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CAPITAL CASE NO. SC23-1735

In the

Florida Supreme Court

RAYMOND BRIGHT,

APPELLANT,

v.

STATE OF FLORIDA,

APPELLEE.

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

APPELLEE'S ANSWER BRIEF

ASHLEY MOODY
ATTORNEY GENERAL OF FLORIDA

JASON W. RODRIGUEZ
SENIOR ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 125285

OFFICE OF THE ATTORNEY GENERAL
PL-01, THE CAPITOL
TALLAHASSEE, FL 32399-1050
(850) 414-3300
capapp@myfloridalegal.com

COUNSEL FOR THE STATE OF FLORIDA

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INTRODUCTION

Raymond Bright beat two young men to death with a hammer and received the two death sentences his operative, penalty-phase jury unanimously recommended. This appeal arises from the denial of *penalty-phase* postconviction relief alone and raises a legion of issues and sub-issues. Not even one merits relief.

RECORD CITATIONS

The State will cite: (1) the direct-appeal record in SC09-2164 as **DAR**[volume]:[page]; (2) the initial postconviction record in SC14-1701 as **1PCR**[volume]:[page]; (3) the resentencing record in SC17-2244 as **RS**[volume]:[page]; and (4) the record here (SC23-1735) as **RSPCR**:[page]. Supplemental-record citations will add the word Supp and volume number, i.e., **RSPCRSupp1**:1.

STATEMENT OF THE CASE AND FACTS

I. STATEMENT OF THE CASE

After a grand jury indicted Bright for the first-degree murders of Derrick King and Randall Brown, a petite jury convicted him as charged and recommended two death sentences, which a judge imposed. (DAR1:19-21; DAR3:520-21; DAR4:710-32; DAR6:1032, 1053-59.) This Court affirmed. *Bright v. State*, 90 So. 3d 249, 265 (Fla. 2012) (*Bright I*), *cert. denied*, 568 U.S. 897 (Oct. 1, 2012). Later, in postconviction, Bright received a resentencing. *State v. Bright*, 200 So. 3d 710, 742 (Fla. 2016) (*Bright II*).

Bright's resentencing occurred in September 2017. The jury unanimously recommended, and court imposed, two death sentences. (RS1:61-68, 521-43.) This Court affirmed. *Bright v. State*, 299 So. 3d 985, 1012 (Fla. 2020) (*Bright III*), *cert. denied*, 141 S. Ct. 1697 (2021). Bright subsequently moved for penalty-phase, postconviction relief; the State answered; and the court granted an evidentiary hearing. (RSPCR:559-634, 1009-83, 1371-72.)

The court denied all claims on 11/1/2023 and Bright timely appealed. (RSPCR:4216-68, 4446, 4508.)

II. STATEMENT OF THE FACTS

A. Guilt-Phase Evidence

On direct appeal, this Court summarized the guilt-phase evidence. *Bright I*, 90 So. 3d at 252-54, 258. The short version is that Brown and King were found murdered in Bright's home and Bright confessed to killing them with a hammer. (DAR9:332-40; DAR10:560-614; DAR10:582-90; DAR11:605-08.) Bright (who sustained only one minor scratch) argued self-defense, claiming Brown/King (whose hands had no gunshot residue) fired a shot. (DAR9:310-16.) The jury rejected his self-defense claim, finding him guilty of the murders. (DAR2:333-336; DAR11:788-89.)

B. First Penalty-Phase Evidence

This Court also summarized the penalty-phase evidence. *Bright I*, 90 So. 3d at 252-54. Bright's first mitigation case focused on his service as a Marine, family relationships, struggles with drugs and alcohol, and employee accomplishments. *Bright I*, at 254-56. Bright admitted the homicides but claimed he acted in self-defense and feared the victims. (DAR7:1134.) However, one of Bright's expert witnesses explained Bright's alcoholism and cocaine use may have produced a paranoid ideation causing him to falsely

perceive the victims as threats. (DAR7:1137.) The jury recommended death by an 8-4 vote. *Id.*

The court (Judge Arnold) followed the recommendation after hearing additional mitigation about Bright's substance abuse, emotional issues, criminal history, and remorse. *Bright I*, at 256-57. Notably, the court gave "little weight" to mitigation that Bright "was afraid of the victims and took steps to get them out of his house" because "even if" Bright was "afraid of the victims and had made attempts to get them out of the house, that does not permit" Bright to "beat them to death with a hammer." (DAR4:723-724.)

C. Initial Postconviction

Bright next sought postconviction relief, primarily raising IATC.[1] *Bright II*, 200 So. 3d at 722. The postconviction court (Judge Arnold) denied guilt-phase relief, but found penalty-phase counsel ineffective. *Id.* at 723. This Court affirmed, finding counsel ineffectively failed to present mitigation, the most compelling of which revolved around Bright's upbringing. *See id.* at 724-36, 742.

[1] Ineffective Assistance of Trial Counsel.

D. Resentencing

Judge Healey presided over Bright's resentencing. (RS1:781,785-86; RS2:1.) The resentencing went from 9/5/2017—9/7/2017, broke for Hurricane-Irma-related closures, and finished on 9/25/2017. (See RS2:PDFpageii.)

Kelli Bynum (lead counsel) and Michael Williams (second chair) represented Bright. (RS2:PDFpageii.) In 2017, counsel Bynum was a board-certified trial attorney with ten years' experience trying criminal cases. (RSPCR:5110-13.) Bright was her seventh overall capital case, but first as lead counsel. (RSPCR:5112.)

The jury was sworn and given its opening charge on 11/6/2017. (RS2:604-22.) Both parties gave opening. (RS2:623-50.)

The State called ten witnesses.[2] (RS2:433-34; 799.) Bright called seven: Janice Jones; Dr. Krop; James Hernandez; Isidore Knight; Michael Bossen; Dr. Steven Gold; and (after the hurricane

[2] Carrie Gray; Michael Majors; Christopher Robinson; Deborah Brookins; Dan Janson; Tracy Stapp; Robert Bell; Shannon Brown; Carolyn Jaudon; and Dr. Rao.

break)[3] Dr. Ouaou. (RS2:799-800, 1134.)

Both parties gave closing. (RS2:1170-1254.) The court then gave the jury its final charge and excused the alternates. (RS2:1257-86.)

The jury unanimously recommended two death sentences. (RS1:61-68; RS2:1289-97.) It found the heinous, atrocious, or cruel (HAC) and prior violent felony (PVF) aggravators for King's murder, and PVF alone for Brown's murder. (RS1:61, 65.) The contemporaneous murders and Bright's 1990 robbery conviction supported the PVF aggravators, while the number of hammer blows supported the King-related-HAC aggravator. (RS1:526-29.)

The court held a *Spencer*[4] hearing where Bright called Tenneka Bright and Correctional-Officer Fayo. (RS1:722-63.)

Ultimately the court followed the jury's recommendation. (RS1:521-43, 770, 777-78.)

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[3] The court also held a hearing on 11/14/2017 to determine how to proceed after the closures. (RS2:1100-1131.)

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

E. Resentencing Postconviction Proceedings

1. Pleading Phase

Bright moved for postconviction relief on 3/22/2022 raising seventeen numbered claims. (RSPCR:559-634.) The State's Answer contended four claims should be summarily denied, but an evidentiary hearing could be helpful on the rest. (RSPCR:1009-1084.) After a *Huff*[5] hearing on 7/19/2022, the court agreed with the State and ordered an evidentiary hearing on all but four claims. (RSPCR:1371-72, 1386-87.)

2. Amendment Litigation

The parties extensively briefed, and the court denied, Bright's 7/14/2022 motion to amend with "four" additional claims. (RSPCR:1087-1176, 1304-19, 1392-94, 1879-2004, 2075-76.)

3. Juror-Interview Litigation

Bright moved to interview the resentencing jurors and alternates. (RSPCR:1177-1180.) The State opposed the motion, and the court denied it. (RSPCR:1337-51, 1389-91.)

[5] *Huff v. State*, 622 So. 2d 982 (Fla. 1993).

4. Judicial-Notice Litigation

Bright moved the court to judicially notice four overarching items: (1) ABA publications/Florida-Bar Rules; (2) prior records; (3) Hurricane Irma; and (4) Harrier Jet Crash Statistics. (RSPCR:1395-1613, 1621-1878, 2005-73; RSPCRSupp1:6058-6059.) His motions proffered over 300 pages. The State opposed judicial notice on items (3) and (4), but, with caveats, not (1) and (2). (RSPCR:2077-2084.)

Bright withdrew the Hurricane-Irma portion of this motion and did not obtain a ruling on the Harrier-Jet portion. (See RSPCR:5653-61.)

5. Clarifying the State-Court Record

The State moved to clarify that "proffers and unadmitted attachments to motions are not evidence in this case"; Bright conceded that was accurate; and the court granted the motion. (RSPCR:2087-91, 2734, 5652-54.)

6. Evidentiary Hearing

The evidentiary hearing went from 11/14/2022—11/17/2022, broke at Bright's request, and concluded on 1/5/2023.

(RSPCR:4948-6056.) Bright called twenty-five witnesses.[6] (RSPCR:4950, 5287-88, 5537, 5675-76, 5976.) The parties also introduced extensive exhibits, including Bright's military records and excerpts from trial counsels' files. (RSPCR:2918-19, 4086.)

7. Closing Arguments

Both parties filed closing arguments on 5/10/2023. (RSPCR:4094-4154 (State), 4155-4215 (Bright).)

8. Order Denying 3.851 Motion

The court denied all claims. (RSPCR:4216-68.)

[6] Kelli Bynum; Michael Williams; Jonathan Ruda; Rick Sichta; Joseph Hamrick; Mikki Silcox; Dr. Ouaou; Meridyth Lee; Dr. Krop; Sara Baldwin; Jayson Shannon; Janice Jones; Tenneka Bright; Sherita Faulk; Brian Williams; Benjamin Lundy; Kristy Bright; Larry Stoneroad; Jimmy Stutler; Wayne Gulley; Johnny James; Dr. Gold; Arthur Cody; Lou-Ann Rickley; and Clifton Alexander.

ARGUMENT SUMMARY

Issue 1: Amendment Denial

There was no abuse of discretion. Bright failed to establish good cause, and his claims were previously available, vague, meritless, and abusive.

Issue 2: Jury-Interviews Denial

There was no abuse of discretion given Bright's motion was untimely and juror interviews are irrelevant to *Strickland* prejudice.

Issue 3: IATC-Failure-to-Contextualize-Killings/Rebut-HAC Claim

Counsel reasonably, strategically chose to avoid casting the victims in a negative light. Bright's proposed strategy neither rebuts HAC nor gives rise to *Strickland* prejudice.

Issue 4: IATC-Failure-to-Present-Additional-Mitigation Claims

Mental-Health Mitigation: Counsel strategically utilized Dr. Krop in 2017 and, no matter what she did, the State would have used Dr. Krop's 2008/2009 testing, Bright's VA records, and Bright's self-report of a normal childhood to rebut mental mitigation. There was no deficiency and no prejudice.

Military Mitigation: Counsel reasonably, strategically utilized a single, military expert witness in 2017 because she knew about Bright's extensive disciplinary history in the Marines, and Bright suffered no prejudice regardless.

Lay/Background Mitigation: Most of these witnesses were not available through reasonable efforts, only gave cumulative testimony, or victim-blaming testimony counsel had already decided to avoid, and the remaining mitigation is minor. There is no deficiency or prejudice.

Issue 5: IATC-Failure-to-Rebut-Innocent-Victims-Depiction Claim

This was a continuation of counsel's strategic decision to focus on mitigation and avoid victim blaming, and Bright suffered no prejudice.

Issue 6: IATC-Failure-to-Argue-Fear-of-Victims Mitigator

See Issue 5 above.

Issue 7: IATC-Opening-Statement Claim

See Issue 5 above.

Issue 8: IATC-Closing-Arguments Claim

See Issue 5 above.

Issue 9: IATC-Failure-to-Object-to-911-Call Claim

Bright can't demonstrate deficient performance or prejudice because he cannot show every reasonable trial judge would have excluded the 911 call. Even if the call was excludable, Bright suffered no prejudice.

Issue 10: IATC-Failure-to-Impeach-Michael-Majors Claim

Counsel reasonably, strategically, chose not to impeach Majors because she wanted to use some of his testimony. In any event, impeaching him would have made no difference to an objectively reasonable jury.

Issue 11: IATC-Failure-to-Object-to-State-Closing Claims

Bright has failed to demonstrate either deficient performance or prejudice on his claim that counsel ineffectively failed to object to/correct three aspects of the State's closing. All these arguments were proper and would not have made a difference to an objectively reasonable juror anyway.

Issue 12: IATC-Failure-to-Life-Qualify-Jury Claim (Summarily Denied)

Bright has failed to demonstrate either deficient performance or prejudice on his claim that counsel ineffectively failed to life-

qualify the jury. Counsel did in fact life qualify the jury. Even if she did not, there was no prejudice. This Court should explain the connection between its actual-bias holdings and *Strickland* considering the recent Eleventh Circuit decision disagreeing with this Court.

Issue 13: IATC-Failure-to-Object-to-Verdict-Form Claim (Summarily Denied)

The objection Bright proposes is frivolous because the verdict form and instructions were proper. There was no deficiency or prejudice.

Issue 14: IATC-Hurricane-Continuance/Mistrial Claim

Counsel reasonably, strategically chose not to move Bright's trial given mid-trial gaps favor the defense and Bright's desire to have this jury try his case. It is also not clear every reasonable judge would have granted a continuance or mistrial.

Bright's prejudice arguments are insufficient and speculative since Dr. Gold's testimony was understandable and there is no evidence counsel would have prepared his experts any differently given more time. Bright's concern about inattentive jurors is

contrary to *Strickland*, which requires presuming an objectively reasonable jury following the law.

Issue 15: Actual-Conflict Claim

An attorney's busy schedule and personal life are not actual conflicts as a matter of law. Even if they were, Bright failed to show they negatively impacted his resentencing.

Issue 16: "Disallowing" Proffer

Bright's current appellate counsel proffered all the work-product he claims was not proffered below. (RSPCR:3299-3874.)

Issue 17: Cumulative-Error Claim

Bright has failed to meet *his* burden to show cumulative error.

STANDARDS OF REVIEW

Issues 1-2 and 16. Decisions on motions to amend, motions to interview jurors, whether there is good cause to excuse time limits, and the contours of a proffer, are all reviewed for abuse of discretion. *Smith v. State*, 213 So. 3d 722, 735 (Fla. 2017) (amendment); *Joseph v. State*, 336 So. 3d 218, 236 (Fla. 2023) (jury interviews); *Dohnal v. Syndicated Offs. Sys.*, 529 So. 2d 267, 269 (Fla. 1988) (good cause); *May v. State*, 326 So. 3d 188, 194 (Fla. 1st DCA 2021) (proffers).

Issues 3-11, 14-15, and 17. After an evidentiary hearing, this Court reviews *Strickland*,[7] actual-conflict, and cumulative error claims under the same mixed standard: (1) giving deference to factual findings supported by sufficient evidence; and (2) reviewing the legal conclusions de novo. *Sheppard v. State*, 338 So. 3d 803, 816 (Fla. 2022) (ineffectiveness); *Calhoun v. State*, 312 So. 3d 826, 850 (Fla. 2019) (actual conflict); *Geralds v. State*, 111 So. 3d 778, 787 (Fla. 2010) (cumulative error). The facts underlying post-evidentiary-hearing issues are viewed in the light most favorable to

[7] *Strickland v. Washington*, 466 U.S. 668 (1984).

the prevailing party, which is the State here. *See Steinhorst v. State*, 695 So. 2d 1245, 1248 (Fla. 1997).

Issues 12-13. Summary denials are reviewed de novo. *Zack v. State*, 371 So. 3d 335, 344 (Fla. 2023).

INVESTIGATIVE FAILURES AND *STRICKLAND*

Bright repeatedly intermingles complaints about counsel's failure to investigate and log research into different items with his appellate issues. He continually mis-relies on, for example, *Hinton v. Alabama*, 571 U.S. 263, 272-74 (2014) (holding counsel deficiently failed to secure additional experts, despite desiring to do so, based on an incorrect belief the law limited him to $1,000 for experts) for the expansive premise that failure to investigate *any* aspect of his case is automatically deficient performance.

But Bright's overbroad reading of counsel's duty to investigate and deficient performance has been wrong for forty years. *See Strickland*, 466 U.S. at 691 (Decisions not to investigate are assessed for reasonableness after "applying a heavy measure of deference to counsel's judgments."). *Cf. Hinton*, 571 U.S. at 274 ("An attorney's ignorance of a point of law that is *fundamental* to his case combined with his *failure to perform basic research on that point* is a quintessential example of unreasonable performance."). Many aspects of a penalty phase are not "fundamental," and *Strickland* does not require counsel to waste precious time

documenting investigation into nits. *See Dunn v. Reeves*, 594 U.S. 731, 739 (2021) (Lawyers have limited "time and resources.").

Moreover, counsel is not required to investigate further when she has already made a reasonable decision to, for example, avoid victim blaming, or utilize (instead of impeach) a witness. Nor is further research in support of meritless objections required to avoid deficient performance. The mere fact that counsel does not recall, or document, research into ancillary issues says very little about deficient performance under *Strickland*. *See Williams v. Allen*, 598 F.3d 778, 792-94 (11th Cir. 2010).

The bottom line is this: Bright's conclusory complaints fail to actually engage with *Strickland*'s deficient-performance prong and explain why every reasonable counsel would have investigated, or further investigated, each issue where he claims the investigation was deficient. For the benefit of later federal courts, this Court should directly address Bright's repeated investigative complaints by finding: (1) he has failed to properly present them for appellate review; and (2) he has failed to establish deficient performance.

ARGUMENT

This appeal presents yet another example of the throw-everything-at-the-wall-and-see-what-sticks mentality that plagues Florida capital cases. In challenging *only* his resentencing, Bright raises twelve ineffectiveness issues (with numerous sub-issues), one actual-conflict issue, and one cumulative-error issue. He also argues abuse of discretion in denying a motion to amend with at least fourteen more claims, denying a motion to interview jurors, and "disallowing" a proffer. All told, Bright tries to present seventeen numbered, and countless actual, appellate issues.

The State will address each issue. But it bears noting Bright's abusive litigation tactics overburden an already-strained, criminal-justice system, delay capital-case resolution, and make meritorious claims harder to find in the forest of frivolousness. *Jones v. Barnes*, 463 U.S. 745, 751-54 (1983); *Henry v. State*, 937 So. 2d 563, 575-76 (Fla. 2006); *United States v. Battle*, 163 F.3d 1, 1-2 (11th Cir. 1998); *Hedrick v. State*, 6 So. 3d 688, 691-92 (Fla. 4th DCA 2009).

This "scattershot approach is the antithesis of sound advocacy" and "sends the message that counsel does not think much of any of the claims raised—or perhaps does not believe the

court able to separate good arguments from bad." *Max M. v. New Trier High Sch. Dist. No. 203*, 859 F.2d 1297, 1300 (7th Cir. 1988) (eleven issues). For capital defendants, the only benefit of the "kitchen-sink" or "laser light show" approach is the inevitable delay in sentence execution caused by "distraction and confusion."[8] *Cf. Rhines v. Weber*, 544 U.S. 269, 278 (2005); *Bowles v. DeSantis*, 934 F.3d 1230, 1248 (11th Cir. 2019). Delay "is the name of the game in death penalty cases." *Burris v. Parke*, 95 F.3d 465, 471 n.1 (7th Cir. 1996) (Manion, J., concurring).

Capital defendants often seek to excuse their shotgun pleadings by invoking the need to preserve issues for later state or federal review. But this explanation doesn't hold water. Federal review of properly exhausted claims is sharply circumscribed to errors where there can be no fairminded disagreement. *E.g.*, *Brown v. Davenport*, 596 U.S. 118, 135-36 (2022); *Mungin v. Sec'y, Fla. Dep't of Corr.*, 89 F.4th 1308, 1316-17 (11th Cir. 2024). As such, if an error is reversible in federal court, it should have been abundantly clear in state court.

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[8] *Dynegy Mktg. & Trade v. Multiut Corp.*, 648 F.3d 506, 513 (7th Cir. 2011).

But shotgun pleading in state court can conceal egregious errors that later become apparent on federal review. When the Eleventh Circuit does reverse, frequently, the problem is that by the time it reviews the case, the chaff has been lost, the briefs are forced to focus on a few narrow issues,[9] and any injustice missed in the forest of frivolousness filed in state court becomes apparent. The limited nature of federal review makes "preserving" issues for it a disingenuous disguise for delay and hope of reversal years later instead of prompt relief now.

