IN THE SUPREME COURT OF FLORIDA

HARRY BUTLER,

Appellant,

v.

CASE NO. SC10-1133
L.T. No. CRC 97-04690 CFANO-A

STATE OF FLORIDA,

Appellee.
_________________________/

ON APPEAL FROM THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT,
IN AND FOR PINELLAS COUNTY, STATE OF FLORIDA

ANSWER BRIEF OF APPELLEE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.. iii

PRELIMINARY STATEMENT.. vi

STATEMENT OF THE CASE AND FACTS................................ 7

SUMMARY OF THE ARGUMENT.. 41

THE *STRICKLAND* STANDARDS AND STANDARDS OF REVIEW.............. 41

ISSUE I 43

IAC/GUILT PHASE CLAIM
Unidentified DNA on Butler's sneakers

ISSUE II 51

IAC/GUILT PHASE CLAIM
Failure to hire psychological expert
on child's competence to testify

ISSUE III 58

IAC/GUILT PHASE CLAIM
Failure to conduct a meaningful
cross-examination of Terry Jackson

ISSUE IV 64

IAC/GUILT PHASE CLAIM
Alleged conflict of interest

ISSUE V 69

IAC/GUILT PHASE & *BRADY* CLAIM
Unidentified palm print on the phone

ISSUE VI 74

IAC/GUILT PHASE CLAIM
Failure to object to M.E.'s testimony

ISSUE VII 77

IAC/GUILT & PENALTY PHASE CLAIM
Counsel's mistake during opening statement

ISSUE VIII 79

IAC/GUILT PHASE CLAIM
Failure to adequately prepare Butler to testify

ISSUE IX 82

IAC/PENALTY PHASE CLAIM

ISSUE X 99
THE CUMULATIVE ERROR CLAIM

CONCLUSION... 100

CERTIFICATE OF SERVICE... 100

CERTIFICATE OF FONT COMPLIANCE... 100

<u>**TABLE OF AUTHORITIES**</u>

Cases

Aguirre-Jarquin v. State,
9 So. 3d 593 (Fla. 2009) 96

Banks v. State,
842 So. 2d 788 (Fla. 2003) 94

Blanco v. State,
963 So. 2d 173 (Fla. 2007) 73

Bobby v. Van Hook,
130 S. Ct. 13 (2009) 93

Boyd v. State,
910 So. 2d 167 (Fla. 2005) 76

Bradley v. State,
33 So. 3d 664 (Fla. 2010) 42, 51, 99

Butler v. State,
842 So. 2d 817 (Fla. 2003) 7, 97

Card v. State,
992 So. 2d 810 (Fla. 2008) 94

Connor v. State,
979 So. 2d 852 (Fla. 2007) 69, 74

Cooper v. State,
856 So. 2d 969 (Fla. 2003) 68

Davis v. State,
990 So. 2d 459 (Fla. 2008) 57

Douglas v. State,
878 So. 2d 1246 (Fla. 2004) 76

Ferrell v. State,
29 So. 3d 959 (Fla. 2010) 79

Floyd v. State,
18 So. 3d 432 (Fla. 2009) 57, 64

Guardado v. State,
965 So. 2d 108 (Fla. 2007) 76

Guzman v. State,
721 So. 2d 1155 (Fla. 1998) 76

Heath v. State,
3 So. 3d 1017 (Fla. 2009) 57

Hitchcock v. State,
991 So. 2d 337 (Fla. 2008) 49

Hodges v. State,
885 So. 2d 338 (Fla. 2004) 95, 98

Jennings v. State,
782 So. 2d 853 (Fla. 2001) 49

Johnson v. State,
921 So. 2d 490 (Fla. 2005) 94, 95

Jones v. State,
928 So. 2d 1178 (Fla. 2006) 93, 94

King v. State,
808 So. 2d 1237 (Fla. 2002) 49

Lloyd v. State,
524 So. 2d 396 (Fla. 1988) 56

Marek v. State,
14 So. 3d 985 (Fla. 2009) 93

Marquard v. Sec'y for Dep't of Corr.,
429 F. 3d 1278 (11th Cir. 2005) 98

McDuffie v. State,
970 So. 2d 312 (Fla. 2007) 49

Mickens v. Taylor,
535 U.S. 162, 122 S. Ct. 1237 (2002) 67, 68

Pace v. State,
854 So. 2d 167 (Fla. 2003) 94

Peede v. State,
955 So. 2d 480 (Fla. 2007) 94

Rivera v. State,
859 So. 2d 495 (Fla. 2003) 94

Schwab v. Crosby,
451 F. 3d 1308 (11th Cir. 2006) 67

Simmons v. State,
934 So. 2d 1100 (Fla. 2006) 58

Sireci v. State,
773 So. 2d 34 (Fla. 2000) 49

Snelgrove v. State,
921 So. 2d 560 (Fla. 2005) 67

Spencer v. State,
615 So. 2d 688 (Fla. 1993) 34

Strickland v. Washington,
466 U.S. 668, 104 S. Ct. 2052 (1984) 41

Taylor v. State,
3 So. 3d 986 (Fla. 2009) 82

Tompkins v. State,
872 So. 2d 230 (Fla. 2003) 49

Wiggins v. Smith,
539 U.S. 510, 123 S. Ct. 2527 (2003) 92

Williams v. State,
967 So.2d 735 (Fla. 2007) 76

Wong v. Belmontes,
130 S. Ct. 383 (2009) 93

PRELIMINARY STATEMENT

References to the direct appeal record and the trial transcripts will be designated by "DA" and the record volume number and appropriate page number (DA Vol. #/page #). References to the instant post-conviction record on appeal will be designated by the record volume number and the appropriate transcript page number (Vol. #/page #).

STATEMENT OF THE CASE AND FACTS

Trial and Direct Appeal

Harry Butler was arrested on March 14, 1997 for the first degree murder of Leslie (Bay) Fleming. On April 7, 1997, the Grand Jury indicted Butler on one count of first degree murder. (DA V1/6-7). Butler's jury trial was held on June 23-27, 1998; the jury returned a guilty verdict on June 26, 1998. (DA V17/1232). The penalty phase was held on June 27, 1998. The jury recommended a sentence of death by a vote of eleven to one. (DA V17/1321). On January 11, 1999, Butler was sentenced to death. (DA V10/1763).

On direct appeal, *Butler v. State*, 842 So. 2d 817 (Fla. 2003), this Court affirmed the judgment and sentence and summarized the facts and the procedural background of this case as follows:

FACTUAL AND PROCEDURAL BACKGROUND

> On the night of March 13, 1997, or early morning hours of March 14, 1997, Leslie Fleming (Fleming), also known as Bay, was stabbed multiple times and asphyxiated by her former boyfriend, Harry Butler (Butler). Shawna Fleming (Shawna), Leslie's sister, discovered Fleming's body at about 7:15 a.m. on the morning of March 14 when LaShara Butler (LaShara), the couple's six-year old daughter, opened the apartment door for Shawna. According to LaShara's trial testimony, on the night before the body was discovered, she had been sleeping with her mother when her father entered the bedroom, picked her up, and took her to her own room. LaShara testified that she saw his face during this process. LaShara also stated she heard her mother say, "Stop," saw her father's leg pinning down her mother's leg, and heard her mother screaming as though she were being hurt. Officer Scott Ballard, one of the first officers on the scene, testified that on the way to the police station, LaShara said, "My daddy hurt mommy. I heard him yelling at her."
>
> Lola Young, a long-time neighbor of Fleming's who had also known Butler for some time, testified she saw Butler hiding

in the bushes near Fleming's apartment between 3:30 and 4 a.m., around the same time as the murder. She also stated that soon after seeing Butler, she saw a blue car speed through the housing complex, stop abruptly, pick up Butler, and speed off. Latwanda Allen (Allen) testified that she, Butler and Martisha Kelly (Kelly) are cousins. Allen said Kelly told her Butler killed Fleming. At trial, Kelly denied having made the statement.

Detective Steffens testified that Kelly stated she went by Fleming's apartment the morning of the murder, looked through a window and noticed the apartment was in disarray. Steffens also testified he questioned Butler, and Butler denied any involvement in the murder. During the interview, Steffens noticed superficial cuts on Butler's hands, which Butler explained he received from falling off a bicycle and from a broken bottle. A broken beer bottle was found on the floor of Butler's room.

Detective Green testified Kelly told him the murder weapon could be found in a dumpster near a food store where a pair of blue shorts, a white T-shirt, a pair of underwear, a towel, and a pair of tennis shoes having no laces were eventually found. However, no weapon was recovered from this location. Dr. Jeannie Eberhardt, a forensic scientist specializing in DNA serology, testified she found the presence of blood on the white T-shirt, but she was unable to confirm a DNA profile of the blood. Blood stains found on the denim shorts, towel, and boxer shorts were also tested, with the same result. The blood was either of an inadequate amount or degraded. The dyes of the denim shorts inhibited DNA testing. However, testing of the sneakers revealed a DNA profile consistent with that of the victim.

Shawna testified that Fleming ended her relationship with Butler several months before the murder. On March 9 Butler moved out of the apartment at Fleming's request. He was present, however, in the apartment on March 11 when Shawna visited her sister. Fleming told Shawna to leave and call the police. One of the officers who arrived on the scene observed red marks on Fleming's back and an injury to her shoulder. Butler was arrested, but bonded out the next evening. Two days after the incident with the police, Butler was again seen at Fleming's apartment. An employee of a cable company, John Dosher, was removing a cable box from the residence. He indicated that Fleming and Butler seemed affectionate with no animosity between them.

Lakisha Miller (Miller), Butler's cousin and Fleming's best

friend, who was known as Red, testified she spent the night with Fleming, at Fleming's request, on the night of March 12. She said she last spoke with Fleming at 8 p.m. on the night of March 13. Miller testified that Butler did not like her and that he was upset over the breakup with Fleming. She also said Butler was upset because Fleming was having an affair with Adonis Hartsfield.

Terry Jackson, Butler's coworker and acquaintance for many years, testified that he gave Butler a ride the day before the murder. During that ride, Butler said he was going to kill Bay (Fleming) and Red (Miller).

Dennis Tennell (Tennell) testified that he shared a motel room with Butler on the night of the murder and that he allowed Butler to borrow a pair of his Nike sneakers the next morning because Butler's shoes were wet. Tennell identified the sneakers found in the dumpster as Butler's. Butler testified he and Tennell attended a party and arrived at their room around 2 a.m. Tennell left for an hour on a "dope run." At some time during the night, Butler noticed his blue and white Converse sneakers were missing and when he asked Tennell where they were, Tennell responded, "I'm on a mission with them." Butler then borrowed Tennell's black Nikes, which Butler was wearing when arrested. As Butler and Tennell left their room, the police confronted them. Tennell ran away and Butler was taken to the police department for questioning. Butler testified he did not know Fleming was dead at this time.

At the penalty phase, several family members, including Butler's father, Junior Butler, testified concerning Butler's early life. Prior to the death of his mother, Butler lived with his mother and father, with Junior Butler supporting the family on fifty dollars a week. Junior Butler indicated that he was tried and acquitted of the murder of Butler's mother when Butler was eight years old. After his mother's death, Butler went to live with his grandmother. Butler's sister, Sandra Butler, testified Butler protected her as a child. When their grandmother died, Junior Butler again took custody of Butler and his siblings. When Butler reached age eighteen, he moved out of his father's house.

On June 28, 1998, the jury recommended Butler be sentenced to death by a vote of eleven to one. The trial court denied Butler's motion for new trial at a hearing on August 7, 1998. On November 2, 1998, the trial judge conducted a *Spencer* [FN1] hearing during which the defense presented additional mitigating testimony from a psychiatrist, Dr. Michael Maher.

> Dr. Maher testified that he interviewed Butler concerning his use of drugs and his psychiatric background. Butler informed him that he used a lot of cocaine on the night of murder, but he also said he did not commit the murder. Dr. Maher indicated that one of the effects caused by the use of cocaine was irrational, repetitive actions. He opined that the number of stab wounds in this case suggests this type of behavior. Dr. Maher further opined that a child whose mother dies as a result of violence faces a great risk of participating in violence to resolve conflicts, especially when this factor is coupled with other dysfunctional social activities, such as drug use.
>
> FN1. *Spencer v. State*, 615 So. 2d 688 (Fla. 1993).
>
> On January 11, 1999, the trial judge concurred with the jury recommendation and sentenced Butler to death. The trial judge found one aggravating circumstance, that the murder was heinous, atrocious, or cruel (HAC). The defense requested two statutory mitigating circumstances, that the defendant was acting under the influence of emotional and mental disturbance and that his capacity to appreciate the criminality of his act was impaired. However, the trial judge found no statutory mitigating factors and four nonstatutory mitigating factors including: (1) Butler was reared without his natural mother (some weight); (2) Butler is a loving and good son (some weight); (3) Butler is well thought of by neighbors and coworkers (slight weight); and (4) Butler has a long-term substance abuse problem (slight weight).

Butler, 842 So. 2d at 821-823.

Post-Conviction Proceedings

On July 13, 2004, Butler filed a Motion to Vacate. (V2/263-310). The State filed its response on September 10, 2004. (V8/453-71). On December 14, 2004, Butler filed a Motion for DNA Testing and on April 8, 2005, the trial court entered its Order. (V8/482-85, V4/581-84). On February 4, 2005, Butler filed an Amended Motion to Vacate, which raised 12 claims and clarified claims one, three and seven. (V4/519-69). The State filed its response on April 6,

2005. (V4/575-80). An evidentiary hearing was held on Butler's IAC and *Brady* claims and the following witnesses testified:

Carol (Davis) Beauchamp:

Carol (Davis) Beauchamp is a latent print examiner at the Pinellas County Sheriff's Office. (V5/709). Beauchamp testified in Butler's 1998 trial. Beauchamp was assigned to Butler's case as a latent examiner to analyze, compare, and evaluate latent prints submitted for comparison purposes. (V5/710). Out of the 113 prints received, 29 were of comparable value, and eight identifications were made. (V5/711-13).

Beauchamp received photographed developed prints found on the phone at the crime scene. (V5/717-18; 720). While Beauchamp did not collect the prints, she was told they were in blood. (V5/719; 743). A partial palm print on the phone had sufficient details available for comparison. (V5/723; 743). There were two different photos which showed this same print. (V5/723). Beauchamp notified Detective Steffens about this fact. (V5/724-25).

The partial palm print, left in blood on the phone, was unable to be identified. (V5/744). Beauchamp recalled that the partial print was important, but could not recall any particular conversations regarding the importance. Beauchamp testified, as an examiner, every print is important. (V5/725-26).

Beauchamp compared the print to: Martisha Kelly, Ronald Corker, Adonis Hartsfield, Shawna Fleming, Steven Shine, LaShara

Butler, Dennis Tennell, Harry Lee Butler, and the victim (Leslie Fleming). (V5/714; 726-27). The print, which appeared to be a partial palm print, was not run through the Automated Fingerprint Identification System (AFIS) because AFIS could only search "prints of fingers" in 1997. Beauchamp asked other examiners to compare the print to Butler's. (V5/727-29). More time was spent on the phone print because "when a print is left in blood, it is much more difficult to compare than a print left possibly on a sheet of paper, polished metal or glass." (V5/727). Beauchamp had "major case prints," which captured all areas including palm prints, from only Butler, Corker, and Tennell. (V5/713-15; 730; 745-46). Beauchamp was not able to identify the print. (V5/747). Beauchamp did not have major case prints of the victim, Leslie Fleming; Beauchamp did not have a known print of that portion of Bay's palm which corresponded to the palm print area left on the phone. (V5/748). Beauchamp knew the State could not exhume her body [which had been cremated]. (V5/748). Beauchamp was unaware that the victim's sister came into the crime scene, saw the phone next to Fleming's body, picked up the phone, moved it into another room and called law enforcement. (V5/749). Beauchamp was not able to identify the phone print. (V5/731). *Beauchamp was unable to say whether the phone print belonged to the victim because she did not have a relevant print of the victim's palm.* (V5/748; 750; 753). The area between the index finger and thumb where one would grab

something was missing from the victim’s prints. (V5/753; 756). Beauchamp was called as a defense witness at trial and beforehand spoke with Mr. Schwartzberg. Mr. Schwartzberg was a very good lawyer and very professional. (V5/751-52).

Annie Brookins:

The deposition of Annie Brookins was taken on October 17, 2008. Annie Brookins has known the Butler family since she was 15 years old. (V18/3017). Ms. Brookins was born in 1947 and she has known Harry Butler since he was born (1961). (V18/3043-44).

Butler’s family lived and worked on a tobacco farm in Georgia, approximately seven or eight miles from the main road, down a dirt road. They lived in a wooden house that was “raggedy” and “run down.” The house was heated by a wood burning fireplace. They used kerosene lamps and there was no running water. The families living on the plantation shared an outhouse with their neighbors. All of the families who lived on the tobacco farm worked in the fields. (V18/3018-3021). The owners of the farm were white and all of the workers were black. (V18/3023). The children also worked in the fields, including Harry. (V18/3021). Some of the children who worked on the farm were as young as six or seven years old. The children went to school when they could - when it was not tobacco season. (V18/3022). Ms. Brookins explained that more value was placed on white people than on black people. (V18/3024). Black people treated white people with respect. White people did not

treat black people with the same respect and it was acceptable to use the "N word." (V18/3023). As a child, Butler wore raggedy clothes, with patches and holes. Butler was a "good child" and a "fat chubby red boy." (V18/3033). He was "[h]appy as he could be with what he had. . ." (V18/3050). Marital infidelity was common and did not seem to affect the kids. (V18/3034). Junior and Spig also cheated on each other. (V18/3030). According to Ms. Brookins, Butler's mother, Spig, had an affair with a married man named Chamberlain. Junior also cheated on Spig with several different women. Hattie Mae and others used to say that Junior was "whoring" just like his daddy. (V18/3031). Junior and Spig had "knock out" fist fights in front of the children. (V18/3034). At one point, Junior and Spig moved to Largo, Florida, but, a month later, Spig left and went back to the tobacco farm in Georgia. When Ms. Brookins lived in Clearwater, she heard that Spig was either drowned by Chamberlain, or drowned accidentally. (V18/3035). Years later, Harry Butler's oldest brother also drowned on a weekend trip to Ft. Lauderdale. (V18/3040).

