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IN THE SUPREME COURT OF FLORIDA

Case No. SC2023-1735
Lower Court Case No. 2008-CF-2887

RAYMOND CURTIS BRIGHT,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

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

APPELLANT'S REPLY BRIEF

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PRELIMINARY STATEMENT

This is an appeal of the circuit court's denial of Mr. Bright's Motion to Vacate Judgment of Conviction and Sentence. The State has filed its answer and this reply follows. This reply will address only the most salient points argued by the State. Mr. Bright relies upon his initial brief in reply to any argument or authority argued by the State that is not specifically addressed herein.

ARGUMENT IN REPLY

ISSUE 1: The Circuit Court Abused Its Discretion in Denying Bright's Amendments to His Postconviction Motion.

In proposed "Claim 18: Ineffective Assistance of Counsel for Failure to Effectively Prepare for Trial," Mr. Bright outlines the many missteps and failures of trial counsel Kelli Bynum before she even got in the courtroom. The most egregious perhaps being her failure to timely confer with State Attorney Melissa Nelson about a life offer. (PCR2. 1100-02). Indeed, a new resentencing granted after postconviction will frequently result in an offer of a life sentence if the attorney utilizes all that has been developed in postconviction and timely and aggressively confers with the State Attorney's Office. *See*, *Terry Smith v. State*, No. 2009-CF-4417 (Duval Cty. Cir. Ct.), at Doc. No. 1285/D1326. However, the earliest Bynum had tried to

meet with Nelson was in June of 2017, several months after she had been appointed to Mr. Bright's case on October 26, 2017. (PCR2.1093-1100).

As stated in the motion to amend, Claim 18 incorporated the pre-trial facts that were pleaded in the Rule 3.851 motion. (PCR2.1092). "[D]ue process demands that some reasonable opportunity be given to defendants who make good faith efforts to file their claims in a timely manner and whose failure to comply with the rule is more a matter of form than substance." *Bryant v. State*, 901 So. 2d 810, 819 (Fla. 2005). Mr. Bright had explicitly incorporated by reference those facts alleged in his Rule 3.851 motion.

The State conceded that "Claim 19: Counsel was Ineffective for Failing to Mitigate or Ameliorate Prior Violent Felonies Offered by the State as Aggravating Factors" was properly pleaded and specifically tied the good cause explanation to the claim itself. (Answer at 26). What the State seems to take issue with is the good cause explanation itself. The claim could not have been pleaded without speaking with Ms. Houghton. Approaching a victim in an investigation is something that needs to be done with great care and sensitivity. It is not something a person can rush into after only having read the facts of the case. Not only is that ill-advised, but in this case, it was completely impossible due to the travel restrictions. As

the State correctly noted, the travel restrictions were lifted prior to the filing of Mr. Bright's Rule 3.851 motion; however the inability to travel had created a backlog of investigative fieldwork that had to be addressed both in Mr. Bright's case and in other CCRC-North cases. (PCR2.5519).

In *Boyd* this Court found that "[t]he determination of good cause is based on the peculiar facts and circumstances of each case," and is reviewable only under an abuse-of-discretion standard. *State v. Boyd*, 846 So. 2d 458, 460 (Fla. 2003) (internal citations omitted). In *Boyd*, the Court found that the defendant had good cause for not timely filing his motion because the defendant "was transferred to another prison and his legal files had not arrived." *Boyd*, 846 So. 2d at 460. *Boyd* contemplates the inability to file a motion when one does not have all the relevant information at hand. In the same way that Boyd had no control over his prison transfer, Mr. Bright had no control over the COVID-19 pandemic or the priority of investigative tasks within CCRC-North's office while there was a backlog.

