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

REPLY BRIEF OF APPELLANT

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APPELLANT'S ARGUMENT IN REPLY

The Appellant relies on the arguments presented in his Initial Brief. While he will not reply to every issue and argument raised by the Appellee, he expressly does not abandon the issues and claims not specifically replied to herein.

ARGUMENT V

THE CIRCUIT COURT ERRED WHEN IT DENIED MR. BUTLER'S CLAIM THAT EXCLUPATORY 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.

The Appellee argued in their Answer Brief that there was neither a *Brady* violation nor deficient performance with regard to the bloody print. Answer Brief of Appellee at 73-74. The Appellee stated:

> The defense received photographs of all latent prints lifted in this case, and deposed Donald A. Barker, who was in charge of forensics at the crime scene, and he testified about a bloody print on the phone. And, Ms. (Davis) Beauchamp was called as a *defense* witness at trial.

Id. at 72-73. Indeed, latent print examiner Carol (Davis) Beauchamp testified for the defense at trial, but her testimony was brief, and it was offered only to show that there were a number of unidentified prints found at the crime scene, which the State pointed out on cross examination is not unusual at a residential crime scene. R. Vol. XV, 840-48. Ms. Beauchamp's final report, which was furnished to the

defense in response to their discovery request, did not indicate that the prints developed on the phone were in blood. PC-R. Vol. XII, 1921-24. Trial counsel did not depose Ms. Beauchamp, and they did not request to see her bench notes, which would have alerted them to the significance of the bloody print. PC-R. Vol. V, 738, 826. At the evidentiary hearing, Ms. Beauchamp described her contact with defense counsel as being limited to a conversation with Mr. Schwartzberg "just prior to the trial." *Id.* at 751. Defense counsel did not make an effort to see Ms. Beauchamp's bench notes. Additionally, although defense counsel deposed Donald Barker prior to trial, and he testified at the deposition about a bloody print on the phone, R. at 1202, he did not testify about the bloody print at trial. R. Vol. XII, 265-326.

As a result of trial counsel's deficient performance, the jury was not made aware of the bloody print on the telephone. Mr. Watts testified that the defense team was probably aware of the bloody print in the sense that it was in discovery, "but we weren't aware of it in the sense of the significance or potential significance of it for the defense." PC-R. Vol. V, 825. He added that if he had known prior to trial what he knows now about the bloody print, he probably would have deposed Ms. Beauchamp. *Id.* at 826. When he was asked about the deposition of Mr. Barker, in which Mr. Barker indicated that bloody prints which

may or may not have been of comparable value were obtained from the phone, R. Vol. VII, 1202, Mr. Watts testified that "[v]iewed now, I see that as significant. At the time I didn't see it . . . And I don't think Mr. Schwartzberg did either." PC-R. Vol. V, 827.

While trial counsel's overall opinion about whether or not he provided effective assistance may be discounted in postconviction proceedings, the testimony from Mr. Watts on this point is not of an opinion but rather of primary, historical facts. The significance of an unknown bloody print of comparable value on the telephone at the crime scene to a "whodunit" defense is obvious. Trial counsel did not depose the fingerprint examiner or pursue other available discovery options, such as requesting the bench notes. Any experienced defense attorney would be familiar with how fingerprint evidence is developed; so this is not a case in which counsel understandably overlooked a line of defense because the science was novel or complicated. Those facts belie any present attempt by the Appellee to reconstruct a "reasonable strategy" argument because a reasonable strategy must be predicated on a reasonable investigation. *Wiggins v. Smith*, 539 U.S. 510 (2003). Counsel's failure to investigate the fingerprint situation at least to the point of determining whether there were or were not any bloody prints of comparable value at the crime scene, in a case where the defense was that someone

other than the defendant committed the crime, constitutes prejudicial deficient performance under *Wiggins*.

Furthermore, this Court has held that "when a failure to depose is alleged as a part of an ineffective assistance of counsel claim, the appellant must specifically set forth the harm from the alleged omission, identifying 'a specific evidentiary matter to which the failure to depose witnesses would relate.'" *Brown v. State*, 846 So. 2d 1114, 1124 (Fla. 2003) (quoting *Magill v. State,* 457 So.2d 1367, 1370 (Fla.1984). Here, a "specific evidentiary matter to which the failure to depose witnesses would relate," namely the existence of an unidentified bloody print of comparable value on the telephone at the crime scene, has been clearly and specifically identified.