Two or three years after Butler's mother passed away, Ms. Brookins started dating Butler's father, and they lived together in Largo. (V18/3036-37). Harry and his siblings lived with their grandmother, Hattie Mae, in Georgia. (V18/3037; 3047). After a while, Sandra came to live with Junior and Ms. Brookins and Sandra lived with them for a year and a half, while the boys stayed with

Hattie Mae. (V18/3037). Junior was physically abusive toward Ms. Brookins and gave her black eyes and cut her cheek with a knife. (V18/3039). Junior went to jail for 30 days. Junior never did this in front of the kids - the boys lived in Georgia and did not see it. (V18/3039-40; 3049). Although Junior had a mean side, Harry Butler was a "good" child and never showed a mean side to Ms. Brookins. (V18/3048). Eventually, Junior and Ms. Brookins broke up because Junior was cheating. (V18/3038). After Ms. Brookins and Junior broke up, the boys moved to Largo, Florida. Ms. Brookins remarried and sometimes saw Harry Butler. (V18/3040). Ms. Brookins did not know how many children Harry Butler had; she knew of two (a girl and boy), and met his older children in Clearwater. (V18/3045; 3051). Ms. Brookins did not recall the name of Butler's high school, but she'd heard that he was a good football player, got good grades, and thought he was a "good child." (V18/3040; 3049). Ms. Brookins never met Ms. Fleming, the mother of Butler's [youngest] children. (V18/3044-45; 3051). Although Ms. Brookins heard about the trial, she did not attend the trial, did not visit Butler in jail, did not telephone him, and did not write any letters to him while he was incarcerated. (V18/3049).

Maude Brown:

Maude Brown is Butler's great aunt. (V6/919). Butler lived in Georgia on a tobacco farm with his parents as an infant, moving to Largo, Florida prior to age three. (V6/937-38). Butler's mother

died when she was 23 years old and Brown was told Butler's mother was murdered. (V6/934-35). Butler was 2 or 3 years old at the time. (V6/937). Butler had a half-brother that died at age 23. (V6/932-33; 935). Brown did not know Butler when he was a young boy. She only got a chance to see Butler a couple of times when he was in high school. (V6/939).

Shirley D. Furtick:

Ms. Furtick, employed by the South Carolina Department of Mental Health, is the liaison for jail and correctional services. (V6/946). She has a degree in social work, is a licensed marriage and family therapist, and social worker. (V6/948). A bio-psychosocial assessment is a tool used by most clinical social workers. (V6/951). It would have been available to trial counsel. (V7/124). Furtick was tendered as an expert in clinical social work and in conducting biopsychosocial assessments. (V7/128).

Ms. Furtick conducted a biopsychosocial assessment of Butler. She reviewed police reports, trial testimony, Department of Corrections' records, hospital records, school records, and trial counsel's notes and letters. (V7/131-35; 138). Furtick interviewed Butler, family members, friends, and a teacher from a school Butler attended. She consulted with Dr. Caddy and read the report from Dr. Harrold Smith. (V7/136-38). She did not talk to Butler about the murder and did not ask him whether he committed the crime. (V7/215).

Ms. Furtick knew that, initially, the Public Defender, Bob Dillinger, personally handled this case. However, Ms. Furtick was unaware that the PD's office had a mitigation specialist, Ms. Petri, employed at the time of trial. (V7/206). A forensic intake investigation was conducted by the defense prior to trial. (V7/207). Their "this is your life" investigation included details of Butler's background and his life history: an intake form and the pre-trial mitigation investigation described Butler's background, including names of family members, when his grandmother died, the wood houses and the old tobacco farm. (V7/207).

Furtick prepared a family tree and summary of her findings. (V7/140-41). She concluded that Butler did not have the support and resources to become a functional adult. (V7/193-94; 203). Furtick found substance abuse, violence, infidelity and unstable relationships in Butler's family. (V7/148-49). Butler's mother died when he was 3 years old. (V7/149-50; 176-77; 210; 231). After his mother's death, Butler was raised by his grandmother, Hattie Polk. Butler lived on the Georgia tobacco farm until Polk's death when he was 10 years old. (V7/149-52). The living conditions were "sparse." (V7/159-60). It was reported that the children were undernourished and subject to harsh discipline. (V7/175; 178-79).

From ages 10 to 18, Butler lived with his father, brothers and sister in Largo. (V7/152; 181; 183). Butler moved out at age eighteen and Butler lost contact with his father. According to Ms.

Furtick, Butler's father was a role model - teaching him that he needed to work and take care of his family. While providing work ethics, Butler's father was not "emotionally present." From age 10 to 18, Butler was providing for himself and did not have parental supervision or structure. According to Ms. Furtick, Butler "turned to the street, living in public houses, the streets, related to gangs, led to the drug culture." (V7/152-53). Furtick concluded that Butler was very close to his older brother, Terry, who acted as a surrogate father. (V7/181, 183-84). When Butler was 14, Terry moved from the home and Harry Butler was "on his own." (V7/184-185). According to Ms. Furtick, when Butler was growing up, there were times which were unstable and marked with emotional and academic gaps. In fifth grade, Butler's teacher commented that he was slow. This was after his grandmother's death and there were a lack of resources to assist Butler. (V7/154-56). Ms. Furtick testified that while Butler was in Georgia, there were no programs which addressed educational deficits or learning disabilities. (V7/163). In Florida, Butler received poor to failing grades. (V7/180; 185). None of the records she reviewed revealed that Butler had any disciplinary or behavioral problems. (V7/163; 187). Butler regularly attended school and played football until he broke his leg. He quit high school at 17, after 11th grade. (V7/186-87).

According to Ms. Furtick, Butler began working between the ages of five and ten on the tobacco farm - toting leaves and

carrying water; and, as a teenager, he returned to the farm on occasions to work. (V7/160-62). During high school, Butler had several jobs. (V7/161). On the defense interview form, Butler indicated that [Largo high school] football was an important part of his life and listed two coaches as influential figures; Ms. Furtick did not interview them. (V7/212). Butler continued to work after high school and eventually owned his own cleaning service business, Duke and Butler's. (V7/189-90; 209-10). Butler supported his pregnant girlfriend (Robin) and family. (V7/190-92). Eventually, Butler began selling drugs and Robin moved from the apartment they shared. (V7/191). Their 13-year relationship was characterized as "on-and-off." (V7/201). Furtick learned that Butler's parents met and married as teenagers. (V7/164). Both lived and worked on a tobacco farm. Butler's father was illiterate. Furtick attributed this to lack of education in Georgia at the time. (V7/166) Butler's mother's death certificate indicated that she drowned and while Butler's father talked about being accused of her murder, according to Furtick, this was not documented anywhere and Butler's father was in Florida when Harry's mother died in Georgia. (V7/174, 177). Harry Butler, from childhood through his teen years, believed his father killed his mother. (V7/174).

On cross-examination, Ms. Furtick admitted that the defense, at the time of trial, did conduct a mitigation investigation, but

she thought it was not as “inclusive” as hers. (V7/216-217). The Public Defender’s Office initially collected background data and mitigation information on Butler. At the time of trial, there were three defense attorneys on this case: Mr. Schwartzberg, Mr. Watts and Ms. Borghetti. Ms. Furtick knew that two of Butler’s family members – his father, Junior, and his sister, Sandra, testified at the penalty phase. (V7/221). The pre-trial defense investigation also included various mental health experts: Drs. Harold Smith, Michael Maher, and Alfred Fireman. (V7/224). Ms. Furtick went to the tobacco farm in Georgia to attempt to find the gravesite of Butler’s mother and any of her relatives. (V7/225-226). Ms. Furtick did not speak with Lorraine Barber, the victim’s aunt, who grew up on the same Georgia tobacco farm with Harry Butler, or the victim’s mother [Vivian Harris], who lived on the tobacco farm next door. Ms. Furtick did speak with Ms. Higgins, who reported that Harry Butler was no disciplinary problem and was a good student; however, according to Ms. Furtick, he was “definitely not a good student.” (V7/227-28). Ms. Higgins didn’t remember Butler that well. On the defense form completed before trial, Butler admitted that he worked only after school and on summer vacation. (V7/229).

Janice E. Stevenson:

Dr. Stevenson is a licensed psychologist from Maryland who has testified as an expert in the area of pediatric psychology. (V6/53). Stevenson reviewed the police incident report, Dr. Crum’s

evaluation of LaShara, law enforcement interviews of LaShara, depositions of LaShara and Dr. Crum, and LaShara's school counselor's notes and drawings from LaShara. (V6/60-62). Additionally, Stevenson reviewed LaShara's trial testimony. (V6/62). Stevenson did not speak to LaShara. Stevenson's primary concern was that Dr. Crum did not take into full consideration the impact of trauma on LaShara's ability to recall and testify in an objective manner. (V6/64-65). Stevenson concluded that a competent clinical examination of LaShara after the murder would have consisted of a blood test for cortisol and an observation of her mental status to see if she was showing any physical indications of stress. Indicators identified by Stevenson were agitation, withdrawal, isolation, dissociation and numbing. According to Stevenson, Dr. Crum did not take any physical indicators of stress into consideration. (V6/69-70).

In Stevenson's opinion, there were a number of tests that should have been fully administered by Dr. Crum, but were not. The tests cited by Stevenson would have assessed LaShara's emotional state. One of these tests, "the House-Tree-Person", consists of drawings which will show indications of trauma. According to Stevenson, Crum used this test as an "ice breaker" instead of as a diagnostic tool. (V6/71-72). Stevenson testified that the standard of operating with children is play, and that Crum utilized talk as the primary data-gathering method which, according to Stevenson, is

not standardized. There were a number of factors Stevenson would have considered in evaluating the reliability of LaShara's testimony. These were: the community she lives in, the family dynamics, the level of income for the family, and her exposure to trauma or domestic violence or drug addiction. Stevenson thought LaShara had insufficient responses for the level of trauma she was experiencing. Stevenson associated her responses with being "numb" and "disassociated." According to Stevenson, these responses were not normal unless they were from one "in a chronic situation where numbness was the order the day." Stevenson did not have any knowledge of the factors she testified to as being relevant in assessing LaShara's testimony. Stevenson concluded that LaShara's emotional maturity should have been assessed, and Stevenson did not believe it had been. (V6/81-84). Further tests, in Stevenson's opinion, would have been able to pin down LaShara's ability to comprehend and communicate what she experienced. Events surrounded by trauma affect the dependability of testimony and Stevenson could have explained same in front of a jury. Stevenson explained that children are more suggestible and seek approval and validation from adults. (V6/85-88). Stevenson also testified regarding the concept of fixation. According to Stevenson, humans who are traumatized may focus their attention on one factor in the environment that makes sense to them, and they "screen out all the rest of that stuff that's overwhelming to their mind." Stevenson believed this

may have occurred here. She believed "it's a hypothesis that needs to be addressed in an assessment of her ability to testify as a competent witness..." (V6/90-92).

On cross-examination, Stevenson acknowledged that Dr. Crum conducted two one-hour interviews of LaShara. (V6/93; 108). The purpose of the interviews was to determine whether or not testifying would be harmful to her, and whether or not LaShara was legally competent to testify. Stevenson did not speak to Bob Dillinger, the elected Public Defender, who personally dealt with Dr. Crum. Stevenson understood that the trial court had to determine if the witness was competent. (V6/93-95). Stevenson did not read the trial testimony of other witnesses (Terry Jackson or Martisha Kelly or Lola Young) whose testimony supported Butler's guilt; she was not provided with it. (V6/96-98). Stevenson was unaware of any undue influence on LaShara prior to Officer Ballard transporting LaShara and Stevenson did not remember reading Officer Ballard's testimony regarding LaShara's spontaneous statement ["My daddy hurt my mommy. I heard him yelling at her."] (V6/101-102; 107). Stevenson did recall reading that, before any traumatic event, LaShara indicated that her daddy picked her up and carried her into her bedroom; LaShara opened her eyes and saw that it was her daddy. (V6/102). Stevenson was unaware that LaShara's grandmother, Ms. Harris, testified that she did not have any contact with LaShara between the time Leslie's body was discovered

and the time LaShara was taken to the police department. (V6/107).

Stevenson did not recall reviewing the pre-trial hearing on the motion in *limine* that the defense conducted in an attempt to preclude the testimony of LaShara. (V6/104-106). Stevenson was not suggesting that someone would be unable to tell the truth after experiencing a huge stress disorder; rather, according to Stevenson, the truth as they know it may not be factual. (V6/107). Stevenson agreed that Dr. Crum conducted two one-hour sessions with LaShara to determine those factors in this case. (V6/108).

Dr. Glenn Caddy:

Dr. Caddy was tendered as an expert in clinical and forensic psychology; and in death penalty investigations and the presentation of mitigation evidence as a mental health expert. (V7/1149-50, 1151-52). Caddy reviewed a number of documents, including trial records, Department of Corrections records, and school records. Caddy met with Butler on three occasions. (V7/1152-1154). Caddy found Butler to be competent. (V7/1202). Included in Butler’s school records were a number of mental maturity tests administered when he was six years old wherein Butler scored below the 50 percentile. Butler’s school records indicated poor grades, test scores below normal levels and notations that he was “slow” and “showed little interest.” Caddy noted a significant number of absences from Butler’s Pinellas County school records. (V7/1154-1160). Caddy also testified

regarding Butler’s medical records. In 1978, Butler was hit over the head with a pipe. The medical records indicated an orbit fracture and some “brain involvement” because Butler became belligerent and disoriented. When asked if Butler may have had brain damage, Caddy answered “I’m not prepared to go that far...” (V7/1162).

During Caddy’s meetings with Butler, Butler described himself as a “happy-go-lucky kid.” Butler talked about “pretty hideous things” from his childhood without much emotion. Butler reported witnessing violence, fear of the dark and stuttering. In Caddy’s opinion, Butler’s disadvantaged upbringing influenced his sense of self, caused him to have a negative attitude toward those in a position of authority and those who appeared well-to-do. (V7/1166-1168). Caddy testified Butler has six children, and he thinks Butler feels very hurt and angry he cannot be there for his children. Butler told him he did not have an alcohol or drug problem, and yet also told him it was common for him to drink twelve to eighteen beers a day. Caddy did not know exactly when Butler began drinking, but testified he was using alcohol in his early teens and was drinking quite a lot as an adult. Caddy did not think the consumption of alcohol would have caused brain impairment in Butler’s teenage years because he did not think the consumption was that great. (V7/1169-72). Caddy was unable to complete an IQ test on Butler due to Butler’s resistance, but

performed neuropsychological testing. (V7/1176-77). Butler's test results indicated academically Butler placed below middle school. Testing of Butler's abstract reasoning and processing indicated impairment. Caddy administered the Wechsler Memory Scale test, indicating below normal results. Based upon his testing, Caddy concluded Butler's brain functions are "pretty inadequate" and he would be limited in terms of his vocational abilities to low-grade laboring positions. (V7/1178-85). Butler's intellectual and scholastic limitations were risk factors that led to his current situation. (V7/1188-89). Caddy recognized Dr. Maher as a well known expert who testified regarding some of the same issues raised by Caddy. (V7/1198).

Butler volunteered that he didn't commit the murder; Caddy would not have asked Butler that question. According to Caddy, Butler is resentful of the inequities between the rich and the poor. (V7/1190-1192). Butler did not tell Caddy about a lot of violence in his life; however, Butler did talk about believing that his father had killed his mother. (V7/1194). Butler indicated that he excelled in high school football and could still remember two coaches, but Butler could not remember anyone else who impressed him in school. Caddy did not speak with the coaches. (V7/1195). The same information addressed by Caddy [Butler's sleeping difficulty, nightmares, enuresis, gambling, poor appetite, stuttering, fear of the dark, reading problems] was obtained by the

defense at the time of trial. (V7/1196-97; 1199). Caddy knew that the defense had mental health experts evaluate Butler prior to trial, those experts included Dr. Fireman and Dr. Maher. Although Dr. Maher did not testify before the jury, he did testify before the court and Caddy confirmed that he also had been called to testify only before the court and not the jury. (V7/1198). Caddy found that Butler was superficially charming and agreed that Butler was competent. (V7/1201-02).

Richard N. Watts:

At the time of the evidentiary hearing, Richard Watts had been a criminal defense attorney for twenty-seven years. (V5/812). He is an experienced death penalty attorney and was appointed to represent Butler after the Public Defender's Office withdrew. Michael Schwartzberg, another experienced death penalty lawyer, was also appointed to Butler's defense team. (V5/813; 846). Watts testified that Schwartzberg, who practiced law for twenty years, was innovative, fought hard for his clients and was the best in the area with DNA evidence. (V5/845). Anne Borghetti was the third attorney appointed to Butler's defense team. (V5/813). At the time of the post-conviction hearing, Schwartzberg was deceased. (V5/815). During Butler's trial, Schwartzberg was responsible for the guilt phase, and Watts was responsible for the penalty phase, although they both participated in both phases. Borghetti was only involved in the penalty phase. (V5/813-14). At trial, the defense

theory was that someone other than Butler committed the murder and that "someone" was a specific individual - Dennis Tennell. (V5/838-39). According to Butler, on the night that Leslie Fleming was killed, Tennell took Butler's shoes and went out "on a mission" with them. (V5/871).

Watts testified that DNA evidence was relatively new at the time of Butler's trial. (V5/817). The defense consulted with Dr. Litman, the only person Watts knew in the area regarding DNA issues. (V5/815). Watts previously hired Dr. Litman, who holds the Andrew Hines Endowed Chair at USF, to analyze DNA. (V5/849). Dr. Litman was "well-qualified" and his qualifications were entered into evidence as State's Exhibit #3. (V5/851-53). State's Exhibit #2 detailed the time Schwartzberg consulted with Dr. Litman, and included 2 1/2 hours on April 14, 1998 and 6 1/2 hours on April 16, 1998. (V5/849-51).

Schwartzberg worked on the DNA issues and the thrust of the defense at trial was to attack the statistical analysis and qualifications of the State's witness. (V5/817; 853). The DNA issue was raised at trial and on direct appeal. (V5/853). Watts testified that if the defense did not take the deposition of the FDLE DNA analyst, it would have been the result of a tactical decision. (V5/819-20). Watts and Schwartzberg inherited this case from the Public Defender's Office. The Public Defender, Bob Dillinger, was personally handling this case and Dillinger

conducted the deposition of Dr. Crum. (V5/853-55). Schwartzberg conducted the pre-trial deposition of LaShara and Watts was present. Schwartzberg questioned LaShara in detail, including regarding the difference between the truth and a lie. Watts agreed that LaShara answered Schwartzberg's detailed questions pretty well. (V5/855). Watts did not think the defense considered hiring their own psychologist to evaluate LaShara or to testify as a defense expert. (V5/820; 872). At trial, the defense position was that LaShara was already tainted by her contact with Dr. Crum and family members and she was not a reliable witness. (V5/820; 856). The defense maintained that LaShara believed what she was saying, but the facts had been suggested to her. The defense repeatedly sought to exclude LaShara's testimony as unreliable – the defense raised this issue (1) via a motion in *limine* prior to trial, (2) twice during trial, in challenging her competency and renewing their objection, and (3) after trial, in a Motion for New Trial, which argued that the trial court erred in failing to exclude LaShara's testimony as unreliable based upon unduly suggestive questioning and influence of family members. (V5/856-59).

