IN THE SUPREME COURT OF FLORIDA
CASE NO. SC10-1133

HARRY LEE BUTLER,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This is an appeal of the circuit court's denial of Harry Lee Butler's motion for postconviction relief brought pursuant to Florida Rule of Criminal Procedure 3.851.

The following format will be used when citing to the record. References to the record of the direct appeal of the trial, judgment, and sentence in this case shall be referred to as "R." followed by the appropriate volume and page numbers. References to the postconviction record on appeal shall be referenced as "PC-R." followed by the appropriate volume and page numbers. All other references will be self-explanatory or otherwise explained herein.

REQUEST FOR ORAL ARGUMENT

Harry Lee Butler has been sentenced to death. Given the gravity of the case and the complexity of the issues raised herein, Mr. Butler, through counsel, respectfully requests this Court grant oral argument.

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STATEMENT OF THE CASE

Harry Butler was arrested on March 14, 1997 for the first degree murder of Leslie Fleming. A Pinellas County grand jury indicted Mr. Butler on one count of first degree murder on April 7, 1997. R. Vol. I, 6-7. The case was tried before The Honorable Frank Quesada from June 23-27, 1998. The jury returned a verdict of guilty on the sole count of first degree murder on June 26, 1998. R. Vol. XVII, 1232. The penalty phase trial was held on June 27, 1998. The jury recommended a sentence of death by a vote of eleven to one. *Id.* at 1321. On January 11, 1999, the trial court sentenced Mr. Butler to death. R. Vol. X, 1763. The judgment and sentence were affirmed at *Butler v. State*, 842 So. 2d 817 (Fla. 2003).

Mr. Butler filed a Motion to Vacate Judgment of Conviction and Sentence with Special Request for Leave to Amend on July 13, 2004, wherein he raised eleven claims. PC-R. Vol. II, 293-310; PC-R. Vol. III, 311-447. The State filed its response on September 10, 2004. *Id.* at 453-71. On December 14, 2004, Mr. Butler filed a Motion for Postconviction DNA Testing. *Id.* at 482-85. The circuit court filed an Order on DNA Testing and Expert Communication and Cooperation on April 8, 2005. PC-R. Vol. IV, 581-84. Mr. Butler filed an Amended Motion to

Vacate Judgment of Conviction and Sentence with Special Request for Leave to Amend on February 4, 2005, wherein he raised twelve claims. *Id.* at 519-69. The State filed its response on April 6, 2005. *Id.* at 575-80.

An evidentiary hearing was held on May 8-9, 2008. PC-R. Vol. IV, 675-98; PC-R. Vol. V, 699-880. The hearing was continued on November 6-7, 2008 and September 29, 2009. PC-R. Vol. VI, 906-1018; PC-R. Vol. VII, 1019-1204; PC-R. Vol. VIII, 1205-91; PC-R. Vol. IX, 1321-1419. Written closing arguments were filed by both parties. *Id.* at 1420-1508; PC-R. Vol. X, 1509-1613; PC-R. Vol. XI, 1619-1719, 1725-1783. On May 13, 2010, the circuit court filed an Order Denying Defendant's Amended Motion to Vacate Judgment of Conviction and Sentence. PC-R. Vol. XI, 1784-1810. A notice of appeal was timely filed on June 4, 2010. PC-R. Vol. XII, 1813-40.

WITNESSES PRESENTED AT EVIDENTIARY HEARING

The following witnesses testified at the evidentiary hearing or via deposition. The details of their testimony will be discussed in more detail under the individual claims.

Glenn Ross Caddy, Ph.D is a clinical and forensic psychologist who is board certified in five subspecialties, including clinical psychology, forensic psychology, behavioral medicine, human sexuality, and trauma. PC-R. Vol. VII, 1145-47.

David Dow is a professor at the University of Houston Law Center and the Director of Litigation at Texas Defender Service. PC-R. Vol. IX, 1331. He was qualified as an expert in the norms and standards regarding death penalty litigation. *Id.* at 1334-35. Since Mr. Butler's case was tried in 1998, he focused on the 1989 American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases [hereinafter 1989 ABA Guidelines]. *Id.* at 1337-38.

Shirley Furtick, MSW is a licensed social worker with several decades of experience. PC-R. Vol. VI, 946, 948.

Elizabeth Johnson, Ph.D is a forensic science consultant specializing in forensic biology and DNA issues. PC-R. Vol. V, 770.

Janice Stevenson, Ph.D is a licensed psychologist, who specializes in working with traumatized children and families. PC-R. Vol. VI, 958, 960.

Carol Beauchamp (a.k.a. Carol Davis) is a latent fingerprint examiner with the Pinellas County Sheriff's Office. PC-R. Vol. V, 709. She was assigned to Mr. Butler's case "as a latent examiner to analyze, compare and evaluate latent prints submitted to [her] for comparison purposes." *Id.* at 710.

Maude Brown is Harry Butler's great aunt. PC-R. Vol. VI, 919. Ms. Brown grew up in a home with Harry's mother, Estelle Walker. *Id*.

Richard Watts and Anne Borghetti represented Mr. Butler at trial. Mr. Watts was appointed to represent Mr. Butler after the Public Defender moved to withdraw. PC-R. Vol. V, 813. Later, Michael Schwartzberg, who is now deceased, was also appointed to represent Mr. Butler. *Id.* at 813, 815. Mr. Watts was mainly responsible for penalty phase, while Mr. Schwartzberg was mainly responsible for guilt phase. *Id.* at 813. Ms. Borghetti worked as a second chair, mainly on the penalty phase, at the direction of Mr. Watts and Mr. Schwartzberg. PC-R. Vol. VIII, 1211-12.

Annie Brookins has known the Butler family since she was fifteen years old. PC-R. Vol. XVIII, 3017. She has known Harry Butler since he was born. *Id.* at 3042.

JURISDICTION

This Court has jurisdiction. Art. V, § 3(b)(1) Fla. Const.

STANDARD OF REVIEW

The standard of review is *de novo*. *Stephens v. State*, 748 So. 2d 1028, 1032 (Fla. 2000). Under *Strickland v. Washington*, 466 U.S. 668, 688 (1984), ineffective assistance of counsel claims are a mixed question of law and fact; with the lower court's legal rulings reviewed *de novo* and deference given to factual findings supported by competent and substantial evidence. *Sochor v. State*, 883 So. 2d 766, 772 (Fla. 2004).

SUMMARY OF ARGUMENT

1. Counsel provided deficient performance by failing to hire experts to identify DNA not belonging to Mr. Butler or the victim that was found in the sneakers the State claimed were worn by Mr. Butler at the time of the offense. There is a reasonable probability that if the jury had been presented with testimony regarding this unidentified DNA they would have found Mr. Butler not guilty.

2. Counsel rendered prejudicial ineffective assistance by failing to challenge the testimony of LaShara Butler. Had counsel presented an expert to explain the factors that would call into question LaShara's reliability, the jury would have disregarded her testimony, found reasonable doubt, and acquitted Mr. Butler. Furthermore, if counsel had presented an expert such as Dr. Stevenson at the competency hearing prior to trial, the trial court may have been persuaded that LaShara was incompetent to testify, in which case the jury would not have heard any of LaShara's testimony.

3. Counsel provided deficient performance by failing to investigate and perform any meaningful cross-examination of Terry Jackson. Information about Mr. Jackson's arrest history and the favorable treatment he received in his own cases in exchange for the information he provided in Mr. Butler's case, as well as Mr. Jackson's prior inconsistent statement, could have been used to impeach and

discredit Mr. Jackson, and would have established that Mr. Jackson had a personal motive to falsely testify against Mr. Butler.

4. Ms. Borghetti had an actual conflict with Mr. Butler due to her prior representation of State witness Terry Jackson. Counsel's performance in Mr. Butler's case was adversely affected by this conflict, as they did not depose Mr. Jackson or impeach him regarding his felony arrests for burglary, his prior felony convictions, or his prior inconsistent statement.

5. The State violated *Brady* when they failed to provide the defense with the handwritten notes of latent print examiner Carol Beauchamp, which would have informed the defense about the existence of an unidentified bloody print on a telephone at the crime scene. Furthermore, counsel provided deficient performance by failing to request Ms. Beauchamp's handwritten notes, depose Ms. Beauchamp, and present evidence of the bloody print at trial. There is a reasonable probability that if the defense had presented this evidence that an unidentified third party was present at the crime scene the jury would have found Mr. Butler not guilty.

6. Counsel provided deficient performance when they failed to object to associate medical examiner Marie Hansen's characterization of some of the victim's wounds as torturous wounds during the guilt/innocence phase of Mr. Butler's trial. This

testimony improperly inflamed and confused the jury. Had this testimony not been heard, there is a reasonable probability that Mr. Butler would have been acquitted, or that the jury would not have recommended death.

7. Counsel provided deficient performance when he told the jury in his opening statement that the DNA of an unknown individual was found on a glass door at the crime scene when, in fact, that DNA was located at a completely different location on the other side of town. As a result of counsel's misstatement, the defense lost credibility with the jury

8. Counsel provided deficient performance by failing to adequately prepare Mr. Butler to testify on his own behalf during his trial, causing him to give false testimony about the number of prior felony convictions he had and to volunteer that he was "on his way to prison." Counsel's deficient performance prejudiced Mr. Butler by undermining his credibility with the jury.

9. Counsel provided deficient performance in a penalty phase that Ms. Borgetti described as "horrible," where the only two defense witnesses harmed Mr. Butler. The mitigation presented during postconviction would have outweighed the one aggravating factor that was found at trial and resulted in a life sentence.

10. The circuit court erred in denying Mr. Butler's claim that cumulative error deprived him of the fundamentally fair trial guaranteed under the Sixth, Eighth,

and Fourteenth Amendments and rendered his convictions and sentence of death unreliable.

ARGUMENT I

THE CIRCUIT COURT ERRED WHEN IT DENIED MR. BUTLER'S CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO HIRE THE NECESSARY EXPERTS TO IDENTIFY DNA NOT BELONGING TO MR. BUTLER OR THE VICTIM THAT WAS FOUND IN THE SHOES THE STATE CLAIMED WERE WORN BY MR. BUTLER AT THE TIME OF THIS OFFENSE.

Mr. Butler alleged in Claim II of the motion for postconviction relief that trial counsel provided prejudicial ineffective assistance by failing to hire the necessary experts to identify DNA not belonging to Mr. Butler or the victim that was found in the sneakers the State claimed were worn by Mr. Butler at the time of the offense. PC-R. Vol. IV, 525-29. The circuit court held an evidentiary hearing on this claim, and found that Mr. Butler failed to establish either prong of *Strickland*. PC-R. Vol. XI, 1786-90. Mr. Butler seeks review of this finding.

On direct appeal, this Court summarized the DNA evidence in Mr. Butler's case as follows:

> Detective Green testified [Martisha] 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.

Butler, 842 So. 2d at 821.

This Court further described the significance of the sneakers:

> 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 the 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 he was arrested.

Butler, 842 So. 2d at 822.

The main line of defense in attacking the State's DNA evidence at trial, which Mr. Watts admitted was unsuccessful, was based on FDLE analyst Jeannie Eberhardt's qualifications in the area of statistics. PC-R. Vol. V, 817. Mr. Watts did not recall taking a deposition of Ms. Eberhardt. *Id.* at 818. The defense team consulted with Dr. Gary Litman, and they provided him with the DNA report from the FDLE. *Id.* at 815-16. Although today Mr. Watts always gets the bench notes, at the time of Mr. Butler's trial DNA was relatively new and he does not know if

he obtained the bench notes in this case. *Id.* at 817.

Elizabeth Johnson, Ph.D. testified at the postconviction evidentiary hearing that the FDLE conducted two sessions of DNA testing on the sneakers that were found in the dumpster. PC-R. Vol. V, 775-76. The first session indicated that blood stains on the sneakers were consistent with the victim's DNA. *Id.* at 775-76. The second session of DNA testing focused on the interior of the sneakers, possibly in an effort to determine who was wearing the shoes at the time of the offense. *Id.* at 776.

The two samples from the insert of the left shoe that were obtained during the second session of DNA testing were recorded on the FDLE report as inconclusive because they fell below the reporting criteria for the laboratory. PC-R. Vol. V, 776, 778, 782. In addition to reviewing the FDLE report, Dr. Johnson reviewed documents that were not reviewed by Dr. Litman prior to trial, such as Ms. Eberhardt's handwritten notes. *Id.* at 782. Since the FDLE report only stated that the results were "inconclusive," an expert would not have been able to ascertain that the sample contained useful data without reviewing these additional documents. *Id.* at 783. Even though the tests were inconclusive, the samples contained human DNA. *Id.* at 779. Worksheets and Ms. Eberhardt's notes revealed that there was enough data to establish that Mr. Butler did not contribute

to either of the samples. *Id.* at 779-80, 783. These areas gave a weak presumptive positive for human blood, which could have resulted from sources other than blood, such as microbes, bacteria, and fungus. *Id.* at 778-79. Dr. Johnson also noted that in later years, some laboratories changed their policies and reported weaker results, such as those obtained in the second session of DNA testing in Mr. Butler's case. *Id.* at 781.

Dr. Johnson recommended that postconviction DNA testing in Mr. Butler's case be conducted at Serological Research Institute (SRI) in California, as opposed to the FDLE laboratory in Tampa. PC-R. Vol. V, 784. Re-testing for DNA during postconviction was ordered and performed by FDLE. The FDLE testing did not reveal any discernable results. PC-R. Vol. X, 1601. When this Court was made aware of FDLE's prohibition of observers during testing, the State was ordered to provide a sample for independent evaluation. *Id.* at 1610-13. Subsequent testing of blood of the sneakers by SRI uncovered several identifiable matches that excluded Mr. Butler. PC-R. Vol. V, 793.

Dr. Johnson was present at SRI when they conducted the DNA analysis of the sneakers, and she was either kept apprised of or actually present for every step of the postconviction DNA analysis in this case, with the exception of the FDLE's examination of the sneakers before they were furnished to SRI. PC-R. Vol. V,

785. The left sneaker was labeled 56-A, and the right sneaker was labeled 56-B. *Id*. In addition to the sneakers, SRI received blood stains from Mr. Butler and Ms. Fleming, and oral swabs from Mr. Tennell. *Id.* at 786.

Dr. Johnson testified about the results of SRI's postconviction DNA analysis of the sneakers. PC-R. Vol. V, 787-95. Of particular relevance to Mr. Butler's case were the findings that Mr. Butler was excluded from the DNA that was detected, and the sneakers contained DNA from more than one unknown person, at least one of which is a male. *Id.* at 793. Dr. Johnson summarized the results:

> **Left Sneaker**
> IL-1: Sample IL-1 was a blood stain on the sole of the left sneaker with a weak profile that appeared to match Ms. Fleming. *Id.* at 789.
> IL-2: Sample IL-2 was small apparent blood stain on the sole of the left sneaker with a weak partial profile of an unidentified human that did not match Mr. Butler, Ms. Fleming, or Mr. Tennell. *Id.* at 787-88.
> IL-3: Sample IL-3 was a sample from the fabric side of the insert of the left sneaker that gave a weak presumptive positive for the presence of blood, but it gave no DNA result. *Id.* at 790.
> IL-4: Sample IL-4 was human DNA that gave a weak presumptive positive for the presence of blood, and it did not match Mr. Butler, Ms. Fleming, or Mr. Tennell. *Id.* at 790.
> IL-5: Sample IL-5 was from the underside of the fabric insert of the left sneaker, and it gave virtually no result other than that it was a weak presumptive positive for blood. *Id.* at 790-91.
>
> **Right Sneaker**
> IR-1: Sample IR-1 was a blood stain on the rear of the right shoe, which was a mixture of more than one person. *Id.* at 791. It contained DNA from a male. *Id*. Mr. Butler, Ms. Fleming, and Mr. Tennell were excluded as contributors to that mixture. *Id.*

> IR-2: Sample IR-2 was a blood stain on the trim of the right sneaker that gave no results. *Id.* at 791.
> IR-3: Sample IR-3 was from the trim of the right shoe. *Id.* at 791. It have a presumptive positive for the presence of blood, but it gave no results. *Id.*
> IR-4: Sample IR-4 was the swabbing fabric side of the insert on the heel half of the right shoe. *Id.* at 791. It was negative for any presumptive chemical tests for blood. *Id.* at 791-92. It gave a very weak partial DNA profile for more than one person. *Id.* at 792. Mr. Butler, Ms. Fleming, and Mr. Tennell were excluded as contributors. *Id.*
> IR-5: Sample IR-5 was the swabbing of the fabric side of the insert on the toe half of the right shoe. *Id.* at 792. It was negative for presumptive tests for blood, and it did not produce any DNA results. *Id.* at 792.