Preservation for possible, future changes in law is also no excuse for shotgun briefing. First, if that is all an issue is, it should be labeled as such, the controlling law that forecloses it explicitly set out, and a brief change-in-law argument made. But more fundamentally, very few legal changes retroactively affect postconviction defendants, and this Court has already provided for later review of the ones that do. *See* Fla. R. Crim. P. 3.851(d)(2)(B).

In any event, speculation the law may one day change is no excuse for wasting this Court's time now. If there is a good

[9] *See* 28 U.S.C. § 2253(c)(1)-(3) (requiring an issue-specific, certificate of appealability to appeal).

argument for a change in law, it should be advanced now in this Court and, failing that, in a certiorari petition, not years later. *See McCarthan v. Dir. of Goodwill Indus.-Suncoast, Inc.*, 851 F.3d 1076, 1099 (11th Cir. 2017) (en banc). That takes time, effort, and in-depth analysis. Litigants who merely stuff issues in a brief without putting in the real work advocating for change should not receive the benefit of legal changes beyond Rule 3.851(d)(2)(B) anyway.

Excuses aside, this case is no exception to the usual rule that when appellants come to this Court "with nine" (or more) "grounds" for reversal, "there are none." *Fifth Third Mortg. Co. v. Chicago Title Ins. Co.*, 692 F.3d 507, 509 (6th Cir. 2012). Despite Bright's insistence on trading his hammer for a "shotgun,"[10] this Court should entirely affirm.

[10] *Gagan v. Am. Cablevision, Inc.*, 77 F.3d 951, 955 (7th Cir. 1996).

1. NO ABUSE OF DISCRETION IN DENYING BRIGHT'S MOTION TO AMEND.

Bright's first issue asserts reversible error in the denial of his motion to amend his seventeen-claim 3.851 motion with four more numbered (and about fourteen actual) claims. This issue is frivolous.

Relevant Facts

Prior Postconviction

In 2013, Bright unsuccessfully raised a mitigation-related-IATC claim for failure to challenge the PVF aggravator with Carla Houghton's testimony that "Bright carried a knife during the robbery" but "never used the knife, just had it where she could see it." (1PCR2:189, 251; 1PCR4:386; 1PCR10:1485, 1500.) Bright also listed her address. (Id.)

Proceedings Below

Bright filed his seventeen-claim, 3.851 motion on 3/22/2022. (RSPCR:559-634.) This motion raised two Hurricane-Irma-related claims and asserted jurors were in evacuation zones. (RSPCR:617-26.) The State answered on 5/5/2022, and Bright moved to amend on 7/14/2022. (RSPCR:1009-83, 1087-1108.)

Bright's proposed amendment added seventeen pages with

"four" numbered IATC claims: (18) Failure to Effectively Prepare for Trial; (19) Failure to Mitigate/Ameliorate the PVF Aggravator; (20) Failure to Question the Potential Jurors About Hurricane Irma; and (21) Failure to Question Selected Jurors About Hurricane Irma. (RSPCR:1087-1108.)

Proposed claim 18 alleged a smorgasbord of facts under its heading. (RSPCR:1093-1103.)

Proposed claim 19 tried to raise around eleven separate IATC claims arguing counsel failed to mitigate the PVF aggravator: (1) with Houghton's testimony that she "has no memory of the robbery or pushing the panic button"; (2) with evidence it was "highly improbable" a witness could have seen anything; (3) with evidence the robbery occurred while Bright was at a low point in his life; and (4) by incorporating "Claims 1-7" to the PVF aggravator. (RSPCR:1105-06.)

Proposed claim 20 alleged counsel ineffectively failed to question the prospective jurors about whether Hurricane Irma would distract them. (RSPCR:1106-07.) This claim had no prejudice allegation and requested leave to amend after jury interviews. (RSPCR:1107.)

Proposed claim 21 alleged counsel ineffectively failed to question the sworn jurors about whether the hurricane would distract them. (RSPCR:1107.) This claim also had no specific prejudice allegation and requested leave to amend after jury interviews. (RSPCR:1107.)

As good cause to support these extensive amendments, Bright argued: (1) that CCRC-N has represented him since 8/31/2020, at the start of the coronavirus pandemic; (2) investigators were unable to travel and locate witnesses until "the summer of 2021"; (3) contact with Bright was restricted; (4) several agencies delayed filing records; (5) CCRC-N comprehensively reviewed the extensive records in Bright's case; and (6) CCRC-N lost two attorneys assigned to Bright's case. (RSPCR:1087-1108.)

The State opposed the motion, Bright filed a reply, and the court denied amendment. (RSPCR:1304-19, 1352-59, 1392-94.) Bright unsuccessfully moved for reconsideration. (RSPCR:1879-1888, 2075-76.) He also attached an affidavit from Carla Houghton. (RSPCR:2003-04.)

Ruling Below

No good cause for amendment. (RSPCR:1392-94.)

Appellate Presentation

Except the Carla-Houghton part of proposed-amendment-claim 19, the rest of Bright's arguments are undeveloped and conclusory. He offers no *specific explanation* tying his failure to raise the rest of the *specific claims* (such as the incorporation-by-reference portion of claim 19, or the failure to question the prospective/sworn jurors noted in claims 20-21) with his good cause arguments. He also offers no supporting, analogous caselaw and merely asserts that counsel's workload and other issues are automatically good cause for failing to raise *any* claim he later wanted to add, and it is an abuse of discretion to determine otherwise. That is not good enough.

All but the Carla-Houghton portion of claim 19 are insufficiently presented for review and should be rejected as such. *E.g.*, *Lynn v. City of Fort Lauderdale*, 81 So. 2d 511, 513 (Fla. 1955).

Merits

The postconviction court did not abuse its discretion in denying Bright's motion to amend. Once a 3.851 motion is filed, it "may not be amended unless good cause is shown." Fla. R. Crim. P. 3.851(f)(4). If good cause is shown, the court "*may* in its discretion

grant a motion to amend." Fla. R. Crim. P. 3.851(f)(4).

A postconviction court has discretion to deny amendment when: (1) the proposed claim is meritless, *Marek v. State*, 8 So. 3d 1123, 1131 (Fla. 2009); (2) the proposed claim is procedurally barred, *Lugo v. State*, 2 So. 3d 1, 21 (Fla. 2008); (3) the facts undergirding the claim were previously available to counsel and should have been raised in the pending 3.851 motion, *Smith v. State*, 213 So. 3d 722, 735 (Fla. 2017); or (4) "the facts asserted in the amended motion are vague, nonspecific, and fail to suggest how relief may be warranted," *id.*

Bright cannot demonstrate an abuse of discretion for four alternative reasons: (A) there was no good cause; (B) the claims were available to Bright when he filed his sprawling 3.851 motion; (C) the alleged facts were vague and claims meritless; and (D) Bright's 3.851 motion and amendments were abusive.

A. No Good Cause

Good cause is defined as "a substantial reason" that must be more than "mere ignorance of law" or "hardship." *State v. Boyd*, 846 So. 2d 458, 460 (Fla. 2003) (cleaned up). It requires more than negligence or inattention. *Bowles v. State*, 276 So. 3d 791, 794 (Fla.

2019); *Sebree v. Schantz, Schatzman, Aaronson & Perlman*, 963 So. 2d 842, 847 (Fla. 3d DCA 2007) (collecting cases).

There is no good cause where counsel simply fails to include a claim that was factually and legally supported at the time the pending 3.851 motion was filed. *See Lugo*, 2 So. 3d at 19-20 (emphasizing the rule's good-cause language and holding there was no abuse of discretion to deny an amendment with a claim that was readily available when counsel filed the pending 3.851 motion).

Bright cannot demonstrate an abuse of discretion here. Proposed claims 18, 20-21, and the PVF, incorporation-by-reference part of proposed claim 19, are all supported by the transcripts or facts available to Bright when he filed his initial 3.851 motion. Bright's mere failure to raise the conduct undergirding these proposed claims as IATC in his 3.851 motion is not good cause.

The Carla-Houghton portion of claim 19 was also available to Bright when he filed his 3.851 motion because: (1) a variant of it was litigated in 2013 (1PCR2:189; 1PCR4:386); and (2) Bright alleged below that any travel restrictions were lifted in the "summer of 2021," around six months before Bright's 3.851 motion was filed.

Finding no good cause was well within the court's discretion.

B. Previously Available

Apart from good cause, but for the same reasons, the court did not abuse its discretion by denying an amendment with claims that were legally and factually available when the pending 3.851 motion was filed. *See Tanzi v. State*, 94 So. 3d 482, 495 (Fla. 2012) (citing *Lugo,* 2 So.3d at 19.)

C. Vague and Meritless

A court has discretion to deny amendment with vague or meritless claims. *Tanzi*, 94 So. 3d at 495 (citing *Lugo,* 2 So.3d at 19.) Bright's claims were both.

Proposed claims 20-21 were not even fully pleaded. They contained no prejudice allegation and requested additional leave to amend. Their vagueness was sufficient reason to deny amendment. So was their meritlessness. *Strickland*'s prejudice prong assumes the jurors dutifully decided Bright's case and prohibits contrary, extra-record evidence to show otherwise. **See below, Issue 2, section A.**

Proposed claim 18 threw in a laundry list of facts, no clear delineation of what the specific *Strickland* claims were, and seemed to allege somewhere around ten different acts or omissions by

counsel. *Cf.* Fla. R. Crim. P. 3.851(e)(1) (each claim or subclaim must be separately pleaded). The prejudice allegations were also entirely conclusory. This claim was not correctly pleaded, there was no way to accurately analyze it, and there was no abuse of discretion for failing to let Bright include it.

The four parts of proposed claim 19 were also vague and meritless. The incorporation-by-reference part was entirely improper under Rule 3.851(e)(1), and Bright's HAC arguments do not translate easily into PVF-related-ineffectiveness challenges. The seven incorporation claims were vague and failed to suggest relief was warranted.

Likewise, the two portions about Carla Houghton and Bright's "low point" are vague and do not suggest relief. The State proved the PVF aggravator by introducing "a copy of the conviction, judgment, and sentence from 1990," and the contemporaneous murders. *Bright III*, 299 So. 3d at 993, 996. Nothing in Bright's proposed amendment suggested an objectively reasonable decisionmaker would have given a life sentence if Bright tried to combat indisputable facts.

Since Bright's proposed amendments were vague,

insufficiently colorable, and meritless, there was no abuse of discretion.

D. Abusive Litigation

Finally, this Court should hold postconviction courts have unfettered discretion to deny amendment when defendants engage in abusive litigation by shotgunning claims into 3.851 motions.

Rule 3.851 was designed to address a narrow class of issues and serious deprivations of constitutional rights that could not be addressed any other way. Aside from *Hurst*[11] litigation, it is relatively rare for a capital postconviction claim to achieve reversal. Most postconviction claims range from farcical, to frivolous, to meritless. But the number of claims makes it harder for courts to bring their full judgment to bear and discover true injustice.

This Court should hold it is never an abuse of discretion to refuse amendment to an *initial*[12] *resentencing* 3.851 motion containing more than *five* claims *and* subclaims *total*, *unless* a capital defendant identifies and offers to remove whatever

[11] *Hurst v. State*, 202 So. 3d 40, 43 (Fla. 2016).

[12] A successive 3.851 should never be allowed to raise more than three post-amendment claims and subclaims total.

claims/subclaims needed so he only has a total of five claims and subclaims in the post-amendment 3.851 motion.[13, 14] *Cf. Jones v. Barnes*, 463 U.S. 745, 752 (1983) (most cases present only "one, two, or three significant questions" and raising "every colorable issue" risks "burying good arguments" in "a verbal mound").

Bright's seventeen-claim 3.851 motion with numerous subclaims was already abusive. *See Hedrick v. State*, 6 So. 3d 688, 691-92 (Fla. 4th DCA 2009). *Cf. Jackson v. Bank of Am., N.A.*, 898 F.3d 1348, 1357 n.10 (11th Cir. 2018) (explaining shotgun pleading is a harmful and abusive litigation tactic); *Starship Enterprises of Atlanta, Inc. v. Coweta Cnty., Ga.*, 708 F.3d 1243, 1251 n.7 (11th Cir. 2013) (same). The lower court did not abuse its discretion by failing to let Bright make it more so.

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[13] In regular 3.851 proceedings, that number should double to ten (five guilt-phase and five penalty-phase claims/subclaims).

[14] Even if there is an offer to delete claims, precluding amendment is still within the court's discretion.

2. NO ABUSE OF DISCRETION IN DENYING BRIGHT'S UNTIMELY MOTION FOR IRRELEVANT JURY INTERVIEWS.

Bright's second issue asserts reversible error in the denial of his motion to interview jurors. This issue is frivolous.

Relevant Facts

Bright's penalty-phase jury swore (or affirmed) to "well and truly try the issues between the State of Florida and the defendant and render a true verdict according to the law and the evidence," and ultimately recommended two death sentences. Fla. R. Crim. P. 3.360; (RS1:61-68; 521-43; RS2:604).

CCRC-N appeared as Bright's postconviction counsel on 9/11/2020 and filed his Rule 3.851 motion on 3/22/2022. (RSPCR:5-6, 559-634.) This motion raised two Hurricane-Irma-related claims. (RSPCR:617-26.) It also (twice) alleged: "Three of the jurors were in mandatory evacuation zones" and listed the zones for six jurors. (RSPCR:619-20.) Elsewhere, Bright mentioned the prospect of jury interviews and stated a "separate motion under Rule 3.575 will be filed at a later date." (RSPCR:616.)

Months later, Bright moved to amend with proposed claims 20-21, which asserted counsel ineffectively failed to ask the

prospective/actual jurors about Hurricane Irma's impact. (RSPCR:1106-07.)

Bright filed his Rule 3.575 motion to interview jurors contemporaneously with his proposed amendments on 7/14/2022. (RSPCR:1177-80.) The motion generally argued jury interviews would support Hurricane-Irma-related-IATC claims. (RSPCR:1177-80.) Bright exclusively wanted to question the jurors about "whether they were distracted by the hurricane's potential impact and aftermath." (RSPCR:1170.)

As good cause, Bright only argued such a motion would have conflicted with trial counsel's "personal priorities." (RSPCR:1178.) Bright never explained why he did not move for interviews sooner after CCRC-N's appointment.

The State opposed the motion. (RSPCR:1337-51.)

Ruling Below

Denied as untimely and legally insufficient. (RSPCR:1389-90.)

Preservation

Bright raises two unpreserved arguments here: (1) CCRC-N had to investigate before it could discover some of the jurors lived in evacuation zones; and (2) caseload/staffing issues provided good

cause. Neither argument was raised below in support of jury-interviews motion.

Appellate Presentation

Bright also raises at least two undeveloped and conclusory arguments in this issue: (1) denying the motion to interview violates due process; and (2) his right to a fair and impartial jury was violated by the lack of assurance the jury could be attentive.

These conclusory arguments are not properly presented for appellate review. *See United States v. Orlandella*, 96 F.4th 71, 96 n.36 (1st Cir. 2024); *Cole v. State*, No. SC2024-1170, 2024 WL 3909057, at *6 n.14 (Fla. Aug. 23, 2024); *Jackson v. State*, 347 So. 3d 292, 300 (Fla. 2022). Bright is not entitled to dump his conclusions into this Court's lap and expect reversal. *E.g.*, *Lynn v. City of Fort Lauderdale*, 81 So. 2d 511, 513 (Fla. 1955). His perfunctory arguments serve only to forfeit them.

But it is worth noting quickly that Bright's right-to-impartial-jury argument also turns *Strickland*'s presumptions on their head. *Strickland*'s prejudice-prong analysis presumes the jury was impartially performing its duty and Bright has the burden of rebutting that presumption with affirmative, trial-record *evidence*,

not speculation or complaints about lacking assurances of impartiality. *See Strickland*, 466 U.S. at 694-95.

Merits

Denying Bright's motion to interview jurors was within the court's discretion for two overriding reasons: (1) the interviews were irrelevant to Bright's IATC claims on *Strickland*'s prejudice prong;[15] and (2) Bright's motion was untimely.

A. Irrelevant to *Strickland* Prejudice

Bright's motion to interview jurors exclusively argued interviews were needed to support his Hurricane-Irma/jury-related-IATC claims. (See RSPCR:1177-80.) But jury interviews are irrelevant to IATC prejudice under *Strickland*. Since Bright's IATC claims failed as a matter of law—with or without jury interviews—there was no abuse of discretion.

Strickland's deficient-performance prong requires evaluating counsel's performance based on what *counsel* knew at the time and

[15] The interviews are even less relevant to Bright's actual-conflict claim because the adverse effect inquiry focuses on whether counsel's strategic decisions were significantly, adversely, influenced by the conflict, not whether there was prejudice under *Strickland*. *See Mickens v. Taylor*, 535 U.S. 162, 172-73 & n.5 (2002).

eliminating hindsight. *See Strickland*, 466 U.S. at 689-90. *Strickland*'s prejudice prong requires assuming the jury was "reasonably, conscientiously, and impartially applying the standards that govern the" penalty-phase "decision." *Id.* at 694-95.

Forty years ago, in *Strickland* itself no less, the State of Florida tried to do what Bright is trying to do now: get into the decisionmaker's mind and see what influenced the sentencing decision. The Supreme Court roundly rejected that attempt and rendered jury interviews legally irrelevant to IATC prejudice.

In *Strickland*, Florida introduced the sentencing judge's testimony at a federal evidentiary hearing. 466 U.S. at 678. The district court, relying on the judge's testimony that the defendant's proposed mitigation would not have altered his sentencing decision, held the defendant suffered no prejudice. *Id*. at 679.[16]

On appeal, the court held that the sentencing judge's testimony "was not to be considered admitted into evidence to explain the judge's mental processes in reaching his sentencing

[16] *See also Washington v. Strickland*, 693 F.2d 1243, 1249 & n.10 (5th Cir. 1982) (en banc).

decision." *Id.* at 683.[17]

The Supreme Court agreed and held that the judge's testimony was *irrelevant* to prejudice determinations on ineffectiveness claims. *Id.* at 694-95 (emphases added). In crafting the now-familiar, IATC prejudice standard, the Court held the analysis must "presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to law" and "must exclude the possibility of arbitrariness, whimsy, caprice, nullification; and the like." *Id.* at 694-95. Further, the "assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision. It should not depend on the idiosyncrasies of the particular decisionmaker." *Id.* at 695.

The Supreme Court then emphatically held: "*evidence about*

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[17] *See also Strickland*, 693 F.2d at 1262-63 (holding "the portion of Judge Fuller's testimony in which he explained his reasons for imposing the death sentence and his probable response to the evidence adduced at the habeas hearing is inadmissible evidence that may not be considered by the district court"). The court listed several reasons for discounting Judge Fuller's testimony from the prejudice determination, including: (1) inability to accurately reconstruct thought processes years later; and (2) the importance of finality and integrity of judgments. *Id.* at 1262-63.

the actual process of decision, if not part of the record of the proceeding under review" should "***not*** *be considered in the prejudice determination*" and is, in fact, "irrelevant to the prejudice inquiry." *Id.* (emphases added.) Later, while analyzing prejudice, it reemphasized that the sentencing judge's testimony was "irrelevant to the prejudice inquiry." *Id.* at 700.

Bright's proposed jury interviews (searching for evidence jurors were distracted instead of conscientiously arriving at their penalty-phase verdict) are exactly the inquiry the Supreme Court held was irrelevant to *Strickland* prejudice forty years ago. No matter what the jurors might say, it would be irrelevant to proving prejudice under *Strickland*. *Cf. State v. Mullens*, 352 So. 3d 1229, 1244 (Fla. 2022) (holding the sentencing and postconviction judge's statement he would have imposed life if the postconviction mitigation had been presented was irrelevant to prejudice).

Instead, the proper resolution of Bright's jury-related ineffectiveness claims requires assuming the jury was "reasonably, *conscientiously*, and impartially applying the standards that govern the decision" instead of being distracted by Hurricane Irma. *Strickland*, 466 U.S. at 694-95, 700. Extra-trial-record evidence to

the contrary, like jury interviews, is "irrelevant" to that determination and could "not be considered." *Id.*

Bright's jury-related-IATC claims failed as a matter of law under *Strickland*. His suggestion the jury may have been too distracted by Hurricane fears to listen attentively to his mitigation case is exactly the type of evidence *Strickland* precludes extra-trial-record development of for prejudice. *See also Tanner v. United States*, 483 U.S. 107, 120 (1987) ("Allegations of" juror "inattentiveness, raised for the first time days, weeks, or months after the verdict, seriously disrupt the finality of the process" and it is not "at all clear" the "jury system could survive" intrusive, post-verdict, investigation). The lower court did not abuse its discretion by prohibiting Bright from going on a fishing expedition for irrelevant evidence.