Watts was not involved in any discussion regarding the cross-examination of Terry Jackson. Watts did not recall any pending charges against Jackson that were given favorable treatment. (V5/822). Watts was "pretty sure" he would have known about this if the defense team had known. (V5/823-24). Watts did not know

anything about Borghetti representing Jackson and had no idea there was any connection between Borghetti and Jackson. (V5/825; V8/1264). It did not seem that Borghetti even recognized Jackson at trial. (V8/1285). It appeared that Borghetti had nothing to do with any charges dropped against Jackson and they would have been dropped regardless of Borghetti. (V8/1263). Watts did not think Borghetti would have known Terry Jackson was connected to the Butler case. (V8/1264). If Watts had known about any connection, he would have annotated the file or obtained a written waiver from Butler. Watts did not recall if either he or anyone else from the defense team examined Jackson's court files. (V8/1265). Watts did not recall Jackson being deposed and did not recall that Jackson was "fairly uncooperative" at the time of trial and the State had to go through the Interstate Extradition of Witnesses Act in order to force Jackson to appear and testify. (V8/1266). Watts did not recall examining the court files of any of the witnesses. Watts testified that Jackson did not stand out in his mind as an important State witness. (V8/1267). Watts testified that Schwartzberg was "wonderful" at cross-examination and a brief cross-examination of Jackson may have been so as not to "dignify the allegation any further." State's Exhibit #1, detailing the State's efforts in order to compel the attendance of Jackson as a witness at the time of trial, was admitted into evidence.

Watts knew that <u>all</u> of the DNA evidence at the crime scene

belonged to the victim, Leslie Fleming. Butler's blood was not found at the crime scene and Tennell's blood was not found at the crime scene. (V5/839). Watts agreed that, at the time of trial, the defense was aware of partial palm print on the telephone. (V5/825). Although Watts did not see it as particularly significant at the time of trial, in post-conviction, Watts agreed that it *perhaps* put an unknown third person at the scene. (V5/825; 844). At the time of trial, the partial palm print was compared to several individuals, but was never identified. Both Dennis Tennell and Adonis Hartsfield were eliminated as the source of the palm print. Watts was also reminded that when the victim's sister, Shawna, discovered the victim's body, the phone was next to the victim and Shawna used that phone to call the police. The victim's palm print [the area between the thumb and forefinger] was not obtained at the autopsy; at the time of trial, the defense knew that the victim's palm print was unavailable for comparison – the victim's body had been cremated. Schwartzberg handled the direct examination of Ms. (Davis) Beauchamp at trial; and, in post-conviction, Beauchamp confirmed that she spoke with Schwartzberg before she testified at trial. (V5/841-44). When questioned about a report [of unidentified DNA on a door] that he misread, Watts did not remember the specifics. However, Watts believed he realized it and tried to correct or neutralize it. (V5/829).

Watts spent a considerable amount of time with Butler and has

a good relationship with him. Watts discussed the plea options with Butler and Butler opted to go to trial. Watts also discussed with Butler whether or not he should testify. (V5/832-33). Butler wanted to testify. (V5/860). Butler wanted to tell the jury that (1) his employer wasn't telling the truth, (2) LaShara wasn't telling the truth and (3) Dennis Tennell committed the crime. Butler also wanted Martisha Kelly to testify for the defense and she did. (V5/862). Watts discussed Butler's prior convictions with Butler and that they would be used as impeachment if Butler testified. (V5/836; 861). Butler wanted to testify. (V5/834). Watts wished he'd asked Butler about his prior felonies on direct, but did not. (V5/835). However, whether it was 9 convictions or 10, it was a lot; and, at trial, the State did not go into any specifics about the prior convictions, but just corrected the number from 9 to 10. (V5/861).

In preparation for the penalty phase, Watts did not hire a separate "mitigation expert." Instead, Watts and Borghetti were the ones who contacted the family members, friends, employers, neighbors and people from Butler's past who might come in and "present a humanizing aspect to the situation." (V8/1267-68). In addition, Schwartzberg did some of the mitigation and presented the penalty phase closing argument. (V8/1281). The trial ended on Friday and the penalty phase began on Saturday morning; however, some of their intended witnesses – family members and Butler's

associates - failed to appear at the penalty phase. Watts testified that it was his "call" to go ahead with the witnesses that did appear. (V8/1269). Watts' decision to go right into the penalty phase was a strategic decision as he feels this is most beneficial for a defendant. (V8/1278). Watts explained that he prefers not to have a delay between the guilt and penalty phases because (1) jurors' emotions harden if they are away for a week or two, (2) there are outside influences that may affect them and (3) they are more "receptive" at that point, especially in a case like this where lingering doubt might be an issue for the jury; therefore, Watts did not to delay it "even an additional hour that morning, much less go into the next week." Furthermore, Watts testified that "a reluctant witness is often not a very good witness" and the witnesses who chose not come to the penalty phase were not straightforward in their communications with the defense. Watts cited these as additional reasons for not seeking a continuance. (V8/1270-71). Watts thought that the "best" witnesses who failed to appear were Harry Butler's son and the mother of Butler's son [Robin Green]; however, Watts acknowledged there were prior allegations of violence involving Ms. Green and Butler. Watts recalled Schwartzberg saying at the penalty phase that they were going to stop because the witnesses, who did appear, did not appear to help. (V8/1279-80).

Watts testified the defense felt they had a number of non-

statutory mitigating circumstances and all three attorneys did mitigation work. (V8/369; 376). Watts testified they had information in their file regarding Butler's family, knew his mother drowned and knew his father was a suspect in her death. At the time of trial, the defense had a picture of Butler's past and knew that he had grown up on a Georgia tobacco farm. Watts did not believe discussing Butler as a drug dealer would have been helpful in the penalty phase. (V8/377-78). Watts was not aware of using a "mitigation expert" at the time of Butler's trial. (V8/376). While the defense retained two psychiatrists (Drs. Fireman and Maher), Watts testified that Butler's case may have been one where it was a choice not to go into his mental health history. (V8/370; 375). Watts explained "[i]f there is a notion that there may be lingering doubt, we wouldn't want to show that his profile would be that of a perpetrator in a case like this." (V8/370). After the jury heard about the victim's 40 stab wounds, and broken jaw, Watts did not believe a mental health expert telling the jury Butler was a "charming" man would have helped his case and he would not have chosen to present such testimony. (V8/378-79).

At the *Spencer*[1] hearing, Dr. Maher's testimony was limited to avoid unfavorable cross-examination. (V8/372). It was a strategic decision not to use Dr. Maher in front of the jury, opting to have him testify before the judge alone. Watts acknowledged that had

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[1] *Spencer v. State,* 615 So. 2d 688 (Fla. 1993).

Dr. Maher testified before the jury, the jury may have been able to learn about Butler's violent past and drug dealing. (V8/380-81). Watts was not interested in showing that Butler had mental health defects and using Maher would not have served the defense purpose. Watts cited the fact a mental health expert's testimony can open many doors for the State to cross-examine as one of the "primary reasons" not to call a mental health expert when the jury was present. Even though Butler's drug use was brought out during the guilt phase, Watts would not have presented [more about] it during the penalty phase. (V8/381-82).

Anne F. Borghetti:

Borghetti began her legal career at the Pinellas County Public Defender's Office and started her own private practice three or four years later. In Butler's case, she worked primarily on the penalty phase at the direction of attorneys Richard Watts and Michael Schwartzberg. (V8/306-07; 334). Borghetti had experience in handling murders and a lot of child abuse cases. (V8/307; 321). The three attorneys met, with Schwartzberg directing the penalty phase where he saw it was best fit for Butler. (V8/320). Schwartzberg was big on accentuating the positives in a person's life during the penalty phase. (V8/332). Schwartzberg was an excellent lawyer. (V8/321-22). Borghetti testified the penalty phase did not go the way the attorneys planned. (V8/310). According to Borghetti, the witnesses were "horrible," Butler's

father only wanted to testify to the fact he didn't kill his wife, and Butler's sister told the jury about a dream where Butler confessed to the crime. (V8/310; 319). Butler's sister was supportive throughout the proceedings, and then "all of a sudden she just turned." (V8/319). Borghetti recalled talking to the penalty phase witnesses she hoped to call. (V8/311). Her notes indicated she spoke to Butler's father, brother, sister, girlfriend, and former employer. (V8/312-313). The plan was to present Butler's life story. (V8/335). There were some witnesses who failed to appear. (V8/312-13). Borghetti's notes indicated she prepared penalty phase subpoenas. (V8/334). Borghetti could not remember who was in charge of gathering background information in mitigation. (V8/311). Borghetti completed a forensic assessment form that she obtained from a death penalty seminar. The purpose of the assessment was to obtain real background information from Butler himself. (V8/314). The form revealed the same type of information that Dr. Caddy addressed. (V2/291-95; V8/330). Borghetti obtained the names of relatives from Butler. (V8/330). She also prepared a family history which included Butler's place of birth, early poor life on an old tobacco farm, school history and mother's death. Borghetti interviewed Butler's sister and knew they picked fruit in the field and were a close-knit family. Borghetti gathered a substantial amount of Butler's personal and family history. (V8/341-43). On cross-examination, State's Exhibit

#6 was entered into evidence. The exhibit was a notice of intent to present expert testimony of mental mitigation from Dr. Fireman. Borghetti could not recall if Fireman testified, but noted that if he was not called it was decision made by the trial team. (V8/323-25). Borghetti testified it could be assumed that Fireman was not called because he did not have any beneficial evidence to offer. (V8/331-32). State's Exhibit #7, a letter from Fireman to Borghetti, was admitted and indicated Borghetti provided material for Fireman's review, including medical records and the forensic assessment. (V8/339-340). Borghetti checked Butler's criminal history to ensure that if Butler took the stand and the State was going to go into his prior offenses, that they only used permissible convictions. Borghetti met with Butler's prior counsel in the Public Defender's Office and interviewed Butler for the penalty phase. (V8/326-28). Borghetti prepared materials for and conferred with a forensic psychiatrist for the penalty phase. (V8/330-31; 333). Borghetti was court-appointed to represent Terry Jackson. Based on records she reviewed, Borghetti never appeared in court on Jackson's behalf. Borghetti had no recollection of ever speaking to Terry Jackson; she looked for a file on him, but did not have any. At the time of trial, Borghetti had no memory of representing Jackson. (V8/308-09).

David R. Dow:

David Dow is a professor at the University of Houston Law

Center, the Director of Litigation at the Texas Defender Service, and the Director of the Texas Innocence Network. (V9/1331; 1333). Dow addressed trial counsel's performance in relation to the American Bar Association (ABA's) capital litigation guidelines and investigation.[2] (V9/1340; 1354-57). Dow has never tried a first-degree murder case. (V9/1372). Dow did not speak to elected Public Defender who initially represented Butler. Dow was not familiar with the Public Defender's Office or the work they put into Butler's case. (V9/1376-77). Dow was not familiar with Michael Schwartzberg's resume. (V9/1380; 1382-83). Dow did not speak to Dr. Fireman or to Dr. Maher, but concluded their work was not as complete as the investigation by collateral counsel's experts. (V9/1387-88). Dow agreed a mitigation specialist was not required by the ABA guidelines and that an investigator or trial counsel could gather mitigation evidence. (V9/1396; 1399-1400). Dow never spoke to Butler's trial counsel. (V9/1409).

Dr. Elizabeth Johnson:

Dr. Johnson was tendered as an expert in forensic biology and DNA analysis. (V5/770-72). Johnson first testified regarding two samples[3] taken from the inside of the left shoe that were recorded by FDLE as inconclusive. When asked if they were blood, Johnson answered that would not be able to be definitely determined. The

[2] The documents illustrating the investigative work done by the Public Defender's Office were introduced as State's Exhibit A-L. (V9/1325-27).

presumptive test was positive for human blood and the samples contained human DNA. There was enough data to establish that Butler could not have contributed to the samples. (V5/776-80). However, this was not reported because the samples did not meet FDLE's lab reporting threshold relating to DNA quantity. (V5/780-81; 800-01). Dennis Tennell was not a contributor to any of the DNA identified on the shoe. (V5/800). According to Johnson, there was no way to tell from the final FDLE report that Butler was excluded as a source of the DNA, but the FDLE worksheets and analyst's notes documented Butler's exclusion. (V5/781; 783). When Johnson was asked, "no one tried to say or indicate that it belonged in any way to Harry Lee Butler, is that correct," Johnson replied, "[t]hey just made an inconclusive determination about it." (V5/802).

Regarding post-conviction DNA testing on both shoes, Johnson testified regarding the left shoe (labeled 56-A): 1) the victim appeared to be the donor of a blood stain on the sole; 2) a small apparent blood stain on the sole could not have been contributed by either the victim, or Butler or Dennis Tennell; 3) two samples from the shoe insert gave a weak presumptive positive result for blood, but gave no DNA results; and 4) another sample from the shoe insert gave very limited data but enough to conclude the victim, Butler or Tennell were not contributors. (V5/785; 787-91).

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[3] FDLE Numbers E-105 and E-106.

Regarding the right shoe (56-B), Johnson testified: 1) a very small blood stain near the rear of the shoe had a mixture of more than one person, contained male DNA, and the victim, Butler and Tennell were all *excluded* as contributors; 2) blood stains on the trim of the right shoe produced no results; 3) the sample from the heel portion of the fabric insert gave a very weak partial profile, with the alleles detected *excluding* the victim, Butler or Tennell; and 4) the presumptive test on the toe portion of the fabric insert was negative for blood and there were no results on that sample. (V5/785; 791-92; 800; 804-05).

Dr. Johnson knew that Butler admitted that the tennis shoes were his and that the shoes were found in a dumpster; however, she did not know how long Butler had the shoes, she did not know when the DNA was placed on the shoes, and she did not know under what circumstances the DNA might have been deposited on the shoe. Some of the DNA could be sweat or contact DNA or transferred from the dumpster. Dr. Johnson admitted, "[n]obody can tell you how it got there – or when." (V5/799-800). Dr. Johnson was unaware that, at the time of trial, the defense hired a DNA expert, Dr. Gary Litman, to review the DNA data and she was unaware that the DNA evidence was reviewed by another expert in the field of DNA testing. Dr. Johnson described the stain on 56-B (the right shoe), found on the trim of the outer edge of the sneaker, as "a very small stained area" underneath an FDLE bar code sticker. (V5/802-04). Dr.

Johnson reviewed the DNA results and agreed that the DNA at the crime scene "all comes back to Leslie." Dr. Johnson agreed that nothing points to Dennis Tennell as having contributed to any DNA on the shoes. (V5/806).

The trial court denied Butler's Amended Motion to Vacate on May 13, 2010. (V11/1784-1810). This appeal follows.

SUMMARY OF THE ARGUMENT

The trial court correctly denied Butler's IAC/guilt and penalty phase claims under *Strickland v. Washington,* 466 U.S. 668, 104 S. Ct. 2052 (1984). The trial court set forth detailed factual findings which are supported by competent, substantial evidence. Inasmuch as no procedural or substantive errors have been shown with regard to the factual findings or the trial court's application of the relevant legal principles, no relief is warranted and this Court should affirm the trial court's order denying post-conviction relief.

THE *STRICKLAND* STANDARDS AND STANDARDS OF REVIEW

The majority of the issues raised in this post-conviction appeal involve claims of ineffective assistance of trial counsel and these IAC sub-claims were denied after the multi-day evidentiary hearings. In *Bradley v. State*, 33 So. 3d 664, 671 (Fla. 2010), this Court summarized the following standards of review applicable to these IAC claims:

> . . . the test when assessing the actions of trial counsel is not how, in hindsight, present counsel would have

> proceeded. See Cherry v. State, 659 So. 2d 1069, 1073 (Fla. 1995). On the contrary, a claim for ineffective assistance of trial counsel must satisfy two criteria. First, counsel's performance must be shown to be deficient. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Deficient performance in this context means that counsel's performance fell below the standard guaranteed by the Sixth Amendment. Id. When examining counsel's performance, an objective standard of reasonableness applies, id. at 688, 104 S.Ct. 2052, and great deference is given to counsel's performance. Id. at 689, 104 S.Ct. 2052. The defendant bears the burden to "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Id. (quoting Michel v. Louisiana, 350 U.S. 91, 101, 76 S.Ct. 158, 100 L.Ed. 83 (1955)). This Court has made clear that "[s]trategic decisions do not constitute ineffective assistance of counsel." See Occhicone v. State, 768 So. 2d 1037, 1048 (Fla. 2000). There is a strong presumption that trial counsel's performance was not ineffective. See Strickland, 466 U.S. at 669, 104 S.Ct. 2052.
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> Second, the deficient performance must have prejudiced the defendant, ultimately depriving the defendant of a fair trial with a reliable result. Strickland, 466 U.S. at 689, 104 S.Ct. 2052. A defendant must do more than speculate that an error affected the outcome. Id. at 693, 104 S.Ct. 2052. Prejudice is met only if there is a reasonable probability that "but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694, 104 S.Ct. 2052. Both deficient performance and prejudice must be shown. Id. Because both prongs of the Strickland test present mixed questions of law and fact, this Court employs a mixed standard of review, deferring to the circuit court's factual findings that are supported by competent, substantial evidence, but reviewing the circuit court's legal conclusions de novo. See Sochor v. State, 883 So.2d 766, 771-72 (Fla.2004).
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> *Bradley*, 33 So. 3d at 671.

The above-cited standards of review apply to all of the claims of ineffective assistance of counsel raised in the Appellant/Defendant's Initial Brief.