In their Answer Brief the Appellee repeatedly referred to the bloody print on the telephone at the crime scene as a "palm print" in an effort to bolster their argument that it belonged to the victim. Answer Brief of Appellee at 11, 12, 31, 69. Ms. Beauchamp explained at the evidentiary hearing that sometimes there is no way to determine what part of the hand a latent print came from, in which case it is necessary to compare the latent print to both fingerprints and palm prints. PC-R. Vol. V, 715-16. While Ms. Beauchamp testified after the fact that the bloody print appeared to her to be a partial palm print, at the time she looked at it as a

fingerprint. *Id.* at 728, 752. Nothing is Ms. Beauchamp's handwritten notes or final report indicate that she believed the bloody print to be a partial palm print. PC-R. Vol. XII, 1904-24. She simply referred to it as a "bloody print." *Id*. The bloody print in question, which is shown in two photographs that were introduced at the evidentiary hearing, is shaped like a finger, and the jury could reasonably have concluded that it was a fingerprint. *Id.* at 1900, 1903.

The Appellee argued that, "although the bloody print was unidentified, that portion of the victim's palm located between her thumb and forefinger was unavailable for additional comparison and exclusion because her body had been cremated." Answer Brief of Appellee at 70. Here, the Appellee attempted to use the negligence of law enforcement in failing to obtain major case prints from the victim before she was cremated to argue lack of prejudice. In fact, this circumstance highlights the ineffectiveness claim. Latent print examiner Carol Beauchamp learned to roll prints early in her career, and when she rolls prints herself she tries to include every area possible. PC-R. Vol. V, 753-54. She explained that the evidentiary hearing that "[m]ajor case prints are a set of inked fingerprints from an unknown 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. Ms. Beauchamp had two sets of the victim's prints, one from the Pinellas County Sheriff's Office's fingerprint file and a set of death prints, which were rolled at her autopsy. *Id.* at 747, 755. Neither set were major case prints. *Id.* at 747. However, both sets included prints of the victim's palms. *Id.* at 753. Ms. Beauchamp testified that it was not the standard procedure in 1997 to roll major case prints of a deceased victim. *Id.* at 755. She was asked whether the failure of the forensic specialist to obtain major case prints from the victim was an "omission", and she stated only that "[m]ajor case prints were not rolled at the time." *Id.* at 756. Pointing out the areas where the police investigation was deficient is exactly what defense attorneys should do; it is one of the reasons for having a trial in the first place. The argument that in the closing years of the Twentieth Century it was still routine practice to roll an incomplete set of prints from a murder victim is dubious in itself, but standard police practice is irrelevant to the issues under consideration here. The police could have made sure they had a complete set of prints before allowing the victim's body to be cremated. Their failure to do so is something that could and should have been uncovered by the defense and presented to the jury as a reason for finding that the State had failed to

meet its burden of proof beyond a reasonable doubt.

There is a connection between these issues and Argument VII regarding Mr. Watts' mischaracterization of the physical evidence in his opening statements. In his closing argument, the prosecutor stated:

> I had the court reporter take down the opening statements . . . . [Defense counsel] said, ["][W]e 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. On the sliding glass door someone else's blood. We can't identify them. Harry Butler is excluded from the DNA."

R. Vol. XVII, 1198. The prosecutor continued:

> No, that wasn't true. Every piece of blood in Leslie Fleming's home was identified and consistent with Leslie Fleming. He admitted he made a mistake. That's a pretty big mistake. But he said the mistake was . . . there is [sic] so many volumes of documents and volumes of evidence, but on the one hand there's all this evidence that even he had trouble digesting, but on the other hand, he was trying to tell you this was a rush to judgment and law enforcement didn't do their job. I submit to you law enforcement did their job.