Counsel's performance regarding the DNA evidence in this case "fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. The circuit court pointed out in its order denying relief that counsel retained and consulted with a DNA expert in this case. PC-R. Vol. XI, 1789. Indeed, counsel consulted briefly with Dr. Litman to make sure no errors occurred. PC-R. Vol. V, 815, 819. However, they did not obtain the bench notes from the FDLE, which would have indicated that Mr. Butler was excluded from the DNA found on the sneakers. *Id.* at 817, 779-80, 783. They did not conduct independent DNA testing of the sneakers, which would have revealed unidentified DNA from more than one person, at least one of which was male. *Id.* at 793. Instead, they unsuccessfully focused on Ms. Eberhardt's qualifications in the area of statistics. *Id.* at 817.

Counsel's strategy of focusing on Ms. Eberhardt's qualifications was not based on a reasonable investigation, and therefore the strategy itself was not reasonable. *Wiggins v. Smith*, 123 U.S. 2527, 2535 (2003).

Mr. Butler has demonstrated that he was prejudiced by counsel's deficient performance. The first session of testing conducted by FDLE indicated that the blood stains on the sneakers were consistent with Ms. Fleming's DNA. PC-R. Vol. V, 775-76. Presumably, whoever killed Ms. Fleming was wearing the sneakers. Mr. Butler testified that his sneakers were missing that night, and Mr. Tennell told him that he was "on a mission" with them. R. Vol. XVI, 1058-59; *Butler*, 842 So. 2d at 822. The circuit court held that the results of the additional DNA testing would have harmed the defense's case because Mr. Tennell was excluded as a potential source of DNA for the samples in question. PC-R. Vol. XI, 1790. However, since the sneakers were missing that night, there is no way that Mr. Butler can know for certain where they were or who was wearing them. The fact that unidentified male DNA was found in both of the sneakers lends credibility to Mr. Butler's claim that someone else was wearing his sneakers on the night Ms. Fleming was killed. If the jury had been presented with testimony regarding the unidentified DNA found in the sneakers, they would have found reasonable doubt, and they would have found Mr. Butler not guilty.

ARGUMENT II

THE CIRCUIT COURT ERRED WHEN IT DENIED MR. BUTLER'S CLAIM THAT TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE BY FAILING TO CHALLENGE THE TESTIMONY OF LASHARA BUTLER.

Mr. Butler alleged in Claim II of his motion for postconviction relief that trial counsel rendered ineffective assistance by failing to challenge the testimony of his daughter, LaShara Butler. PC-R. Vol. IV, 529-31. The circuit court held an evidentiary hearing on this claim, and found that "there is insufficient evidence in the record to establish prejudice under *Strickland*." PC-R. Vol. XI, 1790-93. Mr. Butler seeks review of this finding.

Seven year old LaShara Butler was examined at a competency hearing just prior to the commencement of opening statements in Mr. Butler's trial. R. Vol. XI, 65-75. There was no psychological expert input at the hearing. PC-R. Vol. VI, 1014. The trial court concluded that she was competent to testify. R. Vol. XI, 75.

LaShara testified for the State at trial. R. Vol. XII, 222-59. The defense did not present any expert testimony to challenge LaShara's testimony. On direct appeal, this Court summarized LaShara's trial testimony as follows:

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 was 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."

Butler, 842 So. 2d at 821.

Mr. Watts testified that the defense team did not consider retaining an expert in the field of pediatric psychology, and it did not occur to them to have LaShara evaluated. PC-R. Vol. V, 820. Their approach to LaShara was that she had already been tainted by Dr. Crum and everyone else who had contact with her. *Id.* In the Motion for New Trial, counsel argued that LaShara was not a reliable witness because she had been tainted by the conversations she had. *Id.*

Dr. Stevenson testified at the postconviction evidentiary hearing about factors that might call into question the overall reliability of LaShara's testimony, including the way she was managed by law enforcement and the examination that was conducted by Dr. Crum, as well as whether Mr. Butler's trial attorneys could have used an expert to mount a defense to LaShara's testimony rather than simply confronting her themselves in cross-examination. PC-R. Vol. VI, 964-65.

Dr. Crum examined LaShara on behalf of the law enforcement officers in

this case. PC-R. Vol. VI, 965. His task was two-fold: (1) to determine whether or not the difficulty of testifying in a criminal case would be harmful to her and (2) to determine whether she was legally competent to testify in court. *Id.* at 998-99. Dr. Stevenson expressed concern that Dr. Crum did not "take into consideration the impact of trauma on her ability to recall material accurately and to testify in an objective manner as to what she saw." *Id.* at 970. She explained that something is traumatic when "it is overwhelming and the mind is not able to take that information in a comprehensible way." *Id.* at 971. The mind can shut out information that it cannot take in and does not understand. *Id.* at 972. Similarly, the mind can fixate on specific details to help it sort out what it is seeing, while at the same time deleting everything else. *Id.*

LaShara witnessed an overwhelming and traumatic event. PC-R. Vol. V, 971. Dr. Stevenson explained that people respond to trauma in three ways: fight, flight, or freeze. *Id.* LaShara froze in place while she watched her mother being killed. *Id.* Apparently, she froze in her mind that her mother's legs were in the air. *Id.* at 972-73. She fixated her mind on one thing in the environment that made sense to her, and screened out everything else that was overwhelming to her mind. *Id.* at 995. Dr. Stevenson found LaShara's numbness striking:

I was suggesting it was striking because for her to go past the body

> with the ease in which it was described and for her to be able to describe the conditions that she experienced with the apparent ease that she described that, she was being a very compliant little girl as if this was not her mother, as if this was roadkill on the side of the road, which is probably an exaggeration. But the way in which she was described was as if she was numb to the situation.

Id. at 976. LaShara's responses to the level of trauma she was experiencing were insufficient and not normal, unless she was in a "chronic situation where numbness was the order of the day." *Id.* at 988.

LaShara may have suffered from acute stress disorder. PC-R. Vol. VI, 973. There is no indication that LaShara was assessed regarding the level of stress she was experiencing. *Id.* Dr. Stevenson described what a competent examination for acute stress disorder would have consisted of. *Id.* at 974-75. One of the first reactions to stress is shock. *Id.* at 973. Dr. Stevenson she did not know whether LaShara was in shock, and if she was for how long she was in shock. *Id.* The second response to stress is usually anger. *Id.* Dr. Stevenson did not know if there was an assessment done of LaShara's anger. *Id.* at 69. These responses to trauma can affect recall, processing of information, and the reliability of subsequent testimony. *Id.* at 974.

Dr. Stevenson discussed the specific standard tests that she believed should have been administered to LaShara. PC-R. Vol. VI, 976-77. One test that Dr.

Crum administered, although as an ice-breaker as opposed to a diagnostic tool, was the House-Tree-Person drawings, which indicate when a person is in a trauma state or a state of shock. *Id.* at 976. Another test that would have been useful is the Children's Apperception Test, which also would have shown whether she was traumatized or in a state of shock. *Id.* at 976-77. The Rorschach Psychodiagnostic Test would have provided an assessment of her emotional stability at deep levels. *Id.* at 977. Additionally, Dr. Crum might have used play to gather information about what LaShara was experiencing emotionally, what she was experiencing cognitively, what conflicts she was experiencing, what challenges she was trying to make sense of, and what her level of comprehension was. *Id.* at 977.

Other factors may have indicated that LaShara was experiencing long-term chronic exposure to trauma. PC-R. Vol. V, 986-87. Exposure to domestic violence, exposure to drug addiction, and the income level of LaShara's family all would have impacted Dr. Stevenson's assessment of her ability to testify as a competent witness. *Id.* at 987. Additionally, LaShara was at an age when children want to please adults. *Id.* All of these factors, in addition to allegedly having witnessed the murder of her mother, would have affected LaShara's recall and her ability to sort details in a coherent manner. *Id.* at 987-88.

Dr. Stevenson testified that Dr. Crum should have assessed LaShara's

emotional maturity. PC-R. Vol. VI, 989. When children are in frightening situations, they tend to "return to younger levels of functioning so that they can restore a level of comfort that they last remember getting." *Id.* Dr. Crum reported that LaShara had indicators of suppression in her dialogue with him. *Id.* This suppression indicates that LaShara's mind was "spontaneously shutting down receipt of information so that it can do what it needs to do to survive." *Id.* Although we know LaShara was not allowing all the information into her consciousness, we do not know what information she was suppressing. *Id.* at 990. Dr. Stevenson speculated that the moment LaShara became traumatized she started functioning like a younger child. *Id.* If Dr. Crum had administered the proper tests, he would have been able to pin down LaShara's ability to comprehend and communicate what she experienced. *Id.*

LaShara's testimony concerning the cable box in the living room is evidence of her regression and suppression of information. PC-R. Vol. VI, 991-92. LaShara testified on cross examination that when she woke up she saw a clock on the cable box. R. Vol. XII, 255-57. However, the cable box was not in the apartment the night her mother was killed. John Dosher, a cable company employee, testified at trial that on March 13, 1997, he removed a cable box from Leslie Fleming's home because the account was past due. R. Vol. XV, 802-03. Counsel introduced the

receipt that was generated as evidence that the cable box had been returned to the cable company. *Id.* at 804. Dr. Stevenson explained that LaShara may have recalled seeing the cable box because her mind shut out her memories of the traumatic event, and in her most recent memory of the living room the cable box was there. PC-R. Vol. VI, 991. This suggests that LaShara was experiencing the effects of trauma, as her mind was trying to return to something that was familiar. *Id.* at 992.

Dr. Stevenson explained further that children are more than suggestible; they are mimes. PC-R. Vol. VI, 993. They mirror everybody around them. *Id.* They pick up on subtle, nonverbal clues from the people around them so that they can know that they got it right. *Id.* They rely on adults to explain to them what is happening. *Id.* at 971. In LaShara's case, her mother, who is the person who would have done that for her, could not help her. *Id.* Dr. Stevenson found no indication that LaShara had a clear comprehension of death, or what she saw when her she walked past her mother's body when she answered the door. *Id.* at 971-72. Assuming that LaShara was frightened, in shock, and unsure after her mother was killed, she would have looked to adults for confirmation that she has done okay. *Id.* at 994. The adults with whom she had contact might not have even been aware of their influence on her, as that influence might be in the form of body language,

voice tones, or eye movement. *Id.* at 1006-07. Following the incident, LaShara may have given answers about which she was not sure, and thought she was right based on nonverbal cues from the adults with which she had contact. *Id.* at 995.

Dr. Stevenson concluded that LaShara's testimony was not as dependable as one would want it to be because it was affected by trauma, and trauma was not ruled out as a contributing factor in her testimony. PC-R. Vol. VI, 992. Even though she may have believed she was truthful in her testimony, the truth as she knew it might not have been factual.[1] *Id.* at 1012. If Dr. Stevenson had been called to testify at Mr. Butler's trial, she could have explained her reasons for doubting the dependability of LaShara's testimony. *Id.* at 992.

Counsel's performance was deficient under *Strickland* because they failed to adequately investigate and challenge the testimony of LaShara Butler. Dr. Stevenson testified that in late 1990s, it was not at all unusual for attorneys to employ experts like her to deal with child witnesses in criminal cases. PC-R. Vol. VI, 963. Counsel's performance in Mr. Butler's case "fell below an objective standard of reasonableness" because they failed to present expert testimony about the unreliability of LaShara's testimony.

[1] At a postconviction deposition, Dr. Crum indicated that his evaluation of Lashara was for competency to testify and there were no findings that she would testify truthfully.

Counsel's failure to present an expert such as Dr. Stevenson prejudiced Mr. Butler. LaShara was the only known eyewitness to the murder of Ms. Fleming. Mr. Schwartzberg acknowledged that "LaShara's testimony is the only testimony that will place Harry Butler in the apartment at the time or supposedly at the time that Leslie Fleming is killed." R. Vol. XI, 62. She testified that she heard her mother scream and she saw her father's leg pinning down her mother's leg just hours before Ms. Fleming's body was discovered. Had counsel presented an expert to explain the factors that would call into question LaShara's reliability, the jury would have disregarded her testimony, found reasonable doubt, and acquitted Mr. Butler. Furthermore, if counsel had presented an expert such as Dr. Stevenson at the competency hearing prior to trial, the trial court may have been persuaded that LaShara was incompetent to testify, in which case the jury would not have heard any of LaShara's testimony.

Additionally, counsel was ineffective for failing to object, failing to move to strike, failing to move for a curative instruction, and failing to request a mistrial when LaShara testified on direct examination, "When my daddy got out of jail one time, my other sisters and my one brother came and then they left." R. Vol. XII, 228. This unsolicited revelation that Mr. Butler had been to jail before warranted a mistrial, and counsel should have objected at the very least.

ARGUMENT III

THE CIRCUIT COURT ERRED WHEN IT DENIED MR. BUTLER'S CLAIM THAT HE WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL DUE TO TRIAL COUNSEL'S FAILURE TO INVESTIGATE AND PERFORM ANY MEANINGFUL CROSS-EXAMINATION OF TERRY JACKSON.

Mr. Butler alleged in Claim IV of the motion for postconviction relief that he was denied effective assistance of counsel due to trial counsel's failure to investigate and perform any meaningful cross-examination of Terry Jackson, who was a key witness against Mr. Butler. PC-R. Vol. IV, 532-37. The circuit court conducted an evidentiary hearing on this claim and found that Mr. Butler failed to establish either prong of *Strickland*. PC-R. Vol. XI, 1793-95. Mr. Butler seeks review of this finding.

Terry Jackson was Harry Butler's coworker and acquaintance. R. Vol. XII, 183. Mr. Jackson testified at trial that he and his brother saw Mr. Butler in front of the Blue Chip Bar on Wednesday, March 12, 1997. *Id.* at 185. Mr. Butler asked him for a ride to the bank and to Bay's house. *Id*. He gave Mr. Butler a ride, and Mr. Butler went inside Bay's house. *Id*. Mr. Butler did not stay long, and after he returned to the car he said that he was going to kill Bay (Leslie Fleming) and Red

(Lakisha Miller). *Id.* Leslie Fleming was murdered on the night of Thursday, March 13, 1997 or the early morning of Friday, March 14, 1997. *Butler*, 842 So. 2d at 821.

Mr. Jackson made a tape recorded statement to Detective Marvin Green on March 18, 1997, which conflicted with his trial testimony. PC-R. Vol. X, 1512-19. Mr. Jackson stated that he and Mr. Butler were in the parking lot across from the Blue Chip Bar when Mr. Butler said he was going to kill Bay and Red. *Id.* The taped statement and a transcript thereof were provided to trial counsel as discovery.

Mr. Jackson either lied to Detective Green on March 18, 1997, or he lied in his testimony at trial. In his trial testimony, Mr. Jackson described how he drove Mr. Butler to Bay's apartment, and when he returned to the car Mr. Butler stated that he was going to kill Bay and Red. In contrast, Mr. Jackson told Detective Green that he heard Mr. Butler make the threat in the parking lot across from the Blue Chip Bar. Counsel failed to depose Mr. Jackson prior to trial, and they did not impeach Mr. Jackson regarding the discrepancy between the statement he gave to Detective Green and his testimony at trial.

Likewise, counsel failed to impeach Mr. Jackson regarding leniency he received in his own criminal cases in exchange for his testimony against Mr. Butler. Mr. Jackson was taken into custody on a misdemeanor warrant on March

18, 1997. PC-R. Vol. X, 1521-28. Detective Green was investigating three burglaries by Mr. Jackson that were reported by the same victim. *Id.* According to Detective Green's report of March 19, 1997, the detective agreed to call Ms. Sturgis and discuss with her whether she wanted the State to drop the case against Mr. Jackson if he continued to speak with them about case number 97-006261 (the case against Harry Butler). *Id.* at 1530-33.