B. Untimely

The court was also within its discretion to find Bright's jury-interview motion untimely. That motion was filed 1,753 days from the jury's penalty-phase verdict, 1,679 days from the court's sentencing order, 114 days from the date Bright alleged jurors were in evacuation zones and mentioned plans to request jury interviews,

all well outside the 10-day, post-verdict limit. *See* Fla. R. Crim. P. 3.575. So, the motion required "good cause" to be timely. *Id.*

Generally, good cause is a "substantial reason," not including "ignorance of the law," "hardship," negligence, or inattention. *State v. Boyd*, 846 So. 2d 458, 460 (Fla. 2003); *Bowles v. State*, 276 So. 3d 791, 794 (Fla. 2019); *Sebree v. Schantz, Schatzman, Aaronson & Perlman*, 963 So. 2d 842, 847 (Fla. 3d DCA 2007).

Bright provided the lower court with exactly one good-cause argument: trial counsel's alleged "conflict." Even granting that as a basis for good cause, the lower court ruled it would not excuse the filing of the motion "more than a year into CCRC-N's representation" and after the "Rule 3.851 motion and the State's Response were filed." (RSPCR:1390.)

It would have been fanciful for the court to hold any different given Bright's sole argument. And the court was not required to scour Bright's filings to construct different good-cause arguments for him that were never raised in relation to this issue. *See Murthy*

v. Missouri, 144 S. Ct. 1972, 1991 n.7 (2024).[18]

In any event, Bright's unpreserved arguments (staffing/caseload difficulties and investigative needs) are nothing more than run-of-the-mill hardships entirely impotent to excuse the delay in this case, particularly since the motion was filed 114 days after Bright alleged the jurors were in evacuation zones, raised Hurricane-Irma-related-ineffectiveness issues, and mentioned he wanted jury interviews.

There was no abuse of discretion here.

[18] *Cf. United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) ("Judges are not like pigs, hunting for truffles buried in briefs" especially "when the brief presents a passel of other arguments.").

3. BRIGHT'S COUNSEL DID NOT INEFFECTIVELY FAIL TO UTILIZE A VICTIM-BLAMING DEFENSE TO REBUT HAC/CONTEXTUALIZE THE MURDERS.

Bright's third issue asserts counsel ineffectively failed to rebut HAC by contextualizing the murders with victim-blaming evidence. This issue is frivolous.

Relevant Facts

Sixteen-year-old Brown had 14 injuries to the outside of his head, and defensive wounds to his arms, wrists, and other body parts. (RS2:829, 836-38.) Twenty-year-old Derrick King had "38 blunt impact injuries to his head, and he had about 20 injuries to his extremities" for a total of "58 various blows or injuries." (RS2:842, 845-48.) The jury heard extensive victim-impact evidence about both Brown and King. (RS2:762-774, 812-820.)

Bright's operative-penalty-phase jury found HAC on King's murder, but not Brown's, and recommended death for both murders after finding PVF applied to both. (RS1:1289-94.)

Counsel knew the victims were drug dealers who Bright allowed to stay in his home in exchange for drugs. (RSPCR:5030.) She knew they had previously threatened Bright, and that Bright had tried to get them removed. (RSPCR:5030.) She also had access

to the wealth of material developed in Bright's prior proceedings. (RSPCR:5117-18.)

Counsel Bynum chose not to present any evidence that the victims threatened Bright or were drug dealers. (See RSPCR:5030-31, 5040, 5079.) She instead combated HAC by focusing on the lack of proof about how long the victims were alive, rebutting the State's image of them as sleeping victims, and pointing out King had cocaine in his system. (RSPCR:5035-36, 5077-80.)

Counsel Bynum emphasized the importance of having a consistent theme with the jury and strategically selected a mitigation-outweighs-aggravation theme instead of focusing on a self-defense-like theme. (RSPCR:5077-5083, 5124.) A self-defense-like strategy would have been difficult because Bright was not going to testify, and the facts that he fled the scene and hid the hammer after the murder would have been difficult to overcome. (RSPCR:5124-26, 5128-30.)

Counsel Bynum explained she did not believe it would be advantageous to attack the victims for several reasons, including their young ages and the fact that she was asking for mercy on behalf of her client who made mistakes and did terrible things.

(RSPCR:5139-5141.) She did not see the benefit of highlighting "the fact that these two young men who were brutally murdered were drug dealers" and believed such a tact would have destroyed her relationship and credibility with the jury. (RSPCR:5140-5141.) Blaming the victims would have been a "bad move." (RSPCR:5141.) It also may have opened Bright up to the cold, calculated, and premeditated aggravator. (RSPCR:5179.)

Preservation

Bright raises an unpreserved—and entirely distinct—IATC claim as part of this issue. He claims counsel ineffectively followed through on her strategy of using the medical examiner to rebut HAC and relied on unadmitted evidence to do so. This separate claim was not separately pleaded (or included at all as far as the State can tell) in Bright's 3.851 motion. (RSPCR:578-83.)

But it is also meritless. Counsel got the medical examiner to concede: (1) there could have been a struggle, and hearts still beat while someone is unconscious; (2) several wounds would have been fatal on their own; and (3) the victims did not survive long enough for brain swelling. (RS2:849-52.) The State adduced evidence that defensive wounds indicated the victims were alive. (RS2:854.)

Counsel then argued in closing that the State failed to prove HAC because of the possibility the victims were unconscious, each blow could have been fatal, the lack of swelling indicated the victims did not survive long, Bright's mentality underwent a major shift, there was no evidence the victims were sleeping, and Bright's remorse and shock. (RS2:1221-27.)

The State bore the burden of proving HAC beyond reasonable doubt and Bright was not required to adduce evidence disproving it. It would be enough to give the jury reasonable doubt which, as we all know, can come from the absence of evidence. But counsel also tried to negate HAC in other ways, pointed at the evidence, and partially succeeded: the jury did not find HAC for Brown. This unpreserved issue is, therefore, meritless.

Ruling Below

The postconviction court explicitly credited counsel Bynum's testimony and found neither deficient performance nor prejudice. (RSPCR:4229-31.)

Appellate Presentation

Bright has failed to adequately rebut the lower-court's no-prejudice determination. His only appellate prejudice "argument" is

a conclusion. That is not enough. Bright's perfunctory argument forfeits this issue and requires affirmance. *Stanton v. Fla. Dep't of Health*, 129 So. 3d 1083, 1085 (Fla. 1st DCA 2013) (single sentence insufficient presentment); *State v. J.V.*, 184 So. 3d 662, 662 (Fla. 1st DCA 2016) (failure to challenge alternative basis for ruling requires affirmance). *See also Lodge v. Kondaur Cap. Corp.*, 750 F.3d 1263, 1274 (11th Cir. 2014); *Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 682-83 (11th Cir. 2014).

Merits

This Court has repeatedly held *not* pursuing a victim-blaming strategy is a reasonable strategic decision. *See Hall v. State*, 212 So. 3d 1001, 1018 (Fla. 2017); *Howell v. State*, 877 So. 2d 697, 703-05 (Fla. 2004); *Spencer v. State*, 842 So. 2d 52, 61-62 (Fla. 2003).

Federal courts have held the same. *E.g.*, *Kearse v. Sec'y, Fla. Dep't of Corr.*, 2022 WL 3661526, at *24 (11th Cir. 2022) (collecting cases and holding counsel reasonably elected not to pursue a victim-blaming defense that he believed "likely to backfire"); *Black v. Workman*, 682 F.3d 880, 904 (10th Cir. 2012) (same).

Courts have also recognized that subtlety may be more effective than direct victim-blaming attacks because it allows jurors to draw their own inferences. *Black*, 682 F.3d at 904.

Victim-blaming concerns are magnified when the victims are young, and the jury hears victim impact evidence. *Cf. Payne v. Tennessee*, 501 U.S. 808, 823 (1991) (recognizing victims are not to be "faceless strangers" in capital penalty phases, the State has a legitimate interest in "counteracting the mitigating evidence" by "reminding the sentencer" that the victim was a unique individual too, and "it might not be prudent for the defense to rebut victim impact evidence" for "tactical reasons"); *Roper v. Simmons*, 543 U.S. 551, 568-79 (2005).

Counsel can take these concerns into consideration, and they are relevant to *Strickland*'s performance (but not prejudice) prong. 466 U.S. at 695.

A. Performance

Bright has failed to establish deficient performance. Counsel reasonably decided to avoid a victim-blaming defense given the victims' ages and the fact that she was asking the jury to show mercy to Bright for his more heinous actions. (RSPCR:5139-5141.)

That reasonable decision obviated the need to research the nuances of how a victim-blaming defense could/would operate in this case. *See Strickland*, 466 U.S. at 691. And it was especially reasonable given Bright's proposed strategy requires introducing double-edged-sword evidence that, while casting the victims in a negative light, also makes it more likely Bright planned their murders and enjoyed their suffering as revenge for their actions. There is no deficient performance.

B. Prejudice.

Bright has also failed to establish prejudice. He argues counsel's failure to admit evidence that the victims had guns, were running a drug operation out of Bright's house, threatened him, and were killed while Bright was struggling for his life, could have rebutted HAC. But he does not argue there is a reasonable probability of a life sentence if counsel introduced this evidence. His prejudice allegations are therefore insufficient, and he has failed to rebut the lower court's prejudice holding.

In any event, Bright's arguments fail for two reasons. **First**, his proposed evidence does not rebut HAC. *Cf. Hall v. State*, 87 So. 3d 667, 671-72 (Fla. 2012) (describing HAC law as focusing on the

"means and manner" of death rather than the defendant's "intent and motivation"). A finding that the defendant "actually intended to inflict a high degree of pain or was indifferent to the victim's suffering" is sufficient, but not necessary, for HAC. *Craven v. State*, 310 So. 3d 891, 904 (Fla. 2020).

Bright's proposed evidence does not rebut HAC. He bludgeoned King to death with a hammer and inflicted about fifty-eight injuries on him. Bright's proposed strategy to "rebut" HAC is entirely irrelevant to the actual HAC evidence in this case, which shows the victims were beaten to death with a hammer. There is no reasonable probability a victim-blaming defense would have overcome the means and manner of King's death and resulted in the jury finding HAC inapplicable. Nor is there a reasonable probability that failing to find HAC would have resulted in a life sentence, which is the true test for *Strickland* prejudice.

Second, Bright's proposed strategy would likely have caused an objectively reasonable jury to find HAC for King *and* Brown instead of just King. Evidence the victims had guns, were running a drug operation out of Bright's house, had threatened him, and were killed during a struggle, coupled with Bright's fear and use of a

hammer, makes it *more* likely Bright actually intended to inflict a high degree of pain or was indifferent to the victims' suffering. *Cf. Valentine v. State*, 98 So. 3d 44, 48, 49 n.4 (Fla. 2012) (capital defendant motivated by revenge stated, "I'm gonna kill you, but you're going to suffer"). An objectively reasonable jury/judge would have neutralized any benefit of Bright's proposed "contextualization" testimony given Bright had other options to remove the victims but refused to follow through.

All this would have solidified HAC, not rebutted it, particularly given Bright's confession that he instigated the encounter that left the victims dead. *Bright I*, 90 So. 3d at 253-53. *See Craven*, 310 So. 3d at 904. *See also Peede v. Att'y Gen., Fla.*, 715 F. App'x 923, 931 (11th Cir. 2017) (collecting cases where double-edged sword evidence was insufficient to show prejudice).

For both reasons, there is no reasonable probability an objectively reasonable jury following the law would have found HAC unproven for King's murder and therefore returned a life recommendation.

4. BRIGHT'S MITIGATION-RELATED-IATC ISSUES FAIL UNDER *STRICKLAND*.

Bright has jammed countless mitigation-related-IATC claims into this "issue." So, rather than go claim by claim, the State will lay out the aggravation, and then analyze Bright's omitted-mitigation claims in three categories: (1) mental-health mitigation; (2) military mitigation; and (3) lay/background mitigation.

But the mitigation Bright complains counsel omitted is mostly cumulative and, in some cases, would have opened the door to affirmatively harmful evidence. Bright has failed to demonstrate his 2017 resentencing counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed" to him "by the Sixth Amendment"—*Strickland*'s performance prong. *Strickland*, 466 U.S. at 687. Likewise, Bright has failed to demonstrate a just-under-51% chance he would have received a life sentence if counsel had done what Bright now says should have been done—*Strickland*'s prejudice prong. This Court should affirm.

AGGRAVATION

At Bright's 2017 resentencing, the State proved HAC and PVF for King's murder and PVF for Brown. (RS1:61, 65.) The contemporaneous murders and a 1990 robbery conviction supported PVF, while the fifty-eight injuries/defensive wounds and Bright's weapon (a hammer) supported the King-related-HAC aggravator. (RS1:526-29.) The jury unanimously recommended, and court imposed, two death sentences. (RS1:61-68, 526-29; RS2:1289-97.)

MENTAL-HEALTH-MITIGATION-IATC ISSUES

It appears the first category of mitigation Bright claims counsel ineffectively failed to introduce is additional, mental-health mitigation from Dr. Krop.

Relevant Facts

2017-Mental-Health-Mitigation Testimony/Argument

Drs. Krop, Gold, and Ouaou, all provided mental-health mitigation at Bright's 2017 resentencing.

Dr. Krop testified he tested Bright in August 2008 and July 2009—less than two years after the murders—and: (1) Bright was not malingering; (2) there was no evidence of psychopathic traits; (3)

there was no evidence of antisocial personality disorder; (4) Bright was anxious and depressed, but Krop did not formally diagnose him; (5) he wasn't able to look into PTSD, and Bright's self-reported history gave no reason to look for PTSD, but he requested follow-up testing and family interviews to probe the matter deeper; (6) there was no indication of PTSD in Bright's VA records; (7) Bright did not report childhood family trauma; (8) the psychological testing did not suggest PTSD; (9) Bright told Krop he had "a good relationship with his family" and graduated on time with average grades; (10) Bright never had specialized course work and was not a disciplinary problem in school; (11) Bright participated in ROTC in school; (12) Bright was court-marshaled for altering a paycheck in the Marines; (13) shortly before the murders, Bright was consuming alcohol and using cocaine; (14) Bright had participated in anger management in 1997; (15) Bright had several DUIs; (16) initially Bright reported a "normal childhood development, free of abuse and trauma," including sexual abuse, although it is normal for abuse victims to report no abuse at first; (17) he did not have enough information to suggest the extreme mental/emotional disturbance, extreme

duress, or substantial impairment mitigators; and (18) he requested further psychological screening to explore mitigation. (RS2:917-34.)

The State's cross-examination honed-in on the fact that there was no evidence of PTSD in Bright's military records, that Bright had not reported childhood trauma to Krop, and that none of the testing Krop did confirmed PTSD. (RS2:922-25.)

On redirect, when Dr. Krop stated further psychological mitigation was "not pursued in this case," counsel noted further testing was not done "by you," and again confirmed that Krop saw the need for additional testing. (RS2:934.)

Dr. Gold evaluated Bright in 2013 testified (in relevant part): (1) Bright committed the murders while influenced by an extreme mental/emotional disturbance; (2) Bright was acting under duress and his capacity to appreciate the criminality of his conduct/conform his conduct to law was substantially impaired; (3) Bright's childhood PTSD played a role in the murders; (4) Bright had all ten adverse childhood experiences and was one of the worst cases Dr. Gold had ever seen; (5) it is common for victims of child/sexual abuse not to report those issues; (6) Bright had military-related PTSD symptoms due to an incident where a pilot

crashed and died and Bright had to collect the body parts, but that was not relevant to the murders in Dr. Gold's view. (RS2:1018-31, 1034, 1071, 1077.)

Dr. Ouaou evaluated Bright in 2014 and testified: (1) about his intensive neurophysiological testing of Bright; (2) individuals with trauma like Bright tend to self-medicate with alcohol or drugs; (3) Bright claimed his older brother sexually and physically abused him; (4) Bright had an average IQ of 100; (5) Bright was diagnosed with anxiety disorders in the VA; (6) Bright suffered from emotional distress due to severe physical and sexual abuse as a child; (7) he was aware Bright previously reported no abuse while growing up; (8) he did not diagnose Bright with PTSD; (9) Bright's brain was "functioning perfectly" and he had no "cognitive disability"; (10) Bright's VA records had no PTSD diagnosis and reflected alcohol/drug issues; (11) Bright had an extensive criminal history; (12) Bright did not comply with drug-abuse treatment while in prison; and (13) he did not ask Bright specifically about the murders. (RS2:1147-67.)

The State argued Krop's 2008/2009 testing was more reliable because it occurred closer to the murders. (RS2:1199-200.) Counsel relied on Dr. Gold's testing and PTSD diagnosis. (RS2:1244.)

Dr. Krop's 2023 Postconviction Mental Mitigation

Dr. Krop testified in postconviction and opined: (1) it is common for defendants to initially deny abuse; (2) he had all the available VA records before Bright's 2009 trial; (3) Bright had PTSD due to his childhood experiences, which was exacerbated by his military experiences (but his childhood was the "primary trauma"); (4) Bright was suffering from PTSD at/near the murders; (5) Bright had 9 or 10 out of ten Adverse Childhood Experiences (ACEs); (6) individuals with more ACEs and PTSD are more likely to have drug and alcohol problems; (7) Bright met the statutory mitigator of extreme emotional/mental disturbance; (8) Bright's ability to appreciate the criminality of his conduct and conform his conduct to law was substantially impaired; (9) Bright expressed remorse; (10) Bright has a lengthy criminal history and realizes he has issues but continues to drink, do drugs, and commit more crimes; (11) Bright told Krop that he altered his military paycheck because "he was using and needed the money"; (12) there was a dispute in the

house between Bright and some of the individuals involved in the cocaine operation about whether he owed them money for cocaine; (13) Bright remembers one victim trying to cover himself with a sweatshirt. (RSPCR:5445-502.)

Counsel's Explanation

Counsel Bynum testified she utilized Dr. Krop because his testing showed Bright did not have antisocial personality disorder. (RSPCR:5040.) Opening argument, and the attorney work product in the State's exhibits, reflect that counsel wanted Krop to testify: (1) there was no evidence Bright was malingering; (2) there was no evidence of psychopathic traits; and (3) there was no evidence of antisocial personality disorder. (RS2:647; RSPCR:3085.) The work product notes that Krop requested, and did not perform, additional psychological testing "which leads to Ouaou." (RSPCR:3085.)

Appellate Presentation

Bright mentions a Dr.-Miller-IATC claim in this issue but does not advance any argument regarding him. He has therefore forfeited any IATC issue related to Dr. Miller, which was not properly raised in his 3.851 motion below anyway. Throwing a name out, stating counsel "could have" called an individual, and omitting any

deficient performance or prejudice analysis is nowhere near proper pleading for IATC claims. (See RSPCR:589.)

Ruling Below

No deficient performance or prejudice. (RSPCR:4231-33.)

Merits

This sub-issue fails both *Strickland* prongs. But first, as a threshold matter, this entire IATC claim rests on the false premise that calling Dr. Krop in 2017 without letting him do additional testing allowed the State to use him to rebut Dr. Gold's mitigation. The State would have used Dr. Krop's prior, 2008/2009 testing (which did not suggest PTSD), Bright's VA records (which also had no indication of PTSD), and Bright's own self-report of a normal childhood to rebut Dr. Gold no matter what Dr. Krop would have said if prepared differently (or not called by Bright) in 2017.

The postconviction court accurately pointed this out in its order denying this claim. (RSPCR:4233 (explaining Dr. Krop's prior testing and testimony "would still have come in"). Bright fails to explain why the postconviction court was wrong for calling out the

false premise this evolving claim rested on.[19] That is an independent reason to affirm.

A. Performance

Bright has failed to demonstrate deficient performance. Counsel Bynum wanted three things out of Dr. Krop, and she got them. For everything else, in 2017, Krop freely admitted he believed additional testing was needed and he did not do it. Counsel presented Dr. Gold as the one who did that testing and found Bright suffered from PTSD and met statutory mitigation.

Reasonable counsel would have known the State would use Dr. Krop's 2008/2009 testing, Bright's VA records, and Bright's self-report of a normal childhood, no matter what counsel did. In that circumstance, it was reasonable for counsel to call Krop, use the parts of his past testing she liked, and emphasize through testimony that Krop recognized additional testing (which he did not perform but Dr. Gold did) was needed. There was no deficient performance here.

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[19] Capital defendants cannot foist the blame on courts for their own lack of clarity. The court below, repeatedly, had to analyze Bright's arguments "to the extent" he asserted them at all. Claims that are not clearly pleaded, and arguments that are not distinctly raised, are forfeited rather than reversible.