While the State asserts that Mr. Bright needs to provide a nexus between the good cause arguments and the specific claims, the State cited no case law for that assertion.[1] An attorney working alone with a finite

[1] Mr. Bright had stated the following good cause reasons: (1) that Mr. Bright's case was assigned to CCRC-North in August of 2020 during the beginning of the coronavirus pandemic. (PCR2.1087); (2) records were not timely disclosed pursuant to Rule 3.852 and litigating those issues

amount of time to present postconviction claims would need to be accommodated in the same way that the state agencies were accommodated and permitted to depart from the timeframes outlined in Florida Rules of Criminal Procedure 3.852 and 3.851. The grace which the lower court extended to other state agencies (and not to CCRC-North) as far as accommodating them during the COVID-19 pandemic, demonstrates that Judge Healey's ruling was "arbitrary, fanciful," and "unreasonable." *Parker v. State,* 904 So. 2d 370, 379 (Fla. 2005). The lower court granted both of the State's requests to extend their deadline to produce records, by sixty days initially and then by a week. (PCR2.30-32, 35, 50-52, 54). This outlying decision, should be reversed to bring it into conformity with the vast majority of cases where amendments are routinely allowed.[2]

ISSUE 3: The Circuit Court Erred in Denying Bright's Claim (1) of Ineffective Assistance of Trial Counsel for Failing to Contextualize the Killings and Rebut the Heinous, Atrocious and Cruel Aggravator.

The State argues that this claim incorporates a separate unpleaded claim relating to trial counsel's inartful cross-examination of the medical

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distracted from other review that needed to be done; (3) Mr. Bright's case has been through multiple proceedings and the records to be reviewed were voluminous; (4) CCRC-North lost half of its attorney staff prior to the filing of Mr. Bright's Rule 3.851 motion, including two of the attorneys on his case; and (5) Mr. Bright's counsel's caseload doubled as she continued to receive new cases.

[2] There is little caselaw to demonstrate this as the State does not appeal a lower court's decision to allow amendment.

examiner. This is not a separate claim. Mr. Bright takes issue with the lower court's finding that trial counsel had her own strategy with regard to rebutting HAC as there is no competent substantial evidence of that. *Green v. State*, 975 So. 2d 1090, 1100 (Fla. 2008). The particulars of Bynum's cross-examination of the medical examiner are included to demonstrate that her espoused strategy is not born out in the record. It is a post-hoc excuse and should be given no credit. The record demonstrates that she did ***not*** get the medical examiner to admit that the victims were likely rendered unconscious early in the attack, she only argued that in closing.

Furthermore, Bynum's argument in closing demonstrated that she was aware that she needed to contextualize the circumstances of the crime. However, as described in the initial brief, Bynum failed to use the knowledge of prior witnesses to present testimony in front of the jury.

As such, the Court's ruling that it was reasonable for her to forego eliciting the circumstances of the crime to attack HAC is not supported by competent substantial evidence.

ISSUE 4: The Circuit Court Erred in Denying Bright's Claim (2) of Ineffective Assistance of Trial Counsel for Failing to Investigate and Present Additional Mitigation.

In his Rule 3.851 motion, Mr. Bright argued that counsel was ineffective for failing to present additional mitigation. (PCR2.583). The claim

then had four sub-parts that dealt with mental health, military service, Tenneka Bright-Lewis, and other lay witnesses. (PCR2.583, 589, 598-99).

Mental Health Mitigation

In its order, the lower court argued that, had Dr. Krop been properly prepared, his testimony would have been cumulative to Dr. Gold, who Bynum and Williams presented via Skype. (PCR2.4232). The lower court ignored the claim that was pleaded, which was that the poor preparation of Dr. Krop led to testimony which prejudiced Mr. Bright. (PCR2.585-88). The issue is not that vital information did not get to the jury, but that Dr. Krop's testimony was ill-prepared and undermined the testimony of Dr. Gold. This is an instance where it would have been better to refrain from calling Dr. Krop at all.

Had Dr. Krop been properly prepared and given access to Mr. Bright (and his records), his testimony would have not contradicted Dr. Gold's testimony. During the penalty phase, Dr. Krop testified that he "didn't have enough information to suggest that" Mr. Bright was under the influence of extreme mental or emotional disturbance. (PP.2.932-33). Similarly, he had not tested for PTSD as "based on the history he gave, there was no reason to go forward with looking at PTSD." (PP.2.921).