Detective Green indicated on pages 14-15 of his March 22, 1997 report that Mr. Jackson gave law enforcement a fictitious name when they stopped him on March 18, 1997. PC-R. Vol. X, 1548. That report likewise stated that Mr. Jackson confessed to the three burglaries during that interview. *Id.* Detective Green's March 22, 1997 report contained the following summary of what occurred after Mr. Jackson's confession:

> He then advised writer that he [had] information that writer might be interested in. Writer then advised him that I needed to talk to him reference this incident. He then began to tell this investigator that he didn't have any information reference to this incident, but that he heard certain things. He later said that since this investigator gave him a break on some charges, he then would tell writer what he knew. He then stated that on Wednesday, 3/12/97, Harry advised him that he had just gotten out of jail, that he was at the vacant lot across from the Blue Chip Bar located at Tangerine Street and North Greenwood Avenue when Harry told him that "I'm going to kill Bay and Red."

Id. at 1548-49

The victim of the three burglaries signed a waiver of prosecution for the Clearwater Police Department on March 20, 1997. PC-R. Vol. X, 1555. The State did not prosecute Mr. Jackson in the three burglary cases even though they had Mr. Jackson's confessions. Counsel deposed Detective Green on April 6, 1997, but they failed to ask him about the break given to Mr. Jackson in exchange for his statement implicating Mr. Butler. R. Vol. VIII, 1339-59.

At the same time, the Office of the State Attorney chose not to prosecute Mr. Jackson on the charge of Throwing a Deadly Missile in case number 97-13206CW. PC-R. Vol. X, 1557-58. The victim in that case knew Mr. Jackson, and he identified Mr. Jackson as the person who threw a concrete block through his car window, cutting his ear. *Id.* at 1560-66. When Officer John Horning of the Clearwater Police Department responded to the scene, the block was inside the car and blood was running down the victim's neck. *Id.* at 1564. Despite this evidence, in a letter to Officer Horning, Assistant State Attorney Thane Covert wrote that "[d]ue to the lack of independent corroborating evidence and testimony, there is insufficient evidence to establish that this Defendant is the person who committed this act." *Id.* at 1558.

Mr. Schwartzberg conducted the cross examination of Mr. Jackson. PC-R. Vol. V, 821. It comprised approximately a page and a half of trial transcript. R.

Vol. XII, 187-88. The only mention at trial of Mr. Jackson's criminal history, which actually came out on the State's redirect examination, was the fact that he was arrested on a misdemeanor warrant. R. Vol. XII, 189. Mr. Watts was surprised that the cross-examination of Mr. Jackson was so short when there was material that Mr. Schwartzberg could have used to impeach Mr. Jackson or show bias or interest. PC-R. Vol. V, 823. He was "pretty sure that he wasn't aware" that Mr. Jackson had pending burglary charges and he might be receiving favorable treatment, and he was "pretty sure that he would have been aware of it if it was something that was known to the Defense." *Id.* at 823-24.

Counsel provided deficient performance by failing to investigate Mr. Jackson's arrest history and the favorable treatment he received in his own cases in exchange for the information he provided in Mr. Butler's case, and for failing to question Mr. Jackson about the same. Additionally, counsel was ineffective for failing to impeach Mr. Jackson at trial with his prior inconsistent statement to Detective Green.

The prejudice is clear. Mr. Jackson was an essential State witness, as the State highlighted in its closing statement:

> And then we have the statement [to] Terry Jackson after Bay gets him arrested because she tells the police about what happened. And the Defendant, right after he bonds out, tells Terry Jackson I'm going to

> kill Bay and Red. . . And if Red had been there like Bay wanted her to be, Bay and Red would be dead, just like he promised that he would do when he spoke to Terry Jackson.

R. Vol. XVII, 1156-57. The statements Mr. Butler allegedly made to Mr. Jackson were highly prejudicial to Mr. Butler, as they implicated him in the murder of Ms. Fleming and helped establish premeditation. The information about Mr. Jackson's arrest history and the favorable treatment he received in his own cases in exchange for the information he provided in Mr. Butler's case, as well as Mr. Jackson's prior inconsistent statement, could have been used to impeach and discredit Mr. Jackson, and would have established that Mr. Jackson had a personal motive to falsely testify against Mr. Butler. Instead, the jury was not aware of that information, and they did not have any reason to disbelieve Mr. Jackson. There is a reasonable probability that, but for counsel's errors in this regard, the jury would have disbelieved Mr. Jackson and the result of the proceeding would have been different.

ARGUMENT IV

THE CIRCUIT COURT ERRED WHEN IT DENIED MR. BUTLER'S CLAIM THAT COUNSEL RENDERED PREJUDICIAL INEFFECTIVE ASSISTANCE DUE TO A CONFLICT OF INTEREST.

Mr. Butler alleged in Claim V of the motion for postconviction relief that he was denied effective assistance of counsel due to trial counsel's conflict of interest,

specifically Anne Borghetti's prior representation of Terry Jackson, an essential State witness. PC-R. Vol. IV, 537-43. The circuit court conducted an evidentiary hearing on this claim and found that there is no evidence of an actual conflict. PC-R. Vol. XI, 1795-97. Mr. Butler seeks review of this finding.

A criminal defendant's Sixth Amendment right to effective assistance of counsel encompasses the right to counsel free of ethical conflicts. *Wood v. Georgia*, 450 U.S. 261, 271 (1981); *Holloway v. Arkansas*, 435 U.S. 475, 481 (1978). A sufficiently significant conflict of interest prevents an attorney from providing the effective assistance contemplated by the Sixth Amendment. *See Wheat v. United States*, 486 U.S. 153, 160 (1988); *Duncan v. Alabama*, 881 F.2d 1013, 1016 (11th Cir. 1989). An "actual conflict" of interest occurs when an attorney has "inconsistent interests." *Smith v. White*, 815 F.2d 1401, 1405 (11th Cir. 1987). To prove that the conflict "adversely affected" his representation, the movant "need not show that the result of the trial would have been different without the conflict of interest, only that the conflict had some adverse affect on counsel's performance." *McConico v. Alabama*, 919 F.2d 1543, 1548 (11th Cir. 1990).

The Sixth Judicial Circuit Public Defender's Motion to Withdraw from the Terry Jackson case prior to Mr. Butler's trial, dated June 12, 1997, stated:

> 1. That the Public Defender was appointed to represent the above Defendant in the above cause on May 28, 1997.
> 2. That counsel has previously been appointed to represent Harry Lee Butler in case number CRC97-04690CFANO-A, in which the Defendant is a witness.
> 3. That the interests of these clients are adverse.
> 4. That, during the aforementioned representation, counsel has ascertained that an ethical conflict exists, which prevents the continued representation of the Defendant in the above cause.

PC-R. Vol. X, 1568. Ironically, when the Office of the Public Defender withdrew from the Terry Jackson case, Ms. Borghetti was appointed as conflict counsel in case number CRC97-09592CFANO-A on June 19, 1997. *Id.* at 1570, 1572. Although the Office of the Public Defender already asserted that the interests of Mr. Butler and Mr. Jackson were adverse, Ms. Borghetti went on to represent Mr. Butler, against whom Mr. Jackson was a vital State witness. The Notice of Appearance filed by Ms. Borghetti in Mr. Butler's case was dated January 15, 1998, less than six full months after she was appointed to Mr. Jackson's case. *Id.* at 1575. Mr. Jackson testified at trial that on the day before Leslie Fleming was murdered, he gave Mr. Butler a ride, during which Mr. Butler said he was going to kill Bay (Ms. Fleming) and Red (Lakisha Miller). *Butler*, 842 So. 2d at 822.

Ms. Borghetti does not recall representing or speaking with Mr. Jackson, and she does not have a file that says "Terry Jackson." PC-R. Vol. VIII, 1213-14. The records she reviewed indicate that she filed a notice of appearance but she

never appeared in court on Mr. Jackson's behalf. *Id.* at 1213. She was on the conflict list, and she was court appointed to represent Mr. Jackson on some cases that were eventually dropped. *Id.* at 308. She does not believe that at the time of Mr. Butler's trial she had any memory that she had previously represented Mr. Jackson. *Id.* at 1214. Mr. Watts testified that he did not know about Ms. Borghetti's prior representation of Mr. Jackson. PC-R. Vol. V, 824.

This case is analogous to *Lee v. State,* in which the First District Court of Appeals held that Mr. Lee and his attorney had an actual conflict of interest because Mr. Lee's attorney previously represented a primary witness against Mr. Lee. *Lee v. State*, 690 So. 2d 664 (Fla. 1st DCA 1997). As the court explained in *Lee*, prejudice is presumed in cases where there are actual conflicts:

> When ineffective assistance of counsel is first asserted in a postconviction motion, the defendant must show that the conflict impaired the performance of the defense lawyer. *Cuyler v. Sullivan,* 446 U.S. 335, 348 (1980). Even then, it is not necessary to show that counsel's deficient performance resulting from the conflict affected the outcome of the trial. As the Court held in *Sullivan*, prejudice is presumed. *Id.* at 349.

Lee, 690 So. 2d at 669.

Ms. Borghetti's performance in Mr. Butler's case was adversely affected by her actual conflict of interest with Mr. Butler. Counsel did not impeach Mr. Jackson regarding his felony arrests for burglary, for which he received leniency in

exchange for his testimony against Mr. Butler. *See supra* Claim IV. Likewise, he was not impeached regarding his prior felony convictions or his prior inconsistent statement. *See supra* Claim IV. Mr. Jackson was not even deposed prior to Mr. Butler's trial. Presumably, Ms. Borghetti investigated Mr. Jackson's criminal record when she represented him in case number CRC97-09592CFANO-A, whether it was for the purposes of a possible bond reduction, negotiations with the State, or in preparation for trial. She presumably would have spoken with Mr. Jackson about his prior record during the course of her representation of him. Ms. Borghetti was prohibited from divulging any information that she learned from Mr. Jackson, even if it would have helped Mr. Butler. The attorney-client privilege did not end with the resolution of Mr. Jackson's case, nor did the conflict end. *See United States v. Ross*, 33 F.3d 1507, 1523 (11th Cir. 1994) (holding that "[t]he need for fair, efficient, and orderly administration of justice overcomes the right to counsel of choice where an attorney has an actual conflict of interest, such as when he has previously represented a person who will be called as a witness against a current client at a criminal trial.")

Ms. Borghetti had an actual conflict with Mr. Butler due to her prior representation of Mr. Jackson. That conflict impaired counsel's performance. It is not necessary for Mr. Butler to show that counsel's deficient performance affected

the outcome of the trial. *Sullivan*, 446 U.S. at 349. Mr. Butler was unaware of his conflict with Ms. Borghetti, and he did not waive the conflict of interest at any time. Therefore, Mr. Butler is entitled to a new trial, free of conflicts.

ARGUMENT V

THE CIRCUIT COURT ERRED WHEN IT DENIED MR. BUTLER'S CLAIM THAT EXCULPATORY EVIDENCE OF AN UNIDENTIFIED BLOODY PRINT AT THE CRIME SCENE WAS WITHHELD FROM THE COURT EITHER THROUGH INEFFECTIVE ASSISTANCE OF COUNSEL OR SUPPRESSION BY THE STATE.

Mr. Butler alleged in the motion for postconviction relief that exculpatory evidence of an unidentified bloody print at the crime scene was withheld from the court, either through ineffective assistance of counsel or suppression by the State, in violation of *Brady*. PC-R. Vol. IV, 543-46. The circuit court conducted an evidentiary hearing on this claim, and found that the (1) the *Brady* claim is without merit because the State did not suppress this evidence and (2) as to the claim of ineffective assistance of counsel there is insufficient prejudice under *Strickland* to merit relief. PC-R. Vol. XI, 1797-1800. Mr. Butler seeks review of these findings.

Ms. Beauchamp, a latent print examiner with the Pinellas County Sheriff's Office, was first assigned to Mr. Butler's case on March 17, 1997. PC-R. Vol. V, 710-11. Twenty-one of the 113 prints she received were of comparable value. *Id.* at 711, 713. She compared the known prints of Martisha Kelly, Ronald Corker,

Adonis Hartfield, Shawna Fleming, Steven Shine, LaShara Butler, Dennis Tennell, Harry Butler, and Leslie Fleming to each of these 21 latent prints. *Id.* at 714-15. She obtained a set of major case prints[2] of Harry Butler and Dennis Tennell. *Id.* at 714. She was able to make a total of eight identifications. *Id.* at 712-13.

On April 10, 1997, Ms. Beauchamp received 21 prints that were found on the phone at the crime scene, which she was asked to analyze and compare to known prints. PC-R. Vol. V, 718, 723. The prints were in blood, and they were developed and photographed by a forensic specialist. *Id.* at 719-20. They were numbered Frame 1, Photo 51 through Frame 29, Photo 71. *Id.* at 719. Enlargements of the 21 prints from the phone were introduced at the postconviction evidentiary hearing. PC-R. Vol. XII, 1883-1903. The blood on the phone belonged to the victim, Leslie Fleming, as all of the blood found at the crime scene belonged to Ms. Fleming. PC-R. Vol. V, 839.

Only two of the photographs of the prints on the phone, which both represented the same print, had sufficient details for Ms. Beauchamp to compare.

[2] "Major case prints are a set of inked fingerprints from a known person that try to capture every area of friction ridge skin underneath the hands and fingers, in between the thumb, the index finger, every area that's possibly possible that we can capture, the side of the fingers, the tips of the fingers and that's not normally captured on a standard fingerprint card." *Id.* at 713-14. Major case prints also include the palm of the hand and the joints of the finger. *Id.* at 714.

PC-R. Vol. V, 723. Those photographs were marked as Frame 18, Photograph 68 and Frame 21, Photograph 71. *Id.* at 25; PC-R. Vol. XII, 1900, 1903. It appeared to her to be a partial palm print[3]; however, Ms. Beauchamp also looked at it as a fingerprint.[4] PC-R. Vol. V, 728, 752. On April 15, 1997, she asked other fingerprint examiners in her office to look at Frame 18, Photograph 68 and Frame 21, Photograph 71, and they agreed with her that the print was of comparable value. *Id.* at 26.

Ms. Beauchamp notified Detective Steffens about her findings regarding the prints on the phone. PC-R. Vol. V, 725. Detective Steffens seemed to think that the bloody print of the phone was one of the more important prints in this case. *Id.* at 725-26. Between April 10, 1997 when she received the prints from the phone, and April 20, 1997, she compared Frame 18, Photograph 68 and Frame 21, Photograph 71 to all of the individuals whose known prints she compared to the other latent prints in this case. *Id.* at 726-27. She looked at the print for a "very

[3] There is nothing in Ms. Beauchamp's handwritten notes or in her final report to indicate that she believed the print was a palm print. PC-R. Vol. XII, 1904-24.

[4] Ms. Beauchamp testified that when she receives a latent print, sometimes she can tell what part of the hand it came from before she compares it to known prints by looking at identifying characteristics in the print based upon the flexion creases, shape, size, and ridge flow. *Id.* at 17. Other times, there is no way to tell what part of the hand the print came from. *Id.* at 17. In cases where she is not able to identify whether the latent print came from a finger of the palm, she compares the latent print to the palms and fingers of the known prints. *Id.* at 18.

long time." *Id.* at 727. Because prints left in blood are more difficult to compare than prints left on paper, polished metal, or glass, she spent more time looking at this print than she spent looking at other prints in this case, and she consulted with other fingerprint examiners in her office. *Id.* Examiners Ronald Richards, Henry Brommelsick, William Schade, Preising, and Sherwood all compared the bloody print with Mr. Butler's known prints. *Id.* at 728-29. None of them expressed the opinion that the print was not of comparable value, and no one was able to make an identification. *Id.* at 729.

Elimination prints are the known prints of any person who had legal access to the crime scene. PC-R. Vol. V, 716. In Mr. Butler's case, many of the prints Ms. Beauchamp was asked to compare were for elimination purposes. *Id.* It is common practice to compare latent prints to the prints of the victim, since the victim was present at the crime scene. *Id.* In this case, Ms. Beauchamp received two sets of Leslie Fleming's known prints: one set from a forensic specialist that was attached to a body release form and a second set that was already on file at the Pinellas County Sheriff's Office. *Id.* at 717. The prints taken of Ms. Fleming at the autopsy were taken by a forensic specialist from the Pinellas County Sheriff's Office, who was trained in rolling prints. *Id.* at 755. Ms. Beauchamp compared these two sets of known prints and confirmed that they were, in fact, from the same

person. *Id.* at 717. When she compared Ms. Fleming's known prints to the latent prints in this case, if one set of known prints did not match, she compared it to the second set because often another set of prints would have captured a different area. *Id*. Although the known prints of Ms. Fleming were not major case prints, they did include Ms. Fleming's palm prints, with the exception of the area between the index finger and the thumb. *Id.* at 747. Since she did not have the major case prints of Ms. Fleming, Ms. Beauchamp could not say conclusively that the bloody print on the phone did not come from Ms. Fleming. *Id.* at 748.