Id. at 1199. If defense counsel had conducted an adequate investigation into the bloody print they would have been able to show that the police did not do their job and were not as thorough as the prosecutor claimed. Moreover, even given Mr. Watts' mistake in the opening statement, Mr. Schwartzberg's explanation about being document dumped could have been shored up by evidence that the existence of the bloody print had been buried in the final, official reports that were provided

to counsel. In other words, Mr. Schwartzberg could have asked Ms. Beauchamp whether she included any indication in her final report that the print was left in blood. He also could have asked Ms. Beauchamp about the intense effort that she, other print examiners, law enforcement, and the prosecutors put into trying to explain the print. Her answers would have lent credence to the idea that the final reports received by defense counsel, though voluminous, were less than forthcoming. As it was, Mr. Schwartzberg's explanation was weak, and the prosecutor was able to exploit defense counsel's "mistake" in their closing argument despite defense counsel's explanations.

Finally, with regard to this argument and Argument I regarding the DNA evidence in Mr. Butler's shoes, the Appellee repeatedly argued that Mr. Butler's defense was that Dennis Tennell did it. Answer Brief of Appellee at 48, 73. Thus, the argument goes, the evidence that was presented in postconviction would not have changed the outcome of the trial because Tennell was eliminated as the contributor of the bloody print as well as the DNA found in Mr. Butler's shoes.[1]

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[1] The Appellee cited *Blanco v. State*, 963 So. 2d 173, 177 (Fla. 2007) "(affirming denial of post-conviction discovery where latent print did not match defense witness at trial, whom defendant had long contended was the 'real' murderer, and print did not match the fingerprints of anyone defense believed to be a suspect)". Answer Brief of Appellee at 73. The case at hand is easily distinguished from *Blanco*. In *Blanco*, the print in question was an unidentified latent fingerprint. *Blanco*, 963 So. 2d at 177. There was expert testimony at trial that the fingerprint

That is a pure straw man argument. The defense never committed to a "Tennell did it" argument, as shown by the portion of Mr. Watts' opening statement, which was cited by the State in its own closing argument at trial. ("We can't present the real killer. I wish we could." R. Vol. XI, 142.) The defense argument was all it needed to be; that there existed a reasonable doubt about whether Mr. Butler was the actual killer. As Mr. Watts testified at the evidentiary hearing, the bloody print would have been useful to the defense at trial because it put an unknown third party at the crime scene. PC-R. Vol. V, 825. Thus, there was no strategic reason not to present evidence of the bloody print. Moreover, whatever approach trial counsel took with regard to Tennell or any other aspect of defense strategy should have been predicated on a reasonable investigation. *Wiggins*, 529 U.S. 510 (2003).

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.

ABA Guidelines

The Appellee cited *Bobby v. Van Hook*, 130 S.Ct. 13 (2009) for the proposition that "the ABA Guidelines are not mandatory requirements, but are

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could have been left at least ten days before the murder. *Id*. In contrast, the relevant print in the case at hand was left in the victim's blood. Therefore, the print must have been left at the time of the offense, which makes it highly relevant, as compared to a latent print that could have been left at any time, and which may have no relevance to the crime.

only guides to determining what is reasonable." Answer Brief of Appellee at 92 (emphasis removed). In *Van Hook*, the United States Supreme Court held that it was inappropriate for the Court of Appeals for the Sixth Circuit to rely on the 2003 ABA Guidelines, which were announced eighteen years after Van Hook went to trial. *Van Hook*, 130 S.Ct. at 16. As the Court explained, "[r]estatements of professional norms can be useful as 'guides' to what reasonableness entails, but only to the extent they describe the professional norms prevailing when the representation took place." *Id*. Recognizing that we must look to the professional norms prevailing at the time of Mr. Butler's 1998 trial, both Professor David Dow's testimony and Mr. Butler's Initial Brief are confined to the 1989 ABA Guidelines.