B. Prejudice

Bright has failed to demonstrate prejudice. The State would have been able to use Dr. Krop's 2008/2009 testing, Bright's VA records, and Bright's self-report of a normal childhood to undermine his mitigation no matter what Dr. Krop said if prepared differently in 2017. There is no just-under-51% chance Bright would have received a life sentence if his jury heard: (1) Dr. Gold's testimony; (2) Dr. Krop's 2023, cumulative-to-Dr.-Gold, testimony; (3) Dr. Krop's initial findings and testing; (4) Bright's VA records contained no evidence of PTSD; and (5) Bright self-reported to Dr. Krop that he had a normal childhood. There is, therefore, no prejudice.

MILITARY-MITIGATION-IATC ISSUES

The second category of mitigation Bright claims counsel ineffectively failed to introduce is additional military mitigation.

Relevant Facts

2017-Military-Mitigation Testimony

Military expert James Hernandez, Dr. Gold, and Bright's sister provided military-related mitigation at Bright's 2017 resentencing.

James Hernandez testified: (1) he served fifteen years active duty in the Marines, another eleven years in the reserves, and another fifteen years in the "retired reserves"; (2) he was experienced with military personnel records due to his time as a personnel officer and legal officer; (3) he worked in military court martials; (4) Bright's personnel file showed Bright received three honorable discharges (followed by immediate reenlistments) and one general under honorable conditions discharge due to alcohol rehabilitation failure; (5) Bright was a jet mechanic as his military occupation specialty and could be an infantryman at any time because he was a Marine; (6) Bright was given a meritorious promotion for performance in an outstanding manner while at the recruit training depot in Parris Island; (7) Bright attended a six-

week advanced infantry school that every Marine attends and spent another six weeks getting his certification to work on AV8A fighter jets; (8) Bright received a good conduct medal for his faithful service between 1975-1978; (9) he was promoted to lance corporal in October 1976 and served overseas; (10) his promotion meant he was a noncommissioned officer with leadership responsibilities; (11) Bright received a second good conduct award for three years of service (1978-1981) that meant he had not gotten into trouble for that period of time and served faithfully; (12) Bright received a "meritorious mast" award from his commanding officer for his duties performed while a plane captain and deployed, specifically, that he observed an "unusual condition" on his assigned aircraft as it took off and "may well have prevented a tragic mishap"; (13) plane captains are charged with the safety of aircraft; (14) the meritorious mast award was based on Bright's observation of a mechanical difficulty that could not be observed until the plane was in flight and his quick decision to tell the pilot to land; (15) Bright's actions probably saved the Marine Corps a million-dollar aircraft and the pilot's life; (16) Bright attended a noncommissioned officer leadership course where he was taught infantry tactics and

leadership skills; (17) Bright was promoted to sergeant based on a composite score that evaluated his specialty, rifle range score, physical fitness test, land navigation, fire team infantry tactics, marksmanship training infantry scores, job proficiency, and conduct; (18) Bright received a certificate of appreciation from his weapons-tactics instructor; (19) Bright was given an award for crossing the equator as part of tradition; (20) Bright served aboard a carrier that was going to Kenya on deployment for an air show that was done for public relations purposes and as a show of strength; (21) alcohol rehabilitation failure meant Bright either did not complete the courses or completed the course and had a second incident; (22) a general under honorable conditions discharge meant the Marines found he served honorably, just not up to the level of a full honorable discharge; (23) the discharge certificate showed that Bright had conditions, not physical, that interfered with the performance of his duties; (24) Bright received a national defense service medal; (25) Bright entered the service at the very end of the Vietnam war during a time where active-duty military were not respected and even instructed not to wear their uniforms off-base; (26) the Marines were much more tolerant of alcohol in the

70s and 80s; (27) alcohol parties were common and expected; (28) mechanics were worked hard, sometimes for as long as fourteen-hour days; (29) he met with Bright, who was "distraught" and "in a state of shock" shortly after the murders. (RS2:935-55.)

On cross, Hernandez testified: (1) Bright received a general discharge due to his alcohol rehab failure; (2) he did not know the reasons behind Bright's discharge other than it was for alcohol rehabilitation failure; (3) he did not know how the Marines determined Bright had an alcohol problem; (4) mechanics were not supposed to drink on the job because of the consequences if something goes wrong with a plane; (5) Bright's rank was reduced for some indeterminate reason and he was promoted after that; (6) Bright did not take and return fire, and Hernandez had not seen any combat records, but he could not rule out the possibility Bright had battlefield experience and was fired upon; and (7) none of the records he reviewed reflected a court martial. (RS2:955-61.)

Dr. Gold also provided additional evidence to Bright's 2017 jury about Bright's military career, including: (1) Bright had military-related PTSD symptoms from "an event in the Marines where" two pilots crashed and died and Bright had to "collect the

body parts"; (2) military-related PTSD was not directly related to the incident at hand; and (3) Bright first began drinking as part of the Marines alcohol culture. (RS2:1052-54, 1077-78.)

Bright's sister testified Bright was proud to be a Marine; received military commendations; and sent pictures of the planes he worked on to his family. (RS2:885-86.)

The State elicited testimony from Dr. Krop about Bright's time in the miliary. According to Dr. Krop, Bright admitted he "was court-martialed for altering a paycheck," but claimed "that was the only disciplinary action he had in nine or ten years." (RS2:926.)

2023 Postconviction Military Evidence

Bright presented additional military-mitigation related witnesses and records in postconviction.

Records

Bright introduced military records gathered by prior counsel (which counsel Bynum had access to) as exhibits 13 and 31. (RSPCR:5018, 5118, 5387, 5889.) These records show a career blotted with issues and dishonorable behavior Bright's 2017 jury was almost completely unaware of, including: (1) Bright was given drug-abuse orientation on 2/22/1973 (RSPCR:2806); (2) on

11/8/1973, Bright was found guilty of disobeying a lawful order and his rank was reduced to Private (RSPCR:2790, 5941-44); (3) on 2/13/1975, Bright was court-martialed, found guilty of "intent to defraud the U.S. Government by altering a government paycheck," had his rank reduced from lance corporal to private, and given a "bad conduct discharge" that was later suspended on appeal (RSPCR:2802, 2838, 2877-80, 5930); (4) Bright confessed to Dr. Krop that he altered the check because he was "using and needed money" (RSPCR:5490); (5) Bright was counseled concerning his "sub-standard personal conduct and improper military bearing" on 8/26/1975 (RSPCR:2807, 5948-50); (6) Bright was found guilty of going AWOL for four days on 8/27/1975 (RSPCR:2790, 5944); (7) Bright was given a second-chance reenlistment waiver in May 1977 despite his forgery conviction (RSPCR:2853-54); (8) Bright's designation as plane captain was disapproved in July 1977 after being previously approved in 1975 (RSPCR:2513, 2530-31); (9) a 10/5/1979 fitness report noted Bright displayed a "lack of tact" dealing with "junior troops" (RSPCR:2816, 5951-53); (10) Bright spent forty-three days (from 12/5/79 to 1/16/80) in a naval alcohol rehabilitation facility on orders from his commanding officer

(RSPCR:2558, 2562-65, 2568, 2844); (11) Bright was found guilty of sleeping at his post in June 1981 (RSPCR:2787, 2790, 2820, 2848, 5945-47, 5954); (12) on 6/9/1982, Bright was counseled about his responsibility to adequately support his dependents (RSPCR:2788, 5934-35); (13) a 6/15/1982 fitness report showing Bright was (a) counseled about his "imprudent use of alcohol"; (b) involved in two "other" alcohol-related incidents in the civilian community; (c) arrested driving on base with a blood alcohol level of .17 while on leave; (d) on leave after spending a night in jail due to getting in a fight while intoxicated and going to court; and warning his career was in jeopardy if he did not discipline "himself with regard to alcohol permanently" (RSPCR:2833, 5955-56); (14) on 6/29/1982, Bright's base driving privileges were revoked from 6/15/1982 to 6/14/1983 due to driving while intoxicated and he was counseled about the consequences of the revocation (RSPCR:2788, 5935-36); (15) on 6/29/1982, Bright was counseled concerning his improper use of government property (RSPCR:2788, 5937-38); (16) a 7/8/1982 fitness report showing Bright was "most effective when working by himself" and "apt to find communication skills with others a large stumbling block" (RSPCR:2832); (17) Bright's

statement in response to this report (and the 6/15/1982 report) disagreeing with his commanding officer over the poor marks in the report, stating that he did not "feel the use of alcohol has any relation to his personal problems," and stating he was taking steps to rid himself of alcohol (RSPCR:2883-84); (18) in May 1983, Bright was counseled about driving on base with a .11% blood alcohol level while his license was revoked (RSPCR:2788, 5938-39); and (19) Bright was deemed ineligible for reenlistment due to alcohol rehabilitation failure and ordered discharged with a general discharge in July/August 1983. (RSPCR:2551, 2559, 2748, 2788, 2795, 2868, 2885, 5939-40.)

Witnesses

Six retired military witnesses testified about their experiences with AV8A Harrier jets, time in the Marine Corps, and Bright and his mechanical skills: Stoneroad (RSPCR:5699-5738); Stutler (RSPCR:5739-63); Gulley (RSPCR:5764-5787); James (RSPCR:5790-97); Rickley (RSPCR:5979-99); Alexander (RSPCR:6001-16.) Each one was honorably discharged and only Stutler had (once) gotten into trouble in the Marines. (RSPCR:5759, 5762.) Stutler learned from his mistake, was never disciplined again, and agreed Bright

did not learn from his own mistakes. (Id.)

Bright also presented Arthur Cody as a military expert to opine that Bright's contributions were not fully put before the resentencing jury. (RSPCR:5853-5925, 5961-65.) The State's cross went through Bright's lengthy disciplinary history and alcohol discharge, highlighted that Cody never served in the Marines, and emphasized that Bright never went to Vietnam or saw combat. (RSPCR:5925-5960.) Cody testified the sleeping incident was at 3:30 a.m. while Bright was on guard duty. (RSPCR:5946, 5962.)

Counsel's Explanation

Lead counsel Bynum explained she utilized Mr. Hernandez to introduce Bright's military career to the jury (instead of seeking out others to present that evidence) because she "wanted the jury to hear how Mr. Bright serviced our country without muddying the waters on all of" the "the negative things that arose for him during his time in the military. Mr. Hernandez, I thought, presented very well. He's a very likable man." (RSPCR:5134-37.) She decided to only use one witness to get Bright's military career in front of the jury to minimize the State's cross-examination ability to highlight all the negative aspects of Bright's military career and because

multiple witnesses sometimes contradict each other. (RSPCR:5137.)

Preservation

Bright raises the unpreserved argument that the lower court's imposition of a procedural bar was erroneous. But he did not raise this argument below and it is therefore unpreserved and no basis for reversal. If a litigant wishes to challenge the lower-court imposition of a procedural bar, the proper time to do so first is in the lower court.[20] *See* § 924.051, Fla. Stat.

Procedural Bar

Bright's 3.851 motion did not assert mitigation-related-IATC claims about counsel's failure to present Larry Stoneroad, Jimmy Stutler, Wayne Gulley, Johnny James. (RSPCR:4236-39.) These were fact witnesses, and there "is no question that when the ineffective assistance claim alleges trial counsel should have presented a *fact* witness, such witness must be named and his or her availability attested to." *E.g.*, *State v. Lucas*, 183 So. 3d 1027, 1031-34 (Fla. 2016). Defendants have a duty to plead the actual,

[20] At minimum, Bright had the opportunity to do so in his motion for rehearing which—while not required to preserve any already-preserved issue—is a way for litigants to preserve unanticipated issues arising in an order denying 3.851 motions.

fact witness testimony that counsel ineffectively omitted in 3.851 motions on pain of forfeiture. *Conde v. State*, 35 So. 3d 660, 664-65 (Fla. 2010).

Bright's scattershot pleading below proves this Court must continue to insist on particularized pleading for IATC claims to avoid additional claims coming out of the woodwork after an evidentiary hearing. Such pleading also ensures the fact witnesses were available to counsel instead of unavailable or unwilling to come. After all, unlike experts, fact witnesses are not retained and handsomely paid for their testimony.

On that note, Bright was not allowed to opaquely refer to the need for another expert in his 3.851 motion and then produce one later. "Each claim or subclaim shall be separately pled." Fla. R. Crim. P. 3.851(e)(1). Bright did not separately plead a claim that counsel ineffectively failed to secure a different expert. He made vague allusions that fall short of a correctly pleaded IATC claim. That is not good enough and forfeits the issue.

Bright was required to both separately plead and name Cody as a witness to properly plead claims regarding his testimony. This Court's decision in *Lucas*, 183 So. 3d at 1032-34, is consistent with

the State's position, and does not allow Bright to escape the fact he failed to name Cody at all in his 3.851 motion. In *Lucas*, this Court held that a defendant is not "always" required to name an expert and show he would have been available at trial for IATC-failure-to-consult/call-an-expert claims. *Id.* at 1034. But Bright's claim is of a different sort because counsel did in fact consult and call an expert (Hernandez).

Thus, Bright needed to plead there was another (better) expert who would have testified differently from the one counsel chose and was available at trial. *Cf. Lucas*, 183 So. 3d at 1034 (explaining its logic in differentiating fact from expert witnesses is "any number of expert witnesses in that field" could have provided that testimony). In those circumstances, the name and availability of the expert are critical to an assessment of ineffectiveness. Battle-of-the-experts-IATC[21] and failure-to-call/consult-an-expert-at-all claims are not the same thing.

[21] Of course, there is no such claim. Counsel is entitled to rely on her expert and Cody was irrelevant to any conceivably valid claim. *E.g.*, *State v. Mullens*, 352 So. 3d 1229, 1237 (Fla. 2022). That is another reason why forcing defendants to plead claims appropriately is important—it prevents wasting time with incognizable claims that can be summarily denied.

This Court should strongly adhere to its requirement that capital defendants plead their claims with specificity because (otherwise) there is no intelligent way to guess what claims may be lurking in a 3.851 motion. When a hidden claim becomes apparent after an evidentiary hearing, the proper remedy is to hold it forfeited instead of starting over at square one. Forfeiture encourages better lawyering and briefing. Post-evidentiary-hearing amendment only encourages gamesmanship and evolving claims, something capital litigation has enough of already.

The bottom line is the testimony presented by these individuals cannot be used to prove IATC. But this Court should reject these claims on the merits as well. *See* 28 U.S.C. § 2254(d).

Ruling Below

The court credited counsel Bynum's testimony, found no deficient performance, and found Bright failed to correctly plead most of his failure-to-call-military-witnesses-IATC claims. (RSPCR:4234-41.) But the order contains a minor factual error—Hernandez did serve in the Marines. (RSPCR:4240; RS2:936.)

Merits

This sub-issue fails *Strickland*'s performance and prejudice prongs.

A. Performance

Bright has failed to demonstrate deficient performance. Hindsight demonstrates the wisdom of counsel's decision to utilize Hernandez as the singular military witness and curate the records she gave him. Because of counsel's skillful care, Bright's 2017 jury heard very little about his lengthy, dishonorable history in the Marines, including that Bright: (1) had trouble getting along with junior troops; (2) went AWOL; (3) defrauded the government because he was "using"; (4) disobeyed a lawful order; (5) slept at his post; (6) received a bad conduct discharge that was later suspended; (7) was cited for his "sub-standard personal conduct and improper military bearing"; (8) was disapproved as a plane captain; (9) spent forty-three days on the military's dime at an alcohol rehab facility; (10) was counseled about his failure to adequately support his dependents; (11) got into a bar fight and spent the night in jail; (12) was arrested driving on base with a .17 blood-alcohol level and had his driving privileges revoked; (13)

misused government property; (14) struggled working with others; (15) refused to take responsibility when his superior gave him poor marks; and (16) drove drunk on base *again* while his license was suspended.

Thanks to counsel's skill, the only negative items the jury heard from Hernandez was Bright once had his rank reduced and was given a general discharge as an alcohol rehabilitation failure because he either did not complete a course *or* had a second alcohol incident. That is not deficient performance. Not even close. *See Wong v. Belmontes*, 558 U.S. 15, 26 (2009) ("Here, the worst kind of bad evidence would have come in with the good. The only reason it did not was because" counsel "was careful in his mitigation case.").

Counsel Bynum explained the three main reasons she chose to exclusively utilize Hernandez: (1) she "wanted the jury to hear how Mr. Bright serviced our country without muddying the waters on all of" the "negative things that arose for him during his time in the military"; (2) Hernandez "presented very well. He's a very likable man"; and (3) utilizing only one military witness minimized the State's ability to highlight the negative aspects of Bright's military career. (RSPCR:5134-37.)

Given Bright's extensive disciplinary history in the Marines, and the fact that counsel was able to utilize Hernandez to present his military career in an almost entirely positive light, counsel's decision to use Hernandez rather than seek out other experts or individuals who served with Bright is eminently reasonable. This was A+ lawyering. *Strickland* only requires a passing grade.

Bright's incantation of *Porter v. McCollum*, 558 U.S. 30 (2009) to save his military-related-mitigation-IATC claims fails. Porter served valiantly on the front lines of combat, and had a troubled upbringing, but his jury learned *none* of that. *Porter*, 558 U.S. at 33, 39. Porter was not a case where counsel put on military-related-mitigation and strategically chose to minimize the negative aspects of the defendant's career by using one, buttoned-up witness to present the mitigation and military history. Nor did *Porter* hold the Sixth Amendment demands every counsel put on live testimony from military comrades. *Porter* has zero application to this case—Bright has a much worse disciplinary history than Porter and counsel put on military mitigation. *Cf. id.* at 33, 35.

Bright's case is a textbook example of the fact that more mitigation is not necessarily better. *See Everett v. State*, 54 So. 3d

464, 485 (Fla. 2010). Reasonable counsel could easily determine it is better to go with one buttoned-up, expert witness, particularly given Bright's extensive disciplinary history in the Marines. *Cf. Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 328 (2009); *Bates v. Sec'y, Fla. Dep't of Corr.*, 768 F.3d 1278, 1295 (11th Cir. 2014). Reasonable counsel can choose quality over quantity. That is exactly what Bright's counsel did. There is no deficient performance here.

B. Prejudice

Bright has failed to demonstrate prejudice. The Supreme Court recently explained that its prior cases finding prejudice for mitigation-related-IATC claims are limited to cases where "defense counsel introduced little, if any, mitigating evidence in the original sentencing" and generally also involve weak aggravation. *Thornell v. Jones*, 144 S.Ct. 1302, 1314 (2024).

This is not such a case. Bright's 2017 jury knew that he was a Marine because of Hernandez and Dr. Gold. It also had testimony about his childhood, background, and psychological issues. Nonetheless, the jury found HAC and PVF for King's murder, and PVF for Brown's murder. These are two of the weightiest factors in

Florida's capital system. *Hall v. State*, 107 So. 3d 262, 278 (Fla. 2012).

Moreover, as postconviction revealed, Bright's proposed military-mitigation strategy works against him. The Marine Corps motto is Semper Fidelis, meaning *Always* Faithful. But Bright was not faithful at numerous, documented points in his military career. He was not faithful when he engaged in extensive criminal conduct in his post-discharge, civilian life. And he was not faithful when he bludgeoned two young men to death with a hammer instead of following through with law enforcement if there was really an issue.

There is no just-under-51% chance an objectively reasonable jury would have given Bright a life sentence if mostly cumulative military witnesses were placed before them, particularly given the State's enhanced ability to paint a more complete view of Bright's disciplinary issues in the Marines. Bright suffered no prejudice.

LAY/BACKGROUND-MITIGATION-IATC ISSUES

The third category of mitigation Bright claims counsel ineffectively failed to introduce is additional lay mitigation.

Relevant Facts

2017-Lay/Background-Mitigation Testimony

Janice[22] (sister), Knight (childhood friend), and Bossen (lawyer) provided lay/background mitigation before the jury in 2017.