On May 12, 1997, Ms. Beauchamp contacted Assistant State Attorney Joseph Bulone, Detective Steffens, and Detective Howard. PC-R. Vol. V, 729. They asked her to compare Frame 18, Photograph 68 and Frame 21, Photograph 71 to the known prints of Martisha Kelly. *Id.* at 729. When she compared the prints, she yielded negative results. *Id.* at 730.

On December 23, 1997, Mr. Bulone requested that Ms. Beauchamp roll a set of major case prints on an inmate, Ronald Corker. PC-R. Vol. V, 730. She and her supervisor, Mr. Schade, went to the Pinellas County Jail and rolled a set of major case prints on Mr. Corker. *Id*. They compared Mr. Corker's prints to Frame 18, Photograph 68 and Frame 21, Photograph 71 with negative results. *Id*.

At one point, Ms. Beauchamp was also asked to compare the bloody print to

Dennis Tennell. PC-R. Vol. V, 744. She personally obtained the major case prints of Mr. Tennell. *Id*. She compared the bloody print with the know prints of Mr. Tennell, and she was not able to identify the print. *Id.* at 746.

Ms. Beauchamp attempted to identify Frame 18, Photograph 68 and Frame 21, Photograph 71 from April to December of 1997. PC-R. Vol. V, 731. She compared the bloody print to known prints of Harry Butler, Leslie Fleming, Martisha Kelly, Dennis Tennell, Ronald Corker, Adonis Hartsfield, Shawna Fleming, Steven Shine, LaShara Butler, and several other juveniles. *Id.* at 731. Despite her best efforts, she was never able to identify the bloody print on the phone. *Id.* at 33-34. Ms. Beauchamp testified that it bothered her that she was not able to identify that print. *Id.* at 732. She stated:

> And there were times I would pull the case out and go back. . . [A]s an examiner you have to understand that it's very difficult to compare a blood print, and this was an ugly blood print. It's very difficult. And I take my job passionately, and I go back multiple times and – to try to compare. And I don't believe there's an examiner around that likes to leave an unidentified print like that, but that's life. That's the way it is. I did my comparison, and you reach a point where the only result I could find was negative results.

Id. at 731-32.

On May 13, 1997, Ms. Beauchamp's supervisor, Mr. Schade, gave her a letter dated May 9, 1997 from William Braun, investigator for Public Defender

Bob Dillinger. PC-R. Vol. V, 733-34. In the letter, Mr. Braun requested "photographic copies of all identifiable latent prints lifted in the above case, including source of lifts." *Id.* at 733. Ms. Beauchamp notified Mr. Bulone about this request, and he advised her to send copies to him and the Public Defender's Office. *Id.* at 734. Accordingly, Ms. Beauchamp complied with the request and sent copies of the prints to the Public Defender's Office. *Id.*

Ms. Beauchamp testified on behalf of the defense at Mr. Butler's trial, but she was not asked about the bloody print. R. Vol. XV, 840-48. She was not deposed prior to trial. R. Vol. V, 128. The jury never heard about the bloody print.

In keeping with her standard practice, Ms. Beauchamp kept handwritten notes as she was investigating Mr. Butler's case. PC-R. Vol. V, 736. A copy of Ms. Beauchamp's handwritten notes was introduced at the evidentiary hearing. PC-R. Vol. XII, 1904-20. These notes detail the effort she put forth trying to identify the bloody print. *Id.* She specifically refers in her handwritten notes to Frame 18, Photo 68 and Frame 21, Photo 71 as the "bloody print." *Id.* She does not recall showing these notes to anyone prior to trial, with the possible exception of her manager. PC-R. Vol. V, 738. She also furnished a report to Detective Steffens, which was introduced at the evidentiary hearing. PC-R. Vol. XII, 1921-

24. In contrast to Ms. Beauchamp's handwritten notes, it does not indicate in the report that the prints developed on the phone were in blood. *Id.*

Mr. Watts testified that the defense team was probably aware of the bloody print in the sense that it was in the discovery, but they were not aware of its potential significance. PC-R. Vol. V, 825. He did not recall receiving any handwritten notes from Ms. Beauchamp. *Id.* at 826. Mr. Watts admitted that the bloody print would have been useful to the defense at trial because it put an unknown third party at the crime scene. *Id.* at 825. Although he does not recall deposing Ms. Beauchamp prior to trial, if Mr. Watts had known then about the bloody print what he knows now, he probably would have deposed her. *Id.* at 826.

***Brady* Claim**

In *Brady v. Maryland*, the United States Supreme Court held that the State must disclose material within its possession or control that tends to negate the guilt of the defendant. *Brady v. Maryland*, 373 U.S. 83 (1963). In order to establish a *Brady* violation, a defendant must prove (1) the evidence is favorable to the accused because it is exculpatory in guilt or sentencing, (2) it was suppressed by the State willfully or inadvertently, and (3) prejudice ensued. *Carroll v. State*, 818 So. 2d 601, 619 (Fla. 2002). A court should consider the evidence in the context of the entire record. *Id*. at 619. "A criminal defendant alleging a *Brady* violation bears

the burden to show prejudice, i.e. to show a reasonable probability that the undisclosed evidence would have produced a different verdict." *Guzman v. State*, 868 So. 2d 498, 506 (Fla. 2004).

The State violated *Brady* by failing to provide the defense with Ms. Beauchamp's handwritten notes. It is evident from the record that Ms. Beauchamp's handwritten notes were suppressed by the State, whether it was willfully or inadvertently. Trial counsel did not receive Ms. Beauchamp's handwritten notes. PC-R. Vol. V, 128. Ms. Beauchamp did not recall showing her handwritten notes to anyone prior to trial. *Id.* at 40. Ms. Beauchamp is an employee of the Pinellas County Sherriff's Office. *Id.* at 709. The prosecution "is charged with constructive knowledge and possession of evidence withheld by other state agents, such as law enforcement officers." *Gorham v. State*, 597 So. 2d 782, 783 (Fla. 1992). The prosecution is charged with the constructive knowledge and possession of Ms. Beauchamp's notes, which were in the actual possession of Ms. Beauchamp, a state agent.

The exculpatory nature of the bloody print on evidence and the prejudice that ensued are discussed in detail below, under the heading, "Prejudice and the Exculpatory Nature of the Evidence in Question."

Deficient Performance under *Strickland*

Counsel's performance in Mr. Butler's case was deficient because they failed to uncover and present evidence of the bloody print on the phone at the crime scene. Counsel has a duty to investigate. *Strickland*, 466 U.S. at 688. Although they called her as a witness at trial, the defense did not depose Ms. Beauchamp. PC-R. Vol. V, 128. Likewise, they did not request Ms. Beauchamp's bench notes. The fingerprint report that the defense received in discovery does not indicate that the prints developed on the phone were in blood. PC-R. Vol. XII, 1921-24. On the other hand, the defense did receive photographs of all latent prints lifted in this case. *Id.* at 36. Counsel deposed Donald A. Barker, who was in charge of forensics at the crime scene, and he testified about a bloody print on the phone. R. 1202; PC-R. Vol. V, 129. However, even if counsel recognized that the print on the phone was in blood, they did not recognize its significance, nor did they follow up with further investigation regarding the print. If counsel had conducted a proper investigation into the fingerprint evidence in Mr. Butler's case, they would have uncovered and presented evidence about the bloody print.

Prejudice and the Exculpatory Nature of the Evidence in Question

The fact that the print in question was in the victim's blood gives it particular importance in Mr. Butler's case. Generally, it is not possible to determine the age of a fingerprint. PC-R. Vol. V, 22. The print in Frame 18,

Photograph 68 and Frame 21, Photograph 71 is unique because it was left in the victim's blood. Common sense dictates that the blood must have still been wet when the print was left. Therefore, the print must have been left at or shortly after the time of the crime. Ms. Beauchamp compared the bloody print to known elimination prints of people whom we know were at the crime scene, including Leslie Fleming, LaShara Butler, and Shawna Fleming, with negative results. *Id.* at 33. Multiple attempts to compare Mr. Butler's known prints with the bloody print also yielded negative results. *Id.* at 30-31.

Although Ms. Beauchamp testified that the bloody print may have been made by the area between Ms. Fleming's thumb and forefinger, which the two sets of Ms. Fleming's known prints did not include, she could not rule out the possibility that the print came from an unidentified third person who was present at the crime scene. Moreover, while Ms. Beauchamp expressed the opinion that the bloody print appeared to be a partial palm print, she also looked at it as a fingerprint. PC-R. Vol. V, 30, 54. Any claim by the State that just because Ms. Beauchamp did not have the major case prints of Leslie Fleming the print on the phone must have come from her is mere speculation. In fact, although Ms. Beauchamp did not have the major case prints of Ms. Fleming, she did have two sets of Ms. Fleming's palm prints and finger prints, at least one of which was

rolled by a forensic specialist from the Pinellas County Sheriff's Office who was trained in rolling prints. *Id.* at 57. Ms. Beauchamp could not match those known prints to the bloody print. *Id.* at 33. A juror looking at Frame 18, Photograph 68 and Frame 21, Photograph 71 might conclude that given the shape of the print, it is a fingerprint, and therefore could not have been left by Ms. Fleming because Ms. Beauchamp compared the print to Ms. Fleming's fingerprints and it did not match. *See* PC-R. Vol. XII, 1900, 1903. Furthermore, even if the bloody print may have belonged to Ms. Fleming, it has not been proven beyond a reasonable doubt that the print belonged to Ms. Fleming. In the same vein, the State has not disproven beyond a reasonable doubt Mr. Butler's theory that an unidentified third person who was present at the crime scene left the bloody print.

The State brought out in the cross examination of Mr. Watts at the evidentiary hearing in this case that the theory of defense was that Dennis Tennell, and not Mr. Butler, committed this crime. PC-R. Vol. V, 140. It is true that Ms. Beauchamp compared the print on the phone and it did not match Mr. Tennell. *Id.* at 33-34. This information, however, is not necessarily inconsistent with the theory of defense, as Mr. Tennell may not have acted alone. Furthermore, had the defense been aware of the bloody print prior to trial, they might have changed their theory of defense.

Therefore, the bloody print, which was found on the phone next to the victim's body, is highly exculpatory because it is evidence that an unidentified person was present at the crime scene. One can imagine a scenario where counsel introduces enlarged copies of Frame 18, Photograph 68 and Frame 21, Photograph 71, points to them, and declares, "Ladies and gentlemen of the jury, there is your real murderer." In fact, counsel apparently had such a strategy in mind with regard to some DNA evidence that they mistakenly thought was found at the crime scene. *See* R. Vol. XI, 139-40, 142-43. Unlike the DNA evidence, the bloody print actually was found at the crime scene. At a minimum, this evidence is inconsistent with the State's theory of the case, which is that Mr. Butler acted alone. At best, it supports Mr. Butler's contention that somebody else killed Leslie Fleming, and it would have caused the jury to have reasonable doubt concerning Mr. Butler's guilt. Either way, there is a reasonable probability that if the defense had presented evidence about the bloody print the jury would have found Mr. Butler not guilty.

Conclusion

Mr. Butler has demonstrated that he is entitled to guilt phase relief under *Brady* and *Strickland* because exculpatory evidence concerning an unidentified bloody print found at the crime scene was withheld from the trial court, which greatly prejudiced Mr. Butler. All three prongs of *Brady* have been met. The State

failed to provide the defense with Ms. Beauchamp's handwritten notes, which would have informed the defense about the bloody print and highlighted its importance. Furthermore, had counsel requested and received Ms. Beauchamp's handwritten notes and/or deposed Ms. Beauchamp, they would have learned of the existence of the bloody print on the phone at the crime scene and there is a reasonable probability that the jury would have returned a verdict of not guilty. Therefore, Mr. Butler is entitled to a new guilt phase trial.

ARGUMENT VI

THE CIRCUIT COURT ERRED WHEN IT DENIED MR. BUTLER'S CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE MEDICAL EXAMINER'S CHARACTERIZATION OF SOME OF THE VICTIM'S WOUNDS AS TORTUROUS WOUNDS.

Mr. Butler alleged in Claim VII of the motion for postconviction relief that trial counsel was ineffective for failing to object to associate medical examiner Marie Hansen's characterization of some of the victim's wounds as torturous wounds during the guilt/innocence phase of Mr. Butler's trial. PC-R. Vol. IV, 547-48. The circuit court conducted an evidentiary hearing on this claim, and found no deficiency in counsel's failure to object to the questioning of Dr. Hansen. PC-R. Vol. XI, 1800-01. Mr. Butler seeks review of this finding.

Counsel failed to object to Ms. Hanson's testimony on redirect in response to the prosecutor's question at R. Vol. XIV, 625 of the record on appeal:

Q. All right. What are torturous wounds?

A. A torturous wound is when you take someone and you make little wounds in the skin, you make a lot of little wounds in the skin as if you are, quote, playing with someone and you make a nick in the skin, it hurts or you threaten somebody and they flinch and you nick their skin and then you continue or multiple small nicks like that may be associated with torturing or terrorizing someone.

Q. Are some of the injuries we observed to Ms. Leslie Fleming consistent with torturous-nature wounds?

A. These could be – the wounds on her chest and in the right incision on her abdomen, the little wound in her abdomen, the wound in the side of the neck, they could be consistent with torture wounds, yes.

Section 90.401, Fla. Stat. (2008) states that "relevant evidence is evidence tending to prove or disprove a material fact." Mr. Butler was charged with first degree murder, the elements of which are set forth in §7.2, Fla. Std. Jury Inst. (2009) as follows:

1. (Victim) is dead.
2. The death was caused by the criminal act of (defendant).
3. There was a premeditated killing of (victim).

Counsel should have objected to the question, "What are torturous wounds?" Characterizing the victim's wounds as torturous is irrelevant and impermissible under §90.401, Fla. Stat. (2008) because it fails to address a material fact.

Furthermore, this testimony is improper because the prejudice outweighs the

probative value. Section 90.404, Fla. Stat. (2008) states that "[r]elevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence." The characterization of some of the victim's wounds as torturous has no probative value regarding the elements of first degree murder. On the other hand, this testimony unfairly prejudiced Mr. Butler. Unfair prejudice has been described as "an undo tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." *Brown v. State*, 719 So. 2d 882, 885 (Fla. 1998) (quoting *Old Chief v. United States*, 519 U.S. 172, 180 (1977)). This rule of exclusion "is directed at evidence which inflames the jury or appeals improperly to the jury's emotions." *Stevenson v. State*, 695 So. 2d 687, 688-89 (Fla. 1997). Testimony that the wounds were torturous was speculative and irrelevant. There was no evidence that the wounds in question were inflicted while the victim was alive. Ms. Hansen's testimony shifted the focus away from the material elements of first degree murder and toward speculation regarding the fear and suffering of the victim before death.

Additionally, the testimony regarding tortuous wounds amounted to impermissible opinion evidence. Where it is undisputed that the medical examiner is qualified to determine the cause of death, the potential suffering of the victim

amounted to an unsupported opinion. With regard to the admissibility of expert testimony, this Court held in *Terry v. State*, 668 So. 2d 954, 960 (Fla. 1996):

> Section 90.702 requires that before an expert may testify in the form of an opinion, two preliminary factual determinations must be made by the court under section 90.105. First, the court must determine whether the subject matter is proper for expert testimony, i.e., that it will assist the trier of fact in understanding the evidence or in determining a fact in issue. Second, the court must determine whether the witness is adequately qualified to express an opinion on the matter.

In Mr. Butler's case, neither prong is met as enumerated in § 90.105(1) and § 90.105(2), Fla. Stat. (2008). The suffering of the victim is not relevant to the determination of any fact in issue. Additionally, the medical examiner was not qualified as an expert in neurology such that she could testify as to the character of pain, and there was no testimony that the wounds were inflicted while the victim was still alive.