Dr. Krop testified that neither Bynum nor Williams had prepared him for his 2017 testimony. “I had no idea what I was testifying about.” (PCR2 5499). The poor preparation of Dr. Krop is alarming particularly in light of this Court’s 2016 opinion, where this Court found counsel ineffective for failing to properly engage with Dr. Krop, and referring to the communication failures as a “cancer throughout Bright’s penalty phase.” *State v. Bright*, 200 So. 3d 710, 729 (Fla. 2016).

Dr. Krop had so little contact with Bynum and Williams that he did not even realize he was testifying in front of a jury, but assumed it was “another evidentiary hearing.” (PCR2.5470-71). Williams conducted the direct examination of Dr. Krop. (PCR2.5222). He had only prepped him over the phone. (PCR2.5224). And while he got everything out of Dr. Krop that he intended to get out, Williams recognized that he had not done a good job with that witness. (PCR2.5266-67).

The contradictions between Dr. Gold’s testimony and Dr. Krop’s testimony undermined the mental health mitigation. Putting on testimony that is detrimental to the defendant is a proper ground for ineffective assistance of counsel. *Buck v. Davis*, 137 S. Ct. 759 (2017). “When a defendant's own lawyer puts in the offending evidence, it is in the nature of an admission against interest, more likely to be taken at face value.” *Id*. at

777. Trial counsel's poor preparation of Dr. Krop was ineffective, and it prejudiced Mr. Bright by giving the jury reason to discount Dr. Gold's testimony which contradicted Dr. Krop's.

Bright's Military Career and Contributions

The claim relating to Mr. Bright's military service was that counsel was "ineffective in failing to investigate and present additional mitigation relating to Bright's military career." (PCR2.592). In 2017 the penalty phase presentation consisted only of James Hernandez going through Mr. Bright's military records. Paper records for someone's employment may document their accolades, accomplishments, and transgressions, but they do not provide insight into what the job itself is actually like on a daily basis. This is especially true for members of our armed forces who undergo intense training and preparation to serve this country.

Those that served with Mr. Bright described how much responsibility they had in ensuring that the Harrier planes, the most difficult and complex aircrafts, were up and running. (PCR2.5705-06, 5989-93). They described Mr. Bright as being a very skilled mechanic who was both attentive to detail and efficient, and always willing to work even under very dangerous, life threatening conditions. They also described how common it was for the

Harriers to crash and how this affected morale and added to the stress of their responsibilities.

On paper Mr. Bright's service might be dismissed by a layperson or juror because the fallacy tends to be that serving in the military is only dangerous and stressful when you are in a combat situation. (Answer at 70). At the evidentiary hearing, those who served with Mr. Bright have painted a picture that clearly shows the error of such a fallacy. The jury needed to hear from those who served with Mr. Bright in order to have a true sense of the contributions made by Mr. Bright to our country. His service is best assessed by those who knew him and served with him, and it was ineffective for trial counsel to not investigate or present any of Mr. Bright's service members who would have highlighted Mr. Bright's contributions.

All of the witnesses who testified in relation to this claim at the evidentiary hearing were disclosed at the Case Management Conference on July 19, 2022.[3] At the Case Management Conference, the lower court thoroughly and with specificity went over the Defense's witness list and had

[3] "At the case management conference, the defendant shall disclose all documentary exhibits that he or she intends to offer at the evidentiary hearing and shall file and serve an exhibit list of all such exhibits and a witness list with the names and addresses of any potential witnesses." Fla. R. Crim. P. 3.851(f)(5)(a).

counsel identify who the witnesses were in relation to Mr. Bright. (PCR2.4516-26). The lower court then granted a hearing on this claim with full knowledge of who the witnesses pertaining to the claim were. (PCR2.1371-72). At the evidentiary hearing, Gunnery Sergeant Larry Stoneroad, Gunnery Sergeant Jimmy Stutler, Gunnery Sergeant Wayne Gulley, Sergeant Johnny James, Major LouAnn Rickley, Sergeant Clifton Alexander, and Captain Arthur Cody testified regarding Mr. Bright's military service. There was never any objection to the unpleaded witnesses testifying in relation to this claim. With other witnesses, the State was quick to object to any questioning or testimony that was "beyond the scope" of the claims in the Rule 3.851 motion. (PCR2. 4993, 5003, 5008, 5354, 5803, 5812). The lower court, as well, intervened *sua sponte* on several occasions to ascertain whether testimony was relevant to a plead claim. (PCR2.5191, 5244).