ARGUMENT

ISSUE I
IAC/GUILT PHASE CLAIM
(Unidentified DNA on Butler's sneakers)

This IAC/guilt phase claim involves the small amount of unidentified DNA located on Butler's discarded sneakers. The sneakers, which Butler admitted were his, were recovered two days after the murder – they were in the middle of a trash dumpster. Against this background of contamination, Butler argues that his experienced attorneys were ineffective in "failing to hire the necessary experts to identify DNA not belonging to Mr. Butler or the victim" that was found on Butler's sneakers. The trial court found neither deficient performance nor resulting prejudice under *Strickland* and explained:

> Butler next alleges that trial counsel provided ineffective assistance of counsel in failing to adequately use a DNA expert to show that the DNA of a person other than Butler or Fleming was found on Butler's sneakers. Evidence presented at trial established that Butler was the owner of a pair of sneakers found in a dumpster near the crime scene and that Fleming's DNA was found on the sneakers. At trial, Butler admitted that the sneakers were in fact his, but testified that another man, Dennis Tennell, had worn them on the night Fleming was murdered and never returned them. (Trial Transcript, pp. 158-59). The Florida Department of Law Enforcement (FDLE) conducted DNA testing on the sneakers. Butler also claims that counsel failed to obtain notes from FDLE that would have revealed the presence of unidentified DNA on the sneakers. He alleges that counsel was ineffective for instead focusing on the qualifications of a DNA analyst from FDLE, Jeannie Eberhardt, as a means to attempt to exclude the DNA evidence, which he argues was an unreasonable strategy.
>
> Butler now claims that, had the jury known that the DNA of a third person was found on the shoes, the outcome of his trial would have been different. In his Amended Motion to

Vacate, Butler so briefly alleges that counsel was ineffective in failing to raise a Frye [fn3] challenge to the DNA results due to lack of proper procedures during the DNA testing. The motion, however, fails to allege any specific improprieties or shortcomings with regard to the procedure or allege any specific prejudice as a result of these purportedly improper procedures.

Strickland v. Washington, 466 U.S. 668 (1984), sets forth the analysis required of an allegation of ineffective assistance of counsel. The United States Supreme Court established in Strickland a two-prong test for reviewing claims of ineffective assistance of counsel, which require a defendant to show that (1) counsel's performance was deficient and fell below the standard for reasonably competent counsel and (2) the deficiency affected the outcome of the proceedings. 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. To satisfy the prejudice test the defendant must show that a reasonable probability exists that the outcome would have been different absent the ineffective assistance. Strickland, 466 U.S. at 694; see also Haliburton v. Singletary, 691 So. 2d 466 (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. The trial court need not necessarily address the deficiency prong first; if the court can determine that defendant cannot establish the necessary prejudice, it need not address or decide the first prong. Strickland, 466 U.S. at 697.

With regard to the Frye challenge issue, the court finds this claim to be insufficiently pled. As noted above, no specific improprieties are alleged in the motion, and no evidence was presented at the evidentiary hearings with regard to this issue. [fn4] As the defense has failed to meet its burden of proof with regard to this claim, it is denied.

With regard to the third-party DNA issue, the Court finds that neither the deficiency nor the prejudice prong of Strickland has been sufficiently established to merit relief. At trial, police detective Wilton Lee, Jr. testified that, based on information he received from an acquaintance of Butler's, he searched for and located various articles of clothing believed to belong to Butler, including **a pair of Converse tennis shoes, in a convenience store dumpster located near the crime scene. Detective Lee testified that he**

found the shoes two days after the murder. They were located one half to three quarters of the way down the dumpster amongst bags of trash, rotten food, flies and maggots, and the shoes and clothing were wet from rain. He testified that the shoes were found in an open-top shoe box, but were not otherwise protected from the elements. (Trial Transcript, pp. 339-48).

Eberhardt also testified at trial. The crux of her testimony was that, while there were indications of blood at several locations on both the right and left shoe, DNA testing on the right shoe was inconclusive due to a small sample size. (Trial Transcript, pp. 449-53). With regard to the left hoe, one DNA profile was found to match Fleming. Butler was excluded as a possible contributor to the DNA profile. (Trial Transcript pp. 455-56). Eberhardt further testified that she conducted a second round of testing on the inside soles of the shoes, essentially to test for DNA of anyone who might have been wearing them, but the results were inconclusive. (Trial Transcript pp. 480-86). **On cross-examination, counsel had Eberhardt reiterate the point, that Butler had been excluded as a contributor to each and every DNA profile taken from the shoes.** (Trial Transcript, p. 480).

At the evidentiary hearing on this claim, Dr. Elizabeth Johnson, a forensic scientist, testified as to the DNA found on the shoes. Dr. Johnson reviewed the DNA testing materials from Eberhardt and oversaw additional DNA testing of the shoes by an independent laboratory. **Dr. Johnson testified that, according to Eberhardt's notes and worksheets, DNA data from the inside sole of the left shoe which was reported formally as "inconclusive" had actually excluded Butler as a potential source of that DNA profile.** Dr. Johnson explained that the exclusion was not testified to at trial and was reported as inconclusive because it did not meet the FDLE lab's reporting threshold. Dr. Johnson did acknowledge, however, that this reporting procedure was consistent with the FDLE lab's operating procedure at the time testing was done and was an accepted practice at that time. Dr. Johnson also testified that there would not have been any way that a layman would have known simply from reading Eberhardt's report that there was useful data found at that location and that it would have taken an expert reviewing Eberhardt's testing in detail to uncover this fact.

With regard to the independent lab testing of the shoes, Dr. Johnson testified that DNA matching Fleming's was found on the sole of the left shoe. Five other samples taken from

the left and right shoes (both inside and outside) indicated the presence of human DNA, but Fleming, Butler, and Tennell were all excluded as possible sources of that DNA. [fn5] All other DNA samples tested were found to have no DNA result. **Dr. Johnson acknowledged that, based on these results, only Fleming was linked to the shoes and no connection to Tennell was established by the results of this testing.**

Finally, Watts testified regarding this issue, stating that in preparation for trial the defense team retained a DNA expert, Gary Litman, and consulted with him at length regarding DNA evidence issues. Specifically, Watts testified, he gave Dr. Litman the FDLE DNA report prepared by Eberhardt. Watts testified that the usual procedure when dealing with Dr. Litman was to provide him with the reports and other discovery provided by the State, allow him to review it, and let him tell the attorneys what else he needed for his review. In this case, Watts was not sure if he gave Dr. Litman Eberhardt's "bench notes" or if he only provided the official report. Watts further stated that, after Dr. Litman's review of the DNA testing, they would rely on him to tell them if the FDLE lab handled the DNA testing properly and they would consult with him regarding the necessity of conducting additional investigation, such as taking the lab analyst's deposition. In this case, Watts testified, it was likely that Eberhardt was not deposed pursuant to a recommendation by Dr. Litman. Billing records presented by the State indicate that Watts and Schwartzberg spent several hours consulting with Dr. Litman on this case.

Additionally, Watts testified that the defense theory at trial was that Dennis Tennell actually murdered Fleming. Watts indicated that they pursued this theory because Butler believe it to be the case and the theory fit with the facts of the case. Watts noted that, at trial, Butler testified that Tennell took Butler's sneakers (which were later found in the dumpster), left for about an hour, and then came back without the shoes.

Based on this evidence, the Court finds that Butler has failed to establish either the deficiency or the prejudice prong of Strickland. **As to the deficiency prong, the evidence clearly shows that counsel retained and consulted with a DNA expert on this case, and there is nothing in the record to show that Dr. Litman gave counsel any indication that the DNA of a third party might be present on the sneakers. As Dr. Johnson noted in her testimony, the inconclusive finding in Eberhardt's report would not have signaled to a layperson**

that this was useful in any way—counsel would have been dependent on Litman's review to uncover this fact. Because the record is devoid of any evidence suggesting that counsel failed to diligently investigate the DNA test results or otherwise acted deficiently, they cannot be said to have provided ineffective assistance of counsel in this regard. To the extent Butler argues that counsel was ineffective for focusing on Eberhardt's qualifications in an effort to exclude the DNA testimony, the court finds that this strategy was not unreasonable at the time of trial. Such a strategy does not now afford Butler relief under Strickland. Counsel's reasonable strategic decisions do not constitute ineffective assistance of counsel. See Lamarca v. State, 931 So. 2d 838 (Fla. 2006); Occhicone v. State, 768 So. 2d 1037, 1048 (Fla. 2000).

Moreover, the fact that the jury was not told of the presence of third party DNA on one of the sneakers is not so prejudicial that the outcome of the trial would have been different. Dr. Johnson testified that there was no way to tell when or how the unidentified DNA was transferred to the shoes. The small amount of unidentified DNA therefore was not necessarily probative of the crime. Furthermore, the sole defense theory in this case was that Dennis Tennell, not Butler, committed the murder. As noted by Dr. Johnson, however, Tennell was excluded as a potential source of DNA for the samples in question. **As Dr. Johnson specifically testified, these results actually excluded rather than linked Tennell to the shoes, thus refuting Butler's theory that Tennell committed the offense. In this respect, the results of additional testing would have hurt, rather than helped, the defense's case. Accordingly, prejudice has not been demonstrated and this claim is denied.**

fn3. Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).
fn4. Additionally, it should be noted that trial counsel cross-examined DNA expert Jeannie Eberhardt extensively at trial regarding testing procedures, issues related to cross-contamination, and her method of statistical analysis. (Trial Transcript, pp. 491-97).
fn5. Dr. Johnson also indicated that the DNA appears to be from more than one unknown person, and a least one of these unknown persons is male.

(V11/1786-90)(e.s.).

At the time of trial, Butler insisted that Dennis Tennell wore Butler's sneakers while out "on a mission" the night that Leslie Fleming was killed. The small amount of unidentified DNA on the discarded sneakers does not match either Butler, the victim, or Tennell. Butler concludes that the unidentified DNA on Butler's cast-off shoes supports his claim that "that someone else was wearing his sneakers on the night Ms. Fleming was killed." (Initial Brief at 14). At trial, Butler claimed that "that someone else" was Dennis Tennell. However, the unidentified speck is not linked to Tennell; thus, it does not support Butler's trial claim that the "someone else" was Tennell. Moreover, Butler's post-conviction expert, Dr. Johnson, does not support Butler's current third party "phantom suspect" theory. Dr. Johnson readily admits that she did not know when the DNA was placed on the shoes, and she did not know under what circumstances the DNA might have been deposited on the shoes; some of it could be sweat or contact DNA or transferred from the dumpster, and "[n]obody can tell you how it got there – or when.". The small amount of unidentified DNA on Butler's discarded sneaker cannot be linked - either in time - or place - or circumstance - to the crime scene at all; and, as a result, it is not probative of the crime. See, *McDuffie v. State*, 970 So. 2d 312, 330 (Fla. 2007).

The unidentified DNA does not exonerate Butler nor implicate anyone else in Leslie Fleming's murder. Instead, it is analogous

to those situations in which Florida courts have denied motions for post-conviction DNA testing where the time and manner in which the evidence was deposited is unknown. See e.g., *King v. State*, 808 So. 2d 1237 (Fla. 2002) (upholding trial court's finding that the defendant could not meet the requisite showing that DNA testing would give rise to a reasonable probability that he would be acquitted or receive a reduced sentence because it was impossible to determine when, where, or how hair was transferred to murder victim's nightgown); *Sireci v. State*, 773 So. 2d 34, 43-44 (Fla. 2000); *Tompkins v. State*, 872 So. 2d 230, 243 (Fla. 2003); *Hitchcock v. State*, 991 So. 2d 337, 348 (Fla. 2008); *Jennings v. State*, 782 So. 2d 853, 859 (Fla. 2001); See also, *Allen v. Secretary, Florida Dept. of Corrections,* 611 F. 3d 740, 746 (11th Cir. 2010) (citing this Court's decision stating, "[a]lthough the hair analysis excluded Allen as the source, it did not exclude the victim; and due to contamination, the two hairs cannot be examined further. Thus, the analysis neither supported nor negated Allen's argument that an unidentified third person committed the murder." *Allen* II, 854 So.2d at 1260).

At trial, the jury knew that (1) the sneakers discarded in the dumpster were Butler's (and were the same ones that Butler claimed were worn by Tennell while "on a mission" the night of Leslie Fleming's murder); (2) the PCR testing on the blood spot on the outside of the left sneaker revealed a DNA profile consistent with

the victim, Leslie Fleming; and (3) the DNA profile of the blood on the sneaker was inconsistent with Butler's DNA. (DA V13/255-456). The items were inside the dumpster, about halfway down. (DA V12/349). The store where the sneakers were located was a highly commercial area trafficked by many people. (DA Vl2/354). Officer Shawn Meeks testified that the tennis shoes, with no laces, were consistent with the loose-fitting sneakers that Butler wore prior to being arrested on March 11th for a domestic violence incident. (DA Vl3/528-30). Shawna testified that Butler usually wore sneakers with no laces. (DA V13/534). Tennell allowed Butler to borrow his Nike sneakers the next morning because Butler's shoes were wet. (DA V15/928; 935). Tennell identified the shoes from the dumpster as Butler's. (DA V15/935).

At the time of trial, testing on blood samples from the inside of the sneaker indicated an inconclusive blood profile. (DA V13/486-87). Blood on Butler's motel room door was not consistent either with Fleming or Butler. (DA V13/475). All of the DNA from the victim's residence was consistent with the profile of the victim, Leslie Fleming. (DA V13/505). Butler testified at trial. When Butler was arrested, he was wearing Dennis Tennell's black Nike shoes (DA V16/1076); and at trial, Butler admitted that the videotape, trial exhibit 22, showed him wearing the [Converse] sneakers which the DNA witness testified matched Leslie Fleming's blood. Butler admitted that the tennis shoes were his shoes. (DA

V16/1058-1059). On cross-examination, Butler verified that the sneakers with the blood matching the victim's DNA were his shoes. (DA V16/1077). As reiterated in *Bradley*, citing *Strickland*, "[a] defendant must do more than *speculate* that an error affected the outcome. . . Prejudice is met only if there is a reasonable probability that "but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Butler has failed to demonstrate any deficiency of counsel *and* resulting prejudice under *Strickland* based on the unidentified DNA located on Butler's discarded sneakers – DNA transferred from an unknown source – at an unknown time – and under unknown circumstances.

ISSUE II
IAC/GUILT PHASE CLAIM
(Failure to hire psychological expert to challenge child's testimony)

Butler next argues that trial counsel was ineffective in failing to consult or present an independent expert in the area of child competency. At trial, the defense filed a pre-trial motion in *limine*, renewed their objections at trial, and again challenged the child's testimony in a motion for new trial. In denying this IAC/guilt phase claim, the trial court found no prejudice under *Strickland* and explained:

> In this two-part claim, Butler first alleges his trial counsel was ineffective in failing to consult an independent expert in the area of child competency, who could have

provided expert testimony to support the defense's position at trial that LaShara Butler [fn6] was not competent to testify or to cast doubt on the credibility of LaShara's trial testimony. Butler contends that he was prejudiced in that LaShara was the only eyewitness and that if counsel had adequately investigated and challenged her testimony, the jury would have disregarded her testimony and acquitted Butler. In the alternative, Butler claims, the court would have found her incompetent to testify and the jury never would have heard her testimony. Second, Butler claims his trial counsel was ineffective in failing to object to LaShara's testimony regarding her father (Butler) getting out of jail. He claims that this statement merited a mistrial in this case.

With regard to the second portion of this claim, the court finds insufficient prejudice to merit relief. During her trial testimony, in response to a question about who lived with her and her mother at their apartment, LaShara responded, "When my daddy got out of jail one time, my other sisters and my one brother they came [to live at the apartment] and then they left." (Transcript, p. 228, lns. 15-17). No follow-up questions regarding Butler's incarceration were asked.

During the course of the trial, however, another witness and Butler himself both offered testimony, which was properly admitted, establishing that Butler had been incarcerated in jail and prison on more than one occasion. First, police detective Steven Bohling testified that, just prior to the murder, he arrested Butler on a domestic battery charge and booked him in the Pinellas County Jail. (Trial Transcript, pp. 155-56). And during the course of Butler's own testimony, he told the jury that, early on in his relationship with Fleming, he stopped seeing her because he was "on [his] way to prison." (Trial Transcript, p. 1014, lns. 14-15). Additionally, on cross-examination, Butler told the jury that he had ten prior felony convictions. (Trial Transcript, p. 1066). **Even without LaShara's testimony, therefore, the jury would have been well aware that Butler was previously incarcerated. Accordingly, a fleeting statement by this child witness cannot be said to have affected the outcome of Butler's trial, as is required under the prejudice prong of Strickland.**

As to the first portion of this claim, regarding LaShara's competency and credibility issues at trial, the court finds that there is insufficient evidence in the record to

establish prejudice under Strickland. During the course of the evidentiary hearing, psychologist Janice Stevenson outlined several perceived deficiencies in the psychological evaluation performed by Dr. Joseph Crum, who evaluated LaShara on behalf of the State and found that she was competent to testify as a child witness. Specifically, Dr. Stevenson testified that Dr. Crum failed to take into account the impact of trauma on LaShara's ability to recall events accurately and testify objectively, including the extent to which LaShara suffered from post-traumatic stress disorder and a numbing response; failed to assess LaShara's emotional maturity level; failed to evaluate the extent to which her testimony was the product of suggestion from family, friends, or police that Butler killed her mother; and failed to evaluate the extent to which her memory suffered due to fixation. Dr. Stevenson also testified that Dr. Crum could have administered several standard tests, identified as house-tree-person drawings, a children's apperception test, and a Rorschach Psychodiagnostic Test, along with play, as diagnostic tools to gain insight on LaShara's psychological state. She further testified that children rely on adults to explain events, that children pick up on cues and mirror people around them, and that children of LaShara's age would usually want to please adults. However, Dr. Stevenson admitted that she did not know to what extent, if any, LaShara suffered from post-traumatic stress disorder, trauma, numbing, fixation, or similar issues, but testified only that Dr. Crum should have assessed these areas to aid in determining her competency and credibility as a witness.

A review of the trial transcript indicates that trial counsel challenged LaShara's competency and credibility first in a motion to disqualify her as a witness prior to trial (transcript, pp. 62-97) and again during a motion for new trial argued on August 7, 1998 (motion for new trial transcript, pp. 4-5). At trial, counsel argued that LaShara was incompetent to testify as a child witness or, alternatively, her testimony was so tainted by statements made to her by family members and police as to be inadmissible.