Counsel's performance in failing to object to this testimony was deficient under the first prong of *Strickland. Strickland,* 466 U.S. at 687. Counsel should have objected based on any or all of the grounds above and moved for a mistrial.

Mr. Butler was prejudiced by counsel's failure to object to Ms. Hansen's characterization of some of the victim's wounds as torturous. *Strickland*, 466 U.S. at 687, 694. This testimony improperly inflamed and confused the jury. Had this

testimony not been heard, there is a reasonable probability that Mr. Butler would have been acquitted, or that the jury would not have recommended death.

ARGUMENT VII

THE CIRCUIT COURT ERRED WHEN IT DENIED MR. BUTLER'S CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE FOR MISCHARACTERIZING THE PHYSICAL EVIDENCE IN HIS OPENING STATEMENT.

Mr. Butler alleged in Claim VIII of his motion for postconviction relief that trial counsel was ineffective for mischaracterizing the physical evidence in his opening statement by telling the jury that the DNA of an unknown individual was found on a glass door at the crime scene when, in fact, that DNA was located at a completely different location on the other side of town. PC-R. Vol. IV, 548-49. The circuit court conducted an evidentiary hearing on this claim, and found that there is not sufficient prejudice to merit relief under *Strickland*. PC-R. Vol. XI, 1801-03. Mr. Butler seeks review of this finding.

Mr. Watts presented the opening statement for the defense in the guilt/innocence phase of Mr. Butler's trial. He informed the jury:

> There's blood. There's fingerprints. There's DNA. There's DNA that isn't Harry Butler and DNA not Bay Fleming at the sliding door at the back, DNA of somebody else . . . So we have got some DNA at the crime scene, somebody else's. We don't know who it is . . .

R. Vol. XI, 139-40. Mr. Watts concluded his opening statement by discussing the

DNA evidence:

> Please keep an open mind until you have heard all the evidence. And when you have heard all the evidence, you will see that there's reasonable doubt, reasonable doubt, plenty of reasonable doubt whether Harry Butler did this. We can't present the real killer. I wish we could. But you will see that somebody else was there, that somebody else's DNA is there. That's the killer. Can't identify him. Harry Butler is excluded from the DNA. Thank you.

R. Vol. XI, 142-43.

Mr. Watts' argument would have been effective, but for the fact that his claims about mysterious DNA found at the crime scene were patently false. All of the blood found at the crime scene belonged to the victim, Ms. Fleming. PC-R. Vol. V, 839. Mr. Bulone addressed Mr. Watts' error in his closing statement:

> Then the Defense in their opening statement as to why you should acquit this man was that there was blood on the door of Leslie Fleming's apartment and we don't know whose blood that is. Well, as it turns out, that's not true in the least. All the blood in that apartment belonged to Leslie Fleming. The door that they are talking about is a door that they went and retrieved from the apartment on Ft. Harrison where Harry Lee Butler was staying. And there was blood from two different individuals, but it wasn't from the Defendant's and it wasn't from the victim's. It could have been anybody's from a day ago to a week ago to years ago.

R. Vol. XVI, 1141-42.

Counsel's performance was deficient under *Strickland*. Although Mr. Watts testified at the evidentiary hearing that he realized his mistake at the moment and

"tried to correct it or tried to neutralize it," the trial record reveals that that is not the case. PC-R. Vol. V, 829. Mr. Watts would have known that all of the DNA found at the crime scene belonged to Ms. Fleming if he familiarized himself with the evidence in this case. Counsel's lack of preparation and unfamiliarity with the evidence failed to meet the meet the minimum standards for effective counsel guaranteed by the Sixth Amendment.

Additionally, the false claims made by Mr. Watts during the defense opening statement prejudiced Mr. Butler and deprived him of a fair trial. As a result of Mr. Watts' misstatement, the defense lost all credibility with the jury: when Mr. Butler testified on his own behalf, when counsel argued that Mr. Butler was not guilty, and when counsel asked the jury to return a recommendation of life in prison. As a result of counsel's deficient performance, the jury found Mr. Butler guilty of first degree murder and he received a sentence of death.

ARGUMENT VIII

THE CIRCUIT COURT ERRED WHEN IT DENIED MR. BUTLER'S CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO ADEQUATELY PREPARE HIM TO TESTIFY ON HIS OWN BEHALF.

Mr. Butler alleged in Claim IX of his motion for postconviction relief that trial counsel was ineffective for failing to adequately prepare him to testify on his own behalf, causing him to give false testimony about the number of prior felony

convictions he had and seriously undermining his credibility with the jury. PC-R. Vol. IV, 550. The circuit court conducted an evidentiary hearing on this claim, and found that neither prong of *Strickland* has been established. PC-R. Vol. XI, 1803-05. Mr. Butler seeks review of this finding.

Mr. Butler testified on his own behalf during the guilt/innocence phase of his trial. R. Vol. XVI, 1014-89. On direct examination, Mr. Butler volunteered that when he first started dating Ms. Fleming, he was on his way to prison. *Id.* at 1014. On cross examination, Assistant State Attorney Schaub questioned Mr. Butler about his prior convictions:

> Q: 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?
> A: Yes, sir.
> Q: Will you please tell us how many times?
> A: Approximately about nine that I know of.
> Q: How about ten?
> A: Maybe so.

Id. at 1066.

Mr. Watts conducted the direct examination of Mr. Butler. PC-R. Vol. V, 834. He testified that he had a good relationship with Mr. Butler. *Id.* at 832. He had discussions with Mr. Butler about whether or not Mr. Butler should testify on his own behalf, and they discussed the fact that his prior record would be used against him. *Id.* at 833. Mr. Watts did not memorialize these discussions with a

memorandum, not does he recall a colloquy in court. *Id.* at 824. He believed that he spoke with the State prior to Mr. Butler testifying, and they agreed on the number of prior felonies Mr. Butler had. *Id.* at 836. Mr. Watts testified that while it is always his goal to bring out the defendant's prior felonies during direct examination as a sort of "anticipatory rehabilitation," he did not do that in Mr. Butler's case. *Id.* at 835. He agreed that the exchange between Mr. Schaub and Mr. Butler on cross-examination, where Mr. Schaub corrected Mr. Butler about the number of felony convictions he had, was "not helpful" to Mr. Butler's credibility. *Id.* He further testified that it was "not a happy moment" for him, and he wished that he had asked Mr. Butler about his prior felony convictions on direct. *Id.*

Counsel provided deficient performance by failing to properly prepare Mr. Butler to testify, and by failing to bring out the number of prior felony convictions Mr. Butler had on direct examination. Mr. Watts should have instructed Mr. Butler not to volunteer that he was "on his way to prison," a fact that the jury would not have heard otherwise. Furthermore, counsel should have stipulated to the number of prior felony convictions prior to Mr. Butler's testimony, and Mr. Watts should have made sure that Mr. Butler knew how many felony convictions he had to admit.

Counsel's deficient performance prejudiced Mr. Butler and "undermined

confidence in the outcome" of his case. *Strickland*, 104 S. Ct. at 2068-69. As Mr. Watts admitted at the evidentiary hearing, Mr. Butler's misstatement regarding the number of prior felony convictions he had was "not helpful" to his credibility. PC-R. Vol. V, 835. The fact that Mr. Butler had been to prison, which the jury would not otherwise have heard, further undermined Mr. Butler's credibility. Since Mr. Butler has proclaimed his innocence from the onset of this case, and his defense was an alibi defense, it was imperative that his testimony be credible to the jury. If counsel had properly prepared Mr. Butler to testify on his own behalf, there is a reasonable probability that Mr. Butler would have been acquitted and/or he would not have been sentenced to death.

ARGUMENT IX

THE CIRCUIT COURT ERRED WHEN IT DENIED MR. BUTLER'S CLAIM THAT COUNSEL PROVIDED PREJUDICIAL INEFFECTIVE ASSISTANCE AT THE PENALTY PHASE OF HIS TRIAL.

Mr. Butler alleged in Claim X of his motion for postconviction relief that he was denied effective assistance of counsel at the penalty phase of his trial. PC-R. Vol. IV, 551-66. The circuit court conducted an evidentiary hearing on this claim, and found that neither prong of the *Strickland* test has been established. PC-R. Vol. XI, 1805-08. Mr. Butler seeks review of this finding.

Penalty Phase Trial

Counsel's penalty phase presentation of mitigating evidence was severely deficient on its face. Only two witnesses were presented to the jury, and both of them did more harm than good.

The first witness the defense presented at Mr. Butler's penalty phase trial was Harry Butler's father, Junior Butler. His testimony on direct examination comprises ten pages of trial transcript. R. Vol. XVII, 1254-64. He provided a skeletal family history, during which he indicated that: he was not certain how many children he had;[5] he could not remember the name of Harry's mother;[6] he could not remember when he married Harry's mother;[7] and he had been accused of murdering Harry's mother, but he did not do it. *Id.* at 1255-56.

Regarding Harry, Junior testified, "I never had to beat on my children their whole lifetime . . . He's never been no bad son. So I wouldn't want to see him executed." R. Vol. XVII, 1257-58. He and his son played around and talked. *Id.* at 1260. After the death of his mother, Harry went to live with his paternal grandmother in Georgia, with whom he apparently had a loving relationship. *Id.* at 1258, 1261. When Harry's grandmother died, Harry came to live with Junior in

[5] "I believe six." *Id.* at 1255.
[6] A. "His mother's name – let me think. It's been so long." Q. "Stella Butler." A. "Yeah, that's the name." *Id.* at 1255.
[7] "Somewhere around '55, '56." *Id.* at 1255.

Largo.[8] *Id.* at 1259. Harry lived with his father until he was "old enough to leave." *Id.* at 1262. According to Junior, his son had an unspecified number of otherwise unidentified children, and he always loved his family. *Id.* at 1262. Junior provided a few additional bits of biographical data, including the names of Harry's siblings, with whom Harry always "got along good." *Id.* at 1259.

When Ms. Borghetti stated that she had nothing further, Junior asked if he could finish the story about Harry's mother. R. Vol. XVII, 1262-63. Ms. Borghetti responded, "Go ahead, Sir." *Id.* at 1263. Junior continued with the following incoherent narrative:

> Okay. When I went to Court to Bainbridge, the judge had all set up like this. So after the boy, the boss man brought his mother in, the mother of my wife, when they took her out, when they took her out of the lake I had her sent to a lung specialist and we got the funeral – got the report back. She didn't have no water in her because she was dead when she went in the water when they were dragging for all that day.
>
> And do you know like a lake got a high break and the water? They told them to go down and bring up, so he brought up and she was still dead like you said with no clothing, just like you are sitting with no water in her body. Then I went and had her funeral. I had to pay for the funeral. And when we went to Court, the judge, after his boss man brought him in, the judge told the boss man, I'm going to handle this.

Id. at 1263.

[8] Junior was not sure how old his mother was when she died.

The entire colloquy from Junior was irrelevant, unresponsive, and highly prejudicial. Any reasonable juror would be struck by the fact that the defendant's father had also been accused of killing the mother of his children. The disjointed and unsolicited nature of Junior's testimony made him appear untruthful. Worse yet, the postconviction investigation has revealed that not only was Junior never a suspect in his wife's murder, but that death records show Junior's wife died from an accidental drowning while he was hundreds of miles away. PC-R. Vol. VII, 140, 1179, 1182.

On cross examination, the State pointed out that although Junior testified that Harry loved his children, there was a period of time when Harry did not see his children because he was in prison. R. Vol. XVII, 1264, 66. Junior also testified that Harry would give Bay large sums of money. *Id.* at 1267. The State asked, "That was from selling drugs, wasn't it?", to which Junior replied, "I wouldn't say that." *Id.* at 1267. There was no redirect examination.

The second witness to testify for the defense during the penalty phase was Harry Butler's sister, Sandra Butler. Her testimony comprises only five pages of trial transcript. R. Vol. XVII, 1268-72. On direct examination, Sandra explained that she did not grow up with Harry. *Id.* at 1269. In fact, she grew up with another related family, and she did not even know she had a brother until she was five or

six years old. *Id.* at 1269. Although she worked in the tobacco field as a child, she did not know if Harry worked in the field. *Id.* at 1270. She came into contact with Harry when she was in middle school and she moved to Florida. *Id.* at 1270. The only information that she offered about that contact was that he wanted her to date one of his friends whom she did not like and he protected her from some girls who were jealous of her. *Id.* at 1270-71.

Significant for what was to come, Sandra told the jury that, as a child, she had to go to church on Sunday. R. Vol. XVII, 1270. Ms. Borghetti concluded the direct examination by asking Sandra, "Is there anything else you would like to tell the jury?" *Id.* at 1271. Sandra replied that during the pendency of this case, she had been praying to the Lord to show her who did this. *Id.* She visited Harry at the jail and asked him if he killed Bay. *Id.* He denied it, but she told him, "Don't lie to me, boy. I said our mama went the same way." *Id.* Sandra testified that she kept praying, and God finally told her the secret of how it happened. *Id.* At that point, Ms. Borghetti concluded the direct examination. *Id.* at 1271-72.

During cross examination, it came out that Sandra met Mr. Schaub that morning and she told him her secret: God told her who did this crime, and it was her brother. *Id.* at 1272. There was no objection or redirect examination. That was the conclusion of the defense case for mitigation to the jury.

***Spencer* Hearing**

The only other testimony offered by the defense prior to sentencing was that of Michael Maher, M.D. during the *Spencer* hearing. The factual basis for Dr. Maher's testimony was limited to an interview with Mr. Butler lasting two hours and information provided in hypothetical "outline" form by counsel. R. Vol. X, 1736, 1742. This testimony comprised ten total pages of trial transcript, including qualifications and cross examination. *Id.* at 1733-42.

Dr. Maher emphasized a number of times that his information was limited. He testified that he did not review "extensive material on the case." R. Vol. X, 1742. On cross examination, Dr. Maher admitted that he did not review any trial or deposition transcripts, police reports or photographs. *Id.* at 1740. He thought he asked Mr. Butler about his family history during the interview, but he did not make any notes about it, and he did not recall what Mr. Butler said. *Id.* at 1742. With regard to the death of Mr. Butler's mother, Dr. Maher testified:

> My information is limited. It is based on one interview with Mr. Butler. It is not based on social service records or school records or other kinds of records of his childhood.

Id. at 1739.

His testimony was offered for the limited purposes of (1) explaining that the numerous stab wounds described as torturous wounds during the guilt/innocence

phase were in fact the product of cocaine-induced perseverance, and (2) the psychological effects of Mr. Butler's mother having died a violent death. R. Vol. X, 1733-42. With regard to the torturous wounds, Dr. Maher testified about "the behavior of an individual, Mr. Butler included, specifically who is intoxicated on cocaine." *Id.* at 1736. Regarding the psychological effects of Mr. Butler's mother having died a violent death, Dr. Maher provided a brief analysis about a hypothetical generic child who grew up under what he called the "simple scenario" described by counsel. *Id.* at 1739. He concluded that such a child might be at greater risk for becoming engaged in violence. *Id.* at 1739. On the other hand, such a child might be more averse to violence. *Id.* at 1739. Dr. Maher did not express an opinion about how the death of Mr. Butler's mother affected Mr. Butler specifically.

Sentencing Order and Spencer Memorandum

The trial court's sentencing order reflects the paucity of mitigating evidence presented during the penalty phase. Overall, the court found that the mitigation presented was relatively minor. R. Vol. V, 835.

The trial court stated that "The psychiatrist testified that *a person* experiencing a cocaine high may engage in behavior which is abnormally persevering . . ." R. Vol. V, 831. (Emphasis added). The court also noted that

neither Mr. Butler nor any other witness testified to impairment. *Id.* at 831.

With regard to the mitigating factor under 921.141(6) (b), Fla. Stat. that the defendant was under the influence of extreme mental or emotional disturbance when the crime was committed, counsel provided less than two pages of argument in the *Spencer* memorandum. R. Vol. V, 775-76. Counsel argued that, "In support of this statutory mitigating factor, the defense presented the court with testimony from the defendant as well as friends and relatives to the effect that Harry was under extreme mental or emotional disturbance." *Id.* at 776. Despite this claim, however, counsel did not cite any of this testimony, probably because no such testimony was presented prior to sentencing.