Judicial estoppel should be applied. The witnesses were discussed well in advance of the hearing, testimony was admitted without objection from the State or comment from the lower court. In its closing argument (which the defense is prohibited from responding to pursuant to Fla. R. Crim. P. 3.851(5)(E)), the State raised this issue for the first time, preventing Mr. Bright from responding prior to the lower court's decision on

the claim. Additionally, it was error for the lower court to even consider the issue since it was waived by the State when they failed to object to the testimony. As such, this Court must consider the testimony of the unpleaded veterans. Any technicality about the pleading should have been addressed prior to the evidentiary hearing, and Mr. Bright should have been afforded the opportunity to fix the deficiency. *Bryant v. State*, 901 So.2d 810, 819 (Fla. 2005). To circumvent Mr. Bright's due process rights in this way is a gross miscarriage of justice.

The State argues that Mr. Bright cannot appeal the lower court's improper imposition of a procedural bar, because the argument was not made to the lower court.[4] However, this is an untenable position as the lower court's ruling that this testimony was procedurally barred was only contained in the final order denying Mr. Bright's Rule 3.851 motion. (PCR2.4216-69). The order denying postconviction relief is a final order, and the only opportunity for raising the issue would have been in a motion for rehearing. However, Florida Rule of Criminal Procedure 3.851 states

[4] The State cites to Florida Statutes Section 924.051 to support its argument. However, Section 924.051 also supports Mr. Bright's argument that the State had multiple opportunities to object to this testimony and failed to do so. It is a travesty that the State sat on this argument and allowed witnesses to be flown in from all corners of the United States on the State of Florida's dime, and then allowed them to testify for a full day in court, again on the State of Florida's dime, only to now try to support the lower court's post-hoc bar.

that a motion for rehearing is unnecessary to preserve an issue for appeal. Therefore, this appeal is the appropriate place to raise the issue.

The State makes a list of "transgressions" in Mr. Bright's military service which the jury did not hear about. The State then asserts that it was reasonable for Bynum to introduce a minimal amount of testimony on Mr. Bright's military service in order to avoid getting into the various transgressions he had throughout his career with the Marines. The law does not support the State's position. The State cites to *Wong v. Belmontes*, 558 U.S. 15 (2009), to support the position that keeping good information out is sometimes necessary to foreclose the introduction of "the worst kind of bad evidence." In *Wong* the evidence that was kept out was evidence of a prior brutal murder. *Id.* at 25-26. Mr. Bright's "lack of tact" with junior troops and civilian alcohol-related incidents are hardly in the same category. Unlike a prior murder, the transgressions actually provide additional mitigation. *Allen v. State*, 137 So. 3d 946, 961 (Fla. 2013) (cleaned up) ("the State may not attach aggravating labels to factors that should militate in favor of a lesser penalty"). The logic the State proposes is exactly the logic that was rejected in the U.S. Supreme Court's decision in *Porter*. The U.S. Supreme Court found it was "unreasonable to conclude that Porter's military service would be reduced to 'inconsequential

proportions,' simply because the jury would also have learned that Porter went AWOL on more than one occasion." *Porter v. McCollum*, 558 U.S. 30, 43 (2009) (internal citations omitted).