The Use of Mitigation Experts

The Appellee argued in their Answer Brief that Mr. Butler has not shown that at the time of his trial mitigation experts were being used by the defense "to repeat blatant hearsay." Answer Brief of Appellee at 93. Guideline 11.8.6(A) of the 1989 ABA Guidelines states that "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 the 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***. *Id.* at 1343-44. The Appellee cited *Marek v. State* for the proposition that "hearsay would be admissible in the penalty phase only if the State would have had a fair opportunity to rebut it." Answer Brief of Appellee at 93 (citing *Marek v.* State, 14 So. 3d 985, 996 (Fla. 2009). Indeed, this Court has recognized that, "Florida law provides that the usual rules of evidence are relaxed during the penalty phase and that hearsay evidence is permitted so long as a fair opportunity of rebuttal is permitted." *Marquard v. State*, 850 So. 2d 417, 425 (Fla. 2002). Although testimony from a mitigation expert regarding information obtained from third-party witness interviews would have constituted hearsay, the State would have had a fair opportunity to rebut this testimony, and the Appellee has advanced no argument to the contrary. Therefore, this testimony would have been admissible under Florida Statute 921.141(1).

Professor David Dow, a professor at the University of Houston Law Center

and the Director of Litigation at Texas Defender Service, PC-R. Vol. IX, 1331, who was qualified as an expert in the norms and standards regarding death penalty litigation, *Id*. at 1334-35, testified at the evidentiary hearing about the use of mitigation experts in capital cases:

> Q: Were mitigation experts in common use in the late nineties?
>
> A: Oh, absolutely. I would say that the use of mitigation experts became a minimum standard of care by the mid 1990s, 1993, 1994, 1995. It was already commonplace by the time of Mr. Butler's trial. It was, indisputably, part of the death penalty lawyers' basic approach to cases that there would be mitigation experts.
>
> . . .
>
> Q: Now it's common for both such experts, mitigation and mental health experts, to rely on third-party witness interviews as the basis of their opinions. Is that an accurate statement?
>
> A: Not only is it common, it is preferred . . .

PC-R. Vol. 1325. Furthermore, Mr. Watts actually changed his practice as a result of his negative experience in Mr. Butler's case, in that he now employs a mitigation expert in almost every case. PC-R. Vol. VIII, 1268.

Additionally, Mr. Butler relies on *Marquard v. State* to demonstrate that at the time of Mr. Butler's 1998 trial mitigation experts were being used by defense attorneys to testify about information obtained from third-party witnesses. *Marquard*, 850 S. 2d 417. In *Marquard*, whose trial took place in the early 1990s,

defense counsel provided all relevant depositions and records to Dr. Krop, a mental health expert, and they relied solely on Dr. Krop to inform the jury about the defendant's problems from a mental health perspective. *Marquard*, 850 So. 2d at 429.

> Based on his interviews with Marquard, his review of the relevant records and depositions, and his interviews with family members, Dr. Krop testified in detail about Marquard's dysfunctional family; alcoholic and abusive mother; abusive and distant father; and deprived and troubled childhood. Dr. Krop reviewed how Marquard had an unstable family life and had been deprived of the emotional care and support he should have received.

Marquard v. Secretary for Dept. of Corrections, 429 F.3d 1278, 1285 (11th Cir. 2005). This Court rejected postconviction counsel's argument that trial counsel provided ineffective assistance of counsel by failing to present the testimony of family and friends who could have personalized the testimony of their expert. *Marquard*, 850 So. 2d at 429. The Eleventh Circuit Court of Appeals affirmed, holding that trial counsels' decision to present mitigation evidence through Dr. Krop rather than through other witnesses is a classic example of a strategic decision. *Marquard*, 429 F.3d at 1309.

As demonstrated above, the use of a mitigation expert was common practice at the time of Mr. Butler's trial, and it was encouraged by the 1989 ABA Guidelines, which had been in place for nearly ten years. Such an expert's

testimony would have been admissible, and it would have permitted trial counsel to go forward with all of their intended mitigation regardless of whether the lay witnesses showed up or “turned” on them during their testimony.

Deficient Performance

The Appellee attempted in their Answer Brief to make the defense penalty phase presentation seem less bad than it was. As addressed in detail in the Initial Brief, and in the words of defense counsel, the penalty phase was “horrendous” for the defense. PC-R. Vol. VIII, 1215. The Appellee then argued that trial counsel conducted a reasonable penalty phase investigation, even though “the family members were not as helpful as the defense anticipated.” Answer Brief of Appellee at 89-91. This argument was anticipated in the Initial Brief:

> 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.