The trial court recognized this lack of evidence when it stated in its sentencing order that, although Mr. Butler argued that "he presented to the court with his own testimony and the testimony of friends and relatives 'to the effect' that he was under extreme emotional disturbance," he did not in fact offer such evidence or cite such testimony. R. Vol. V, 832. The trial court recounted testimony that was presented during the guilt/innocence phase and concluded that this mitigator was unsupported by the evidence. *Id.* at 832-33.

The trial court's analysis on this point demonstrates that counsel's argument cannot make up for deficient investigation, preparation, and presentation of

mitigating evidence. It certainly appears from the trial record that Mr. Schwartzberg, the more experienced attorney, stepped in and gave the penalty phase closing argument, despite having told the jury that his role was limited to the guilt/innocence phase, in an effort to salvage a situation brought on by the deficient performance of Ms. Borghetti.

Counsel further argued in the sentencing memorandum that, "The defense did not present expert physician testimony to establish Harry's mental condition since he was maintaining his innocence." R. Vol. V, 776. That statement does not make sense, since an expert, unlike the defendant and his friends and relatives, is uniquely able to testify on the basis of hypotheticals, such as a request to incorporate the facts presented by the State through crime scene witnesses and the medical examiner. That is routine practice in a criminal case. Mr. Butler had already been found guilty. Furthermore, in guilt phase closing arguments, Mr. Schwartzberg argued for second degree murder as a lesser-included offense, despite Mr. Butler's claim of innocence. R. Vol. VII, 1160-62. This was a sentencing proceeding. Not only were counsel's statements wrong as a matter of evidentiary law, but if it were generally enforced in capital cases it would lead to the wholesale prohibition of expert mental health testimony in cases where the defendant asserts his innocence.

Regarding nonstatutory mitigation, the trial court stated in its sentencing memorandum that, "[t]he defendant offered the testimony of a psychiatrist, who said the defendant's family history showed he was caught in a cycle of domestic violence." R. Vol. V, 833. In response, the trial court found that "no evidence was presented that the defendant's family circumstances involved violence." *Id.* at 833. Counsel further argued in the sentencing memorandum that Mr. Butler had a "troubled childhood." *Id.* at 777. The trial court, however, found that "Poverty is not a per se indicator of a troubled childhood, and the defendant offered no other evidence to convince the Court this circumstance exists." *Id.* at 834.

In support of the mitigating circumstance that "Harry Butler is well thought of by friends, neighbors, and co-workers," counsel referred to two witnesses who were called during the guilt/innocence phase. R. Vol. V, 778. One witness was Ted Dallas, whose testimony on direct examination was that Mr. Butler did not seem angry when Dallas picked him up after his release from jail on the domestic battery. R. Vol. XV, 818-30. His testimony did not say anything about how he or anyone else thought of Mr. Butler generally. *Id.* at 818-30. The other witness, James Wood, was called by the State. The totality of his testimony as it relates to this mitigating circumstance was as follows:

Q. Harry worked for you eight years?

A. For a long time, yes,
Q. Good worker?
A. Oh, yeah, real good worker.
Q. Showed up when he was supposed to?
A. Everyday.
Q. And you still consider Harry your friend, don't you sir?
A. Sure enough.

R. Vol. XIV, 637-38. The Court commented in its sentencing order that the facts shown were "not an outpouring of support," and further noted that the court file was "devoid of letters or notes in support of the defendant." R. Vol. V, 835.

Regarding additional mitigation, counsel stated in the sentencing memorandum that "[o]ther witnesses were expected to testify as to Harry's character but they were unavailable at the time of trial." R. Vol. V, 779.

Trial Counsel's Testimony at the Evidentiary Hearing Concerning Penalty Phase

Mr. Watts was in charge of the penalty phase, and Ms. Borghetti followed his lead, deferring to him in terms of virtually everything. PC-R. Vol. VIII, 1214-15. Ms. Borghetti, who had not previously been involved in a case in which the State was seeking the death penalty, worked on the case "for the experience" so that she could become certified to be first chair on death penalty cases. PC-R. Vol. V, 813; PC-R. Vol. VIII, 1212. Ms. Borghetti, Mr. Watts, and Mr. Schwartzberg would all meet together and talk about the penalty phase. *Id.* at 1216.

The attorneys did their own mitigation investigation in Mr. Butler's case. PC-R. Vol. VIII, 1281. There was not a mitigation expert on the case, or an investigator who concentrated specifically on the penalty phase. *Id.* at 1216, 1268, 1272. Ms. Borghetti used a forensic assessment form she obtained at a death penalty seminar to interview Mr. Butler and collect background information from him. *Id.* at 1219. Ms. Borghetti's records indicate that the mitigation witnesses she spoke with prior to Mr. Butler's penalty phase trial included Robin Green, the mother of his child; Sandra Butler, his sister; Junior Butler, his father; Terry Butler, his brother; and James Wood. *Id.* at 1218. Ms. Borghetti has reports from Dr. Smith, Dr. Fireman, and Dr. Maher in her file, but she does not specifically remember speaking with any one of them. *Id.* at 1222. Although the defense filed a Notice of Intent to Present Testimony of Mental Mitigation through Dr. Fireman, Dr. Fireman did not testify. *Id.* at 1229. There is no evidence that trial counsel obtained Mr. Butler's school records from Georgia. *Id.* at 1249, 1276-77.

The penalty phase did not go as planned. PC-R. Vol. VIII, 1215. The guilt phase ended on Friday afternoon, and they came back on Saturday morning to begin the penalty phase. *Id.* at 1269. Ms. Borghetti handled the penalty phase opening statement, direct examination of the two defense witnesses, and the *Spencer* memorandum. *Id.* at 1213, 1221. Mr. Schwartzberg did the penalty phase

closing. *Id.* at 376.

Some of the witnesses they expected to show up during the penalty phase trial did not appear. PC-R. Vol. VIII, 1217. During the week of the guilt phase, several of Mr. Butler's family members and associates whom the defense intended to call as penalty phase witnesses were present. *Id.* at 1269. On the morning of the penalty phase trial, a carload of those witnesses failed to appear. *Id*. According to Mr. Watts, the witnesses who did not appear were the best witnesses and the witnesses who would have done the most good, including Harry's son, Harry Jr., and his son's mother, Robin Green. *Id.* at 1272, 1279. Although Mr. Watts felt that those witnesses would have been better witnesses than the two who ultimately ended up testifying, he made the call to go ahead with the penalty phase without them. *Id.* at 1269.

Ms. Borghetti described what went wrong:

> It was horrendous. The witnesses that did show up were horrible. They – his father only wanted to testify to the fact that he didn't kill his wife, wouldn't – didn't say anything good.
>
> And his sister, I guess, had had a dream that night that Harry had told her that he did it, and she turned to the jury and blurted that out or I think it was a dream. Maybe. That's what I recall.
>
> I recall it was so bad that Michael Schwartzberg threw a pen at me to sit down and to stop talking, to stop asking questions. I don't know which witness it was that did it. But he did that. That's how bad it

was.

Id. at 1215.

As a result of his negative experience with Mr. Butler's penalty phase, Mr. Watts changed his practice in a couple of regards. PC-R. Vol. VIII, 1268. First, he now employs a mitigation expert in almost every case, who shares information about the defendant's social background with the psychologist and defense attorney. *Id.* at 1268, 1273. Additionally, he now subpoenas all penalty phase witnesses. *Id.* at 1268.

Mitigation Evidence Presented at the Evidentiary Hearing

Annie Brookins

Annie Brookins was born in 1947. PC-R. Vol. XVIII, 3043. She has known the Butler family since she was fifteen years old. *Id.* at 3017. Her aunt was married to a member of the family, and they traveled from Florida to Georgia once or twice a year for two weeks to one month at a time to visit the Butler family until Ms. Brookins was in her late twenties or early thirties. *Id.* at 3017-19, 3025, 3042.

The Butler family lived and worked on a plantation approximately seven or eight miles from the main road, down a dirt road "way back in some woods." PC-R. Vol. XVIII, 3018-19. The wooden house they lived in was "raggedy" and "run down." *Id.* at 3019-20. There were holes in the roof, and it leaked. *Id.* "You

could sit in a chair and see the ground underneath the house." *Id.* at 3020. There was no electricity or running water. *Id.* at 3020. The house was heated by a wood burning fireplace and lit with kerosene lamps. *Id*. The families living on the plantation shared an outhouse with their neighbors. *Id.*

All of the families who lived on the plantation worked in the tobacco fields. PC-R. Vol. XVIII, 2021. The owners of the farm were white, and all of the people who worked there were black. *Id.* at 3023. They grew the tobacco, hoed it, cut it, and carried it to the barn. *Id.* at 3021. The children who lived on the plantation also worked in the fields, including Harry. *Id.* Some of the children who worked on the plantation were as young as six or seven years old. *Id.* at 3022. The children carried tobacco, and those who were too small to work in the fields carried water to the people who were working in the fields. *Id.* at 3021. The children only attended school when it was not tobacco season. *Id.* at 3022.

Ms. Brookins described the relationship between the white community and the black community where Harry grew up in Georgia. More value was placed on white people than on black people. PC-R. Vol. XVIII, 3024. Black people treated white people with respect, saying "Yes m'am" or "Yes, sir boss." *Id.* at 3023. White people did not treat black people with the same respect, and it was acceptable use the "N word." *Id.* at 3024. Ms. Brookins described what happened

when a black person who worked on the plantation got in trouble:

> If he was a good worker and they liked him, they didn't care what you do. You'd never go to jail. You know it was like you was his boy or you was his girl. You know, you didn't have to worry because you weren't going to jail or nothing.

Id. at 3024. Even in death, white people were treated differently than black people:

> [W]hite had nice cemeteries. Blacks had – when you find a church way back in the woods and the cemetery in the back of the church, you know. They had buried, put you in a box and dig a hole, put you in, you know. Put a jag of flowers there. Take something and made a cross, make a marker, you know so they know whose grave it is.

Id. Ms. Brookins testified that there was no way she would have liked to have lived in Georgia where the Butler family lived back then. *Id*. at 3025.

Ms. Brookins has known Harry Butler since he was born. PC-R. Vol. XVIII, 3042. He wore raggedy clothes as a child, with patches and holes. *Id.* at 3022. She described Harry as a "good child" and a "fat chubby red boy." *Id.* at 3038. He was "[h]appy as he could be with what he had . . . They didn't have nothing really to be happy with." *Id*. at 3050.

Harry's parents were Rochester Butler Jr. (Junior) and Estelle Butler (Spig). PC-R. Vol. XVIII, 3025-26. When Junior and Spig started dating, he was approximately 27 years old and she was approximately fourteen years old. *Id.* When they married, she already had a child with another, unknown, man. *Id.* at

3027. She had three more children with Junior: Terry, Harry, and Sandra. *Id.* at 3028.

There was a culture of marital infidelity in the Butler family, to which the children, including Harry, were exposed. PC-R. Vol. XVIII, 3033. Junior's father, Mitchell Butler, had two children by his wife, Annie Will Butler, and nine or ten children by Harry's mother, Hattie Mae. *Id.* at 3031. He lived with his wife in a house next door to Hattie Mae, and he carried on a relationship with both women at the same time. *Id.* at 3032-33.

> When he get ready to go sleep with Miss Hattie, he'd leave and go sleep with Miss Hattie. He ready to sleep with his wife, he'd go back home. On Saturdays, every other Saturday the ladies swap seats [in the car]. One Saturday the wife ride in the front, one Saturday the woman ride in the front and the wife ride in the back.

Id. at 3033. Junior and Spig also cheated on each other. *Id.* at 3030. Spig was having an affair with a married man named Chamberlain, who lived on a different farm. *Id.* at 3031. Junior cheated on Spig with several different women, including a woman named Sister. *Id.* Hattie Mae and others used to say that Junior was "whoring" just like his daddy. *Id.*

In addition to infidelity, Junior had a propensity for violence toward women. Junior and Spig engaged in "knock out" fist fights in front of the children, including Harry. PC-R. Vol. XVIII, 3034. Later, when Junior was with Ms.

Brookins, he was physically abusive toward her. *Id.* at 3039. He gave her black eyes and a scar on her left cheek from where he cut her with a knife. *Id.*

Spig's behavior was wild and erratic. She was very pretty, with light skin and green eyes. PC-R. Vol. XVIII, 3026. A lot of men showed an interest in her. *Id.* at 3027. She was wild, and she liked to flirt. *Id.* She drank every weekend. *Id.* at 3029. Spig would often leave, and nobody knew where she was, so Miss Hattie had to keep the children. *Id.* at 3029-30. Ms. Brookins recalled an incident when Sandra was only three weeks old, and she and Spig drank moonshine together. *Id.* at 3028. Spig drank too much and she said she was going to throw the baby out the window. *Id.* Ms. Brookins grabbed Sandra from Spig and took her to Miss Hattie. *Id.* at 3029. Spig became ill that night and was throwing up and bleeding heavily, so they took her to the hospital. *Id.*

At some point, Junior and Spig moved to Largo, Florida. PC-R. Vol. XVIII, 3035. Shortly thereafter, Spig left and went back to the plantation in Georgia. *Id.* Ms. Brookins was living in Clearwater at the time, and she heard that Spig was either drowned by Chamberlain, the man she was having an affair with, or drowned accidentally. *Id.* Years later, Harry's oldest brother also drowned on a weekend trip to Ft. Lauderdale. *Id.* at 3040.

Sometime after Spig passed away, Ms. Brookins and Junior started dating,

and they lived together in Largo. PC-R. Vol. XVIII, 3036-37. Harry, who was ten or eleven at the time, and his siblings lived with their grandmother, Hattie Mae, in Georgia. *Id.* After some time, Sandra, the youngest child, came to live with Junior and Ms. Brookins, while the boys stayed with Hattie Mae. *Id.* at 3037.

Eventually, Junior and Ms. Brookins broke up because Junior was cheating on her. Pc-R. Vol. XVIII, 3038. She found out later that he had another child by the name of Isaiah, who was born either when they were together or shortly before they got together. *Id.* at 3038-39. Isaiah also lived on the plantation, across the street from the Butlers. *Id.* at 3039.

Mr. Butler's trial attorneys did not contact Ms. Brookins. PC-R. Vol. XVIII, 3041. She was living in Ft. Lauderdale at the time of the trial and she would have been available to testify at trial had she been called. *Id.* at 3041; 3046.

Maude Brown

Maude Brown is Harry Butler's great aunt. PC-R. Vol. VI, 919. Ms. Brown grew up in a home with Harry's mother, who was two or three years older than Ms. Brown. *Id.* at 919, 921.

Harry's mother, Estelle Walker, had several nicknames. Estelle's mother gave her the nickname "Spig." PC-R. Vol. VI, 920. On the farm, she was called "Pickaninny," which is a derogatory name. *Id.* Her grandmother, on the other

hand, called her "Grand" because she was so beautiful. *Id.* at 15.

Ms. Brown's parents, who were Spig's grandparents, raised Spig. PC-R. Vol. VI, 919-20. Spig's mother, Elease, was only thirteen years old when Spig was born. *Id.* at 921. Spig's father, Wilbert Walker, was approximately thirty-five years old and married with a family. *Id.* at 921-22. Mr. Walker, who lived and worked on another farm a couple of miles away, was a friend of Elease's mother. *Id.* at 922. Elease's parents were not happy about the situation because Elease was a young girl and they felt that Mr. Walker took advantage of her. *Id.* at 922-23. Elease lived at home after she gave birth to Spig, but when she was fifteen years old she married Willie Washington and moved away. *Id.* at 924.

Spig was "young and wild." PC-R. Vol. VI, 930. She drank moonshine. *Id.* at 931. She did what she wanted to do, and she did not like taking orders. *Id.* at 930. Spig was a pretty girl, and a lot of men were interested in her. *Id.* She had her first child, Levester, when she was fourteen years old, and Ms. Brown never learned who the child's father was. *Id.* at 932. She later married Junior, and they had three children together: Terry, Harry, and Sandra. *Id.* at 933. Harry was born in 1961, and he lived on a nearby tobacco farm, which was similar to the farm where Ms. Brown and Spig grew up. *Id.* at 933-34.