Janice testified: (1) Bright was her older brother; (2) they grew up impoverished and had no running water, plumbing, or toiletries; (3) Bright was picked on at school for not being clean; (4) Bright's father physically abused him with "whippings," "beatings," and "hittings," including picking up random objects in their junkyard and striking Bright with them to the point of drawing blood and causing Bright to pass out from the abuse; (5) they were punished for doing things normal children would do; (6) Bright developed a stutter when he was nervous/upset and would get beaten for stuttering; (7) Bright wet the bed growing up, which drew his father's anger; (8) Bright was weaker and their father preyed on

[22] The State will refer to Bright's family witnesses by their first name to avoid confusion.

that; (9) their father verbally abused Bright; (10) before and after school, the children were forced to work in a junkyard that surrounded their house and were sometimes late to school because of the work, which incurred punishments too; (11) they were not allowed to play with other children; (12) Bright was forced to continue working in the junkyard even after stabbing himself in the eye, which caused a permanent injury; (13) once Bright accidentally set himself on fire once in the junkyard, hid it, and returned to work to avoid punishment; (14) they were never paid; (15) Bright witnessed his father abuse his mother by pulling her hair, dragging her down, and hitting her in the head; (16) Bright's father had a gun and would brandish it threateningly and shoot it in the air; (17) Bright's sister would hide the gun when her father was drunk; (18) Bright would hear his father sexually assaulting his mother as she cried and begged him to "get off of her"; (19) their father had extramarital affairs; (20) their father was an alcoholic, would go on binges were he would leave for days or weeks drinking, and sometimes return and attack them/their mom; (21) their father once went drinking, left Bright and his sister out in the bitter cold for hours, and did not return until late at night; (22) their dad

would brag about that time and say he "raised some tough kids" because he "almost froze them to death but they survived"; (23) Bright ran away and joined the Marines when he was nineteen; (24) Bright struggled with substance abuse after he came home from the military in 1989 and tried to get help from the VA, which would help for awhile but not permanently; (25) sometimes Bright would be clean and then he would relapse; (26) Bright seemed to be doing good in November 2007, but they didn't talk as frequently after that; (27) she unsuccessfully tried to get "individuals who were residing in his house to leave;" (28) Bright seemed afraid, nervous, and distressed about the individuals in his house; (29) Bright helped her son with his drug struggles; (30) Bright was a positive influence in her children's lives; (31) Bright helped fix her roof after a hurricane; (32) Bright's family has positive relationships with him, and he actively tries to be part of their lives; (33) her dad was "a loving father" but didn't do his best; (34) Bright had an alcohol problem in the Marines; (35) their dad couldn't hold a job because he drank too much; and (36) she was not blaming the Marines for Bright's substance abuse. (RS2:856-911.)

Knight testified: (1) he and Bright met as kids, grew up in the same neighborhood, and were best friends; (2) Bright started working in the junkyard around six years old and would work from sunup to sundown; (3) he had to sneak over because Bright's father wouldn't allow anyone over; (4) Bright was not allowed to have a normal childhood; (5) Bright's father once whipped Bright hard with an extension cord after finding out Knight visited; (6) Bright's father was an alcoholic; (7) Bright's father once made Bright work after Bright cut off part of his finger at school; (8) after Bright joined the military, he would only see Bright when he came home; (9) Bright would always stutter around his father; (10) Bright's father was verbally abusive; (11) Bright did go to school and had food; (12) Bright did not get into trouble with the law as a child or use alcohol and drugs in his teens; and (13) Bright's oldest brother and Bright seemed to have a good relationship as adults; (14) Bright's childhood "was torture" and "child abuse."(RS2:968-89)

Mr. Bossen testified he spoke with Bright shortly after the murders. Bright was despondent, crying, having trouble speaking. (RS2:992-94.) The next day, when he saw Bright in person, Bright was very despondent and unable to communicate. (RS2:994-95.)

At the *Spencer* hearing, Tenneka testified for her father. (RS1:728-43.) The court found Bright established (through Janice and Tenneka) that he has positive relationships with others. (Id.) But it gave that mitigator little weight. (RS1:539-49.)

2023 Postconviction Lay/Background Mitigation

Bright presented family witnesses to give additional examples of Bright's childhood, positive family relationships/their positive views on Bright, and the issues he was having with people in his house: Janice (RSPCR:5539-89), Tenneka (RSPCR:5589-5617), Sherita (RSPCR:5617-33), Kristy (RSPCR:). He also presented Williams (RSPCR:5634-39) and Lundy (RSPCR:5640-42) as available individuals who previously testified about Bright's work ethic, mechanical skill, and positive qualities. *See Bright II*, 200 So. 3d at 717, 719-21, 738-39, 740 n.15. Finally, Bright presented some testimony that Maxine Singleton was residing at "10970 Lem Turner Road," maybe in apartment 1112. (RSPCR:5417-19; 5423.) Bright was unable to present Maxine Singleton for medical reasons and relied on her prior testimony. (RSPCR:5523.)

Counsel tried, unsuccessfully, to get everyone other than Kristy Bright (who she was not asked about) and Janice (who

testified in 2017) to Bright's 2017 penalty phase. **See below, Merits, section A**.

Ruling Below

The court found counsel made reasonable efforts to have Tenneka, Sherita, Singleton, Williams, and Lundy testify. (RSPCR:4242-47.) For Tenneka, the court found counsel was not deficient, and for Singleton, Williams, Lundy, and Faulk, the court found no deficiency and no prejudice. (RSPCR:4242, 4247.) For Kristy Bright, the court found any IATC-failure-to-call claim procedurally barred. (RSPCR:4243 n.4.)

Appellate Presentation

Bright has failed to challenge the lower-court's imposition of a procedural bar to his (apparent) failure-to-call-Kristy-IATC claim. That issue is therefore forfeited, and her testimony cannot validly be considered on this issue. However, this Court should issue alternative holdings because her testimony appears in the record, and she will probably be raised in federal court.

Separately, Bright does not argue any of the court's factual findings about witness unavailability are unsupported by

competent, substantial evidence. That issue is therefore now forfeited.

Merits

This sub-issue demonstrates the importance of capital defendants accurately separating and pleading their claims. In this sub-issue alone, Bright argues counsel failed to adduce testimony from seven different individuals. Each should have been pleaded and analyzed separately based on counsel's individual efforts to procure them and the impact of their testimony. *See* Fla. R. Crim. P. 3.851(e)(1). The State handled them this way below (RSPCR:4129-38, 4151 n.8) but on appeal, given the space limitations and Bright's insistence on raising a legion of frivolous issues, it must take a different tact.

So, as a threshold, the State will discuss (A) counsel's reasonable efforts to locate the unpresented witnesses (Tenneka, Sherita, Kristy, Lundy, Williams, and Singleton) Bright discusses. Then, based on Bright's Initial Brief, the State will divide the testimony from these witnesses into the three distinct categories they fall into: (B) evidence about Bright's childhood, positive relationships with his family, their perceptions of him; (C) evidence

about the issues Bright was having with people in his house; and (D) evidence about his skill as an employee, mechanic, and mentor.

A. Counsel's Reasonable Efforts

Bright has failed to establish deficient performance because counsel made reasonable efforts to locate and present the omitted witnesses alleged as part of this claim below. Notably, "the test for deficient performance is not whether counsel could have done more; perfection is not required. Nor is the test whether the best criminal defense attorneys might have done more. Instead, the test is whether what counsel did was within the wide range of reasonable professional assistance." *Thomas v. Att'y Gen.*, 992 F.3d 1162, 1187 (11th Cir. 2021).

In performing this analysis on appeal, the facts are viewed in the light most favorable to sustaining the postconviction court's ruling, and postconviction court's factual findings supported by competent, substantial evidence cannot be disturbed even if there is contrary evidence in the record.

So viewed, counsel made reasonable efforts to procure Sherita, Tenneka, and Singleton. Sherita refused to come because she was a nurse with a patient. (RSPCR:3037.) Tenneka did not initially

answer counsel's calls, and then refused to come even though counsel begged. (RSPCR:3023-24, 3030-31, 3033, 5053-54.) Counsel's investigator left Singleton voice messages on a number from "the file from Sitchta," and went to five different addresses (including "10970 Lem Turner Rd. Apt. 1107") looking for her without success. (RSPCR:3023, 3035-36.)

Likewise, given the minor nature of their testimony, counsel also made reasonable efforts to locate Williams and Lundy, including background checks, searching for addresses/phone numbers, visiting a potential one for Williams, and asking Janice for help. (RSPCR:3023, 3031, 3039, 3046, 3057, 5052, 5058, 5376, 5384-85, 5390.)

That brings us to Kristy, who was never alleged as part of this claim in Bright's 3.851 motion below. It does not appear Bright asked counsel about her and any efforts, or strategic reasons, for not having her testify. Bright has therefore failed to overcome *Strickland*'s presumption of competence and establish deficient performance. *E.g.*, *Harvey v. Warden, Union Corr. Inst.*, 629 F.3d 1228, 1239 (11th Cir. 2011). That is particularly true given she is simply another, cumulative, family witness. **See section B below**.

B. Childhood/Family Mitigation[23]

Counsel was not deficient, nor Bright prejudiced, for failing to present additional childhood/family mitigation about their positive views of him because it is cumulative to what counsel introduced before the jury in 2017. (RS2:856-911, 968-89.)

IATC claims about failure to present cumulative evidence automatically fail both prongs of *Strickland*. *Covington v. State*, 348 So. 3d 456, 479 (Fla. 2022) (holding there as "no deficient performance" *and* "no prejudice" because the evidence was cumulative). Evidence is considered cumulative when "it tells a more detailed version of the same story told at trial or provides more or better examples or amplifies the themes presented to the jury." *Holsey v. Warden, Georgia Diagnostic Prison*, 694 F.3d 1230, 1261-62 (11th Cir. 2012) (citing numerous cases including *Cullen v. Pinholster*, 563 U.S. 170, 199-201 (2011).)

Bright's childhood/family mitigation is cumulative to what counsel introduced in 2017. While he, arguably, presents "a more

[23] The State is counting Maxine Singleton's good/generous-boyfriend testimony about Bright in this section. (See DAR4:726 (evaluating Singleton's testimony about Bright as a boyfriend and giving it "slight weight").

detailed version" of his childhood/family relationships, "more or better examples," or "amplifies" the childhood and family themes presented in 2017, that is exactly what cumulative evidence is. *Holsey*, at 1261-62. There was neither deficient performance nor prejudice for failing to present the cumulative, childhood/family mitigation presented in 2023 in 2017. *Covington*, 348 So. 3d at 479.

C. Victim-Blaming Testimony

Counsel was not deficient, nor Bright prejudiced, by the failure to introduce additional testimony about the issues Bright was supposedly having with individuals in his house. On performance, counsel made a reasonable, strategic decision to avoid putting on evidence about the victims being drug dealers who Bright was having issues with given their youth and the fact that she was asking the jury to show mercy for Bright's more heinous crime of beating them to death with a hammer. **See Issues 3 and 6**. There is no deficient performance.

Nor was there prejudice. **See Issues 3 and 6**. Given the aggravation, there is no just-under-51% chance an objectively reasonable jury would have granted Bright's plea for mercy when he beat two young men to death with a hammer instead of following

through with police and getting them removed. That is especially true since Bright's apparent issues with the victims make it even more likely he planned their murders and enjoyed their suffering.

D. Skillful Mechanic/Employee/Mentor Mitigation

Finally, counsel was not deficient, nor Bright prejudiced, by the failure to introduce testimony that Bright was a skillful mechanic, diligent employee, and mentor to younger mechanics. This is fairly minor mitigation—it was presented at Bright's first penalty phase and only given "some weight." (DAR4:725-26.)

It cannot be said, given the mitigation counsel did present, that counsel's failure to present this mitigation was an error "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687. Failure to present this minor mitigation is simply not that kind of error. It is well established that penalty-phase counsel may reasonably stop investigating mitigation after gathering a "substantial amount of information." *Porter v. McCollum*, 558 U.S. 30, 39 (2009) (citing *Bobby v. Van Hook*, 558 U.S. 4, 9-12 (2009) and *Strickland v. Washington*, 466 U.S. 668, 699 (1984).)

The Sixth Amendment only requires counsel to investigate a defendant's background for mitigation and, reasonably, decide when to stop. *See Van Hook*, 558 U.S. at 9-13 (counsel reasonably investigated mitigation despite stopping before uncovering additional family members that would have helped "narrate the true story of" his "childhood experiences"). There is no Sixth Amendment obligation to find and throw every scrap of mitigation at a penalty-phase jury. *See id.* at 9-13.

Bright's resentencing counsel uncovered and presented a great deal of mitigation to paint a picture of Bright as a formerly abused child, a skillful Marine who received commendations, and a man whose family loved him, and a man who struggled with alcohol/drugs and relapsed. Omitting this minor mitigation was not a serious error. Bright has therefore failed to establish deficient performance.

The minor nature of this mitigation also means it fails *Strickland*'s prejudice prong.

CUMULATIVE EVIDENCE REVIEW

Bright has failed to demonstrate deficient performance and the overarching parts of the mitigation he presents fail on the prejudice prong too. But the State believes it would be helpful if this Court issues an alternative holding—assuming complete deficiency on this issue—that the evidence produced in 2023 is insufficient to show a reasonable probability of a life sentence if it had all been introduced in 2017.

Assuming complete deficient performance, the real question for *Strickland*'s prejudice prong is whether there is a just-under-51% chance Bright would have a received a life sentence if all the 2023 evidence urged on appeal was included in 2017. *See Thornell v. Jones*, 144 S.Ct. 1302, 1314 (2024); *Harrington v. Richter*, 562 U.S. 86, 112 (2011). In answering that question, this Court must evaluate all aggravation and omitted penalty-phase "evidence—the good and the bad—when evaluating prejudice." *Wong v. Belmontes*, 558 U.S. 15 (2009).

The answer to that question is easy. No. The aggravation for both of Bright's sentences was strong. It included another murder (PVF) and, for the King-related sentence, HAC as well. With Bright's

2023 evidence, there was a *lot* of bad that would help the State negate Bright's attempt to use his military service as mitigation. The evidence that was helpful to Bright was mostly either cumulative or double-edged-sword. And the remaining good mitigation (good employee/mentor) the 2017 jury did not hear is nowhere near enough to make a difference.

Viewing all the evidence cumulatively, Bright suffered no prejudice under *Strickland*. To aid future federal courts deciding this multi-layered issue, the State encourages this Court to issue an alternative holding—assuming complete deficiency on this issue—that Bright suffered no *Strickland* prejudice when all the evidence (aggravation and mitigation, good and bad) discussed in issue 4 is analyzed.

5. BRIGHT'S COUNSEL DID NOT INEFFECTIVELY FAIL TO REBUT STATE'S "INNOCENT VICTIMS" DEPICTION.

Bright's fifth issue asserts counsel ineffectively failed to rebut the State's depiction of the victims as innocent. This issue is frivolous.

Relevant Facts

See Issue 3 facts. The State's closing argument referred to the victims as "innocent" on four occasions. (RS2:1178, 1189, 1201.)

Ruling Below

No deficient performance. (RSPCR:4247-48.)

Merits

Bright argues counsel ineffectively failed to counter the State's closing-argument depiction of the victims as "innocent young men" by pointing out the victims had firearms, threatened Bright, and were running a drug operation out of his house. This was a continuation of counsel's reasonable strategy to avoid victim-blaming and not deficient performance. **See Issue 3**.

There is also no prejudice. As presented in this claim, this evidence does not rebut either aggravating factor or add mitigation. Bright's jury was instructed to base its decision exclusively on the

aggravating and mitigating circumstances rather than prejudice, bias, or sympathy, and is presumed to have followed that instruction. (RS2:1264, 1269-71.)

Moreover, as the postconviction court pointed out, victim-blaming would have "invited the State to point out the many alternatives to resolving" Bright's issues with the victims that "did not involve bludgeoning two young men to death with a hammer." (RSPCR:4248.) Bright's proposed victim-blaming strategy would likely have resulted in a net loss with an objectively reasonable jury, and certainly not a reasonable probability of a life sentence.

This Court should therefore affirm this issue.

6. BRIGHT'S COUNSEL DID NOT INEFFECTIVELY FAIL TO ARGUE THE "FEAR-OF-VICTIMS" MITIGATOR.

Bright's sixth issue asserts counsel ineffectively failed to argue the fear-of-the-victims mitigator. This issue is frivolous.

Relevant Facts

A fear-of-the-victims mitigator was argued in Bright's original penalty phase and given little weight. (DAR4:723-724.)

Dr. Gold provided resentencing testimony that Bright believed the victims were going to kill him. (RS2:1028-29, 1041, 1063.) But Counsel Bynum (with Bright's explicit assent) withdrew the fear-of-victims mitigator as explicit, enumerated mitigation. (RS2:1123-26.) This was another part of her conscious decision not to utilize a victim-blaming strategy. (RSPCR:5079, 5106-07, 5139-41, 5174-75.) **See Issue 3 facts**.

Ruling Below

No deficient performance. (PCR:4248-49.)

Note

Bright exclusively performs the wrong prejudice analysis in his plea for reversal. See I.B. at 74 (arguing prejudice is that the jury

did not take into consideration the surrounding circumstances). Legally incorrect arguments provide no basis to reverse.

Merits

Bright argues counsel ineffectively removed the fear-of-the-victims mitigator from the jury's consideration. His arguments fail *Strickland*'s framework. On deficient performance, counsel Bynum reasonably chose not to use a victim blaming strategy in this case considering victims youth and the fear that doing so would destroy her credibility with the jury and backfire against Bright (who beat them to death with a hammer). (RSPCR:5077-84, 5124-25, 5139-41.) This was a reasonable strategic decision, *e.g.*, *Howell*, 877 So. 2d at 703, and Bright agreed with it, *see Smith v. State*, 330 So. 3d 867, 882 (Fla. 2021).

The fact that some evidence in the record supported this mitigator shows that counsel was employing subtlety, hoping the jury would make the leap to victim-blaming so she herself did not have to. (RS2:1247 (arguing there was "something going on in at that house"); RSPCR:5078-79); *Black*, 682 F.3d at 904.

On prejudice, there is no reasonable probability an objectively reasonable jury would have issued a life recommendation had

Bright's counsel focused on his fear of the victims. The State would have rebutted this mitigation through evidence showing Bright had options (like following through with police) other than beating the victims to death with a hammer to neutralize it.

Bright's fear of the victims also makes the State's argument that he attacked the victims while they were sleeping even stronger, and thereby reinforces HAC. But even standing alone, there is no reasonable probability of a life recommendation had counsel included this mitigation. This Court should therefore affirm on both no-deficient-performance and no-prejudice grounds.

7. BRIGHT'S COUNSEL DID NOT GIVE AN INEFFECTIVE OPENING BY FOCUSING ON MITIGATION INSTEAD OF VICTIM-BLAMING.

Bright's seventh issue asserts counsel's opening statement ineffectively focused on mitigation instead of portraying the victims as lowlifes who deserved to be beaten to death with a hammer. This issue is frivolous.

Relevant Facts

See Issues 3 and 6 facts. The opening statement focused on mitigation stemming from Bright's abusive childhood, military service, mental health issues, and psychological risk factors. (RS2:640-50.) The court repeatedly instructed Bright's jury that attorney arguments are not evidence, and the law required its sentencing decision to be based on the penalty-phase evidence alone. (RS2:605, 1169, 1264, 1269-71.)

Ruling Below

No deficient performance or prejudice. (RSPCR:4250.)

Appellate Presentation

Bright once again fails to include an accurate prejudice analysis and rebut the lower court's no-prejudice determination. That issue is now forfeited, and affirmance required.

Merits

This issue is frivolous on *Strickland*'s performance and prejudice prongs.

A. Performance

Bright failed to prove deficient performance. When assessing performance (as opposed to prejudice), counsel's "selection of strategies" can be based on her perception of the decisionmakers before her. *Strickland*, 466 U.S. at 695.

This Court repeatedly held *not* pursuing a victim-blaming strategy is reasonable. *See Hall v. State*, 212 So. 3d 1001, 1018 (Fla. 2017); *Howell v. State*, 877 So. 2d 697, 703-05 (Fla. 2004); *Spencer v. State*, 842 So. 2d 52, 61-62 (Fla. 2003). And victim-blaming concerns are magnified when the victims are young and the jury hears victim impact evidence. *Cf. Roper v. Simmons*, 543 U.S. 551, 568-79 (2005); *Payne v. Tennessee*, 501 U.S. 808, 823 (1991).

Experienced, board-certified, counsel Bynum reasonably pursued a mitigation-related theme instead of a victim-blaming one. Counsel's perception of how arguments could provoke a jury are proper considerations in the deficient performance analysis.

Strickland, 466 U.S. at 695. And counsel did not need to investigate the nuances of how a victim-blaming strategy could be utilized when she made a reasonable decision not to pursue that strategy. *See Strickland*, 466 U.S. at 691.

Counsel's decision is eminently reasonable under these circumstances, which include the victim's youth, the way Bright bludgeoned them to death, the victim impact evidence, and that counsel was asking the jury to spare her client's life for far more heinous crimes than Bright accuses the victims of committing. There is no arguable deficient performance here.

B. Prejudice

There is also no prejudice. Bright's jury was explicitly instructed to base its sentencing decision on the penalty-phase evidence and that attorney arguments are not evidence. Under *Strickland*'s prejudice prong, opening statement changes will *never* sway a properly instructed jury. *See* 466 U.S. at 694. Bright points to no trial-record evidence the jury did anything other than follow the court's instructions. And neither extra-trial-record-evidence, nor the lack of evidence, can rebut *Strickland*'s presumption.

