel pursued a strategy which called for the rejection of mental-health testimony without obtaining the professional opinion as to whether such mitigation evidence could have properly been presented to the jury and judge. *See Rose v. State*, 675 So. 2d 573 (case law rejects the notion that a strategic decision can be reasonable when the attorney has failed to investigate his

options and make a reasonable choice between them). This is especially critical regarding the rejection of psychiatric testimony without the benefit of an evaluation. *See Middleton v. Dugger*, 849 F.2d 491, 495 (11th Cir. 1988) (where the court stated psychiatric mitigating evidence "has the potential to totally change the evidentiary picture"). Here, you have the presence of alcohol abuse, child abuse documented by the family doctor and the state's own mental-health expert which was never presented to the jury to explain defendant's behavior that night.

Another very troubling aspect of trial counsel's representation of defendant during his capital proceeding emerged out of the testimony of counsel and his co-counsel at the 3.850 Hearing held November 19, 2000. Mr. Seliger testified that he allowed co-counsel, Amando Garcia, to conduct the closing argument in this capital case with little time for Mr. Garcia to prepare for what would be his only death-penalty closing argument of his legal career. This was confirmed in Mr. Garcia's testimony at the Post-conviction Hearing. Judge Gary did not allow this issue to be raised at the Hearing and would not consider it in his Order. However, there is clearly something seriously flawed in a trial strategy that removes the experienced capital-defense counsel, Mr. Seliger, from giving a

closing argument in a case in which he has been involved for a-year-and-a-half and stepping aside in favor of inexperienced capital trial counsel, Mr. Garcia, who had been involved in the case for less than a week, even if his preparation period is viewed in the most generous light. A review of the closing argument conducted by Mr. Garcia betrays that inexperience and lack of expertise to conduct the closing argument in the capital case. *See Lara* at 1289 (discussing inexperience of trial counsel in first capital case). There was not one single mention of § 921.141(6), Fla. Stat. or reference to statutory mitigation that the jury must consider. There was no mention of the jury instructions on statutory and non-statutory mitigation. There was no reference to the fact that Annie Pearl Collins, one of the witnesses who observed Chad Banks on the night of the crimes as a waitress at the juke joint, was a relative of the victims of the crimes. There was no discussion in closing argument that as a grieving victim, Ms. Collins may have had an emotional interest in the outcome of the case which clouded her confusion. It would be understandable that a relative of a ten-year-old girl who has been brutally raped and murdered was not about to let the perpetrator avoid the consequences of his actions because he had been drinking at a juke joint owned by her family where she was employed. There was no discussion in

closing argument that, as a surviving victim, she may have an interest in the outcome of this case, specifically that Chad Banks get the death penalty. Who wants to be responsible for serving up the fuel which ignited the fire that led to this catastrophe? Yet, no mention of this fact. Likewise, there was no evidence brought forward that the police officers investigated Chad Banks's consumption of alcohol or his whereabouts on the night of the murder and confirmed the story that he had told in his confession.

CONCLUSION

The deficient acts and omissions of trial counsel prejudiced the defendant in a way that he was not able to put forth such compelling, mitigating evidence which could have reasonably convinced just three more jurors that life imprisonment was the appropriate sentence for this offense. For those reasons, Appellant Chadwick D. Banks respectfully asks this Court to reverse and remand this matter and order a new trial on the penalty phase.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief of Petitioner was served by U.S. Mail/hand delivery to Curtis M. French, Assistant Attorney General, Office of the Attorney General, The Capitol, PL-01 Tallahassee, FL 32399-1050, this 11th day of January, 2002.

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements set forth in Florida Rule of Appellate Procedure 9.210(a)(2). The size and style of type used in this brief is Courier New Regular 12 pt. (Western) and Courier New Italic 12 pt. (Western).

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