Both Spig and her youngest child, Levester, died tragically at the age of

twenty-three. PC-R. Vol. VI, 935. She heard that a man named Johnny Chamberlain murdered Spig, but he did not serve any time for the crime. *Id.* at 934. Harry was only two or three years old when his mother died. *Id.* at 937. Levester died from drowning. I*d.* at 935.

The Butler family lived and worked on the Preston Leslie Farm, which was so named because Preston Leslie was the owner of the farm. PC-R. Vol. VI, 925. As far back as she knew, her family had always lived on this farm. *Id.* at 943. Six or seven other families also lived on the farm. *Id.* at 925. During the tobacco season, they worked in the tobacco field. *Id.* In March, they put the tobacco in the barns, and the ladies worked in the barns. *Id.* at 926. The children worked in the field from April until late July. *Id.* Sometimes the children were not able to attend school because they had to work in the fields. *Id.* at 927. Other times, the children came home early from school because they had to work in the field. *Id.* at 928. Ms. Brown was five years old when she started working in the field. *Id.* at 926. Spig also worked on the farm. *Id.* at 928.

The Preston Leslie farm was ten miles from town. PC-R. Vol. VI, 929. When Ms. Brown was growing up, her family did not own a car. *Id.* at 923. There was a bus that went into town, but they could not afford the bus fare. *Id.* at 929. Instead, they had the option of walking to town or getting the "boss man" to take

them in his truck. *Id.*

The farm provided housing for the workers. PC-R. Vol. VI, 925. They used oil lamps for light because the houses did not have electricity. *Id.* at 926-27. They used outhouses because the houses did not have indoor plumbing. *Id.* at 926-27. For many years they had to carry water from a spring in the woods, and they washed their laundry in a tub. *Id.* at 927-28. There were cracks in the houses where the sun shined though. *Id.* at 926. It was very cold in the winter, and they used a fireplace for heat. *Id.*

Ms. Brown testified that none of Harry's trial attorneys contacted her. PC-R. Vol. VI, 936. She was living in St. Petersburg at the time of the trial and she would have been available to testify at trial had she been called. *Id.*

Shirley Furtick, MSW

Shirley Furtick, MSW testified about the biopsychosocial assessment she conducted on Harry Butler. A biopsychosocial assessment is a nationally known tool used by clinical social workers to gather information about a particular individual, group, or family. PC-R. Vol. VI, 951. In this case, Ms. Furtick interviewed numerous witnesses, reviewed records and scholarly literature, met with Mr. Butler, visited the plantation where Mr. Butler grew up, and consulted with Dr. Caddy. PC-R. Vol. VII, 1037-1044.

Ms. Furtick identified patterns of substance abuse, mutual infidelity, unstable relationships, violence, and economic deprivation in the Butler family. PC-R. Vol. VII, 1054. She traced these patterns as far back as Harry's grandparents. *Id.* His grandfather, Mitchell Butler, was married to Annie Walker. *Id.* at 1050. His grandmother, Hattie Polk, who also lived on the "plantation farm," was his girlfriend. *Id.* at 1050-51. Ms. Walker and Ms. Polk did not get along, and Ms. Polk was known to frequently drink and go after Ms. Walker. *Id.* at 1051.

These patterns continued with Harry's parents. PC-R. Vol. VII, 1054. There was mutual infidelity, and both of Harry's parents abused corn liquor. *Id.* at 1054, 1071. They had frequent altercations with one another. *Id.* at 1054. Although they physically abused each other, it was mostly initiated by Harry's mother. *Id.* at 1074. Harry's mother was a headstrong person who would sometimes leave for days, with no one knowing where she was. *Id.* A relative would take the children while she was gone, and when she returned she would become antagonistic with Junior. *Id.*

There was also a pattern of women having children at a very young age. Harry's mother, Estelle, was born to a thirteen year old girl. PC-R. Vol. VII, 1069. Similarly, when Harry's parents met on the plantation Estelle was fourteen years old and Junior was approximately nineteen years old. *Id.* Estelle already had one

child, Levester, from another man. *Id.* at 1073. It was common back then for women on the plantation to have children at a very young age so that they had more people to work and make money for the family. *Id.* at 1070.

Even with these extra bodies earning income, it was difficult for families on the plantation to make ends meet. They grew their own produce, and they were dependent on the owner of the plantation for seeds. PC-R. Vol. VII, 1070. They only made $4.50 a week working on the farm, and sometimes they were so indebted to the plantation owner that they did not even get that. *Id.*

Harry's mother, Estelle, had several nicknames, including "Spig" and the racially derogatory nickname "Pickaninny." PC-R. Vol. VII, 1068. Ms. Furtick described the significance of the name "Pickaninny":

> What I can akin it to, if I might use an example, if you recall the ministries (sic) of I guess it would have been the '50s, 60s, when you would have the white ministries (sic) with black faces or you had the Amos and Andy show and they would have the black faces with the little bows tied in the hair, kind of up and bows stuck around, that was the image of the pickaninny during that time.

Id. at 1069.

Harry experienced a series of losses and a chaotic home environment throughout his life, beginning in his early childhood. PC-R. Vol. VII, 1054, 1057. His mother died at Christmastime when he was three years old. *Id.* at 1082. The

death certificate listed the cause of death as an accidental drowning. *Id.* at 1140. However, there was a rumor in the family that she was murdered, and Harry grew up believing that his father killed his mother. *Id.* at 1079. Although Junior testified at Harry's trial about being accused of murdering Spig, it is not documented anywhere. *Id.* Furthermore, he could not have murdered her because he was in Largo, Florida when she died in Georgia. *Id.* at 1082.

After his mother's death, Harry and his brothers were sent to live with their paternal grandparents on the plantation in Georgia for the next six years. PC-R. Vol. VII, 1055-56, 1069. Harry did not have contact with his mother's family again until his teens. *Id.* at 1059. His father stayed in Florida. *Id.* at 1057. His sister, Sandra, went to live with another family member. *Id.* at 1080. Around that time, Harry developed enuresis, or bed wetting, which continued for two years after his mother's death. *Id.* at 1056-57. When this happened, Harry would be woken up in the middle of the night and paddled. *Id.* at 1057.

Ms. Furtick described Harry's life on the plantation in Georgia during the years he and his brothers lived with their grandparents. They lived in a crowded two bedroom shack with no electricity, no running water, and outdoor toilets. PC-R. Vol. VII, 1065, 1080. They were malnourished because they did not have food available to them. *Id.* at 1080. The children worked in the tobacco fields

alongside their parents. *Id.* at 1056. Young children, including Harry from the ages of five to ten, would wake up at 6:00 am to tote tobacco leaves from one area to another and carry water to the workers. *Id.* at 1066, 1080. If the children did not get up, they were beaten. *Id.* at 1080. When they were not working, the children were left to fend for themselves while their parents worked in the tobacco fields, and they acted as surrogate parents for each other. *Id.* at 1056.

Harry's grandparents used physical discipline on Harry and his brothers. According to the children, Mitchell Butler was a particularly harsh disciplinarian:

> He was the one that if they didn't get up at the time allotted to go to the fields, then they would be woken with a strap. Or once they got home at night, then he would get them up out of bed and would beat them with a strap or whatever he could get his hands on at that time.

PC-R. Vol. VII, 1083. Hattie Polk also employed physical discipline, whether it was with the strap, her hand, or whatever she could find. *Id.* at 1083. Sometimes the children would run, and their grandparents would wait until they went to bed to wake them up and beat them in the middle of the night. *Id.* at 1084.

The school system where Harry lived in Georgia was bad. PC-R. Vol. VII, 1067. Harry's father was illiterate due to his lack of education. *Id.* at 1071. During harvesting season, the children were not allowed to go to school because they had to stay home and harvest the tobacco. *Id.* at 1065. There were no

programs in place to address educational deficits or learning disorders. *Id.* at 1068. In the mid 1960s and early 1970s, the schools were just beginning to be racially integrated, and the black children from the plantations were still separated from the white students. *Id.* at 1067. The children from the plantations were generally not nicely dressed, and they would come to school in torn pants. *Id.* at 1067, 1065. At times, they were picked on by the other children. *Id.* at 1067. When the children did not do what they were told, the teachers paddled them. *Id.*

Harry's grandmother passed away when Harry was ten, once again depriving Harry of the bonding attachments children need from birth to age twelve. PC-R. Vol. VII, 1057. Harry's grandfather died soon thereafter. *Id.* at 1084. Harry moved to Largo to live with his father, where he lived until he was eighteen. *Id.* at 1057. At the time, Junior was living with his girlfriend, Annie Brookins, but they broke up shortly after Harry moved to Florida. *Id.* at 1085.

There were no strong adult males in the home, and Harry was left to provide for himself, without parental supervision, structure, or guidance. PC-R. Vol. VII, 1058. Although his father was a role model in terms of a strong work ethic, he did not provide emotional support for Harry, and he was in and out of the home. *Id.* at 1059. Harry's older brother, Terry, acted as a surrogate parent to Harry, and the two were very close. *Id.* at 1086, 1088. When Harry was fourteen years old,

Terry, who was seventeen, went to prison for a couple of years, leaving Harry to parent himself. *Id.* at 1058, 1090. When Harry was seventeen years old, his brother Levester drowned at the age of twenty-three. *Id.* at 1056.

Ms. Furtick explained what happens when emotional bonding does not occur with children, or when this bonding is interrupted:

> With emotion bonding, all children need to bond with their primary caretaker, and, of course, when that doesn't happen, children develop lack of self-image, lack of self. They don't make good relationships . . . with other people. They have problems with self-esteem in early school, throughout peer relationships. . . [C]hildren have to go through stages of development. If any aspect of that developmental stage, that milestone, is not reached, then if it's not resolved and not successfully completed, there will be a deficit for that child and in Harry's case the deficit is being able to emotionally attach and form feeling relationships.

PC-R. Vol. VII, 1077-78.

As a result of Harry's lack of parental supervision, structure, and guidance, Harry experienced substantial gaps emotionally and academically. PC-R. Vol. VII, 1058-59. Despite everything he was dealing with in his childhood, he did not receive counseling. *Id.* at 1060. In one of Harry's school reports from the fifth grade, shortly after his grandmother passed away, a teacher commented "slow, slow, slow." *Id.* at 1059-60. He received Ds and Fs throughout high school. *Id.* at 1090. On the other hand, he was a very good football player. *Id.* at 1091.

However, he dropped out of school in eleventh grade after he broke his leg and could not play football anymore. *Id.* at 1091-92.

Although Harry learned from his father the importance of working and taking care of the family, he did not have the intellectual skills to do so. PC-R. Vol. VII, 1085. When Harry was approximately eighteen years old, Robin Green, his girlfriend of five years, became pregnant, and he felt that he needed to support her, as well as his siblings. *Id.* at 1083, 1095. After dropping out of school, Harry held various unskilled jobs doing sanitation at Orange Grove Garbage Service, stocking at Winn-Dixie, and doing construction. *Id.* at 1094. He left each of these jobs because he felt he was not making enough money. *Id.* He worked at an aluminum company for one and a half to two years, and he quit when his supervisor told him that he would be placed in a position that would become available and that did not happen. *Id.*

Harry eventually started selling drugs because it was easy money. Pc-R. Vol. VII, 1096. He lived in the projects, and his friends were in the drug trade. *Id.* For Harry, selling drugs was the best way he knew to take care of his family. *Id.* at 1100. His girlfriend, Robin, eventually left because Harry was selling drugs and using cocaine and crack cocaine. *Id.* at 1139.

Ms. Furtick discussed risk factors and protective factors. PC-R. Vol. VII,

1097. "[I]n order for children to grow up as happy, successful, productive, functional adults, there are supports and resources and helping things that need to happen in their life." *Id.* at 1099. In Harry's case, these things were not there. *Id.* The risk factors in Harry's life included unstable relationships, substance abuse, domestic violence, relational losses, emotional cutoffs from extended family, poverty, and intellectual deficits. *Id.* at 1100-03. The losses he suffered impacted his ability to bond with people, and taught him not to trust or become attached to others because they eventually leave. *Id.* at 1102. Harry overcompensated for his intellectual deficits by acting tough, or using rationalization or denial. *Id.* at 1109. Ms. Furtick did not find any protective factors that would have helped put Harry on a positive path. *Id.* at 194. She concluded that, given the many risk factors that he faced with no protective factors, it is not surprising that he engaged in criminal activities such as selling drugs. *Id.* at 1109.

Glenn Ross Caddy, Ph.D

Glenn Ross Caddy, Ph.D was initially hired by CCRC-Middle to look into Mr. Butler's competence. PC-R. Vol. VII, 1152. His involvement in this case eventually segued into an investigation concerning mitigation. *Id.*

Dr. Caddy performed a thorough review of Mr. Butler's school records. Mr. Butler's performance in school was poor. PC-R. Vol. VII, 1157. He received

mostly C's, D's, and F's in school, yet he was promoted because he was getting older. *Id.* at 1157, 1161. He had a significant number of absences. *Id.* at 1160. In 1971, when Mr. Butler was in fifth grade, a teacher made the notation, "slow, slow, slow," on Mr. Butler's permanent record. *Id.* at 1157-58. In 1972, another teacher wrote, "Harry showed little interest in his work. He is quite slow in all areas." *Id.* at 1159. Standardized testing that was conducted in Pinellas County revealed that Mr. Butler was performing below normal levels. *Id.* at 1160. Likewise, testing and educational status reports from the Department of Corrections records revealed that Mr. Butler was underperforming intellectually. *Id.*

Dr. Caddy reviewed records from Suncoast Hospital in Largo, Florida, dated June 1978. PC-R. Vol. VII, 1162. Mr. Butler was hit over the head with a pipe, and there was an orbital fracture. *Id*. Several days into his hospitalization, he became belligerent and was disoriented, which suggests that there was a brain impact. *Id.*

Dr. Caddy's first meeting with Mr. Butler took place on January 3, 2004 and lasted for approximately six hours. PC-R. Vol. VII, 1163, 1172. Mr. Butler provided Dr. Caddy with a family history. *Id.* at 1165. He also reported an extreme fear of the dark, speech disfluency, and difficulties with sleep. *Id.* at 1167. He described the 1978 incident in which he was hit in the head and suffered a

severe injury. *Id.* at 1169. Although Mr. Butler claimed that he did not have a problem with drugs or alcohol, he reported that it was common for him to drink twelve to eighteen beers a day. *Id.* at 1170. At the end of the first visit, Mr. Butler asked Dr. Caddy, "Why didn't they do this at trial?" *Id.* at 1175. Dr. Caddy understood this to mean somebody with an advanced degree sitting down and spending a lot of time with him. *Id.*

On his second visit with Mr. Butler, which took place on May 21, 2004, Dr. Caddy intended to begin some formal testing. PC-R. Vol. VII, 1173, 1177. When he attempted to administer an IQ test, Mr. Butler would not allow it. *Id.* at 1174. Mr. Butler explained to Dr. Caddy that he was not retarded and he does not want anybody to try to say he was retarded. *Id.* However, it was clear to Dr. Caddy by the end of the second visit that the real reason Mr. Butler did not want to submit to formal intellectual testing was that he did not have confidence in the results, and he wanted to have a view of himself as a bright person. *Id.* at 1176.

Dr. Caddy was able to convince Mr. Butler to submit to some psychological testing by explaining to him that he wanted to understand a little bit about his brain functioning and promising him that he would not conduct an intellectual assessment. PC-R. Vol. VII, 1175, 1177. This testing took place on the second visit, as well as the third visit on August 11, 2005. *Id.* at 1177. The testing

revealed that Mr. Butler's brain functions are "pretty inadequate." *Id.* at 1185. He would be limited, in terms of his vocational abilities, to low-grade laboring positions. *Id.* As a result of his intellectual and scholastic limitations, he did not have the tools to extract himself from the world of drug dealing and crime that he was involved in. *Id.* at 1187-89. "On the other hand, he actually presents interpersonally a little bit brighter than he actually performs operationally" and "he puts a fair bit of emphasis on impression managing." *Id.* at 1185. It is not possible to get a realistic appraisal of his abilities until you get under the venire. *Id.* at 1186.

Dr. Caddy further described how Mr. Butler's disadvantaged upbringing affected the person he is as an adult:

> [I]t contributed to the compromising of opportunity. It influenced his sense of self. It caused him to have a very negative attitude to people – towards people who seem well-to-do. I don't think that it was so much that he was jealous of what they had, but fundamentally resentful of the inequities to which he had been exposed.