The State references Mr. Bright receiving drug-abuse orientation on February 22, 1973, as one example of "dishonorable behavior." (Answer at 66). The State's inclusion of this under "dishonorable behavior" is both duplicitous and asinine as the record the State cites to demonstrates that, on that same date, Mr. Bright received many instructions on rules and conduct for the U.S. Marine Corps as part of his bootcamp training. (PCR2.2806). Mr. Bright, who enlisted for assignment in January of 1973 was sent to USMC boot camp at Parris Island in February of 1973. (PCR2.2862, 1325). During this same timeframe, Mr. Bright was selected as the "outstanding recruit" of his platoon, received near perfect marks of 4.8/5.0, and was selected for an immediate meritorious promotion upon completion of boot camp. (PCR2.2889, 1325).

The State also takes out of context Mr. Bright's 1981 write-up for having "slept at his post." (Answer at 75). It is important to understand that this did not happen while Mr. Bright was working as a mechanic, but rather while he was assigned to some sort of dorm monitor duty in the barracks. (PCR2. 5945-47, 5954). Capt. Cody's testimony explained this, and it is

noted in the records themselves that this occurred at 3:30 AM in the barracks. (PCR2.5945-47, 5954, 2790).

Another mischaracterization is that Mr. Bright received a "bad conduct discharge" that was "later suspended on appeal." (Answer at 67). The colonel in charge of the 1975 court martial proceeding made the discharge a suspended sentence to be re-addressed in twelve months, very much akin to how a suspended sentence works in the criminal context. (PCR2.1326, 2877, 5931).

As Capt. Cody explained extensively, the court-martial seemed to be quickly forgiven as Mr. Bright continued to be promoted, recognized for his achievements, and awarded more and more responsibility. Capt. Cody noted that Mr. Bright was permitted to re-enlist in 1977 for a second enlistment period, with his commanding officer noting how "gratifying" it was to see such "significant improvement." (PCR2.2623, 5902).

Capt. Cody also explained the importance of Mr. Bright being chosen for the 1977 mission in Kenya. (PCR2.2619-21). Being chosen for the mission is a highly selective process, and only the best and brightest are trusted to represent the United States on a cooperation mission with another country. (PCR2. 5900-01). It is important to note that Mr. Bright was chosen in spite of several instances of "dishonorable behavior" as the State

characterizes it, suggesting that both the court martial and the minor transgressions had been forgotten and forgiven already by his commanding officers. (Answer at 66-67).[5]

The State represents that in 1979 Mr. Bright was sent "on the military's dime" to a rehabilitation facility for 43 days. (Answer at 67, 75). While true, it is worth noting that he was sent to the Naval Alcohol Rehabilitation Center, a facility whose very existence suggests that it is not uncommon for servicemen to have issues with alcohol. (PCR2.2558). Upon his return, Mr. Bright continued to receive glowing evaluations: his "innovative thinking in tackling problem areas;" his "excellent initiative and cooperation;" his being "one of the most qualified and knowledgeable NCOS in the Power-Plants Division;" and "his enthusiastic, energetic

[5] The State points to Mr. Bright being disapproved as a plane captain in 1977, however a closer look at the record reveals that the State is likely misinterpreting a poorly positioned strikethrough as an underline. (PCR2.2513). The record certifying Mr. Bright as a plane captain in 1977 is similar to many of the other records where the form provides two options with a slash, e.g., approved/disapproved and the reviewer is to indicate which of those options applies. In several of the other documents, the option the reviewer does not wish to select is struck through, leaving the correct option *untouched*. (PCR2.2511-12).

Even this very document seems to indicate that the "underlines" are being used in place of a strikethrough, as the *designation* is underlined when *requalification* would be the correct choice, considering that Mr. Bright had previously been qualified in 1975. (PCR2.2513).

attitude[, which] was instrumental in the successful completion of the carrier qualification." (PCR2.2815-20).

It is not a reasonable strategic decision to be uninformed about Mr. Bright's service, and Mr. Bright suffered prejudice due to this.