It is within the discretion of the trial court to determine whether a child is competent to testify. Lloyd v. State, 524 So. 2d 396, 400 (Fla. 1988). **The court questioned LaShara directly, assessing her ability to distinguish a truth from a lie, reality from fantasy or make believe, and her understanding of an oath. (Trial Transcript, pp. 66-75). The court then asked her questions about events occurring around**

the time of her mother's death to evaluate her memory of that time period. (Trial Transcript, pp. 77-83). Based on this questioning, the court found her competent to testify. (Trial Transcript, p. 83). The court also found that her testimony was not so tainted as to render it inadmissible, specifically finding that there was no indication of suggestion or taint during initial police questioning, but that the defense would be permitted to cross-examine her regarding suggestibility so that the jury could consider it when weighing her credibility. (Trial Transcript, pp. 84-97). Specifically, it noted LaShara's testimony that her grandmother told her between five times and daily that her daddy had killed her mommy and that there would be a trial to determine whether he had killed her. (Trial Transcript, p. 93). The court also acknowledged that, in viewing the videotape of the police interview of LaShara, the interviewer's bias and suggestion to LaShara was obvious. (Trial Transcript, p. 95).

Despite all of this, however, the court concluded that LaShara was competent to testify and that these facts went to the weight of the evidence, not its admissibility, and could be disclosed to the jury. (Trial Transcript, pp. 96-97). **First, as noted above, there has been nothing presented that establishes LaShara Butler was suffering from trauma, post-traumatic stress, or other psychological phenomena to such a degree that it would have rendered her trial testimony inadmissible or unreliable. Although Dr. Stevenson speculated that LaShara may have experienced one or more of these issues based on her trial testimony and the results of her evaluation by Dr. Crum, her testimony was nothing more than speculation. Even assuming this speculation was correct, Dr. Stevenson was unable to say whether LaShara was affected to such an extent that it altered her testimony in any material way.**

Additionally, based on the lengthy in-court evaluation of LaShara and the findings made by the court as to her competency, it is unlikely that additional testimony — even expert testimony — as to taint or general incompetence would have altered the court's decision to permit her testimony at trial. Accordingly, counsel's failure to present expert testimony to support this position cannot be said to have prejudiced Butler. Floyd v. State, 18 So. 3d 432 (Ha. 2009) (finding no prejudice under Strickland by counsel's failure to object to child witness's competency where court sufficiently examined and properly qualified child witness).

> Finally, during cross-examination of LaShara at trial, Schwartzberg had the opportunity to establish for the jury that her grandmother told her "a lot" that her father killed her mother. (Trial Transcript p. 241). Schwartzberg also cross-examined LaShara about details of her direct testimony that were inconsistent with her earlier statements or which conflicted with other evidence and issues regarding her police statements that indicated interviewer bias. (Trial Transcript, p. 242-57). **In sum, defense counsel was able to raise the issues of taint and witness credibility with the jury through the use of cross-examination. Therefore, although an expert may have been able to provide more direct testimony with regard to these issues, counsel was able to clearly make these points to the jury without the use of an expert. Accordingly, there is no reasonable probability that an expert witness's testimony as to the issues of her credibility would have changed the outcome of the trial.** This claim is therefore denied.
>
> fn6. LaShara Butler is the daughter of Defendant Butler and the victim, Leslie Fleming.

(V11/1790-93).

Dr. Stevenson never examined LaShara. Instead, Stevenson critiqued the contemporaneous evaluation conducted by Dr. Crum at the time of trial and offered additional factors that might call into question the overall reliability of LaShara's testimony. As the trial court reiterated, under Florida law, whether a child witness is competent to testify is based on "his or her intelligence, rather than his or her age, and, in addition, whether the child possesses a sense of obligation to tell the truth." *Lloyd v. State*, 524 So. 2d 396, 400 (Fla. 1988). The trial judge has the discretion to decide whether a witness of tender age is competent to testify, *Lloyd,* 524 So. 2d at 400; and the trial court in this case conducted a hearing at the time of trial, saw the then

seven-year-old LaShara, personally questioned her, observed her demeanor, and found the child is "bright, articulate [and] well able to express the things she has observed." (V1/105). At the time of trial, the court concluded:

> [THE COURT]: **The long of the short of it is I don't see anything that's going to taint her testimony as a matter of law where it should be excluded from the jury**. I will indicate to you that everything I have heard, everything I saw on that tape may go - will probably go into evidence if you all choose so that the jury can give it all proper weight. **But this child is bright, articulate, well able to express the things she has observed back then and now, and she is going to be on her own when you start asking her questions about what was said, what was discussed, what was asked, whether that suggested something.** But that's where we are.
>
> There's that first real interview which is - the first interview I assume she had. That might have been a spontaneous declaration to some officer or something of that nature, but that first interview certainly I didn't see a single thing about it that clearly suggested the way this child should testify.
>
> (V11/96-97) (e.s.).

The trial court's ruling on the admissibility of LaShara's testimony involved an issue which was cognizable on direct appeal. See, *Lloyd v. State,* 524 So. 2d 396, 400 (Fla. 1988). This issue was not challenged on direct appeal; therefore, any underlying challenge to the admissibility of LaShara's testimony is procedurally barred and is not cognizable under the guise of ineffective assistance of counsel. See, *Heath v. State,* 3 So. 3d 1017, 1033, fn. 11 (Fla. 2009), citing *Pooler v. State*, 980 So. 2d 460, 470 (Fla. 2008).

Strickland does not set forth any requirement that an expert must be hired in any case. Moreover, in *Floyd v. State*, 18 So. 3d 432 (Fla. 2009), this Court held trial counsel was not ineffective for failing to challenge the competency of the child witnesses. Butler's post-conviction expert testimony failed to support a conclusion of deficient performance and any possible prejudice. Instead, Stevenson second-guessed the assessment made at the time of trial and suggested additional matters that "might" have been helpful in challenging the child's testimony. First, the determination of the child's competency to testify remains a decision for the trial court, not an expert witness, and it is one this court personally made. Second, the reliability of the child's testimony was vigorously challenged by the defense at the time of trial. It is hardly surprising that experts might have a difference of opinion and Butler's blanket reliance on Stevenson's critique is misplaced. See, *Davis v. State,* 990 So. 2d 459, 463 (Fla. 2008) (affirming denial of IAC claim and rejection of testimony by CCRC's experts, Dr. Robert Smith and Dr. Janice Stevenson). Moreover, Butler has not established that a defense expert's testimony, such as Stevenson's, even would have been admitted at trial. See, *Simmons v. State*, 934 So. 2d 1100, 1116 (Fla. 2006) (holding that the trial court did not abuse its discretion in refusing to admit the defense expert's testimony on psychological factors affecting the reliability of eyewitness

identification and reiterating "a jury is fully capable of assessing a witness' ability to perceive and remember, given the assistance of cross-examination and cautionary instructions, without the aid of expert testimony") And, even if Butler's claim is only that a psychologist should have been hired as a consultant, he cannot establish any deficiency of counsel and resulting prejudice. Butler's attorneys were not neophytes in challenging witness' testimony. At trial, defense counsel's strategy included emphasizing the likelihood of suggestibility, highlighting inconsistencies in the testimony, and reinforcing the probability of undue influence and taint.

A decision regarding what witnesses to call is a matter of trial strategy which will not be second-guessed under *Strickland*. In addition, mere conjecture and speculation are not enough to support a showing of prejudice. No prejudice can be established because, even if Stevenson's testimony had been offered at the time of trial, it would not have provided a basis to grant the defense motion. Butler has not demonstrated that the Court would have found LaShara not competent to testify and the result of Butler's trial would have been different.

ISSUE III
IAC/GUILT PHASE CLAIM
(Failure to conduct a "meaningful" cross-examination of Terry Jackson)

Next, Butler argues that Mr. Schwartzberg was ineffective in failing to conduct a "meaningful" cross-examination of Terry

Jackson about an alleged inconsistency between Jackson's trial testimony and his prior taped statement and leniency Jackson allegedly received in exchange for his testimony. The trial court found no prejudice under *Strickland* and elaborated:

> Butler claims his attorneys provided ineffective assistance of counsel by failing to investigate and cross-examine State witness Terry Jackson about statements he made to police that were inconsistent with his trial testimony, as well as the fact that Jackson allegedly received preferential treatment from the State on pending charges in exchange for his testimony against Butler.
>
> At trial, Jackson testified that he saw Butler on the night of Wednesday, March 12, 1997, in the parking lot of a bar when Butler asked Jackson for a ride. During the drive, Jackson testified, Butler told him that he was going to kill Bay and Red, referring to Leslie Fleming and her sister, Shawna Fleming. (Trial Transcript, pp. 185-86). On re-direct examination, Jackson testified that, at the time he spoke to police about the Butler case, he had been arrested on an open misdemeanor charge. (Trial Transcript, p. 189).
>
> **After reviewing the record the court finds that, even if Jackson had been cross-examined regarding the inconsistencies in his police statement and any open charges against him, it is unlikely that there would have been a different outcome at trial. As noted, Jackson himself told the jury that he was in police custody on an open charge when he gave his statement.**
>
> **Additionally, despite Butler's claim that Jackson received preferential treatment in exchange for his statement, that conclusion is not sufficiently established by the record.** Butler claims ineffective assistance of counsel in failing to investigate Jackson's arrest history and the alleged favorable treatment he received from the State. Butler alleges that the State declined to pursue prosecution on three burglary charges against Jackson, despite having Jackson's confessions, and that the State entered a notice that no information would be filed in the case involving of the charge of throwing a deadly missile even though there was evidence against Jackson. Butler contends that counsel deposed Detective Green, who interviewed Jackson, but failed ask about the alleged "break" being given to Jackson. Butler alleges prejudice by claiming that there is a reasonable

probability the outcome of trial would have been different had counsel used this information to impeach Jackson and show that he had a motive to testify falsely against Butler.

Upon a cursory review the police report cited in the Defendant's motion to vacate seems to indicate that the police were granting Jackson some leniency in exchange for testimony. However, a more careful examination reveals that the report contains information to the contrary. A police report attached to the Defendant's motion indicates that the victim of Jackson's burglary charges repeatedly informed police that she did not want to pursue prosecution and that she agreed to sign a no prosecution form. The police report goes on to state that the cases were closed because the victim did not want to prosecute; it is not clear that prosecution on these charges ever commenced.

Documentation included in the Defendant's motion as to Jackson's pending charge of throwing a deadly missile indicates that the State declined to prosecute due to a lack of independent corroborating evidence and testimony, but that charges could be reconsidered if further information developed. **It has not been conclusively shown, therefore, that there was in fact a deal to provide favorable treatment in exchange for Jackson's testimony at Butler's trial. The court accordingly finds that counsel was not deficient for failing to address this alleged favorable treatment.**

Moreover, even if counsel had taken up the issue of Jackson's alleged preferential treatment, the court notes that the State could have introduced evidence that Jackson was not cooperative as witness in this case. The record indicates that the State had to seek judicial assistance in compelling Jackson's presence at trial. Additionally, at the conclusion of Jackson's trial testimony, he was excused from his subpoena and told by the assistant state attorney, "You can go back to Georgia." (Trial Transcript, p. 189). This seems to indicate that, at least by the time of Butler's trial, Jackson was living at liberty in Georgia and was not actively participating with the State or volunteering his testimony in exchange for any type of deal on his charges.

With regard to the inconsistencies between Jackson's statement to police and trial testimony, the differences seem to be minor and do not materially impact the central point of Jackson's trial testimony, which was that one to two days before the murder, Butler told Jackson that he was going to kill Leslie Fleming. In his motion to vacate, Butler

> emphasizes the portion of Jackson’s statement to the police in which Jackson stated that he did not drive Butler anywhere as being totally inconsistent with his trial testimony. Butler claims that Jackson testified at trial that he drove Butler to Fleming’s apartment and heard the threat of killing Fleming afterwards, but that he told law enforcement he heard Butler make the threat in a parking lot. Looking at Jackson’s statement to the police in full context, however, it appears that the detective was at that time asking Jackson if he aided Butler in the murder in any way, and so it is unclear whether the detective is asking Jackson if he drove Butler on March 12, 1997 or two nights later when the murder occurred. [fn7] For these reasons, the court finds that the inconsistencies were not critical to the case and failure to raise them at trial did not likely affect the out me of this trial.
>
> As the defendant has failed to sufficiently establish prejudice under Strickland, this claim is denied.
>
>> fn7. The transcript reads, in pertinent part, as follows:
>> Q: Did you in any way help Harry? Drive Harry to the scene?
>> A: No
>> Q: Did you take any items to hide for Harry?
>> A:No
>> Q: Did you see Harry with any weapons at all?
>> A: No
>> Q: Did you ever see Harry with any weapons?
>> A: No
>
> (V11/1793-95) (e.s.).

Terry Jackson was not a “cooperating” witness for the State at trial; instead, the State had to invoke the Interstate Extradition of Witnesses Act in order to force Jackson to appear and testify at trial. (V8/361). At the time of trial, the defense had Jackson’s taped statement to Detective Green; and, at the commencement of trial, Mr. Schwartzberg demonstrated his familiarity with the statement and sought to exclude Jackson’s testimony altogether. (DA

V11/13-14). At trial, Terry Jackson admitted that he and his brother had been drinking in front of the Blue Chip Bar on Wednesday night and that Jackson paid "no attention" to Butler's remark and told Butler to "leave that mess alone." (DA V12/186). When the prosecutor asked Jackson if he *walked away* from Butler after that, Jackson replied "[i]t was in the car." (DA V12/186). On cross-examination, Mr. Schwartzberg established:

> Q. You didn't call the police and tell them he was going to kill Bay and Red?
>
> A. Why should I? I didn't think he was going do nothing like that.
>
> (DA V12/188).

On redirect examination, Jackson admitted that he spoke to the police after Bay was murdered. (DA V12/189). Jackson testified, "[t]hey had a misdemeanor warrant on me and they arrested me and they questioned me when they got me downtown." (DA V12/189). Defense counsel was obviously familiar with Jackson's prior taped statement; and, at trial, Jackson admitted that he paid "no attention" to Butler's remark. In faulting defense counsel for failing to highlight whether Jackson "walked off away from it," Butler is merely second-guessing defense counsel's strategic emphasis at the time of trial.

Butler also argues that defense counsel was ineffective in failing to impeach Jackson on leniency allegedly received in exchange for his testimony. Butler's self-serving conclusion is

unsupported by the record. Butler alleges that the detective agreed to call the burglary victim, and discuss with her whether she wanted to drop the case if Jackson continued to speak with them about case number 97-006261 [the homicide case against Butler]. However, the police report (V10/CCRC Appendix C) includes that when Jackson was arrested and law enforcement began to interview him on burglaries, Jackson told the officer THEN that he and the victim had made amends and she did not want to prosecute. The investigating officer informed Jackson that he would still conduct the interview and that he would call the victim after the interview. During the interview, Jackson told the officer again that he and the victim had talked about her not prosecuting. After the interview, the officer called the victim and the victim advised that she did not want to prosecute. The officer asked the victim three times if she was sure, and she said she was sure. The victim was advised to fill out a No Prosecution form and she agreed to do so. Thus, there is absolutely NO support for Butler's wholesale conclusion that law enforcement called the victim about dropping the charges IF Terry Jackson spoke to them on the murder case.

Butler also criticizes defense counsel for failing to cross-examine Jackson about not being prosecuted for Throwing a Deadly Missile, despite the victim's identification and physical evidence of the concrete block and blood on the victim. However, in the police report, 97-13206 (V10/CCRC Appendix G), the law enforcement

officer reported that Jackson admitted he was at the scene, but denied throwing the block. Also, the officer confirmed that he "could not locate any witnesses to the incident." The State recommended a No Information (V10/CCRC Appendix F) based on the "lack of independent corroborating evidence and testimony" which would "establish that Defendant [Jackson] is the person who committed this act. Should further information develop, charges will be reconsidered." In other words, the State was open to prosecuting Jackson if they obtained independent evidence or testimony showing that Jackson was responsible. Here, as in *Floyd v. State*, 18 So. 3d 432, 452 (Fla. 2009), trial counsel was not ineffective for failing to impeach the state witness on the unrelated criminal case. There is no support for Butler's conclusion that Jackson received favorable treatment in exchange for his testimony. Moreover, even if the defense, at trial, had tried to show that Jackson somehow attempted to "curry favor" with the prosecution, the State could then introduce evidence that Jackson was not a cooperating witness and his presence was compelled. Butler has failed to establish any deficiency of counsel and resulting prejudice arising from the alleged failure to conduct a more "meaningful" cross-examination of Terry Jackson.

ISSUE IV
IAC/GUILT PHASE CLAIM
(Alleged conflict of interest)

Butler argues that his defense attorneys were ineffective

during the guilt phase because Ms. Borghetti, one of Butler's attorneys at the penalty phase, was briefly appointed to previously represent one of the State's witnesses, Terry Jackson, on an unrelated criminal case that was not pursued by the State. In denying this IAC/guilt phase claim, the trial court found no evidence of any actual conflict and denied this claim as follows:

> In his fifth claim, Butler alleges that trial counsel Anne Borghetti provided ineffective assistance of counsel due to a conflict of interest in her representation. Specifically, Butler alleges that Borghetti previously represented Terry Jackson, who offered testimony against Butler at trial, and that Butler's Sixth Amendment right to conflict-free counsel was therefore violated . Butler argues that there was an actual conflict between Borghetti and Butler and that Borghetti's representation of Butler was adversely affected in that (1) Jackson was not impeached at Butler's trial regarding his felony arrests for burglary, for which, Butler claims, Jackson was granted leniency in exchange for his testimony against Butler; (2) Jackson was not impeached regarding his prior felony convictions; and (3) Jackson was not deposed by defense counsel prior to Butler's trial. Furthermore, Butler cites Lee v. State, 690 So.2d 664 (Fla. 1st DCA 1997), for the proposition that prejudice is presumed in cases where an actual conflict exists. Butler alleges that Borghetti "presumably" investigated Jackson's criminal record and spoke to him, and that attorney-client privilege would have prevented her from disclosing such information. Butler contends that he was unaware of any conflict and did not waive a conflict at any time.
>
> To establish a claim of ineffective assistance of counsel based on an alleged conflict of interest, the defendant must "establish that an actual conflict of interest affected his lawyer's performance." Herring v. State, 730 So. 2d 1264, 1267 (Fla. 1998) (citing Cuyler v. Sullivan, 46 U.S. 335, 350, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980); Buenoano v. Dugger, 559 So.2d 1116, 1120 (Fla. 1990)). "To demonstrate an actual conflict, the defendant must identify specific evidence in the record that suggests that his or her interests were impaired or compromised for the benefit of the lawyer or another party." Id. at 1267 (citing Buenoano v. Singletary, 74 F.3d 1078, 1086 n. 6 (11th Cir.1996); Porter v. Singletary, 14 F.3d 554, 560 (11th Cir.1994); Oliver v.