PC-R. Vol. VII, 1168. He "was exposed to so many unfortunate and tragic things that he had to suck it all in and cope" as a form of self-preservation. *Id.* at 1167.

Analysis

Deficient Performance Under *Strickland*

Counsel's performance during penalty phase fell below an objective

standard of reasonableness." *Strickland,* 466 U.S. 668. In contrast to the trial court's finding that the mitigation presented at trial was "relatively minor," a wealth of mitigation evidence was presented in postconviction. This evidence, which was not presented during the penalty phase of Mr. Butler's trial, includes patterns of substance abuse, marital infidelity, unstable relationships, domestic violence, economic deprivation, a series of losses, emotional cutoffs from extended family, a chaotic home environment, intellectual and educational deficits, and a lack of parental supervision.

From the time the Office of the Public Defender withdrew to the time of Mr. Butler's trial, the defense team had approximately eight months to prepare. PC-R. Vol. IX, 1339. Guideline 11.4.1(A) of the 1989 ABA Guidelines states:

> Counsel should[9] conduct independent investigations relating to the guilt/innocence phase and to the penalty phase of a capital trial. Both investigations should begin immediately upon counsel's entry into the case and should be pursued expeditiously.

Id. at 1339. Professor Dow explained that attorneys are not permitted under the Guidelines to simply continue the investigation where the previous attorneys left off, but instead must conduct an independent investigation from the outset. *Id.* at 1340. Therefore, even if previous counsel already spoke with a witness, the new

[9] The word "should" in the Guidelines means "something that lawyers in the capital case must do." PC-R. Vol. IX, 1342.

counsel would be obliged under the Guidelines to conduct his own independent investigation and speak with the same witness. *Id.* at 1379. In the case at hand, even though the Office of the Public Defender previously represented Mr. Butler, Ms. Borghetti, Mr. Watts, and Mr. Schwartzberg were obligated to conduct an independent penalty phase investigation, and they were not permitted to rely on any investigation previously conducted in Mr. Butler's case.

Guideline 11.8.6(A) states:

> Counsel should present to the sentencing entity or entities all reasonably available evidence in mitigation unless there are strong strategic reasons to forego some portion of such evidence.

PC-R. Vol. IX, 1343. Guideline 11.8.6(B) lists a number of topics that counsel should consider presenting, such as medical history (including illness or injury, and alcohol and drug use); educational history (including achievement, performance, and behavior), special educational needs (including cognitive limitations and learning disabilities) and opportunity or lack thereof; employment and training history (including skills and performance, and barriers to employability); family and social history; and expert testimony concerning any of the listed factors and the resulting impact on the client, relating to the offense and to the client's potential at the time of sentencing. *Id.* at 1343-1344.

Although Ms. Borghetti did some investigation into Mr. Butler's

background and was aware of many details of Mr. Butler's life, including his childhood on the tobacco farm and the economic challenges that his family faced, this information was not presented to the jury during the penalty phase trial, or to the Court during the *Spencer* hearing. PC-R. Vol. VIII, 1246-47, 1282. Ms. Borghetti testified that she prepared subpoenas for two penalty phase witnesses, but these subpoenas do not appear in the record on appeal. PC-R. Vol. VIII, 1239. Counsel provided deficient performance by not subpoenaing the penalty phase witnesses. If the penalty phase witnesses who did not appear were subpoenaed and did not show up for the trial, counsel could have moved for an order to show cause under Fla. R. Crim. P. 3.840. Furthermore, when a carload of defense witnesses, including the two witnesses Mr. Watts felt would have been the most effective, failed to appear on the morning of the penalty phase trial, Mr. Watts provided ineffective assistance of counsel when he did not even ask for a continuance. PC-R. Vol. VIII, 1269.

Additionally, counsel provided deficient performance by failing to employ a mitigation expert in Mr. Butler's case. The Florida Statutes permit the introduction of hearsay at the penalty phase in a capital case. PC-R. Vol. IX, 1353; F.S. 921.142(2). However, unlike a person who is qualified as an expert in the field of mitigation, an attorney cannot testify about the mitigation investigation he or she

conducted. PC-R. Vol. IX, 1411. If counsel employed a mitigation expert prior to trial, that expert could have testified about Mr. Butler's background, and the jury would have heard that evidence even in the event that the lay witnesses did not appear. Instead, because counsel did not employ a mitigation expert in this case, the jury did not hear much of the information that the defense uncovered in its mitigation investigation, and there were some serious gaps in the defense's penalty phase case.

Capital attorneys have been employing mitigation experts since death penalty prosecutions resumed in the 1980s. PC-R. Vol. IX, 1351. In fact, the Guidelines recognize the use of mitigation experts in capital cases. *Id.* at 1357-58. Guideline 11.4.1(D)(3)(C) states in part:

> Counsel should attempt to conduct interviews of potential witnesses in the presence of a third person who will be available, if necessary, to testify as a defense witness at trial. Alternatively, counsel should have an investigator or mitigation specialist conduct the interviews.

PC-R. Vol. IX, 1354-55. Similarly, Guideline 11.4.1(D)(7)(D) states that "[c]ounsel should secure the assistance of experts where it is necessary or appropriate for presentation of mitigation." *Id.* at 1359. It took four to five years for the 1989 Guidelines to penetrate the culture of the defense bar in jurisdictions where capital attorneys either were not high-end criminal defense attorneys or were

not in public defender's offices that were focused on indigent capital defense. *Id.* at 1358. The use of mitigation experts became a minimum standard of care by the mid-1990's. *Id.* at 1351. By the time of Mr. Butler's trial in 1998, the use of mitigation experts in capital cases was commonplace. *Id.*

Professor Dow testified that it is both common and preferred for mitigation and mental health experts to rely on third-party witness interviews as a basis for their opinions. PC-R. Vol. IX, 1351. One of the reasons experts rely on third-party witness interviews is that they do not want to rely too heavily on testimony from the defendant:

> Sometimes because if the defendant is mentally impaired, the defendant's ability to give useful and meaningful information is also going to be impaired. Sometimes even in the case of a defendant who is not mentally impaired, the mere trauma of the event will interfere with his ability to give meaningful and useful information.
>
> And then on top of that, as I think was illustrated by this case, in cases where the professionals have some instinct or reason for believing that the defendant suffers from mental impairment, there are many defendants who deny that they have any mental impairment and, therefore, their self reporting is going to be intentionally false because they don't want to be diagnosed as mentally retarded or as mentally infirm.
>
> I think perhaps that Mr. Butler falls into that category, and for that very reason it's not only a mistake, but I think it's a serious mistake for mental health professionals to rely solely or even significantly on self-reporting when they are performing a mitigation investigation.

Id. at 3152. Hence, an interview, or a series of interviews, with the defendant is only the first step of many in the mitigation investigation. *Id.* at 3152-53.

Although the defense presented Dr. Maher at the *Spencer* hearing, Dr. Maher was not hired until very late. PC-R. Vol. IX, 1387. The Guidelines would have required that he be hired much earlier. *Id.* In contrast to Dr. Caddy and Ms. Furtick, he did not review "extensive materials on the case," including social service records, school records, or other kind of records of his childhood. R. Vol. XX, 1742, 1939. His testimony was extremely limited, and was based only on an interview with Mr. Butler lasting two hours and information provided in hypothetical "outline" form by counsel. R. XX, 1736, 1742. As Professor Dow noted, "neither Dr. Maher nor Dr. Fireman conducted the type of thorough, complete investigation in terms of conducting interviews, as well as administering diagnostic tests, that the experts who testified in this evidentiary hearing conducted." *Id.* at 1387.

Under *Wiggins*, a reviewing court must consider the reasonableness of counsel's strategy. *Wiggins,* 123 S. Ct. at 2527. Professor Dow testified that he could think of any strategic reason why any of the testimony presented by Dr. Caddy and Ms. Furtick during the evidentiary hearing would not have been presented at Mr. Butler's trial. PC-R. Vol. IX, 1347-48. All of the testimony that

Dr. Caddy and Ms. Furtick presented was mitigating, as opposed to aggravating, in nature. *Id.* at 1348. Furthermore, counsel did not offer any strategic reason for failing to present additional mitigating evidence during the penalty phase.

The State suggested during the evidentiary hearing that counsel would not want to introduce evidence about Mr. Butler being a drug dealer because they would not want the jury to know about it. PC-R. Vol. VIII, 1238, 1282-83. However, Mr. Watts acknowledged that Mr. Butler's drug use was "inextricably intertwined in the Defense case" and there would be no point in trying to hide it during the penalty phase. *Id.* at 1287. In fact, Mr. Butler himself testified during the guilt/innocence phase that he sold cocaine. R. Vol. XVI, 1015. The trial court cited Mr. Butler's testimony in the sentencing memorandum, in which it stated that he "testified that he supported his family by hustling, and that he kept his cocaine in the victim's apartment." R. Vol. V, 834. Mr. Watts informed the jury in the opening statement in the guilt/innocence phase trial that Mr. Butler sold cocaine. R. Vol. XI, 140. Likewise, Ms. Borghetti told the jury during her opening statement in the penalty phase trial that Mr. Butler is a drug dealer. R. Vol. XVII, 1253.

Thus, since the jury had been aware since defense counsel's opening statement in the guilt/innocence phase trial that Mr. Butler was a drug dealer, any

strategy on the part of counsel to avoid presenting available mitigating evidence for fear that the jury would find out that Mr. Butler was a drug dealer would have been unreasonable under *Wiggins*, 123 S.Ct. 2527. On the contrary, it would have made more sense for the defense to present evidence such as what was presented during the postconviction evidentiary hearing, which would have humanized Mr. Butler and explained how and why he came to sell drugs to support his family.

Prejudice Under *Strickland*

Mr. Butler was prejudiced by the damaging testimony that was presented by the defense during the penalty phase trial and counsel's failure to present the mitigating evidence that was presented during postconviction. "[T]here is a reasonable probability that, but for counsel's unprofessional errors," Mr. Butler would have received a life sentence. *Strickland*, 466 U.S. at 694.

Counsel's deficient performance prejudiced Mr. Butler because the witnesses whom the defense presented harmed Mr. Butler. Ms. Borghetti emphasized this point during the evidentiary hearing, when she testified that the penalty phase was "horrendous" and the witnesses who testified were "horrible." PC-R. Vol. VIII, 1215. In fact, one of the witnesses was so bad that Mr. Schwartzberg threw a pen at Ms. Borghetti so that she would stop asking questions. *Id.*

Much of Junior Butler's testimony at trial consisted of him describing how he was accused of murdering Harry's mother. R. Vol. XVII, 1254-64. According to Ms. Borghetti, Junior Butler, "didn't say anything good." PC-R. Vol. VIII, 1215. On the other hand, his testimony may have led the jury to believe that Harry followed in his father's footsteps by murdering the mother of his own children. What the jury did not hear is that the death certificate listed Ms. Butler's cause of death as an accidental drowning. PC-R. Vol. VII, 1140. Furthermore, it would have been impossible for Harry's father to have murdered his mother because he was in Largo, Florida when she died in Georgia. *Id*. at 1082.

The testimony of Harry Butler's sister, Sandra Butler, was at least equally damaging. She did not know very much about her brother and offered little, if any, mitigation. However, her testimony of a dream in which God told her that brother was the person who committed this crime was extremely damaging to Mr. Butler, who maintained his innocence throughout trial. R. Vol. XVII, 1272. Furthermore, Mr. Watts testified that counsel hoped that "lingering doubt" might be an issue for the jury in the penalty phase. PC-R. Vol. VIII, 1270. Sandra Butler, who was the final witness to testify in front of the jury during the penalty phase trial, would have erased any lingering doubt that the jury might have had.

Aside from counsel presenting witnesses during the penalty phase who

actually harmed his case, Mr. Butler was prejudiced by counsel's failure to present the mitigating evidence presented during postconviction. In order to assess the probability that in a case such as this the result would have been different if not for counsel's deficient performance, it is necessary to reweigh the mitigating evidence produced at trial and in postconviction against the aggravating evidence. *Williams v. Taylor*, 529 U.S. 362, 397-98 (2000); *See also*, *Porter v. McCollum*, 130 S.Ct. 447 (2009) (per curiam).

This is not a case in which the aggravating evidence was overwhelming and could not be outweighed by mitigating evidence. The only aggravating factor found by the trial court was that the murder of Leslie Fleming was especially heinous, atrocious, or cruel, as cited in 921.141(5)(h), Fla. Stat. (2008). R. Vol. V, 831. Justice Pariente stated on direct appeal that "Butler's crime is not among the 'most aggravated and unmitigated of [the] most serious crimes' for which the death penalty is reserved." *Butler*, 842 So. 2d at 841 (Pariente, J., concurring in part and dissenting in part) (quoting *State v. Dixon*, 283 So. 2d 1, 7 (Fla. 1973)).

Likewise, this is not a case in which the mitigating evidence presented during postconviction "would barely have altered the sentencing profile presented to the sentencing judge." *Strickland*, 466 U.S. at 700. The trial court found that the mitigation presented at trial was "relatively minor." R. Vol. XV, 835. In

contrast, a substantial amount of mitigation was presented during postconviction. When all of the mitigation presented at trial and during postconviction is reweighed against a single aggravating factor, the scales tip in Mr. Butler's favor. There is a reasonable probability that, had the jury, who recommended death by a vote of 11 to 1, heard all of the mitigating evidence that was available, a majority of the jury would have recommended a life sentence.

ARGUMENT X

THE CIRCUIT COURT ERRED WHEN IT DENIED MR. BUTLER'S CLAIM THAT HIS TRIAL WAS FRAUGHT WITH PROCEDURAL AND SUBSTANTIVE ERRORS, WHICH CANNOT BE HARMLESS WHEN VIEWED AS A WHOLE, SINCE THE COMBINATION OF ERRORS DEPRIVED HIM OF A FUNDAMENTALLY FAIR TRIAL GUARANTEED UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

Mr. Butler alleged in Claim XI of his motion for postconviction relief that his trial was fraught with procedural and substantive errors, which cannot be harmless when viewed as a whole, since the combination of errors deprived him of a fundamentally fair trial guaranteed under the Sixth, Eighth, and Fourteenth Amendments. PC-R. Vol. IV, 566-67. The circuit court conducted an evidentiary hearing on this claim, and found that cumulative error is not appropriate in this case. PC-R. Vol. XI, 1808-09. Mr. Butler seeks review of this finding.

Mr. Butler did not receive the fundamentally fair trial to which he was entitled under the Sixth, Eighth, and Fourteenth Amendments. *See Heath v. Jones*,

941 F.2d 1126 (11th Cir. 1991); *Derden v. McNeal*, 938 F.3d 605 (5th Cir. 1991). The sheer number and types of errors in Mr. Butler's guilt and penalty phases, when considered as a whole, virtually dictated a verdict of guilt and a sentence of death. While there are means for addressing each individual error, addressing these errors on an individual basis will not afford adequate safeguards required by the Constitution against an improperly imposed death sentence. Repeated instances of ineffective assistance of counsel, which are addressed in Arguments I though IX *supra*, significantly tainted Mr. Butler's guilt and penalty phases.

These errors cannot be harmless. Under Florida case law, the cumulative effect of those errors denied Mr. Butler his fundamental rights under the Constitution of the United States and the Florida Constitution. *State v. Diguilio*, 491 So. 2d 1129 (Fla. 1986); *Ray v. State*, 403 So. 2d 956 (Fla. 1981); *Taylor v. State*, 640 So. 2d 1127 (Fla. 1st DCA 1994); *Stewart v. State*, 622 So. 2d 51 (Fla. 5th DCA 1993); *Landry v. State*, 620 So. 2d 1099 (Fla. 4th DCA 1993).

CONCLUSION

Based on the foregoing, the circuit court improperly denied Mr. Butler relief on his 3.851 motion. Relief is warranted in the form of a new trial, a new sentencing proceeding, a remand to the trial court with directions that Mr. Butler's sentences be reduced to life, or any other relief that this Court deems proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief of Appellant has been furnished by United States Mail, first class postage prepaid, to all counsel of record and the Defendant on this ___ day of December, 2010.

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CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Initial Brief of Appellant, was generated in Times New Roman, 14 point font, pursuant to Fla. R. App. 9.210 (a) (2).

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