Initial Brief of Appellant at 90-92. The Appellee's argument now is apparently that an attorney who learns of relevant mitigating evidence but who does not present that evidence because of a failure to take the steps necessary to do so either through neglect or not knowing how to do so is somehow immunized from an allegation of ineffectiveness. If that is the argument, the Appellant does not agree with it.

Prejudice and Proportionality

The Appellee argued that "this was an egregious case, clearly deserving of the ultimate punishment." Answer Brief of Appellee at 95. The Appellee cited *Aguirre-Jarquin v. State*, 9 So. 3d 593 (Fla. 2009) and *Larkins v. State*, 739 So. 2d 90, 95 (Fla. 1999) for the proposition that HAC is one of the "most serious

aggravators set out in the statutory scheme." Answer Brief of Appellee at 95. In fact, *Aguirre-Jarquin* was a unanimous affirmance involving a double murder, in which the court found eight aggravators altogether, and *Larkins* was reversed because the death sentence was disproportionate. Neither case applies here.

Regarding the Appellee's argument that any potential deficiency on the part of trial counsel could not have prejudiced Mr. Butler, it should be borne in mind that only a single aggravator, namely the heinous, atrocious and cruel aggravator [hereinafter "HAC"] was found by the trial court. R. Vol. V, 831. Generally, this Court has held that a death sentence is not proportionate when supported by a single aggravator and the mitigation is substantial. *Almeida v. State*, 748 So. 2d 922, 933 (Fla. 1999); *Jones v. State*, 705 So. 2d 1364, 1367 (Fla. 1998). "[W]hile this Court has on occasion affirmed a single-aggravator death sentence, it has done so *only where there was little or no mitigation*." *Jones*, 705 So. 2d at 1366.

Because there was only one aggravator in this case, Mr. Butler can establish prejudice under *Strickland* in either of the following ways:

1. There is a reasonable probability that, but for trial counsel's deficient performance, Mr. Butler would have received a life sentence at trial.
2. The mitigation presented during postconviction plus the mitigation presented during the penalty phase trial are "substantial", and because

there is only a single aggravator the death penalty is not proportionate. As such, even if Mr. Butler was sentenced to death, if trial counsel had presented the mitigation that was presented during postconviction his death sentence would have been overturned on direct appeal.

The trial court found that the mitigation presented at trial was "relatively minor." R. Vol. V, 835. The trial court did not find any statutory mitigation. R. Vol. V, 832-33. With regard to the non-statutory mitigation offered by the defense, the trial court stated the following in the sentencing order:

The defendant cited seven non-statutory mitigating circumstances:

1. He was reared without his natural mother. The defendant's father testified that the defendant was eight years old when his mother was murdered, and the father was charged with the murder, but was acquitted. The defendant was sent to live with his grandmother and cousins in Georgia. The defendant offered the testimony of a psychiatrist, who said the defendant's family history showed he was caught in a cycle of domestic violence. The Court finds that no evidence was presented that defendant's family circumstances included violence. His father testified that he was accused of defendant's mother's murder, but he was acquitted. The Court does find that he was reared without his mother, and gives that circumstance some weight.

2. He had a troubled childhood. The defendant's father testified that he visited the defendant twice a month in Georgia, and took him back to Largo when the grandmother died. He described the defendant as a "good kid" who was loved by him and by the grandmother. The defendant's father was employed, but the family was poor. The Court is not reasonably convinced that this circumstance exists. The testimony of the defendant's father and the defendant's own argument

refute this claim as a mitigating circumstance. 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.

3. The defendant is a hard worker. The defendant's father testified that his son provided for his children financially. A friend of the defendant's testified that he occasionally hired the defendant to work in a concrete block business, and he was a good worker. The defendant testified that he supported his family by hustling, and that he kept cocaine in the victim's apartment. The Court is not reasonable convinced this circumstance exists, since hard work in an illegal activity is not characterized as mitigating by lawful society.

4. The defendant is a loving and good father. The defendant points to his father's testimony that the defendant always loved his family. The Court is not reasonably convinced that such a circumstance exists. A loving and good father would not support his children by selling cocaine. A loving and good father would not brutally murder the mother of his children and leave her mutilated body in a pool of blood for the children to find as they began their day.