Even without the presumption, there is no reasonable probability of a life sentence if counsel would have run with Bright's proposed opening statement. This Court should affirm.

8. BRIGHT'S COUNSEL DID NOT GIVE AN INEFFECTIVE CLOSING BY FOCUSING ON MITIGATION INSTEAD OF VICTIM-BLAMING.

Bright's eighth issue asserts counsel's closing argument ineffectively focused on mitigation instead of blaming the young victims for their actions before Bright bludgeoned them to death with a hammer. This issue is frivolous.

Relevant Facts

See Issue 3 facts. Counsel Bynum's closing argument focused on Bright's childhood and urged the jury to spare his life. (RS2:1210-54.) The court repeatedly instructed Bright's jury that attorney arguments are not evidence, and the law required its sentencing decision to be based on the penalty-phase evidence alone. (RS2:605, 1169, 1264, 1269-71.)

Ruling Below

No deficient performance or prejudice. (RSPCR:4250-51.)

Merits

This issue is frivolous. Bright failed to prove counsel deficiently failed to utilize a victim-blaming closing. **See above, issue 7, section A**. And Bright suffered no prejudice both as a

matter of law and without *Strickland*'s presumptions. **See above, issue 7, section B**.

9. BRIGHT'S COUNSEL DID NOT INEFFECTIVELY FAIL TO OBJECT TO MICHAEL MAJORS' 911 CALL.

Bright's ninth issue asserts counsel ineffectively failed to object when Michael Majors 911 call was admitted. This issue is frivolous.

Relevant Facts

Majors called 911 after discovering the victims murdered in Bright's home. (RS2:677-79.)[24] The 911 call with Majors confirmed: (1) the address where the victims were found; (2) what the crime scene looked like; (3) that Majors was cousin of one victim. (RS2:677-79.) Counsel asked Majors if he "needed a moment" before cross-examining him. (RS2:681.)[25] The court instructed the jury to base its decision exclusively on the aggravating and mitigating circumstances rather than prejudice, bias, anger, or sympathy. (RS2:1264,1269-71.)

Counsel Bynum believed the call was admissible as part of the State's ability to review the crime with the penalty-phase jury.

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[24] The 911 call was also introduced back in 2009 during the guilt phase. (DAR9:338-40.)

[25] Counsel did the exact same thing before cross-examining Brown's mother. (RS:660.)

(RSPCR:5071-73, 5076, 5149-50.)

Ruling Below

No deficient performance or prejudice. (RSPCR:4251-52.)

Merits

Bright appears to argue counsel deficiently failed to object to the 911 call as both irrelevant under § 90.401, Florida Statutes, and overly prejudicial under § 90.403, Florida Statutes. He is wrong on both counts, but, alternatively, suffered no prejudice.

A. "Missed" Relevance Objection

Bright's claim that counsel deficiently failed to object to Majors' 911 call on § 90.401 grounds is meritless for three reasons. **First**, a reasonable attorney could believe the 911 call was relevant to the time and circumstances of the murder and corroborating Majors' account. *See Cooper v. State*, 856 So. 2d 969, 980 (Fla. 2003). That is especially true given the trial judge and Counsel Bynum (both experienced) believed the call was admissible. (RSPCR:4251-52.)

Second, any argument the 911 was irrelevant is too novel to support an ineffectiveness claim. *See Sanchez-Torres v. State*, 322 So. 3d 15, 23 (Fla. 2020) (citing *Steinhorst v. Wainwright*, 477 So.

2d 537, 540 (Fla. 1985).) Bright's failure to point to any caselaw indicating 911 calls are irrelevant in the circumstance his counsel faced is a failure to meet his *Strickland* burden.

Third, as the trial court pointed out, counsel affirmatively utilized the 911 call and Majors emotional state thereafter to her advantage. The 911 call thus provided counsel with "an opportunity" to "express empathy for the circumstances Mr. Majors experienced and humanize herself and, by extension" Bright. (RSPCR:4252.)

For all these reasons, this Court should affirm this missed-relevance-objection issue on no-deficient-performance grounds.

B. "Missed" § 90.403 Objection

For much the same three reasons as addressed above, Bright's claim that counsel deficiently failed to object to Majors' 911 call on § 90.403 grounds is meritless. **First**, reasonable counsel could have believed that the 911 call was admissible over a § 90.403 objection, particularly since the experienced judge below came to the same conclusion. (RSPCR:4251-52.) **Second**, any contrary argument is too novel to support an ineffectiveness claim given Bright provides no caselaw to support his position. **Third**, counsel affirmatively

utilized Majors emotional state to humanize herself and Bright to the jury. This Court should affirm on no-deficient-performance grounds for all these reasons.

C. No 911 Call Prejudice

Prejudice for failure to exclude evidence requires a defendant to make a two-prong showing of: (1) a meritorious exclusion argument; and (2) a reasonable probability the outcome of the proceeding (in this case a penalty phase) would have been different if the evidence was excluded. *See Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986); *Taylor v. Sec'y, Fla. Dep't of Corr.*, 64 F.4th 1264, 1271 (11th Cir. 2023). There is no exception to *Strickland*'s requirement that a defendant must show a reasonable probability of a different outcome to establish prejudice. *Thornell v. Jones*, 144 S.Ct. 1302, 1310 (2024) (penalty-phase prejudice can be shown "only" if there is a reasonable probability of a life sentence).

The proper prejudice analysis therefore requires Bright to show both: (1) his proposed objections would have resulted in 911-call exclusion; and (2) but-for counsel's failure to exclude the call there is a reasonable probability of a life sentence. *See Kimmelman*, 477 U.S. at 375.

Bright's prejudice arguments fail at both points. The 911 call was relevant to the time, circumstances of the murder, and corroborated Majors' discovery of his friend at Bright's address. And a trial court would not have abused its discretion by finding the call admissible under 90.403, Florida Statutes.[26] Bright cannot, therefore, establish his proposed objections were "meritorious" under *Kimmelman*.

There is also no reasonable probability of a life sentence. Bright suffered zero prejudice from the 911 call as a matter of law under *Strickland*'s governing framework. His jury was instructed to base its sentencing decision exclusively on the aggravating and mitigating circumstances rather than prejudice, bias, anger, or sympathy. (RS2:1264,1269-71.) *Strickland* presumes the jury did just that.

911-call exclusion would have had no effect on an objectively reasonable jury following the law since it only provided background information. The same is true even without *Strickland*'s

[26] Trial judges have wide discretion when ruling on § 90.403 objections. *White v. State*, 817 So. 2d 799, 806 (Fla. 2002). The only logical way to find an objection "meritorious" under *Kimmelman* when a judge has wide discretion is to require a showing that every reasonable judge would have sustained the objection.

presumptions. This Court should therefore affirm on no-prejudice grounds.

10. BRIGHT'S COUNSEL DID NOT INEFFECTIVELY FAIL TO IMPEACH MAJORS.

Bright's tenth issue asserts counsel ineffectively failed to impeach Michael Majors with pending charges and prior felonies. This issue is frivolous.

Relevant Facts

Counsel knew Michael Majors had felony convictions but strategically chose not to attack him because she wanted to use his testimony to rebut the State's picture of the victims as sleeping. (RSPCR:5073-75, 5150-51.) There was no reason to discredit him, and she affirmatively utilized his testimony in closing to: (1) rebut the State's argument that Bright attacked the victims while they were sleeping; and (2) argue Bright's mind underwent an extreme change between when Majors saw him playing chess with King and the murders. (RS2:1223-26; RSPCR:5074, 5150-51.)

Ruling Below

No deficient performance. (RSPCR:4252-53.)

Appellate Presentation

Bright's conclusory arguments fail to properly present this issue for appellate review. He presents no reason why every

reasonable counsel would have impeached Majors, who primarily provided background information and whose testimony was partially corroborated by the 911 call. Nor does he explain why every reasonable counsel would have researched well-worn impeachment law. Instead, his arguments consist of self-serving conclusions and dumping the deficient-performance question into this Court's lap. That is not proper presentation, and if Bright was unwilling to develop this issue it should never have been raised.

Bright also, yet again uses the wrong prejudice analysis, and asserts that the failure to impeach a key witness is always prejudicial under *Strickland*. He is wrong. *E.g.*, *Thornell*, 144 S.Ct. at 1310. Capital defendants must either correctly analyze prejudice or make an argument for a change in the law. Bright does neither.

Merits

This frivolous issue fails on both the deficient performance and prejudice prongs.

A. Performance

Bright has not proven counsel deficiently failed to impeach Majors. Counsel explained she wanted to use his testimony to rebut the State's depiction of the victims as sleeping, show Bright's mind

underwent an extreme change, and avoid attacking Majors because he was both sympathetic and gave a straightforward, non-combative account. Reasonable counsel could make that choice.

Nor was experienced trial counsel required to perform research on impeachment law before deciding whether to impeach this straightforward witness. Bright's instance that counsel waste time documenting research on every topic—no matter how banal—before making strategic decisions is absurd. That is the benefit of experience, which focuses the scarce resource of time on issues that truly matter instead of nitpicking. And, in any event, the focus of deficient performance "calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind." *Harrington v. Richter*, 562 U.S. 86, 110 (2011).

A reasonable lawyer could choose not to impeach Majors. That ends the deficient-performance inquiry even if other reasonable lawyers would choose to impeach him. *See Strickland*, 466 U.S. at 689 (even the "best criminal defense attorneys would not defend a particular client in the same way"); *Bates v. Sec'y, Fla. Dep't of Corr.*, 768 F.3d 1278, 1299 (11th Cir. 2014) (explaining trial litigation is anything but an exact science and there is no one size-

fits-all approach). Bright can only show deficient performance if *every* reasonable attorney would have impeached Majors. *See Perkins v. United States*, 73 F.4th 866, 879 (11th Cir. 2023). His conclusory arguments do not come close to making that showing.

B. Prejudice

Bright suffered no prejudice as a matter of law. He does not actually make a prejudice argument, and none is readily apparent. If Majors were impeached, the jury would only be allowed to utilize that evidence as reason to doubt his testimony—which was partially corroborated by the 911 call and focused on background rather than mitigation and aggravation. There is no reasonable probability of a life sentence if counsel chose to impeach Majors and that is the "only" way Bright can show prejudice under *Strickland*. *Thornell*, 144 S.Ct. at 1310.

11. BRIGHT'S COUNSEL DID NOT INEFFECTIVELY FAIL TO OBJECT TO THREE STATE CLOSING ARGUMENTS.

Bright's eleventh "issue" argues his counsel ineffectively failed to object to three separate arguments made in the State's closing. These issues are frivolous.

Relevant Facts

The State made three relevant arguments in closing: (1) sympathy was "not a basis" for the jury's decision, "it's mitigation and aggravation" (RS:1183); (2) Bright did not get PTSD from the military (RS:1200); and (3) Bright "was showing up for work drunk or had an alcohol problem.… He" kept "failing, came to work drunk, dismissed." (RS:1203-04.) During the resentencing, Dr. Gold responded "okay" when the prosecutor began reading his notes stating Bright "started drinking in the morning and it escalated from there." (RS:1053-54.)

Counsel Bynum tackled these arguments in closing by: (1) focusing on the mitigation before the jury (RS:1210-14, 1227-54); (2) refocusing the jury on Bright's childhood-related PTSD and ensuring the jury was aware no one was blaming the Marines (RS:1239); and (3) pointing out that Bright's service in the Marines

was not just alcoholism, that he was first introduced to alcohol in the Marines, and that his alcoholism was a way to suppress his childhood (RS:1238-40). Counsel also reminded the jury of the court's instruction that closing arguments are not evidence. (RS:1224.)

Bright failed to develop any of his subclaims with counsel Bynum. But she testified she tried to avoid objecting to closing arguments due to a fear the jury would think she was trying to hide something. (RSPCR:5153.) She tended to reserve her arguments for closing since she had the unrebutted last word there. (RSPCR:5151-53.) She also did not believe Bright had military-related PTSD. (RSPCR:5162.) Dr. Gold made a brief statement in the resentencing that Bright had military-related PTSD that was not relevant to the murders. (RS:1077.)

Ruling Below

The Court addressed the three arguments above as subclaims and held Bright failed to demonstrate: (1) deficient performance on the sympathy subclaim; (2) deficient performance or prejudice the military-related, PTSD subclaim; and (3) deficient performance or prejudice on the drunk-on-the-job subclaim. (RSPCR:4254-4257.)

Appellate Presentation

Bright tosses these three separate IATC claims out in about a page-and-a-half filled with conclusions, complaints, and very little, if anything, in the way of developed argumentation. By presenting these issues the way he has, Bright has only forfeited them. This Court should not tolerate ill-briefed arguments like these, particularly when the brief presents so many like them.

Bright has also failed to clearly rebut the lower-court's holdings on any of these issues and that requires affirmance. **See above, Issue 3, Appellate Presentation Section**.

Merits

The State will be brief since this three-in-one issue is both frivolous and poorly briefed.

Sympathy Argument. This Court has already determined that the State's sympathy argument was proper and "the prosecutor did not instruct the jurors to disregard evidence of Bright's abuse in reaching their decisions." *Bright III*, 299 So. 3d at 999. It found the comments were "not error" at all. *Id.* This issue is therefore procedurally barred. *E.g.*, *Barwick v. State*, 361 So. 3d 785, 793 (Fla. 2023).

Moreover, counsel cannot be deficient, nor Bright prejudiced, for failure to object to an argument this Court held perfectly proper. Bright's insistence on pursuing this issue while ignoring this Court's direct-appeal holding epitomizes this argument's frivolous nature.

Military PTSD Argument. Bright has failed to prove deficient performance or prejudice. Based on the penalty-phase evidence, the State was allowed to argue Bright did not have military-related PTSD or trauma in closing. (See RS2:924 (no evidence of PTSD in Bright's VA records); *Bright III*, 299 So. 3d at 1005 (competent, substantial evidence in the form of Dr. Krop's testing and testimony, VA records, Bright's self-report of a normal childhood supported rejection of PTSD). Counsel was not deficient, nor Bright prejudiced, by the failure to lodge a non-meritorious objection.

Counsel was also not deficient because she strategically chose to mostly avoid objecting to the State's closing. Instead, counsel focused on Bright's childhood-related PTSD and that everything traced back to that. (RS:1239-41) Reasonable counsel could decide it was better to address the State's argument this way than object, and nothing in Bright's perfunctory arguments show otherwise.

Drunk-on-the-Job Argument. Bright both abandoned this subclaim and failed to show either deficient performance or prejudice. On abandonment, he adduced no evidence contradicting the prosecutor's reading of Dr. Gold's notes, and did not ask counsel why she did not object to this argument. *See Ellerbee v. State*, 232 So. 3d 909, 925 (Fla. 2017); *see also Dunn v. Reeves*, 594 U.S. 731, 739 (2021).

On deficient performance, counsel testified she did not like objecting in closing because she feared the jury would think she was hiding something. *See Varner v. State*, 306 Ga. 726, 734-35 (Ga. 2019) (rejecting an ineffectiveness claim because counsel reasonably chose not to object for this reason). That is a reasonable, strategic reason not to object in closing. *Id.*

Counsel followed through on her plan to rebut the State's arguments in closing by pointing out Bright's entire career was not marked by alcohol abuse, and that he was relapsing and struggling with unresolved, childhood trauma. (RS:1237-40.) Moreover, as the Court pointed out below, the fact that the military was aware of Bright's alcoholism and ultimately discharged him as a result made the State's inference reasonable. (RSPCR:4256.)

There is also no prejudice for two reasons. **First**, there is no indication any objection would have been meritorious. The State was making reasonable inferences from the record. **Second**, it was indisputable that Bright left the Marines because he was an alcohol rehabilitation failure. Under these circumstances, there is no reasonable probability of a life sentence even if counsel had successfully objected.

No Prejudice As a Matter of Law. Bright's primary prejudice problem on all these subclaims is they involve the failure to object to closing arguments. But the Court told the jury that closing arguments were not evidence and it was required to rely on its recollection of the evidence. (RS:1169, 1267, 1270-71.) *Strickland* requires assuming they did so and arrived at the verdict based on the law and evidence. 466 U.S. 694-95. Bright provides no in-the-trial-record evidence to rebut that presumption.

Closing arguments make no difference to an objectively reasonable, penalty-phase jury following these instructions. *See Brady v. Maryland*, 373 U.S. 83, 90 (1963) (rejecting a "sporting theory" of justice that evaluates prejudice by analyzing what an unlawful jury might have done); *Strickland*, 466 U.S. at 694

(adopting the prejudice prong used in prosecutorial-suppression cases).

As such, Bright suffered no cognizable prejudice on these closing-argument claims. He certainly has not established a just-under-51% chance an objectively reasonable jury following the law would have returned a life-verdict but-for these arguments. *See Thornell*, 144 S.Ct. at 1310; *Richter*, 562 U.S. at 112; *Strickland*, 466 U.S. at 694-95.

12. THE POSTCONVICTION COURT CORRECTLY SUMMARILY DENIED BRIGHT'S CLAIM THAT HIS COUNSEL INEFFECTIVELY FAILED TO "LIFE QUALIFY" BRIGHT'S OPERATIVE, PENALTY-PHASE JURY.

Bright's twelfth issue argues his counsel ineffectively failed to life qualify the jury. Counsel in fact did. This issue is frivolous, but provides an opportunity for the State and this Court to analyze the Eleventh Circuit's recent holding in *Guardado v. Sec'y, Fla. Dep't of Corr.*, 112 F.4th 958 (11th Cir. 2024).

Relevant Facts

Bright's counsel "life qualified" the jury. (RS2:477-80, 486-87.) *See Morgan v. Illinois*, 504 U.S. 719, 733 (1992) (explaining life qualification occurs through questions designed to ferret out "those prospective jurors who would *always* impose death following conviction") (emphasis in original). The jury was also instructed to base its sentencing decision on the aggravating/mitigating circumstances. (RS2:1257-67, 1269-71.)

Ruling Below

The postconviction court summarily denied this claim because counsel "life qualified" the jury, Bright's prejudice allegations were speculative, and he failed to demonstrate an actually-biased juror served. (RSPCR:4257-58.)

Merits

This issue is frivolous. Bright's counsel life-qualified the jury so there is no deficient performance. (RS2:486-87.)

There is also no prejudice as a matter of law given the presumption the jury followed the court's instructions and based their verdict on a careful assessment of the aggravating and mitigating circumstances. *See Brown v. Jones*, 255 F.3d 1273, 1279-80 (11th Cir. 2001) (failure to life qualify did not result in *Strickland* prejudice). Bright points to no on-the-trial-record evidence to pierce S*trickland*'s presumptions, so this issue fails.

Prior to *Guardado*, 112 F.4th at 990-95, the State would have left it at that. But the Eleventh Circuit recently ruled this Court's longstanding requirement for juror-related-IATC claims to show actual bias in order to demonstrate *Strickland* prejudice is an unreasonable application of *Strickland*. *Id.* This issue thus presents an opportunity to address *Guardado*.

That discussion will proceed in four parts. First, explaining *Strickland*'s prejudice-prong presumptions. Second, analyzing this Court's holding in *Carratelli v. State*, 961 So. 2d 312, 324 (Fla. 2007) and explaining how it fits within those presumptions. Third,

explaining *Guardado*. Fourth, urging this Court to clarify that *Guardado* and *Carratelli* actually perform the same analysis.

A. *Strickland*'s Prejudice-Prong Framework

The State will begin with *Strickland*'s prejudice-prong presumptions and analysis. At first blush, *Strickland* leaves no room for complaints about counsel's performance in jury selection because it deems seated jurors entirely fungible for the prejudice analysis.

Strickland's penalty-phase prejudice determination turns on "whether there is a reasonable probability that, absent the errors, the sentencer" would "have concluded that the balance of aggravating and mitigating circumstances did not warrant death." 466 U.S. at 695. In answering this question, apart from an exception not relevant here, the prejudice inquiry presumes the "jury acted according to law." *Id.* at 694. It proceeds "on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision." *Id.* at 695.

The prejudice inquiry does "not depend on the idiosyncrasies of the particular decisionmaker, *such as unusual propensities*

toward harshness or leniency," like, for instance, whether a juror labeled himself a one or five for death on a one-to-five scale. *See id.* at 695 (emphasis added). Such idiosyncrasies are "irrelevant to the prejudice inquiry." *Id.*

As a result, evidence about the actual decisional process "if not part of the record of the proceeding under review" should "not be considered in the prejudice determination." *Id.* Thus, *Strickland*'s presumptions that the jury acted according to law and impartially rendered its verdict cannot be rebutted with extra-trial-record evidence the way, for example, *Strickland*'s presumption of adequate assistance can be. *See Dunn v. Reeves*, 594 U.S. 731, 739 (2021). But it must be rebutted, and indeed outweighed, by evidence before a defendant can prevail. *Cf. Harvey v. Warden, Union Corr. Inst.*, 629 F.3d 1228, 1239 (11th Cir. 2011).