Wainwright, 782 F.2d 1521, 1524-25 (11th Cir.1986).

It is not disputed that Borghetti did, for a brief period, represent Jackson before her representation of Butler began. **There is no evidence in the record, however, to support Butler's claim that his interests were compromised as a result of Borghetti's representation of Jackson.** At the evidentiary hearing on this claim, Borghetti testified that she worked primarily on preparation of the penalty phase of Butler's case, with some minor involvement in guilt phase preparation. **Borghetti admitted that she had been appointed to represent Jackson and entered a notice of appearance in his case, but had no recollection of appearing on his behalf in court or of ever speaking with Jackson. Borghetti further testified that she has no personal file on Jackson. Richard Watts, co-counsel for Butler, also testified, stating that he had no idea that Borghetti had previously represented Jackson and it was his belief that, at the time, Borghetti did not realize the connection between Jackson and Butler.**

Butler notes that the Public Defender's motion to withdraw in case number CRC97-09592CFANO, State of Florida v. Terry Jackson, filed on June 12, 1997, bases the allegation of conflict on the fact that Jackson was listed as a witness in the Butler case and that the Public Defender had also been appointed to represent Butler. A review of the record in Jackson's case substantiates Borghetti's testimony regarding the extent of her representation in that case. The record indicates that Borghetti was appointed as conflict-free counsel on June 20, 1997 and filed a notice of appearance on June 26, 1997. The State filed a notice that no information for Jackson'ss charge of throwing a deadly weapon would be filed on August 5, 1997.

Borghetti did not file a notice of appearance in Butler's case until January 15, 1998. Borghetti's representation of Jackson concluded well before she filed a notice of appearance in Butler' case. As her representations of Jackson and Butler did not overlap, Borghetti's representations were successive, not concurrent. See Mickens v. Taylor, 535 U.S. 162, 175 (2002) noting that Sullivan applies in the context of concurrent representation); Cooper v. State, 856 So.2d 969, 974 (Fla. 2003)("A lawyer suffers from an actual conflict of interest when he or she actively represents conflicting interests."). Additionally, Butler has not identified specific evidence from the record suggesting his interests were compromised. Cooper, 856 So.2d at 974; Herring, 730 So. 2d at 1267.

> Accordingly, there is no indication that an actual conflict of interest arose as a result of Borghetti's representation of both Jackson and Butler. See generally Hunter, 817 So. 2d at 793. Credible evidence indicates that Borghetti did no substantive work on the Jackson case and she has no recollection of ever speaking with Jackson or appearing on his behalf during the course of her representation of Jackson. In fact, all evidence appears to indicate that all Borghetti did on the Jackson case was file a boilerplate notice of appearance before the State filed its notice that no information would be filed, that Borghetti did not even recall having briefly appeared in Jackson's case before representing Butler, and did not realize that there was any connection between the two men. As there is no evidence of an actual conflict, this claim is denied.
>
> (V11/1795-97) (e.s.).

In *Mickens v. Taylor*, 535 U.S. 162, 122 S. Ct. 1237 (2002), the Supreme Court emphasized that *Sullivan* applies to cases of multiple *concurrent* representation. *Sullivan* does not hold that a presumed prejudice rule applies outside that context. See, *Schwab v. Crosby*, 451 F. 3d 1308, 1325; 1327 (11th Cir. 2006) (rejecting CCRC's claim of conflict under both *Strickland* and *Sullivan*); See also, *Snelgrove v. State*, 921 So. 2d 560, 566 (Fla. 2005)

In this case, Ms. Borghetti's appointment to represent Terry Jackson on a criminal case which was not pursued, involves, at most, a case of successive rather than concurrent representation. Based on records she reviewed, Ms. Borghetti never appeared in court on Jackson's behalf. (V8/308). Ms. Borghetti had no recollection of ever speaking to Terry Jackson; she looked for a file on him, but did not have any. (V8/309). At the time of trial, Borghetti had no memory of ever representing Jackson. (V8/309).

Under *Mickens*, the defendant must first show that his attorney had an actual conflict of interest and that the conflict adversely affected counsel's performance. *Mickens*, 535 U.S. 162, 172 n. 5, 122 S.Ct. 1237, 1244 n. 5, ("An 'actual conflict,' for Sixth Amendment purposes, is a conflict of interest that adversely affects counsel's performance.") In *Cooper v. State*, 856 So. 2d 969, 974-975 (Fla. 2003), this Court emphasized:

> To establish an ineffectiveness claim premised on an alleged conflict of interest, Cooper must establish that an actual conflict of interest adversely affected his lawyer's performance. A lawyer suffers from an actual conflict of interest when he or she actively represents conflicting interests. **To demonstrate an actual conflict, the defendant must identify specific evidence in the record that suggests that his or her interests were compromised. A possible, speculative, or merely hypothetical conflict is insufficient to impugn a criminal conviction.** *Hunter v. State*, 817 So.2d 786, 791-92 (Fla. 2002) (citations and quotation marks omitted). A review of the facts contained in the record before this Court reveals no actual conflict, and we conclude that Cooper's assertions amount to no more than the speculation deemed insufficient in *Hunter*.

Butler's claim fails under *Strickland*. Butler failed to demonstrate that an actual conflict of interest existed and that Ms. Borghetti's prior appointment adversely affected defense counsel's performance. See also, *Connor v. State*, 979 So. 2d 852, 861 (Fla. 2007), citing *Wright v. State*, 857 So. 2d at 871-72 (holding that defendant must show that counsel actively represented conflicting interests and that an actual conflict of interest adversely affected his lawyer's performance). Butler has not shown that the alleged conflict "adversely affected" defense counsel's

performance. Butler has not identified anything that defense counsel either did, or failed to do, because of Ms. Borghetti's perfunctory appointment to represent Jackson on an unrelated criminal case where a "no info" was filed. The trial court found "no evidence of an actual conflict" and Butler has failed to establish both a deficiency of counsel and resulting prejudice under *Strickland*.

ISSUE V
IAC/GUILT PHASE & *BRADY* CLAIM
(Unidentified palm print on the phone)

Butler alleges his counsel was ineffective in failing to establish that a palm print on a telephone at the crime scene did not match the *available* prints of the victim or Butler. Alternatively, Butler argues the State committed a *Brady* violation[4] for allegedly failing to disclose the existence of the unidentified print. The blood on the telephone belonged to the victim, Leslie Fleming; indeed, all of the blood found at the crime scene belonged to Ms. Fleming. The telephone was found next to her body and the phone was used by Shawna Fleming to call the police. Although the bloody print was unidentified, that portion of the victim's palm

[4]To demonstrate a *Brady* violation, the defendant must establish that (1) the evidence at issue is favorable to the defendant, either because it is exculpatory or impeaching; (2) the evidence was suppressed by the State, either willfully or inadvertently; and (3) prejudice ensued. *Strickler v. Greene*, 527 U.S. 263, 281-82, 119 S. Ct. 1936, 1948 (1999). To establish prejudice, the defendant must demonstrate that "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id.* at 290 (quoting

located between her thumb and forefinger was unavailable for additional print comparison and exclusion because her body had been cremated. In denying this claim, the trial court found the *Brady* claim without merit and found no prejudice under *Strickland*:

> Butler alleges his counsel was ineffective in failing to bring out at trial the fact that a bloody palm print was found on a telephone at the crime scene that did not match the prints of either the victim or Butler. Alternatively, he argues the State committed a Brady [fn8] violation for failing to disclose the existence of the unidentified fingerprint to the defense.
>
> In order to succeed on a claim involving an alleged Brady violation, the defendant must establish that (1) the evidence at issue is favorable to the defendant, either because it is exculpatory or impeaching; (2) the evidence was suppressed by the State, either willfully or inadvertently; and (3) prejudice ensued. Strickler v. Greene, 527 U.S. 263, 281-82 (1999). To establish prejudice, the defendant must demonstrate that "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." Id. at 290 (quoting Kyles v. Whitley, 514 U.S. 419, 435 (1995)).
>
> First, the Brady claim is clearly without merit. Butler claims that the State failed to provide the handwritten notes of latent fingerprint examiner Carol Beauchamp (formerly Carol Davis of the Pinellas County Sheriff's Office. He further alleges that, even if the State was not in possession of the notes, the State was charged with constructive knowledge of evidence held by law enforcement agencies. During the evidentiary hearing, Beauchamp testified that she received a letter from the Public Defender's Office requesting the latent fingerprint materials in May 1997, when that office was representing Butler, and that she sent copies of the prints to the Public Defender's Office in response to its discovery request. Additionally, Watts testified at the evidentiary hearing that, upon reviewing materials from the case file, the information from Beauchamp regarding the unidentified print is present in the court file and was therefore known to the defense at the time of trial. Moreover, the court notes that Beauchamp was called as a

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Kyles v. Whitley, 514 U.S. 419, 435 (1995)).

defense witness at trial, and her information was therefore available to the defense. The Florida Supreme Court has previously held that "[t]here is no Brady violation where the information is equal or accessible to the defense and the prosecution, or where the defense either had the information or could have obtained it through the exercise of reasonable diligence." Floyd v. State, 8 So.3d at 451 (quoting Provenzano v. State, 616 So.2d 428, 430 (Fla. 1993)). **Based on the foregoing, the court finds that the State did not suppress this evidence.**

Second, regarding the ineffective assistance of counsel issue, Butler argues that counsel was ineffective for failing to uncover and present evidence about the print in question. Butler contends that the print was exculpatory because it was in the victim's blood and could not be determined to definitely match the prints of Butler or Fleming. He claims that counsel did not depose Beauchamp or request her notes. Butler contends that he was prejudiced in that this print was highly exculpatory evidence that likely would have changed the outcome of trial. He alleges that it was not proven beyond a reasonable doubt that the print belonged to Fleming, and that while the print did not match those of Dennis Tennell, such a conclusion was not necessarily inconsistent with the defense theory because Tennell might not have acted alone.

Beauchamp testified at the evidentiary hearing that she did not recall showing her handwritten notes to the defense attorneys before trial. Watts testified that the defense team was probably aware of the print but not of its potential significance. Butler now argues that, had his trial attorneys obtained her notes they would have become aware of the importance of this print. Watts testified at the evidentiary hearing that the fact that this print was unidentified could have been useful at trial because it could have placed a third party at the crime scene, and that he would have deposed Beauchamp had he known about the print.

As to this claim of ineffective assistance of counsel, the court finds insufficient prejudice under Strickland to merit relief. Beauchamp testified at trial that, of 113 fingerprint lifts from the crime scene, 84 were of no comparable value, 21 were not identified, and eight [fn9] were positively identified. The print in question was included in the 21 prints labeled as unidentified at trial. (Trial Transcript, pp. 845-46). Beauchamp further testified at trial that, in her opinion, the print in question was a partial palm print and several of her colleagues agreed with

this assessment. She further explained that, in order to make a valid comparison of a known print to an unknown print, the same areas of the finger or hand must be compared. (Trial Transcript, p. 844). **While that portion of the palm was available for and compared to the known case prints of Butler, Shawna Fleming, Martisha Kelly, Ronald Corker, Steven Shine, Adonis Hartsfield, LaShara Butler, Takisha Butler, and Dennis Tennell, that portion of the victim's palm was not available for comparison purposes. Therefore, while all of the aforementioned persons were able to be excluded as the source of the palm print, Leslie Fleming was not excluded.**

Based on the foregoing, the existence of the unknown palm print is of limited exculpatory value. As previously outlined, the defense's theory at trial was that Dennis Tennell actually murdered Fleming while wearing Butler's tennis shoes. Watts testified that Adonis Hartsfield was a second possible suspect in the case. Latent print analysis conclusively excluded these two men as the source of the bloody palm print. Additionally, the evidence presented at trial indicates that Fleming was found lying next to the telephone on which the palm print was lifted and, as indicated above, Fleming was not able to be excluded as the source of the palm print. Therefore, even had this information been disclosed at trial, the State could have plausibly argued at Fleming—not an unidentified killer—was the likely source of the print. The suspects known at the time of trial were excluded as sources of the print, but the victim cannot be excluded as a source. Accordingly, the court finds that, even if the jury had been made specifically aware of the unknown print on the telephone, there is not a reasonable likelihood that this information would have changed the outcome of the trial. This claim is therefore denied.

fn8. Brady v. Maryland, 373 U.S. 83 (1963).
fn9. Three prints were identified as belonging to Butler, four to Fleming, and one to Takisha Butler, Fleming and Butler's daughter. (Trial Transcript, pp. 845-46).

(V11/1797-1800) (e.s.).

The defense received photographs of all latent prints lifted in this case, and deposed Donald A. Barker, who was in charge of

forensics at the crime scene, and he testified about a bloody print on the phone. And, Ms. (Davis) Beauchamp was called as a *defense* witness at trial. As in *Floyd*, "there is no *Brady* violation where the information is equally accessible to the defense and the prosecution, or where the defense either had the information or could have obtained it through the exercise of reasonable diligence."

Butler failed to establish both deficiency of counsel and resulting prejudice under *Strickland*. Again, all of the blood at the crime scene belonged to the victim, including the blood on the phone. The print on the phone did not match either Butler or the alternate suspect suggested by Butler at the time of trial, Dennis Tennell, nor Adonis Hartfield. See, *Blanco v. State*, 963 So. 2d 173, 177 (Fla. 2007) (affirming denial of post-conviction discovery where latent print did not match defense witness at trial, whom defendant had long contended was the "real" murderer, and print did not match the fingerprints of anyone defense believed to be a suspect). Butler speculates that maybe some third-party was at the crime scene and maybe that phantom suspect left the bloody print on the phone. However, relief on ineffective assistance of counsel claims must be based on more than mere speculation and conjecture. *Connor v. State*, 979 So. 2d 852, 863 (Fla. 2007). Moreover, any additional third party theory would have been countered by the State's evidence that the phone with the victim's blood was found

next to the victim and the victim could not be excluded as the source of the bloody print because she was cremated. Butler has not demonstrated any deficiency of counsel and resulting prejudice under *Strickland* based on the unidentifiable print on the victim's phone. See also, *Allen*, supra; *Connor*, 979 So. 2d at 863 (rejecting IAC/guilt phase claim where defendant failed to allege or demonstrate any specific prejudice arising from the failure to examine unidentified fingerprints).

ISSUE VI
IAC/GUILT PHASE CLAIM
(Failure to object to M.E.'s testimony about torturous wounds to victim)

Butler argues that trial counsel was ineffective in failing to object to the prosecutor's redirect questioning of the Associate Medical Examiner about torturous wounds to the victim. In denying this claim, the trial court found the prosecutor's questioning was invited by the defense and also found no deficiency of counsel:

> Butler alleges that trial counsel was ineffective in failing to object to the trial testimony of medical examiner Marie Hansen when she referred to some of the wounds inflicted on Fleming as "torturous wounds" during re-direct examination. Butler contends that this testimony was improper because it was outside the scope of cross-examination, called for speculation, did not address any material fact, had no relevance, was more prejudicial than probative, and was designed to inflame the jurors' emotions.
>
> Butler claims that there was no testimony or proof that the superficial wounds were inflicted while the victim was still alive and that the origin of the superficial wounds was conjecture. He further argues that Dr. Hansen was not qualified as an expert to testify regarding the characterization of pain and whether the wounds were inflicted before or after death, and that her testimony amounted to impermissible opinion evidence. In addition,

Butler argues that the "tortu[r]ous" characterization impermissibly imputed general behavior patterns to him, which could have misled the jury. Butler asserts that counsel was ineffective for failing to object to the allegedly irrelevant and speculative nature of the testimony, as well as to Dr. Hansen's lack of credentials to testify on suffering of the victim.

The record reflects that, during cross-examination, defense counsel questioned Dr. Hansen regarding whether Fleming was likely unconscious during the stabbing, ostensibly for use during penalty phase mitigation. (Trial Transcript, pp. 618-21). The State asked Dr. Hansen on re-direct what tortu[r]ous wounds were. (Trial Transcript, p. 624). The State further questioned Dr. Hansen regarding the torturous wound issue, relating it back to the issue of Fleming's consciousness. (Trial Transcript, pp. 625-27). The State then asked Dr. Hansen, "Why would someone keep stabbing someone if they were unconscious?" to which defense counsel immediately objected as speculative The objection was sustained. (Trial Transcript, p. 626, lns. 15-19).

The court finds that, by raising the issue of Fleming's consciousness when the stab wounds were inflicted, the defense invited the line of questioning regarding torturous wounds to rebut argument by the defense that Fleming was unconscious when the wounds were inflicted. To the extent the Defendant claims that counsel was ineffective for failing to object to Dr. Hansen's lack of credentials to testify regarding the suffering of the victim, the court first notes that it was the defense that addressed the matter of whether the victim was conscious when the fatal wounds were inflicted in an effort to show that the victim may have been unconscious. (Trial Transcript, pp. 618-21). **The State's questions on redirect examination were in response to the issues raised by the defense on cross-examination. Although Dr. Hansen testified that torturous wounds hurt, she did not express any opinion as to whether the victim suffered; her testimony regarding tortu[r]ous wounds simply dealt with the possibility that the victim could have been conscious. (Trial Transcript, pp. 625-29). Counsel had no grounds to object on this basis. Accordingly, the court finds that the questioning was within the scope of cross-examination and relevant—therefore any objection to this questioning would have been overruled. Counsel cannot be found ineffective for failing to raise a meritless objection.** See Maharaj v. State, 778 So. 2d 44, 958 (Fla. 2000).

Accordingly, the court finds no deficiency in counsel's failure to object to the questioning of Dr. Hansen, and this claim is denied.

(V11/1800-01) (e.s.).

The prosecutor's redirect examination of Dr. Hansen was invited response to defense counsel's cross-examination of the Medical Examiner, wherein the defense sought to establish that the victim was unconscious for the fatal wounds. (DA V14/618-621). The State was entitled to rebut this effort by the defense to establish through the Medical Examiner that the victim had not experienced the wounds due to being unconscious. Florida case law recognizes that defensive wounds may be considered indicative of consciousness. See, *Guardado v. State*, 965 So. 2d 108, 116 (Fla. 2007); *Douglas v. State*, 878 So. 2d 1246 (Fla. 2004); *Williams v. State*, 967 So.2d 735 (Fla. 2007). Defensive wounds have also been equated with torture and torturous conduct. See, *Guzman v. State*, 721 So. 2d 1155, 1160 (Fla. 1998); *Boyd v. State*, 910 So. 2d 167, 191 (Fla. 2005). In this case, the M.E.'s descriptions of the wounds and photographic evidence of the wounds were relevant to show the manner of the commission of the crime and premeditation. Further, as the trial court found, the prosecutor's questioning was within the scope of cross-examination and relevant; therefore, any objection to this questioning would have been overruled. Counsel cannot be found ineffective for failing to raise a meritless objection. See, *Maharaj v. State*, 778 So. 2d 44, 958 (Fla. 2000).