5. The defendant is a loving and good son. Again, the defendant cites the testimony of his father. The Court finds this circumstance may reasonably exist, and gives it some weight.

6. The defendant is well-thought of by neighbors and co-workers. The defendant cites the testimony of one friend and the concrete supervisor who hired him from time to time. While this was not an outpouring of support, the Court finds that this circumstance exists, and gives it slight weight. The Court notes that the Court file is devoid of letters or notes in support of the defendant.

7. The defendant has a long-term substance abuse problem. The defendant cites his own testimony that he had a long-term substance abuse problem. The Court finds that this circumstance may exist, but gives it slight weight.

R. Vol. V, 833-35. In total, the trial court found four non-statutory mitigating

circumstances: that Mr. Butler was reared without his natural mother (some weight), that he is a loving and good son (some weight), that he is well-thought of by neighbors and co-workers (slight weight), and that he may have suffered from a long-term substance abuse problem (slight weight). *Id.*

Considering the mitigation that was presented at trial, this Court found on direct appeal that a sentence of death is proportional in this case. *Butler v. State*, 842 So. 2d 817, 834 (Fla. 2003). However, even without having heard the additional mitigating evidence presented during postconviction, 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)). She would have reversed and remanded for imposition of a life sentence on proportionality grounds. *Id*. In support of her finding that this crime is not among those crimes for which the death penalty is reserved, Justice Pariente cited the following mitigation that was presented during the *Spencer*[2] hearing:

> Although the trial court found no statutory mitigation in this case, there is evidence that Butler was drinking alcohol and using cocaine on the night of the murder. Dr. Michael Maher explained that irrational, repetitive actions are a common effect caused by the use of

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

> cocaine. He opined that the number of stab wounds in this case-which the trial court used to support the HAC aggravator- is consistent with this effect. Further, regarding the violent death of Butler's mother when Butler was only eight, Dr. Maher explained that a child whose mother dies as a result of violence faces a greater risk of participating in violence to resolve conflicts, especially when combined with drug use.

Butler, 842 So. 2d at 840 (Pariente, J., concurring in part and dissenting in part).

According to the Appellee, "[t]he additional mitigation offered in post-conviction is not compelling and adds nothing significant to the mitigation already weighed by the trial court." Answer Brief of Appellee at 98. The additional mitigation that was presented during postconviction is detailed in Mr. Butler's Initial Brief. Initial Brief of Appellant at 69-88. Notably, while the trial court finds that "no evidence was presented that defendant's family circumstances included violence", Mr. Butler offered substantial evidence in postconviction regarding a cycle of domestic violence in Mr. Butler's family, including fist fights between Mr. Butler's parents, which he and his siblings witnessed. Postconviction counsel also presented evidence of patterns of marital infidelity, substance abuse, economic deprivation, and unstable relationships in Mr. Butler's family. Furthermore, in contrast to the trial court's finding that trial counsel did not present evidence of a troubled childhood, the testimony presented during postconviction established that Mr. Butler grew up in poverty on a tobacco plantation, where he

encountered racial discrimination and worked in the tobacco fields as a young child. During harvesting season, the children were not allowed to go to school because they had to stay home and harvest the tobacco. Mr. Butler was physically disciplined as a child, and he was beaten if he did not get up to work in the tobacco fields at 6:00 a.m. Aside from the death of his mother, which the trial court found[3], Mr. Butler also experienced the death of his grandparents when he was ten years old, and the untimely death of his brother, Levester, when Mr. Butler was seventeen years old. Mr. Butler's father did not provide emotional support for him and he was in and out of the home, so Mr. Butler relied on his older brother, Terry, to act as a surrogate parent. Terry went to prison when Mr. Butler was fourteen years old, and Mr. Butler was left to parent himself, without parental supervision, structure, or guidance. Additionally, postconviction counsel presented evidence of Mr. Butler's intellectual deficits, which contributed to Mr. Butler selling drugs so that he could support his family. What the trial court considered to be the "relatively minor" mitigation presented during Mr. Butler's penalty phase plus the mitigation that what presented during postconviction is substantial. In light of the

[3] The trial court found that, based on the testimony of Mr. Butler's father, Mr. Butler's mother died when he was eight years old. R. Vol. V, 833. In fact, according to Shirley Furtick, MSW, who obtained the official death certificate of Estelle Butler, Mr. Butler's mother passed away when Mr. Butler was only three years old. PC-R. Vol. VII, 1082, 1139-40.

fact that only a single aggravating factor was established, if trial counsel had presented this additional mitigation during the penalty phase, a sentence of death would have been disproportionate and it would not have been upheld on direct appeal. *See Almeida*, 748 So. 2d at 933; *Jones*, 705 So. 2d at 1367.