A straightforward reading of *Strickland*'s prejudice-prong rules suggests juror-related claims are not cognizable. Since the prejudice inquiry presumes an objectively reasonable juror following the law, and prohibits extra-record evidence to rebut the presumption, a defendant cannot demonstrate that the failing to have juror 5 instead of juror 42 (or judge A instead of judge B) gives rise to a

reasonable probability of a different outcome. Law-abiding jurors, whether harsh or lenient, are presumed fungible under *Strickland*. *See* 466 U.S. at 694-95.

The Supreme Court has never recognized any relevant way to alter its prejudice analysis and base the reasonable-probability analysis on anything other than what an objectively reasonable decisionmaker following the law would have done if counsel performed differently. And it has affirmatively prohibited extra-record evidence to rebut the presumption.

Thus, in the average case, a court is left with the presumption the jury followed the law and nothing to show otherwise. That presumption, without further inquiry, defeats most *Strickland* claims (other than counsel's failure to admit or exclude evidence) on its own. *See Wong v. Belmontes*, 558 U.S. 15, 27 (2009) (the burden of demonstrating prejudice rests with the defendant); *cf. Reeves*, 594 U.S. at 739 (lack of evidence cannot overcome *Strickland*'s presumption of adequate performance).

Bright's twelfth issue illustrates the average case where *Strickland*'s presumption conclusively defeats an IATC claim. Bright's jurors were explicitly and correctly instructed on the on the

law and, if they followed it, which *Strickland* presumes they did, Bright cannot show he was harmed by any assumed failure to ask life-qualifying questions. The instructions required the jury to analyze the aggravation and mitigation rather than impose a death sentence merely because Bright had a first-degree murder conviction.

Since Bright cannot rebut that presumption by calling the jurors to determine what they actually did,[27] and there is no clear evidence in the record the jury did anything but its sworn duty, this Court is left with *Strickland*'s prejudice-prong presumptions alone. In that circumstance, the presumption prevails. *Cf. Harvey v. Warden, Union Corr. Inst.*, 629 F.3d 1228, 1239 (11th Cir. 2011) (explaining *Strickland*'s presumption of adequate performance defeats ineffectiveness claims if the record is incomplete, unclear, or the evidence is insufficient to outweigh the presumption).

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[27] The Supreme Court's careful tailoring of prejudice to avoid posttrial-juror/judge interviews fits neatly within its direct-appeal warning that: "It is not at all clear, however, that the jury system could survive" intrusive, post-verdict, jury interviews. "Allegations of juror misconduct, incompetency, or inattentiveness, raised for the first time days, weeks, or months after the verdict, seriously disrupt the finality of the process." *Tanner v. United States*, 483 U.S. 107, 120 (1987).

Counsel's failure to ask additional, life-qualifying questions would have had no effect on a law-abiding, objectively-reasonable, jury. Bright cannot, therefore, show a reasonable probability that he would have received a life sentence but-for any assumed deficiency. This issue fails on a pure *Strickland* analysis under the prejudice-prong presumptions.

B. Piercing *Strickland*'s Presumptions with Actual Bias (*Carratelli*)

But *Strickland*'s presumptions can be pierced (or rebutted) by evidence an actually biased juror served. *See Virgil v. Dretke*, 446 F.3d 598, 612 (5th Cir. 2006) (refusing to apply *Strickland*'s presumptions where two jurors who explicitly stated they were not "fair and impartial" served). That is why this Court's actual-bias requirement for juror-related-IATC claims is correct and exactly what *Strickland* itself requires to show a reasonable probability of a different outcome for these claims. *See Carratelli*, 961 So. 2d at 324-25; *Strickland*, 466 U.S. at 694-95.

If a defendant can demonstrate (from the face of the record) that an actually-biased decisionmaker served in the decision-making process, then *Strickland*'s presumptions the jury acted

according to law and impartially applied the standards governing the decision are rebutted.[28] *See Virgil*, 446 F.3d at 611-14.

Virgil perfectly illustrates when it is proper to pierce *Strickland*'s prejudice-prong presumptions based on clear, face-of-the-record, juror bias. Virgil was convicted, given a thirty-year sentence, and unsuccessfully challenged his judgment in the state-court system. *Virgil*, 446 F.3d at 600-01. The district court denied his federal petition, but the Fifth Circuit agreed to hear his biased-jurors-related-IATC claim about jurors Sumlin, Sims, Saddler, Faulconer, and Jarboe, all of whom sat on the jury deciding his case. *Id.* at 601-02.

During jury selection, all five jurors stated they would not believe a convicted felon as easily as someone who had not been convicted of a felony or would not believe a prior felon at all. *Id.* at 602-03. Sumlin and Sims additionally, and explicitly, testified that they could not be fair and impartial in this case because of their

[28] Since *State v. Kaczmar*, SC2022-1671 is still pending, and Bright's current appellate counsel is the same as Kaczmar's, the State wishes to make clear that this actual-bias discussion has no application to Kaczmar's case. *Speculation* about the *possibility of bias* and actual *evidence* the jury was not *impartial/did not follow the law* are entirely different animals.

background with law enforcement/prior victimization. *Id.* at 603-04. No one tried to rehabilitate these two jurors. *Id.* at 604.

The Fifth Circuit began by determining counsel only deficiently failed to strike jurors Sumlin and Sims before moving to prejudice. *Id.* at 608-11.[29] The court set out *Strickland*'s prejudice prong, including the presumptions the jury followed the law and impartially arrived at its verdict. *Id.* at 611-13. But the court refused to apply those presumptions in the face of explicit, on-the-record evidence that jurors Sumlin and Sims conceded they could not be fair and impartial. *Id.* at 13-14. *Virgil* is therefore an example of when, based on the face of the record, *Strickland*'s presumptions are pierced (or rebutted) by evidence of actual, juror bias/impartiality.

This Court reached the same result without expressly discussing *Strickland*'s prejudice-prong presumptions in *Carratelli*, 961 So. 2d at 325-26. Carratelli claimed his counsel ineffectively failed to strike juror Inman. *Id.* at 316, 325-26. This Court recognized that *Strickland* requires a defendant to show a

[29] The Fifth Circuit's deficient-performance analysis is questionable for reasons not relevant here. *Harvey v. Warden, Union Corr. Inst.*, 629 F.3d 1228, 1244-45 (11th Cir. 2011).

reasonable probability of a different outcome at trial, and held that "such prejudice can be shown only where one who was actually biased against the defendant sat as a juror." *Id.* at 324. It defined "actual bias" as "bias-in-fact that would prevent service as an impartial juror"[30] and required the evidence of bias be "plain on the face of the record." *Id.* at 324.

It then applied the actual-bias standard to juror Inman. *Id.* at 325-26. In jury selection, Juror Inman stated he was: (1) exposed to case-related pretrial publicity: (2) felt, based on what he had heard, that Carratelli's defense "didn't make some sense" and (3) agreed it would be more difficult for Carratelli to convince juror Inman of his innocence because of the pretrial publicity. *Id.* But juror Inman also stated that he had no definite opinion about Carratelli's guilt, he would listen to the defense, and he would be able to "sit down with an open slate and listen to what is said and make up my mind from there" without "bias or prejudice" and be a "fair and impartial juror." *Id.*

[30] That is the well-established, constitutional standard for an unbiased, impartial jury. *E.g.*, *Murphy v. Florida*, 421 U.S. 794, 800 (1975); *Skilling v. United States*, 561 U.S. 358, 395-99 (2010).

This Court held juror Inman was not actually biased because the "record plainly shows" he "held no firm opinion except that he could be fair, listen to the evidence, and follow the law. Thus, *Carratelli* fails to demonstrate prejudice under *Strickland*." *Id.*

This Court's actual-bias analysis in *Carratelli* is compelled by *Strickland*'s presumptions which (unless there is on-the-face-of-the-record evidence to the contrary) require presuming the jury is impartially and dutifully performing its role and prohibit contrary, extra-trial-record evidence to show otherwise. The only way to rebut that presumption for juror-related claims is plain, trial-record *evidence* (not speculation) that a decisionmaker was not in fact impartial/would not follow the law.

Other than the Eleventh Circuit, every court to clearly address juror-related-IATC claims has held that actual bias is required to demonstrate *Strickland* prejudice. *Virgil*, 446 F.3d at 611-14; *Dickey v. Davis*, 69 F.4th 624, 647 (9th Cir. 2023) (establishing prejudice for a claim of ineffectiveness "in the context of juror selection" requires a showing that "the jury panel contained at least one juror who was biased"); *Davis v. Woodford*, 384 F.3d 628, 643 (9th Cir.

2004) (same); *Haight v. Jordan*, 59 F.4th 817, 833 (6th Cir. 2023) (same); *Smith v. State*, 7 N.W.3d 723, 730 (Iowa 2024) (same).[31]

The reality is that *Carratelli*'s actual-bias formulation is simply shorthand for what kind of juror requires piercing *Strickland*'s presumptions and would lead to a reasonable probability of a different outcome (acquittal or life sentence). The Supreme Court has adopted claim-specific reformulations of *Strickland*'s reasonable-probability analysis where appropriate. *E.g.*, *Thornell v. Jones*, 144 S.Ct. 1302, 1310 (2024) (mitigation-related-IATC claims); *Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986) (motion-related-IATC claims); *Lee v. United States*, 582 U.S. 357, 364-65 (2017) (plea-related-IATC claims).

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[31] Two caveats to this analysis. *First*, if counsel reasonably, strategically, chooses to permit a biased juror to serve, *Strickland*'s prejudice-prong presumptions remain intact. *Second*, while *Strickland*'s prejudice-prong presumptions should not apply after counsel deficiently allows a biased juror to serve, it is not at all clear that the seating of a biased juror alone automatically equates to *Strickland* prejudice (a reasonable probability of a different outcome) no matter how overwhelming the evidence or weak the defense. *See Canfield v. Lumpkin*, 998 F.3d 242, 248-49 (5th Cir. 2021) (finding "even if" juror "M.T." were biased, the state court reasonably found there was no *Strickland* prejudice due to the overwhelming evidence); *State v. Chandler*, 362 So. 3d 347, 351-53 (La. 2023) (partial juror alone insufficient to show prejudice); *People v. Manning*, 948 N.E.2d 542, 550 (Ill. 2011) (same). That is a question for another day.

That is all *Carratelli* is. Except for evidence on the face of the jury-selection record that an actually biased juror sat, there is no way to pierce *Strickland*'s prejudice-prong presumptions.[32]

As applied to Bright's twelfth issue, since there is no evidence of actual bias on the face of the record, *Strickland*'s presumptions remain intact and require a finding of no prejudice.

C. *Guardado*: Actual Bias by Another Name

Although *Carratelli*'s actual-bias analysis is no stricter than *Strickland*'s prejudice-prong framework, the Eleventh Circuit has held it is. *Guardado*, 112 F.4th at 990-94. But, in determining the actual-bias analysis Florida (and every other court) employs to determine whether there is a reasonable probability of a different outcome is higher than *Strickland* prejudice, the court failed to recognize the interplay between *Strickland*'s prejudice-prong presumptions and *Carratelli*'s actual-bias analysis. As a result, the

[32] Nor is there any way to find counsel deficient in jury selection. Later-occurring evidence a juror did not follow the law would not justify holding counsel deficient for failing to strike a juror before the jury was sworn.

court incorrectly condemned *Carratelli* as an unreasonable application of *Strickland*. *Guardado*, 112 F.4th at 990-94.[33]

But then, on de novo review, the Eleventh Circuit performed the exact same actual-bias analysis this Court used in *Carratelli*. It evaluated the three jurors at issue (Pennington, Hall, and Corneilus) based on the jury-selection record. *Guardado*, 112 F.4th at 994-95. It held there was no reasonable probability of a different outcome if those jurors were stricken because each "confirmed during individual voir dire that, despite their connections to the case, they would be fair if seated." *Id.* "All three jurors, in other words, insisted—repeatedly and unequivocally—that they could follow the law." *Id.* at 995. As a result, the Eleventh Circuit held there was no prejudice under *Strickland*.

If that analysis seems oddly familiar, that's because it is. This Court has been performing it for juror-related *Strickland* claims since 2007. *Carratelli*, 961 So. 2d at 327 ("The record plainly shows

[33] *But see Hightower v. Schofield*, 365 F.3d 1008, 1039-41 & n.57 (11th Cir. 2004) (finding no prejudice for a juror-related-IATC claim after reviewing "the cold record to detect bias" because there was no evidence the juror's death-penalty views would cause him to violate the law or his oath), *reinstated after remand*, *Hightower v. Terry*, 459 F.3d 1067, 1072 (11th Cir. 2006).

that juror Inman held no firm opinion except that he could be fair, listen to the evidence, and follow the law. Thus, *Carratelli* fails to demonstrate prejudice under *Strickland*."). It is, in fact, the Supreme Court's actual-bias test. *See Murphy v. Florida*, 421 U.S. 794, 800 (1975) (defining "the constitutional" standard for impartial jurors as that a "juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court").

The State will address two (there are more) overarching analytical errors with *Guardado* and its misunderstanding of *Strickland*'s prejudice prong. **First**, actual bias is not a higher standard than *Strickland*'s reasonable probability requirement for prejudice. The Eleventh Circuit appears to have taken the terms "actual bias" and "reasonable probability" at face value and held the former is higher than the latter. On a surface-level analysis, that might seem like a reasonable conclusion. But the Eleventh Circuit never answered the deeper question: what kind of juror would create a reasonable probability of a different outcome and satisfy *Strickland*'s prejudice prong?

That deeper question is complicated by *Strickland*'s general requirement to perform the reasonable-probability analysis on

objectively reasonable, impartial, jurors following the law, preclusion of extra-record evidence to the contrary, and complete prohibition on an idiosyncratic analysis based on the decisionmaker's "harshness or leniency." *Strickland*, 466 U.S. at 694-95. But those presumptions illuminate the correct answer to the deeper question *Strickland* requires a court to answer for juror-related-IATC claims.

An actually-biased juror—one who cannot lay aside his impression/opinion and render a decision based only on the law and evidence—is the *only* kind of juror where *Strickland*'s presumptions the jury acted according to law, and impartially applied the standards governing its decision, are pierced. Law-abiding jurors are fungible for *Strickland* purposes. Biased, partial ones that cannot follow the law are not. When a defendant can point to evidence, on the face of the trial-record, that an actually-biased juror decided his fate, *Strickland*'s presumptions give way. *See Virgil*, 446 F.3d at 611-14.

When the only evidence in the trial record shows the jurors are impartial and willing to follow the law, there is no way to pierce *Strickland*'s presumptions and perform an otherwise prohibited,

idiosyncratic, subjective, prejudice analysis based on the specific decisionmakers. And when those presumptions, prohibitions, and objective analysis are in place, there is no prejudice for failing to have juror 5 instead of juror 42. *See Strickland*, 466 U.S. at 694-95.

Carratelli's actual-bias analysis is therefore correct because—without an actually-biased juror—the prejudice analysis hinges on what an objectively reasonable jury following the law would have done. The idiosyncrasies of jurors, whether harsh or lenient, are irrelevant to that analysis. *Strickland*, 466 U.S. at 694-95. Under *Strickland*, swapping one law-abiding juror for another creates no prejudice as a matter of law. *See id.*

The Eleventh Circuit failed to grapple with the rest of *Strickland*'s prejudice-prong framework when it incorrectly determined *Carratelli*'s actual-bias requirement was a higher standard than *Strickland* prejudice. *Carratelli*'s actual-bias analysis is nothing more—and nothing less—than the answer to the riddle every court applying *Strickland* to juror-related-IATC claims must answer: what kind of juror would create a reasonable probability of a different outcome? The answer, as this Court correctly recognized in *Carratelli*, is an actually-biased one.

Second, despite rebuking this Court's actual-bias analysis, the Eleventh Circuit then performed the same analysis (three times) and proclaimed it as *Strickland*'s reasonable-probability analysis. *Guardado*, 112 F.4th at 994-95. The court searched the face of the jury-selection record for evidence the three jurors could not be fair and impartial. *See Guardado*, 112 F.4th at 992 (quoting *Carratelli*'s actual-bias definition pages before evaluating three jurors for evidence of impartiality). When there was no evidence of impartiality, the court then held there was no *Strickland* prejudice. *Id.* at 994-95.

The Eleventh Circuit indisputably reached the right result. It merely retitled the actual-bias analysis courts have been using for decades as a reasonable-probability analysis. The court then proclaimed its retitled, juror-related-IATC-claim prejudice prong was correct while every other court using the same analysis but calling it an actual-bias analysis was wrong.

But what's "in a name? That which we call a rose by any other name would smell as sweet." William Shakespeare, *Romeo and Juliet*, act II, sc. ii. Likewise, an actual-bias analysis, by any other name, is still an actual-bias analysis. *Guardado* is only

persuasive in the sense that it ultimately applied the correct, actual-bias analysis. Its rebuke of *Carratelli* is not.

D. Clarification Required

Guardado requires this Court to address the interplay between *Carratelli* and *Strickland* to ensure federal courts do not lightly cast aside its juror-related-IATC-prejudice holdings instead of deferring to them. *See* 28 U.S.C. § 2254(d).

As a threshold, this Court is entitled to disagree with the Eleventh Circuit and continue to follow *Carratelli*. *E.g.*, *Glassroth v. Moore*, 335 F.3d 1282, 1302 n.6 (11th Cir. 2003) (observing state courts are "not bound to agree with or apply the decisions of federal district courts" or federal "courts of appeal"); *State v. Dwyer*, 332 So.2d 333, 335 (Fla. 1976) (observing that a federal appellate decision on federal constitutional law "is not by any means binding" in state court). The only "downside" of doing so is federal courts will not give deference to this Court's *Carratelli*-based decisions and perform *Guardado*'s de novo review, which is really just *Carratelli* by another name, until the Supreme Court weighs in.

But, in adhering to *Carratelli*, this Court should explain the flaws in the Eleventh Circuit's analysis. It should clarify that

(semantics aside) *Carratelli*'s actual-bias analysis is exactly what the Eleventh Circuit did in *Guardado*. And it should explain the *Strickland*-based, connective tissue between the reasonable-probability and actual-bias analyses, and what *Strickland*'s prejudice-prong presumptions and analysis mean in this context: law-abiding jurors are fungible while actually-biased ones are not.

The only way to show a reasonable probability of a different outcome for juror-related-IATC claims is to pierce *Strickland*'s presumptions by demonstrating (from the face of the trial record) an actually-biased juror (one who was not impartial/could not follow the law) served.

As for Bright's twelfth issue, it fails under any analysis and should be affirmed on both *Strickland*'s deficient performance and prejudice prongs.

13. THE POSTCONVICTION COURT CORRECTLY SUMMARILY DENIED BRIGHT'S CLAIM THAT HIS COUNSEL INEFFECTIVELY FAILED TO OBJECT TO THE VERDICT FORM.

Bright's thirteenth issue argues his counsel ineffectively failed to make a frivolous, verdict-form objection. This issue is frivolous.

Relevant Facts

Bright's resentencing jury was repeatedly instructed its mitigation decision did not have to be unanimous, and a juror who did not find mitigation could consider mitigation found by a different juror. (RS1:457; RS2:27-28, 609-10, 1263-64.) Bright's jury issued a non-unanimous mitigation decision. (RS1:62-63, 66-67.)

Ruling Below

Summarily denied because any verdict-form objection was meritless. (See PCR:4258-59, 4266-67.)

Merits

This issue is frivolous. A jury may not be misled by improper instructions/verdict forms reasonably indicating its mitigation decision must be unanimous. *Mills v. Maryland*, 486 U.S. 367, 369-84 (1988), *modified by Boyde v. California*, 494 U.S. 370 (1990) (explaining there must be a "reasonable likelihood" the jury was

misled). But a *Mills*' violation only occurs where the "jury instructions *and* verdict forms at issue" inform "the jury that it could not find a particular circumstance to be mitigating unless all 12 jurors agreed that the mitigating circumstance had been" proven. *Smith v. Spisak*, 558 U.S. 139, 144 (2010). Even silence is not enough. *Id.* at 148.

Given the court's repeated instructions, counsel cannot be deemed deficient, nor Bright prejudiced, for failing to make a meritless *Mills*' objection. Nor can counsel be deficient for failing to waste time better spent elsewhere researching a frivolous verdict-form argument.