ISSUE VII
IAC/GUILT & PENALTY PHASE CLAIM
(Counsel's mistake during opening statement)

Butler argues that that counsel was ineffective because Mr. Watts made a mistake in opening statement when he informed the jury, ". . . we have got DNA at the crime scene, somebody else's. We don't know who it is . . . ." This mistake *was* corrected and neutralized at trial by co-counsel, Mr. Schwartzberg. (DA V17/1187-1188). In denying this IAC claim, the trial court found the claim insufficiently alleged and found no prejudice under *Strickland:*

> Butler alleges that trial counsel Watts was ineffective in arguing during opening statements that the DNA of an unknown person was found on the door to Fleming's apartment and that it was the DNA of the killer. In fact, this unknown DNA was found on a door in Butler's motel room, not Fleming's apartment. Butler argues that this error allowed the State raise this discrepancy during closing arguments and caused the defense to lose credibility with the jury.
>
> First, the court notes that this claim is facially insufficient because Butler fails to allege that, but for counsel's error, the outcome of his trial would have been different. Strickland, 466 U.S. at 694; Haliburton v. Singletary, 691 So. 2d 466 (Fla. 1997). Notwithstanding this pleading defect, the court finds there is not sufficient prejudice to merit relief under Strickland. **Watts in fact incorrectly argued in the opening statement that the DNA of an unknown third person was found at the crime scene. Despite Butler's contention, however, this argument was made only briefly and was by no means the "primary focus" of Watts' opening statement.** (Trial Transcript, pp. 134-143). First, Watts argued at length that Butler had an alibi the night of the murder. He then argued very briefly that the DNA of a third person was found at the crime scene, but the argument was made in the context of his arguing that (1) there was no physical evidence linking Butler to the crime scene, and (2) the police did little investigation in this case and immediately assumed Butler was the killer based on his domestic history with Fleming. (Trial Transcript, pp. 139-40). He raised the DNA issue one more time at the end of his

statement, but again very briefly. (Trial Transcript, pp. 142-43).

At the evidentiary hearing on this claim, Watts conceded that he had made an error in stating that unknown DNA was found at the crime scene and explained he had confused it with the DNA found on a door in Butler's apartment. Watts further testified that he realized his mistake in the midst of making the opening statement and tried to correct or neutralize it.

In fact, during the defense's closing argument at trial, Schwartzberg addressed Watts' mistake, explaining to the jury that in fact the mix-up was actually Schwartzberg's error because he reviewed several reports and misread them. (Trial Transcript, pp. 1186-87). He then went on to argue, however, the significance of finding DNA of an unknown person in the Butler apartment, stating,

> But the fact of the matter is that there is DNA in this case that does not belong to either Harry or Leslie Fleming. Wouldn't it be interesting if it belonged to Dennis Tennell? Wouldn't it be interesting that the man - the only reason he claims he went to Harry Butler's apartment that night is because Harry insisted he goes [sic]? His blood is on the back of that door.
>
> They knew Dennis Tennell was involved. How hard was it? They got his fingerprints or Martisha Kelly. Wouldn't it be interesting if it was Martisha Kelly's blood on the back of the door and they got a court order to get her fingerprints. How hard was it to get her blood?

(Trial Transcript, pp. 1187-88). **Essentially, counsel was able to take a brief mistake made in opening statements and turn it around in closing statements to argue that the unknown DNA created reasonable doubt in the case. Weighing the brevity of Watts' argument on the DNA issue against the totality of the record in this case, the court finds no reasonable likelihood that, absent the error, the outcome of Butler's trial would have been different.** Accordingly, this claim is denied.

(V11/1801-03) (e.s.).

In light of defense counsel's correction and explanation to the jury during closing argument, Butler cannot demonstrate any basis for relief under *Strickland*. See, *Ferrell v. State*, 29 So. 3d 959 (Fla. 2010) (rejecting IAC/guilt phase claim - based on failure to present alibi defense as defense counsel had promised during opening statement - where defense counsel provided explanation to the jury during closing argument).

ISSUE VIII
IAC/GUILT PHASE CLAIM
(Failure to adequately prepare Butler to testify)

In this IAC/guilt phase claim, Butler alleges that defense counsel Watts was ineffective in failing to adequately prepare Butler to testify about the total number of his prior felony convictions. At trial, when Butler was asked how many times he had been convicted of a felony, he replied, "*approximately about nine that I know of*." Immediately thereafter, the prosecutor asked, "*How about ten*," and Butler admitted, "*Maybe so*." (DA V16/1066). That was it - the State did not focus on this negligible discrepancy. And, as to Butler's reference to prison, the trial court found there was ample evidence offered by Butler and several other witnesses regarding his history as a drug dealer and the fact that he had been arrested multiple times for domestic violence. The trial court found no prejudice under *Strickland* and explained:

> Butler alleges that trial counsel was ineffective in failing to adequately prepare him to testify as to his number of prior felony convictions on cross-examination, thus causing him to give an incorrect number of prior convictions

and "seriously undermining his credibility with the jury." Defendant's Amended Motion to Vacate Judgment of Conviction and Sentence, p. 32).

Essentially, the claims of ineffective assistance of counsel are threefold: (1) counsel should have instructed Butler not to volunteer to the jury that he was "on his way to prison" during direct examination; (2) counsel failed to preempt the State's question regarding prior felony convictions by asking it during direct examination; and (3) counsel failed to stipulate to the number of prior convictions before trial so that Butler did not have to be corrected by the State in front of the jury.

Regarding issues (2) and (3), the court finds no prejudice. Although Watts testified at the evidentiary hearing that he wished, in hindsight, that he had asked Butler about his prior convictions and gotten it out of the way, **ultimately the jury would have become aware of Butler's ten prior convictions regardless of whether it was brought out on direct or cross-examination.** Additionally, the exchange between the State and Butler on cross-examination was very brief and did not raise any significant issues as to Butler's credibility. Specifically, at the beginning of cross-examination, the following brief exchange took place:

> **State:** Before I begin, Mr. Butler, I would like you to turn to the jury and answer this question, sir: Have you ever been convicted of a felony?
> **Butler:** Yes, sir.
> **State:** Will you please tell us how many times?
> **Butler:** Approximately about nine that I know of.
> **State:** How about ten?
> **Butler:** Maybe so.

(Trial Transcript, p. 1066). **The State did not question Butler any further regarding prior convictions and never asked him about the nature of the offenses. Given the limited impeachment served by this exchange and its brevity, the court finds it to be of little significance. Additionally, Watts testified at the evidentiary hearing that, prior to trial, he did discuss the number of prior felony convictions with Butler and the State and did stipulate to the number of convictions. Therefore it appears that Butler's incorrect answer as to this issue was the result of his own confusion and not the result of ineffective assistance of counsel. As neither the prejudice or deficiency prong of <u>Strickland</u> have**

been established as to issues (2) and (3), they are denied.

Similarly, with regard to issue (1), the court finds that the remark was made in passing and was of limited significance. At the beginning of his testimony, while explaining his romantic history with Fleming, Butler stated, "We met in '88, so - and we got together. I left her alone. I stopped saying anything to her. Got together back in 1989. In fact, I was on my way to prison." (Trial Transcript, p. 1041, lns. 12-15). No additional testimony regarding his prison record was offered or otherwise mentioned during direct examination.

However, the court notes that there was ample evidence offered by Butler and several other witnesses regarding his history as a drug dealer and the fact that he had been arrested multiple times for domestic violence charges against Fleming. (Trial Transcript, pp. 145-49; 151-59; 174; 197-99; 526-30; 788-89; 878-80; 1015; 1024-26; 1069-74). **And, as indicated above, the State properly elicited on cross-examination the fact that Butler had ten prior felony convictions. Given this testimony, it would hardly be a surprise to the members of the jury that Butler had, at some point in his past, served time in prison. While Butler's testimony was not helpful, this brief reference to serving time in prison cannot be said to have changed the outcome of his trial.**

Moreover, it should be noted that Butler offered no evidence in support of issue (1) at the evidentiary hearings on this motion. There is, therefore, nothing in the record to indicate whether trial counsel did or did not instruct Butler not to mention his past prison terms. Butler has not shown that counsel did not adequately prepare him to testify, nor has he demonstrated that he suffered prejudice. Accordingly, based on the record before the court, it finds that neither the deficiency nor the prejudice prong of Strickland has been established. Claim IX is therefore denied.

(V11/1803-05) (e.s.).

During the post-conviction hearing, trial counsel Watts confirmed that he had discussed Butler's prior convictions with him and that they would be used as impeachment if Butler testified and

would not be used if he did not testify. Butler wanted to testify. At trial, Butler's recollection of his number of prior felony convictions was qualified from the outset and whether Butler had "*approximately about nine*" or "*maybe*" ten, any inconsistency between the two was inconsequential in the overall course of events. The jury was correctly informed that Butler had multiple prior felony convictions and Butler failed to establish any deficiency of counsel and resulting prejudice under *Strickland* based on an alleged failure to adequately prepare the defendant to testify. See, *Taylor v. State*, 3 So. 3d 986, 996 (Fla. 2009), citing *Zack v. State*, 911 So. 2d 1190, 1198 (Fla. 2005)

ISSUE IX
IAC/PENALTY PHASE CLAIM

Butler alleges that his defense attorneys were ineffective, during the penalty phase, in presenting only two family members, Butler's father (Junior) and Butler's sister (Sandra), both of whom allegedly "did more harm than good"; failing to use a "mitigation expert" and failing to call more witnesses, both lay witnesses and experts, to present additional evidence. After the multi-day evidentiary hearing, the trial court found no deficiency of counsel and no resulting prejudice under *Strickland* and stated:

> Butler claims his trial counsel was ineffective in failing to adequately investigate and present mitigating evidence during the penalty phase of his trial. Specifically, Butler alleges that counsel failed to obtain a sufficient mental health evaluation and failed to obtain adequate information regarding Butler's background to be used in mitigation. Butler also argues that counsel was ineffective for failing to adequately prepare and conduct in-court examinations of

the witnesses who did testify. In his motion to vacate, Butler alleges that information should have been presented regarding his abandonment and emotional cut-offs during early childhood, his chaotic family environment as a child, his socio-economic and educational deprivations during childhood, inadequate coping skills and impulse controls, severe substance abuse, mental and emotional disorders, and possible brain damage.

During the penalty phase of Butler's trial, trial counsel presented two mitigation witnesses — Butler's father, Junior Butler, and his half-sister, Sandra Butler. A third witness, Dr. Michael Maher, testified at the Spencer hearing regarding Butler's substance abuse. Although the testimony offered by Junior Butler and Sandra Butler during the penalty phase was somewhat inarticulate, trial counsel Borghetti was able to touch on several of the issues raised in Butler's current motion, including the deaths of his mother and grandmother during his childhood and the instability that these deaths caused, as well as Butler's poverty and lack of education. At the evidentiary hearing on this claim, Watts and Borghetti testified that they anticipated having several other witnesses testify during the penalty phase, including Butler's son and his son's mother but that these witnesses did not show up for court. Watts explained that the attorneys decided to go forward with the proceedings despite the missing witnesses because, strategically, they thought it would be advantageous not to have a break between the guilt and penalty phases and also because witnesses who do not volunteer their testimony and must be subpoenaed generally do not make good mitigation witnesses. Borghetti testified that, while she did obtain the names of several of Butler's family members, she would not have called anyone to testify who did not personally know him. Borghetti also admitted that the testimony of the two witnesses they did present did not go as planned.

Both the attorneys noted that they did retain a mental health expert, Dr. Fireman, during pre-trial preparation of this case to conduct a mental health evaluation of Butler. Although neither could specifically recall the results of the evaluation, they agreed that the fact that they did not tall Dr. Fireman to testify at trial or the Spencer hearing indicates that his evaluation was not helpful to the defense. Finally, both attorneys testified that they did not present certain evidence to the jury regarding Butler's drug activity — either as a user or a drug dealer — because they wanted to focus on the positive aspects of his life and did not think

this type of testimony would have been persuasive to a jury.

During the course of evidentiary hearings, multiple witnesses were presented by the defense to offer testimony regarding Butler's family and personal history as well as his mental health and educational background. Annie Brookins, who was related by marriage to a member of Butler's extended family, testified that the Butler family lived in dismal circumstances on an isolated tobacco farm in an area of rural Georgia where racism was commonplace. She testified that the children in the family attended school sporadically and described Junior's propensity for violence towards women, along with a general acceptance of infidelity within the family. Butler' great-aunt, Maude Brown, testified that Butler had a poor, rural upbringing in Georgia. He labored in the tobacco fields as a child and had limited access to education. According to Brown, Butler's mother was "young" and "wild" and, while she did drink moonshine, was not an alcoholic. Brown testified that Butler's mother died in an apparent drowning accident when Butler was two or three years old and Brown heard rumors that she had been murdered. Butler's older brother also drowned when Butler was a teenager. Brown indicated that she did not keep in touch with Butler regularly after his mother died and really did not know Butler as an older child or adult. Brown stated that she would have been able to testify at the penalty phase at trial.

Social worker Shirley Furtick, MSW, offered testimony regarding a biopsychosocial assessment of Butler. She gathered information by interviewing Butler, various family members, and others who knew Butler, visiting the area in which he grew up, and reviewing a wide range of school, medical, and other records, along with scholarly literature. The gist of Furtick's testimony was similar to that of Brookins and Brown, indicating that Butler was raised in a poor, rural environment and had quite a bit of instability in his upbringing due to his mother's death when he was a young child. Furtick further testified that she identified patterns of infidelity, violence, and substance abuse in Butler's family, that Butler did not have much parental supervision or structure, that the children were subject to physical discipline, and that Butler eventually began selling drugs. School records obtained by Furtick indicate that Butler was a very poor student. Psychologist Glenn Caddy, who conducted several tests on Butler, offered further testimony that school records and IQ testing indicated that Butler has low intelligence and suffered emotional impairment due to his disadvantaged upbringing. Dr. Caddy also noted there was some

indication that his mother drank substantially when she was pregnant with him, although there was limited testimony as to this fact.

Finally, the defense presented the testimony of Professor David Dow, who testified that the amount of investigation done by trial counsel did not conform to the ABA guidelines regarding minimum standards for lawyers handling capital cases. Specifically, Professor Dow testified that counsel relied on previous investigations done by the Public Defender's office rather than conducting a completely new, independent investigation. He also indicated that Butler had ten to eleven family members who could have offered information as to his family background, as well as school, employment, and medical records that could have been used in mitigation that were not obtained by trial counsel in this case. Professor Dow testified that, under the ABA guidelines, attorneys in capital cases are required to make investigation into all of these factors in mitigation, but admitted that there is no duty to ultimately introduce this information at trial.

After reviewing the record, the court finds neither deficient performance by trial counsel nor prejudice under Strickland. As recounted above, trial counsel's mitigation investigation included finding several family members or acquaintances of Butler's, as well as an extensive mental health evaluation by Dr. Fireman and a second evaluation by Dr. Maher. Although several of the witnesses counsel anticipated calling during the penalty phase failed to appear, the court finds it was reasonably trial strategy for them to go forward with the hearing as scheduled. Reasonable trial strategy is not subject to collateral attack in a motion for postconviction relief. See Lamarca, 931 So. 2d 838; Occhicone, 768 So. 2d 1037.

Additionally, although Butler now challenges the sufficiency of the evaluation by Dr. Maher, it must be emphasized that Dr. Maher was retained only after Dr. Fireman evaluated Butler and apparently made findings that were not beneficial to the defense. There is no evidence in the record to indicate that Dr. Fireman's initial evaluation was in any way insufficient. And, even though Professor Dow testified as to the obligations of the attorneys with regard to obtaining mental health information on a capital defendant, he did not testify that counsel has a duty to retain multiple mental health experts. In fact, Professor Dow conceded that, although counsel has a duty make investigation into the

> mental health of a capital defendant, counsel has no duty to ultimately present this information at trial. In this case, it appears that counsel did retain Dr. Fireman to make a comprehensive evaluation of Butler and, after receiving the results of that evaluation, elected not to introduce them. **Retaining and presenting Dr. Maher at the Spencer hearing appears to have been a second attempt to introduce at least some mitigating evidence as to Butler's mental state at the time of the murder. The court therefore finds no deficiency in this regard.**
>
> **Finally, although the defense presented extensive testimony from several witnesses to establish the existence of additional mitigating evidence not presented at trial, the essence of this testimony amounted to the things already heard, in a summary fashion, during trial proceedings: that Butler grew up poor, his mother and grandmother died when he was young, he moved around due to instability caused by the deaths of his mother and grandmother, he has little education and limited intellectual abilities, and has some problems with substance abuse. The court finds that none of this additional testimony was of such significance that, had it been presented during the penalty phase, it would have persuaded either the jury to recommend life or the court to ultimately impose a life sentence in this case.** As previously noted, in sentencing Butler, the court found that the aggravating factor that the crime was especially heinous, atrocious, or cruel was shown and gave this factor great weight in rendering its sentence. There is not a reasonable probability that the aforementioned postconviction testimony would have changed the outcome. Accordingly, the court finds no prejudice under Strickland and this claim is denied.

(V11/1805-08) (e.s.).

At trial, in addition to the guilt phase evidence, the defense presented two additional witnesses at the penalty phase, Harry Butler's father, Junior, and Harry's sister, Sandra. (DA V17/1254-1272). Junior testified that Harry was a good son. (DA V17/1255; 1258). According to Junior, when Harry was a child, Junior was accused of murdering Harry's mother (DA V17/1255); Junior was

acquitted of the charge. (DA V17/1263). After his mother's death, Harry lived with his grandmother and he grew up with his brothers and sisters in Georgia, while Junior lived in Largo. (DA V17/1257-1259). After the grandmother died, Junior brought the children back to Florida. (DA V17/1261). Butler's family was poor and his father supported the family on only fifty dollars a week. (DA V17/1257). Harry lived with Junior until he was about age 18. Harry loved his children and would give Bay money to take care of the family. Junior loved his son. (DA V17/1262).