The Appellee argued that Mr. Butler was not prejudiced because "the post-conviction experts largely duplicated information previously known by the defense", Answer Brief of Appellee at 98. While some of the information presented during postconviction may have been known to trial counsel, the information was not known to the jury or to the trial court. This is not a case where trial counsel conducted a reasonable mitigation investigation and, taking all of the potential mitigation into consideration, they made a strategic decision to present only that information that was consistent with their theory of mitigation. In fact, Ms. Borghetti testified at the evidentiary hearing that trial counsel's plan for penalty phase was to present Mr. Butler's life story. PC-R. Vol. VIII, 335. That did not happen. Furthermore, because this was a case in which there was only one aggravating factor, counsel had a heightened duty to present all available mitigation to ensure that "substantial" mitigation existed in the record so that even if Mr. Butler was sentenced to death the case would be overturned by this Court on a proportionality review.

The Appellee's argument about prejudice appears to include an incorrect "nexus" component, although the word is not used. The Appellee, predictably, emphasized the gruesomeness of the crime, while dismissing evidence about the defendant's background as "anecdotal hearsay", among other things. Answer Brief of Appellee at 95-98. The Appellee argued that the mitigation offered in postconviction "does not reduce Butler's moral culpability, at all," and "the unremarkable disclosure that, unfortunately, 40+ years ago in rural Georgia, black people were not treated as well as white people does not mitigate Butler's heinous crime." *Id.* at 97-98. The nexus argument is a recurring one. The law in Florida is settled: "Clearly, Florida law does not require that a proffered mitigating circumstance have any specific nexus to a defendant's actions for the mitigator to be given weight." *Cox v. State*, 819 So. 2d 705, 712 (Fla. 2002). Any nexus or causation argument should be rejected. Mitigation includes any circumstance that may persuade a juror or the court to spare the defendant's life. *Farina v. State*, 937 So. 2d 612, 619 (Fla. 2006). It is well-settled that evidence of family background and personal history,[4] substance abuse[5], being raised in dysfunctional family

[4] *See, e.g., Stevens v. State*, 552 So. 2d 1082, 1086 (Fla. 1989).
[5] *See, e.g., Clark v. State*, 609 So. 2d 513, 516 (Fla. 1992); *Mahn v. State*, 714 So. 2d 391, 400-01 (Fla. 1998).

circumstances[6], lack of parenting[7], child abuse[8], and low intelligence[9] may be considered as mitigation. Furthermore, despite the trial court's finding that "[p]overty is not a per se indicator of a troubled childhood", this court has found that an impoverished background constitutes valid mitigation. *See, e.g., Maxwell v. State*, 603 So. 2d 490, 492 (Fla. 1992); *Foster v. State*, 614 So. 2d 455, 461 (Fla. 1993).

CONCLUSION

Based on the foregoing Reply Brief of Appellant, as well as the Initial Brief of Appellant, the circuit court improperly denied Mr. Butler relief on his 3.851 motion.

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[6] *See, e.g., Snipes v. State*, 733 So. 2d 1000, 1008 (Fla. 1999); *Mahn*, 714 So. 2d at 402.

[7] *See, e.g., Snipes*, 733 So. 2d at 1008; *Mahn*, 714 So. 2d at 402; *Strausser v. State*, 682 So. 2d 539, 542 (Fla. 1996).

[8] *See, e.g., Mahn*, 714 So. 2d at 402.

[9] *See, e.g., Williams v. State*, 987 So. 2d 1, 11 (Fla. 2008); *Henyard v. State*, 689 So. 2d 239, 244 (Fla. 1997).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply 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 June, 2011.

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CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Reply 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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