14. BRIGHT'S COUNSEL DID NOT INEFFECTIVELY FAIL TO MOVE FOR A HURRICANE-RELATED CONTINUANCE/MISTRIAL.

Bright's fourteenth issue argues his counsel ineffectively failed move for a hurricane-related continuance/mistrial. This issue is meritless.

Relevant Facts

The court, counsel, and Bright had several conversations about the Hurricane Irma throughout Bright's September 2017 penalty phase.

9/6/2017: The parties and court privately discussed Irma during jury selection. The court and State did not want to move the penalty phase. (RS2:436, 439-40.) Counsel Bynum stated she had no objection to picking another trial date, noted she was dissolving her firm and moving, provided the court with her schedule, and noted both that she would "never do anything to jeopardize" her "client's trial" and might need to push off one of her other capital cases. (RS2:438-39.)

Shortly after jury selection, courthouse closures came in for 9/8/2017 and 9/11/2017 and the parties agreed to begin evidence. (RS2:592-604.)

9/7/2017: The parties continued presenting evidence. Dr. Gold testified via skype, and the court reporter labeled parts of his testimony inaudible. (RS2:996-1078.) After Dr. Gold's testimony, before the jury left, one juror noted he was in an evacuation zone, and the court strictly charged the jury not to perform any research or form fixed opinions on the case. (RS2:1090-94.)

9/8/2017—9/15/2017: The courthouse was closed, but the court held a hearing to determine how to proceed on 9/14/2017. (RS2:1100-05.) In a sworn colloquy, Bight told the court: (1) he agreed with continuing the trial until 9/25/2017; (2) he did not want a mistrial; (3) he wanted to continue with this jury and finish his penalty phase. (RS:1102-04.) In this same hearing, Bright noted he and counsel disagreed about sequestration and counsel stated she would defer to Bright's wishes. (RS:1129-31.)

9/25/2017: The jury returned for Bright's penalty phase and heard Dr. Ouaou's testimony. (RS2:1134, 1141.) The Court thanked the jury for returning, noted all of them "survived" the storm "pretty well," no one had "any major league damage or flooding or anything of that sort," and all "came through relatively unscathed." (RS2:

1141.) Later, the Court noted "things went beautifully as far as the storm is concerned." (RS2:1284-85.)

At the evidentiary hearing, counsel Bynum explained that mid-trial breaks usually favor the defense because the aggravation is not as vividly in the jury's mind, and she did not believe the court would have granted a continuance had she asked for one. (RSPCR:5127-28, 5146, 5168.) Bright was against asking for a mistrial; he wanted this particular jury to decide his case. (RSPCR:5126-28, 5153.)

By Bright's penalty phase, counsel Bynum was only representing one other defendant, had declined other appointments, and spent most of her time on Bright's case. (RSPCR:5101, 5104, 5114-15.) She could have rescheduled Bright's trial without jeopardizing her move. (RSPCR:5105-06, 5114-16, 5146.)

Counsel Bynum's notes show her strategy was to: "Empower" the "3's" and turn "5's into police." (RSPCR:3202, 3206.) In 2017, death recommendations had to be unanimous. (RSPCR:1267.)

Ruling Below

The court explicitly credited counsel Bynum's testimony and found no deficient performance or prejudice. (See RSPCR:4259-64.)

It also found the Dr. Ouaou prejudice allegations were not properly pleaded and based on proffered (not actual) evidence. (RSPCR:4263 & n.7.)

Procedural Bar

Bright did not plead any prejudice regarding Dr. Ouaou in this issue below. Those prejudice allegations are therefore procedurally barred and may not be advanced after the pleading phase.

Appellate Presentation

This issue contains several insufficiently presented arguments. Bright's argument that he was prejudiced by the inaudible parts of Dr. Gold's testimony is not properly presented because he does not identify any relevant, inaudible part of Dr. Gold's testimony or explain what the inaudible portion prevented the jury from hearing/understanding. *Cf. Lowe v. State*, 259 So. 3d 23, 65 (Fla. 2018); *Jones v. State*, 923 So. 2d 486, 489 (Fla. 2006).

The same is true for Bright's arguments about failure to redirect or prepare Drs. Gold/Ouaou. Bright's "arguments" are nothing more than conclusory assertions that more time would

have changed counsel's preparation. Unlike Appellees,[34] Appellants have a duty to flesh out arguments completely and make error clearly appear. Bright has failed to do that here.

Merits

Bright seems to argue counsel ineffectively failed to perform two different, Hurricane-Irma-related, actions: (1) request a continuance or (2) request a mistrial. But he does not differentiate between them. The State therefore analyzes them together.

A. Performance

Bright has failed to demonstrate deficient performance. Counsel Bynum testified not moving for a continuance/mistrial was strategic decision based on part on Bright's own desires, their view of the jury, and her view that mid-trial gaps favor the defense not

[34] *E.g.*, *Cohen v. Mohawk, Inc.*, 137 So. 2d 222, 225 (Fla. 1962) (If "upon the pleadings and evidence before the trial court, there was *any* theory or principle of law which would support the trial court's judgment in favor of the plaintiffs, the district court was obliged to affirm that judgment."); *Jaworski v. State*, 804 So. 2d 415, 419 (Fla. 4th DCA 2001), *on reh'g* (Dec. 26, 2001) (holding the State, which initially conceded, could successfully assert the trial court did not err in rehearing); *State v. Pitts*, 936 So. 2d 1111, 1133 (Fla. 2nd DCA 2006) (appellate courts must affirm "if the record before" them "establishes a proper basis for the trial court's ruling" even "if the specific basis for affirmance has not been articulated by the appellee").

the State. The circuit court credited her testimony, and Bright does not argue the courts findings are unsupported by competent, substantial evidence. *See Calhoun v. State*, 376 So. 3d 583, 586 (Fla. 2023). Reasonable counsel could elect not to seek a continuance/mistrial for these reasons, and Bright's perfunctory arguments, with no cited, caselaw support, do not demonstrate otherwise. There is no deficient performance here.

B. Prejudice

Bright has also failed to demonstrate prejudice. *Strickland*'s prejudice for failure to file a motion requires a two-fold showing: (1) the motion would have been successful; and (2) a reasonable probability of a life sentence if the motion was granted. *See Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986); *Taylor v. Sec'y, Fla. Dep't of Corr.*, 64 F.4th 1264, 1271 (11th Cir. 2023); *Thornell v. Jones*, 144 S.Ct. 1302, 1310 (2024) (penalty-phase prejudice).

Mere failure to change the trial date does not amount to *Strickland* prejudice. *Sylvester v. United States*, 868 F.3d 503, 511-13 (6th Cir. 2017) (no prejudice in not moving for speedy-trial dismissal where the dismissal would be without prejudice); *see Escobedo v. Lund*, 760 F.3d 863, 871-72 (8th Cir. 2014) (holding a

state decision requiring a reasonable probability of an acquittal instead of just a mistrial to establish prejudice was reasonable under *Strickland*); *Hobdy v. Raemisch*, 916 F.3d 863, 881 (10th Cir. 2019) (same).

Bright's prejudice arguments—both below and on appeal—are fatally flawed because he fails to address the prejudice threshold required by *Kimmelman*: would a continuance/mistrial motion have been granted? Both are within the trial court's vast discretion, and there is no argument every reasonable trial court would have granted such a motion if counsel had made it. **See above, Issue 9, n.26**. Bright's prejudice allegations fail here, and fatally so.

But they fail without this threshold too. Bright argues he was prejudiced in three ways: (1) issues with Dr. Gold's testimony; (2) issues with Dr. Ouaou's testimony; and (3) evacuation-zone jurors.

Dr. Gold testified and his testimony was understandable. (RS2:996-1078.) Judge Healey (who presided over the resentencing) and counsel both noted that Dr. Gold's testimony was not as riddled with truly inaudible sections as the transcript makes it appear, and the critical points were understandable. (RSPCR:4262, 5046.) But Bright then moves to generalized complaints about Dr.

Gold not being prepared well enough and failing to offer additional mitigation. These complaints have no logical connection to the failure to seek a mistrial/continuance. He adduced no evidence that Dr. Gold would have been prepared any differently had counsel performed these actions and offers only speculation on that front. He also failed to specifically plead prejudice on that basis. IATC claims are not moving targets after an evidentiary hearing is granted. Failure to properly prepare Dr. Gold an expert is an entirely separate IATC claim.

Finally, Bright argues Dr. Gold's skype testimony was not as impactful. But that makes no difference to an objectively reasonable juror following the law. Bright's proposed prejudice analysis would require this court to go into the minds of the jurors and *guess* whether they would have been swayed by in-person testimony after skype testimony did not do the trick. Fortunately, *Strickland* precludes that kind of ad hoc, impossible to reliably apply, analysis. *See* 466 U.S. at 694-95.

Moving on, Bright argues Dr. Ouaou was not adequately prepared, and counsel failed to redirect him on PTSD. These prejudice allegations were not properly raised below and are based

on proffered (rather than actual) evidence.[35] For both reasons, this Court should reject these prejudice allegations on procedural grounds.

Not that the merits make a difference. What Dr. Ouaou's pretrial preparation and counsel's failure to redirect him have to do with a missed continuance or mistrial is anyone's guess. Bright's prejudice analysis rests on speculation Dr. Ouaou would have been prepared, or redirected, differently if counsel sought a mistrial/continuance. But there is no logical, if/then connection between those two things. And speculation is not the same thing as *Strickland* prejudice. Not even close.

Finally, Bright argues he was prejudiced because jurors were in evacuation zones and deprived of his opportunity to prove this claim. It fails because juror interviews are irrelevant to *Strickland*'s prejudice prong, which requires the court (absent on-the-trial-record evidence to the contrary) to evaluate prejudice based on an objectively reasonable juror following the law. *See Strickland*, 466 U.S. at 694-95. **See above, Issue 2, section A**.

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[35] Bright has not presented any argument the court erroneously excluded the evidence.

Setting all this aside, there is no just-under-51% chance the jury would have given a life verdict if these "issues" were fixed. The jury found HAC and PVF (two ways) for King's murder and PVF for Brown's. The mitigation Bright provided at trial could not overcome the aggravation, and the minor "prejudice" points addressed in this issue would not have changed that. This Court should affirm.

15. TRIAL COUNSEL'S SCHEDULE AND PERSONAL LIFE ARE NOT SIXTH AMENDMENT CONFLICTS THAT SIGNIFICANTLY, ADVERSELY AFFECTED BRIGHT.

Bright's fifteenth issue argues his 2017 resentencing lead counsel suffered from an actual conflict of interest. This issue is meritless.

Relevant Facts

See Issue 14 facts. Counsel Bynum testified she was not trying to just bill for this case and get out of town and could have rescheduled for late October/early November without interfering with her move. (RSPCR:5104-06, 5114-16, 5146.)

Ruling Below

No conflict or significant adverse effect. (See RSPCR:4264-65.)

Merits

Bright argues counsel Bynum's busy schedule, vacation plans, and desire to dissolve her firm and move out of Florida, constitute an actual conflict. He is wrong as a matter of law.

An actual-conflict claim under *Cuyler v. Sullivan*, 446 U.S. 335 (1980) requires a defendant show: (1) that his "attorney actively represented conflicting interests"; and (2) a significant, adverse effect flowing from that conflict. *Mickens v. Taylor*, 535 U.S. 162,

166 172-73 & n.5 (2002); *Braddy v. State*, 219 So. 3d 803, 817 (Fla. 2017); *Ochoa v. United States*, 45 F.4th 1293, 1298 (11th Cir. 2022). Prejudice is presumed if a defendant can meet this standard. *Braddy*, 219 So. 3d at 817.

This issue fails at both analytical points. **First**, the actual-conflict framework exclusively applies to concurrent, joint representation of conflicting *client* interests. *See Downs v. Sec'y, Fla. Dep't of Corr.*, 738 F.3d 240, 265 (11th Cir. 2013) (citing *Mickens v. Taylor*, 535 U.S. 162, 174-75 (2002)); *see also Schwab v. Crosby*, 451 F.3d 1308, 1324-28 (11th Cir. 2006).

It categorically does not apply to "conflicts" (scare quotes intended) stemming from an attorney's busy schedule or personal life. *See Peterson v. State*, 221 So. 3d 571, 583 (Fla. 2017) (rejecting an actual conflict claim based on counsel's busy schedule); *Dennis v. State*, 109 So. 3d 680, 698 (Fla. 2012) (allegation of actual conflict based on "work load" was meritless); *United States v. Zackson*, 6 F.3d 911, 920-21 (2d Cir. 1993) (holding counsel's "enormous time constraints" due to "prior trial commitments" were not an actual conflict); *United States v. Peters*, 232 F.3d 903 (10th Cir. 2000) (unpublished table decision) (agreeing with *Zackson*). *See*

also Mickens, 535 U.S. at 176 (explaining the actual-conflict rule is "not" designed "to enforce the Canons of Legal Ethics").

Bright's actual conflict claim thus fails as a matter of law because counsel's personal life and busy schedule are *never* actual conflicts allowing defendants to escape *Strickland*'s framework.

Second, Bright cannot establish a significant adverse effect. Counsel explained that she did not want to move the September 2017 penalty phase because: (1) Bright did not want to move it; (2) gaps in trial favor the defense; and (3) the jury was favorable in her view. As the court pointed out, even with counsel's plans, she could have rescheduled his penalty phase for the last two weeks of November, delayed her departure from Florida, or simply withdrawn from Bright's case. (RSPCR:4265.) Bright has failed to establish any assumed conflict "significantly affected counsel's performance." *See Mickens*, 535 U.S. at 173.

This Court should therefore affirm.

16. NO PROFFER-RELATED ERROR OCCURRED BELOW.

Bright's sixteenth issue asserts reversible error occurred when he was not allowed to "proffer" trial counsel's file below. Bright's proffered the entirety of what he wanted to admit below. (RSPCR:3299-3874). This issue is beyond frivolous.

Relevant Facts

On 1/5/2023, Bright filed the exact, full, unredacted, resentencing-counsel, work-product exhibits he claims the court below did not allow him to proffer. (RSPCR:3299-3583 (resentencing counsel Bynum's work product); RSPCR:3585-3874 (resentencing counsel Williams' work product). These documents were filed by current CCRC-N appellate counsel and the court was told about them. (RSPCR:3299-300, 6032.).

The directions to the clerk filed by current appellate counsel requested the inclusion of all "exhibits (whether entered into evidence or proffered for purposes of appeal)." (RSPCR:4454.) Thus, the full, unredacted, work-product documents that Bright argues were not proffered appear in the record. (RSPCR:3299-3874.)

Every time Bright asked to *proffer* excluded evidence below, the State supported him, and the trial court allowed the proffer. (RSPCR:5412-13; 5518-19.)

Appellate Presentation

This issue is insufficiently presented for review for numerous reasons. **First**, in a single, perfunctory sentence, Bright briefly asserts the court below "erred in disallowing counsel" to "proffer the testimony of *certain witnesses and evidence*" supporting his claims. But his substantive arguments exclusively relate to the work product of Bright's two resentencing counsel. Any proffer arguments regarding other evidence or witnesses are insufficiently presented for appellate review and should be discarded, especially if they are raised in reply.

Second, Bright's heading includes a reference to due process, but his arguments offer nothing to support that constitutional contention. He relies exclusively on Florida proffer law. So, the due process issue is insufficiently presented. *See Max M. v. New Trier High Sch. Dist. No. 203*, 859 F.2d 1297, 1300 (7th Cir. 1988) ("A litigant cannot require constitutional adjudication by incanting magic spells or pointing a finger at a particular clause.").

Third, while Bright claims he was not allowed to "proffer" evidence below—and relies on caselaw about not being able to proffer excluded evidence to ensure complete appellate review of whether the evidence was properly excluded—he fails to address the fact that a complete proffer of the excluded evidence appears in the Court's record. (RSPCR:3299-3874.)

That failure raises a **fourth** presentation issue. It isn't clear whether Bright is actually complaining about the court's supposed failure to let him *proffer* excluded evidence or *admit* the evidence. But his caselaw and arguments only clearly go to the former issue. Any argument that the court below erred in *excluding* the work-product (which Bright in fact proffered in full) is not properly raised.

All of this is to say the State and this Court are not required to chase argument shadows. *See United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990). Bright was required to "spell out" his "arguments squarely and distinctly or else forever hold" his "peace." *Id.* That, he most assuredly, and repeatedly, did not do.

Preservation

This issue is not preserved. Bright cites no portion of the record where he asked to *proffer* (as opposed to *admit* into evidence)

resentencing counsels' work product below. He failed to put either the judge below or the State on notice of his supposed "proffer" attempt, a matter made even worse because each time he tried to proffer evidence below, the State urged the court to allow the proffer and the court did. (RSPCR:5412-13; 5518-19.)

Merits

Bright's argument is beyond frivolous and affirmatively misrepresents the record. True enough, it is error to refuse to permit a proffer of excluded evidence because doing so precludes full appellate review. *E.g. May v. State*, 326 So. 3d 188, 194 (Fla. 1st DCA 2021); *May v. State*, 363 So. 3d 226 (Fla. 6th DCA 2023). But that isn't what happened here.

Bright proffered all the work-product evidence he wished the postconviction court would have admitted. (RSPCR:3299-3874.) Current appellate counsel filed those documents and asked they be included in the record. (RSPCR:3299, 4454.) The trial court did not "disallow" the filing or (obviously) preclude it from appearing in the record.

There can be no *proffer*-related error when this Court has the counsel's complete "representation of what evidence the defendant"

proposed "to present" below. *Cf. LaMarca v. State*, 785 So. 2d 1209, 1216 (Fla. 2001) (defining proffers). This issue is beyond frivolous.

17. BRIGHT HAS NOT PROVEN CUMULATIVE ERROR.

Bright's seventeenth issue argues asserts the cumulative effect of resentencing counsel's errors prejudiced him.

Ruling Below

No cumulative error. (RSPCR:4267-68.)

Merits

Bright argues the prejudice from the various errors in his case combine to require new guilt and penalty phases. He is incorrect. Just as *Strickland* places the burden on criminal defendants to show prejudice, cumulative-error claims do too. *E.g.*, *Brown v. State*, 304 So. 3d 243, 271 (Fla. 2020). The only claims that could, theoretically, be cumulated here are Bright's IATC claims because the rest involve postconviction errors or an actual conflict claim with a completely different prejudice prong.

This Court should also clarify that claims on which there is no prejudice as a matter of law add nothing to the cumulative-prejudice analysis. *Cf. Henderson v. Kennedy*, 253 F.3d 12, 19 (D.C. Cir. 2001) (In "law as in mathematics zero plus zero equals zero."). For instance, claims where there is no prejudice as a matter of law due to the presumption the jury followed the court's instructions

should not be cumulated in this analysis. That gets rid of most of Bright's prejudice allegations.

Bright has failed to establish cumulative prejudice for several reasons. **First**, none of his issues establish deficient performance and therefore there is no prejudice to cumulate. **Second**, for many of his issues, there was no prejudice as a matter of law. Those claims add nothing to a cumulative prejudice analysis.

Third, in light of the overwhelming and valid evidence in this case, cumulative error should be denied even if this Court finds multiple instances of deficiency on claims where the prejudice determination is not zero prejudice as a matter of law. Analyzing any assumed prejudice cumulatively, Bright cannot demonstrate a just-under-51% chance that an objectively reasonable jury would have issued a life recommendation in this case. *See Harrington v. Richter*, 562 U.S. 86, 112 (2011). His cumulative-error claim therefore fails.

CONCLUSION

This Court should affirm.

Respectfully submitted and certified,

ASHLEY MOODY
ATTORNEY GENERAL OF FLORIDA

/s/ Jason W. Rodriguez
JASON W. RODRIGUEZ
SENIOR ASSISTANT ATTORNEY GENERAL
Florida Bar No. 125285

Office of the Attorney General
PL-01, The Capitol
Tallahassee, FL 32399-1050
(850) 414-3300
jason.rodriguez@myfloridalegal.com
E-Service: capapp@myfloridalegal.com

Counsel for the State of Florida

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of September 2024, I electronically filed the foregoing with the Clerk of the Court by using the Florida Courts E-Portal Filing System which will send a notice of electronic filing to the following: Elizabeth Spiaggi and Nida Imtiaz, Assistants CCRC-North, 1004 DeSoto Park Drive, Tallahassee, Florida 32301, **elizabeth.spiaggi@ccrc-north.org**; **nida.imtiaz@ccrc-north.org**.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 14-point Bookman Old Style in compliance with Florida Rule of Appellate Procedure 9.045. This brief contains **27,056** and exceeds the 25,000-word limit in Florida Rule of Appellate Procedure 9.210(a)(2)(C), (a)(2)(E). A motion to accept enlarged brief has been filed contemporaneously with this brief.

/s/ Jason W. Rodriguez
Attorney for the State of Florida