When Sandra Butler began to testify, she first had to regain her composure and explained that she'd "cried all night." (DA V17/1268). Sandra and Harry grew up without a mother and Sandra learned that she had a brother at age five or six. Sandra had to work in a tobacco field when school was out, but she didn't know if Harry did also. (DA V17/1268—1271). Harry loves her and protected her in school. Harry denied the killing to her, but she prayed and God told her Harry committed the crime. (DA V17/1270—1272). After Sandra testified, Ms. Borghetti informed the trial court that she expected to call another witness, Robin Green, and was told that "maybe" [Robin] "is on her way." Ms. Borghetti noted that Robin Green "*would be the last witness*." (DA V17/1273). However, Robin Green [the mother of Butler's older children] was not called at the penalty phase or in post-conviction.

During Mr. Schwartzberg's penalty phase closing, he argued,

inter alia, that the aggravating factor (HAC) had not been established and the victim was unconscious at the time the fatal wounds were inflicted. (DA V17/1306-1307). He then argued that the State's own case provided mitigation - including whether Butler was operating under an extreme mental or emotional disturbance, whether obsession clouded his ability to think and act rationally, and whether he was under the influence of alcohol or cocaine to the extent the ability to conform his conduct was substantially impaired. (DA V17/1307-1308). Schwartzberg emphasized that Butler was raised without his mother, had a troubled childhood, "went from one maternal image to that of his grandmother and having her die and then being raised on $50 a week," was a hard worker, supported his six children, was a loving and good son, and was well-liked by friends and coworkers; but Butler has a long-term substance abuse problem, and the punishment should be life in prison, without the possibility of parole. (DA V17/1309-1313).

At the *Spencer* hearing, the defense called Dr. Michael Maher, a psychiatrist. (DA V10/1733–1742). Dr. Maher interviewed Butler about his cocaine habit and psychiatric background. (DA V10/1735-36; 1740). Butler admitted that he'd used a lot of cocaine on the night of the murder, but denied committing the murder. (DA V10/1740-41). Dr. Maher testified that one effect sometimes caused by cocaine was "perseveration" or irrational, repetitive action. (DA V10/1736). In this case, the number of stab wounds suggested

that pattern of behavior. According to Dr. Maher, a young child whose mother dies as a result of violence faces a greater risk of participating in violent behavior. (DA V10/1738-1739). The child would be "more at risk for becoming engaged in violent activities, particularly if . . . involved with drugs and other dysfunctional social activities. . ." (DA V10/1739).

All three defense attorneys participated in the penalty phase. Borghetti agreed that Schwartzberg was "captain of the ship" and would direct the penalty phase where it was the best fit. (V8/309-311; 320). Although Borghetti had never handled a penalty phase before, she had done other murder cases and had tried numerous criminal cases, including many child abuse cases. (V8/307; 321). Borghetti interviewed Butler and completed a forensic assessment form. (V8/314; 328-329; 340). Borghetti prepared a synopsis, like a family history, about Butler's background. (V8/341-343). The background information included: (1) his birthplace, (2) his mother drowned when he was three, (3) he grew up on a tobacco farm in Georgia, (4) his family was low income and lived in an old wooden house, (5) he attended Williams Elementary in Georgia, (6) he moved to Largo in the sixth grade, and (7) he dropped out of Largo High. (V8/341-342). Borghetti interviewed Sandra and knew they were a close-knit family. (V8/342).

There were three lawyers on this case; and, in most death penalty cases, the "second chair" attorney is usually in charge of

mental mitigation. Additional funds for a "mitigation specialist" likely would not have been approved by the Court. (V8/329; 347). Ms. Borghetti has never seen a "mitigation expert" testify in Pinellas County and has never heard of a "mitigation expert" testifying at trial [in lieu of witnesses who could provide direct testimony]. (V8/347-349). She checked Butler's criminal history and conferred with his prior counsel; the P.D.'s Office was very aggressive in murder cases and exploring mental health issues. (V8/326-328; 349-350). Ms. Borghetti spoke with several potential witnesses for the penalty phase: Colleen Ryan; Lee Roy Bell; Oran Pelham; Robin Green (the mother of Butler's oldest children); James Wood; the defendant's father, Junior; and the defendant's siblings, Sandra Butler and Terry Butler. (V8/312-313). The defense had the mental health experts' reports from Dr. Harold Smith, Dr. Fireman and Dr. Maher and she prepared subpoenas for some penalty phase witnesses. (V8/317; 319-320; 331; 334). Ms. Borghetti consulted with the forensic psychiatrist and prepared a notice of intent to present expert testimony of mental mitigation from Dr. Fireman. (V8/323-324; 330; 334; 336). Borghetti also provided Fireman with Butler's medical records and Dr. Fireman personally evaluated Butler. (V8/340-341). The decision not to call Dr. Fireman would have been made after consulting with Watts and Schwartzberg. (V8/325; 331-332). Schwartzberg was big on focusing on positive aspects of the defendant's life and would not want to emphasize

that the defendant was a drug dealer. (V8/333). Moreover, Borghetti would have objected if the prosecutor had argued that Butler was a drug dealer. (V8/333). This was a tough case - the victim had over 40 stab wounds, her jaw was broken, she was asphyxiated, her children were nearby during the attack, and the HAC aggravator is a very strong aggravating circumstance. (V8/332). Ms. Borghetti researched legal issues for the penalty phase, including the "HAC" aggravator (V8/334); she reviewed the forensic psychologist's competency assessment and she prepared a motion for statement of aggravating circumstances, memorandum on jury override and *Spencer* memorandum. (V8/316; 336-337).

Any decision on what to present during the penalty phase would have been made in conjunction with Mr. Watts. (V8/346). Attorney Watts made the strategic decision to go forward with the two family members, Junior and Sandra, who appeared to testify. Although the defense had planned to present Butler's life story, the penalty phase did not go as they had planned. (V8/310; 335). Instead, Butler's father, Junior, focused primarily on himself and insisted that he did not kill his own wife. (V8/310; 318). Sandra, who had been very supportive before trial, then "just turned" and revealed a dream where God told her that Harry had done it. (V8/319).

Although the family members were not as helpful as the defense anticipated, they nevertheless did include beneficial mitigation (including that Butler's mother died when he was a child, his

childhood was spent in rural Georgia, his family was very poor, and he was a loving and good son and brother); and this mitigation was highlighted during Mr. Schwartzberg's penalty phase closing. The Sixth Amendment does not require counsel to present *all* available mitigating evidence in the penalty phase of a capital trial in order to be deemed to have performed reasonably. To the extent Butler suggests this is necessary pursuant to ABA guidelines and *Wiggins v. Smith*, 539 U.S. 510, 123 S. Ct. 2527 (2003), this claim must be rejected. No case holds that the Constitution compels the presentation of all possible mitigating evidence. In *Wiggins*, the attorney had not investigated sufficiently to make a reasonable decision about what evidence to present. In *Wiggins*, the medical, school, and social services records revealed that the defendant suffered severe physical and sexual abuse at the hands of his alcoholic mother and various foster parents throughout his childhood, teenage years, and even into early adulthood. 539 U.S. at 516, 123 S. Ct. 2527. No cases interpret the Sixth Amendment as foreclosing counsel's ability to make reasonable strategic decisions on the presentation of available mitigating evidence. Furthermore, the ABA guidelines are not mandatory requirements, but are *only guides* to determining what is reasonable. See, *Bobby v. Van Hook*, 130 S. Ct. 13 (2009), citing *Strickland*.

In this case, defense counsel personally interviewed the mitigation witnesses and compiled the mitigation. However, Butler

appears to fault counsel for not calling a "mitigation expert" at the penalty phase - in lieu of witnesses with direct knowledge of Butler's background - to repeat otherwise inadmissible hearsay. However, hearsay would be admissible in the penalty phase *only if* the State would have had a fair opportunity to rebut it. See, *Marek v. State*, 14 So. 3d 985, 996 (Fla. 2009). Further, Butler has not shown that, at the time of trial, "mitigation experts" were used by the defense to repeat blatant hearsay. To the contrary, Ms. Borghetti's testimony refutes any such suggestion. Finally, any claim that an expert witness was essential to presenting mitigation was squarely rejected by the U.S. Supreme Court in *Wong v. Belmontes*, 130 S. Ct. 383 (2009). Trial counsel made a strategic decision to present expert testimony on mental health mitigation at the *Spencer* hearing only; and, in post-conviction, trial counsel also confirmed that the defense would not have presented additional drug-dealing testimony to the jury. Trial attorneys have great discretion in determining whether and how to present mental health evidence. *Jones v. State*, 928 So. 2d 1178 (Fla. 2006). Florida case law has upheld the reasonableness of a mitigation strategy which focuses on humanizing the defendant rather than presenting available mental health or illegal drug-related evidence that focuses on negative information. See, *Jones*, supra; *Johnson v. State*, 921 So. 2d 490, 501 (Fla. 2005). While it is true that the jury knew about Butler's drug-related background,

the defense did not intend to focus on it during the penalty phase; instead, the defense sought to present family members to testify about Butler's hardscrabble upbringing. Trial counsel's focus was a reasonable strategic decision and is unassailable under *Strickland*. See, *Jones*; *Pace v. State*, 854 So. 2d 167, 173-74 (Fla. 2003) (rejecting IAC claim asserting counsel should have presented evidence of illegal crack cocaine use); *Banks v. State*, 842 So. 2d 788 (Fla. 2003) (no IAC claim where counsel consulted mental health expert and decided against presenting mental health evidence after considering his options).

In addition, the presentation of additional or even more favorable mental health testimony in post-conviction does not render counsel's prior investigation into mitigation ineffective. See, *Pace*, 854 So. 2d at 175; *Rivera v. State*, 859 So. 2d 495, 504 (Fla. 2003); *Card v. State,* 992 So. 2d 810, 817 (Fla. 2008); *Peede v. State*, 955 So. 2d 480, 494 (Fla. 2007). Trial counsel's decisions were not uninformed; to the contrary, the defense had secured the services of several mental health experts to explore possible mental health mitigation. See, *Jones*, 928 So. 2d at 1186 (finding trial counsel's retaining of expert complied with duty to investigate mental mitigation); *Johnson*, 921 So. 2d at 500. Here, as *Hodges v. State,* 885 So. 2d 338, 347 (Fla. 2004), Butler's defense team included experienced attorneys who were keenly aware of the responsibility to find and introduce mitigating evidence.

The tactical decision to present Dr. Maher at the *Spencer* hearing only was objectively reasonable. In addition, the defense also explored mitigation through family members and friends. Although the penalty phase witnesses were not as helpful as the defense had expected, it is clear that the defense was aware of the type of mitigation available and determined to use the strategy of presenting family members.

Even if Butler arguably could demonstrate any deficiency of counsel, which the State strongly disputes, he cannot demonstrate any resulting prejudice. "*Strickland* does not require the State to 'rule out' a sentence of life in prison to prevail. Rather, *Strickland* places the burden on the defendant, not the State, to show a 'reasonable probability' that the result would have been different. 466 U.S. at 694, 104 S. Ct. 2052." *Belmontes*, 130 S. Ct. 383 (2009). Any potential deficiency in trial counsel's performance could not possibly have prejudiced Butler. This was an egregious case, clearly deserving of the ultimate punishment. The HAC factor is one of the "most serious aggravators set out in the statutory sentencing scheme." *Aguirre-Jarquin v. State*, 9 So. 3d 593, 610 (Fla. 2009), quoting *Larkins v. State*, 739 So.2d 90, 95 (Fla. 1999). In addressing this most serious factor, the trial court found:

> **The evidence showed that Ms. Fleming was brutally stabbed, slashed beaten, strangled, suffocated, and left for dead while her three little girls slept just down the hall. According to the medical examiner, she was stabbed or slashed**

with a sharp instrument 45 times on her neck, torso, and lower abdomen. Twenty-five of the wounds were deep stab wounds, and twenty of the wounds were wide, elongated incised wounds. There were so many wounds, in fact, that the medical examiner testified that "after a while describing them you run out of new words to describe them with." Some of the wounds were consistent with "torturous wounds" designed to torture or terrorize a victim. Ms. Fleming, the medical examiner testified, had such wounds on her neck, chest, and abdomen. Some of her wounds were "defensive wounds" inflicted when a victim tries to shield vital body parts from an attacker. A victim is, by definition, alive and conscious when such wounds are inflicted. Ms. Fleming had six of these wounds on her hands, and additional arguable defensive wounds on her arms; one stab wound went through her wrist. **In addition to the stabbing and slashing, Ms. Fleming was beaten. The medical examiner testified that she had a fractured jaw, bruises in her mouth, swelling of her face and lips, and abrasions on her upper and lower lips. In addition to the stabbing and slashing and beating, Ms. Fleming was strangled.** The medical examiner found petechiae in her left eye, a symptom consistent with pressure injury to the neck. **Finally, a plastic bag was found on Ms. Fleming's face. A pillow was on the floor next to her face. The fatal wound, in the medical examiner's opinion, was a stab wound to the side of the neck which caused Ms. Fleming to bleed to death.** The entire episode lasted ten minutes or more, the medical examiner estimated.

* * *

. . . The defendant offered the testimony of a psychiatrist to mitigate the State's position that the crime was unnecessarily torturous. The psychiatrist testified that a person experiencing a cocaine high may engage in behavior which is abnormally persevering and repetitive. However, the defendant, in his own testimony, never claimed that he was impaired by cocaine or other substances during the time of the murder. No witnesses testified to impairment. Therefore, the Court finds that this crime meets the criteria for heinous, atrocious, or cruel. Surely, the defendant showed no pity for Ms. Fleming in the way he killed her. The condition of her body, as described by the medical examiner, shows that the methods used to kill her were unnecessary. The evidence shows that some of the wounds were actually inflicted specifically to torture her. While we will never know for certain the order in which she was assaulted with a virtual menu of horror show techniques, we do know from Ms. Fleming's wounds that she was alive and fighting during part of the

> assault. We also know this from the testimony of her young daughter by the defendant, who awoke briefly to the sound of Ms. Fleming screaming "Stop! Stop!" and glimpsed her father's leg entangled with her mother's legs. **There was no conscience present in that living room that night, no pity. There was only horrible violence, torture and terror.**
>
> **The Court gives this aggravating factor great weight.**
>
> (DA V5/829-833) (e.s.).

On direct appeal, this Court agreed that the "totality of the circumstances in this case, which includes this indifference combined with the brutality of this murder, supports imposition of the death penalty." *Butler,* 842 So. 2d at 834. The post-conviction testimony does not reduce Butler's moral culpability for this crime, at all, and would not have shifted the balance of aggravating and mitigating factors. None of the post-conviction evidence establishes any statutory mitigating circumstances in his favor; and, in rejecting the statutory mitigation of "extreme mental or emotional disturbance," the trial court previously explained:

> The defendant states that he was under the influence of extreme mental or emotional disturbance when the crime was committed. Florida Statute 921.141(6)(b). He argues that he presented the court with his own testimony and the testimony of friends and relatives "to the effect" that he was under extreme emotional disturbance. He does not cite or quote any testimony. **The Court is not reasonably convinced-the test for a mitigating factor-that this factor exists. The defendant, when testifying, did not offer any such evidence. Several of his friends testified to events of that evening, and pictured the defendant as engaged in a cocaine party at a motel. But there was no description of the defendant presented which could meet the standard of extreme emotional disturbance. The defendant testified that he ingested cocaine during the evening, but never stated that he was impaired. Based upon**

the totality of the facts, the Court finds that this factor does not exist.

(DA V5/832—833) (e.s.).

The additional mitigation offered in post-conviction is not compelling and adds nothing significant to the mitigation already weighed by the trial court. The additional "mitigating" evidence offered in post-conviction is largely anecdotal hearsay and much of it concerns other family members and events that occurred outside the presence of Butler. *See*, *Hodges,* 885 So. 2d at 349, n. 6. In addition, much of the post-conviction testimony simply would have amplified the themes previously raised at trial and addressed at sentencing. See, *Marquard v. Sec'y for Dep't of Corr.,* 429 F. 3d 1278, 1308 (11th Cir. 2005) Moreover, the additional post-conviction testimony on non-statutory mitigation is mixed and of limited value. Despite a claim of an impoverished childhood, Butler's evidence showed that he had a family that loved him and cared for him. Further, the post-conviction experts largely duplicated information previously known by the defense; and the unremarkable disclosure that, unfortunately, 40+ years ago in rural Georgia, black people were not treated as well as white people does not mitigate Butler's heinous crime. The additional evidence offered in post-conviction does not alter the powerful HAC aggravator, and the prejudice prong of *Strickland* <u>cannot</u> be satisfied.

ISSUE X
THE CUMULATIVE ERROR CLAIM

Lastly, Butler argues that he was denied a fundamentally fair trial and that relief should be granted on the basis of alleged cumulative error. In denying this claim, the trial court concluded:

> Finally, Butler alleges that the cumulative effect of the errors alleged in the above claims has sufficiently prejudiced him as to merit relief. As claims I through X have been found to be without merit, cumulative error analysis in not appropriate in this instance. See Griffin v. State, 866 So 2d 1, 22 (Fla. 2003) ("[W]here individual claims of error alleged are either procedurally barred or without merit, the claim of cumulative error must fail."). Accordingly, this claim is denied.

(V11/1808-09).

A claim of alleged trial error is cognizable on direct appeal; and, therefore, is procedurally barred in post-conviction. Furthermore, here, as in *Bradley v. State*, 33 So. 3d 664 (Fla. 2010), where the alleged errors urged for consideration in a cumulative error analysis "are either meritless, procedurally barred, or do not meet the *Strickland* standard for ineffective assistance of counsel[,] ... the contention of cumulative error is similarly without merit." *Id.*, citing *Israel v. State*, 985 So. 2d 510, 520 (Fla. 2008).

CONCLUSION

Based on the foregoing facts, arguments and citations of authority the decision of the lower court should be affirmed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Mark S. Gruber, Assistant CCRC-Middle, Office of the Capital Collateral Regional Counsel, Middle Region, 3801 Corporex Park Dr., Suite 210, Tampa, Florida 33619-1136; and Fred Schaub, Assistant State Attorney, Sixth Judicial Circuit, P.O. Box 5028, Clearwater, Florida 33748-5028, on this 4th day of April, 2011.

CERTIFICATE OF FONT COMPLIANCE

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

Respectfully submitted,

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