In addressing the standard for ineffective assistance for failure to present mitigation (and that is the claim at issue here) the U.S. Supreme Court has stated: "To assess [the] probability [of a different outcome under *Strickland*], we consider the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding—and reweig[h] it against the evidence in aggravation." *Sears v. Upton*, 561 U.S. 945, 955–56 (2010) (cleaned up). They went on to explain that this "will necessarily require a court to "speculate" as to the effect of the new evidence—regardless of how much or how little mitigation evidence was presented during the initial penalty phase. *Id*. at 956. The prejudice prong will invariably require some speculation on the court's part and is more nebulous than the State's very specific finding of just under 51% likelihood of a different outcome. All of this missed mitigation together is substantial and outweighs the aggravation. This Court should reverse the lower court's rulings as to the missed mitigation as the rulings are not supported by competent substantial evidence. A new penalty phase is due.

ISSUE 12: The Circuit Court Erred in Summarily Denying Bright's Claim (11) of Ineffective Assistance of Counsel During Jury Selection.

There is nothing in the record that conclusively refutes the claim that counsel was ineffective during jury selection.

Trial counsel Bynum's impromptu rating system for the jurors went from "0" to "5" and only identified those individuals who could never vote for death as "0's", but it failed to assign a number for those individuals who could never vote for life. Bynum did a disservice with this rating system as the rating system did not enable her to identify those jurors who could be struck for cause because they would always vote for death. Both "4s" and "5s" are defined by Bynum as individuals who favor the death penalty, but can vote for life. (PP.2.498-546). The twelve jurors who were empaneled all identified themselves as "4s" or "5s". (PP.2. 500-85).[6]

Trial counsel Bynum also failed to ask the appropriate follow-up questions to help develop cause challenges and wheedle out those jurors who were predisposed to vote for death. Indeed, she only made five cause

[6] The jurors who were empaneled were Ms. Craw, Mr. Leonard, Ms. Rhone, Ms. Dixon, Ms. Gay, Mr. Rhodes, Mr. Kenny, Mr. Dempsey, Ms. Lowe, Ms. Arias, Mr. Carr, Mr. Rhoden, and Mr. Kinsey. (PP.2.585). There self-ratings were as follows: Craw (4) , Leonard (4), Rhone (5), Dixon (5), Gay (4), Rhodes (5), Kenny (5), Dempsey (4), Lowe (4), Arias (4), Carr (4), Rhoden (3), and Kinsey (5). (PP.2.500, 503, 505, 513, 511, 514, 516, 525, 533, 534, 541, 548-49). Rhoden and Kinsey were the alternates. (PP.2.1285).

challenges, none of which were based on the juror's view of the death penalty, with the exception of one cause challenge that ***eliminated an individual who had scruples about the death penalty.*** (PP.2.446, 566, 569, 575, 580). She objected to none of the State's cause strikes, nor did she attempt to rehabilitate anyone. Another peculiarity of the jury selection is that nine out of the twelve jurors had family or friends in law enforcement but were never questioned about whether this would affect their partiality.[7] (PP.2.62, 63, 67, 421, 77, 93, 104, 114, 123). While this was only a penalty phase, the State presented ten witnesses, five of whom were law enforcement. (PP.2.1305). This failure to question the jurors about their ties to law enforcement further suggests that counsel was rushing the voir dire in order to get the jury seated and the trial underway.

The lower court cited to the following questions as life-qualifying: "Does anybody think that, well, if all of these things have been met that you *should* have to vote for death? Does anybody have a problem with always than [sic] being able to vote life no matter what?" (PCR2.4258) (emphasis

[7] Dixon, Gay, and Kinny were the only jurors with no ties to law enforcement. (PP.2.77, 68, 80). Rhodes did not have family or friends in law enforcement, but worked in "security" himself. (PP.2.77). Rhone also did not have family or friends in law enforcement but was majoring in criminal justice in anticipation of working in law enforcement (PP.2.421), and she was also planning on working her night shift at Arby's and reporting to jury duty in the mornings. (PP.2.41). Both of the alternates had family or friends in law enforcement. (PP.2.124, 125).

added). These questions ensure that the jurors can hold their ground as to their opinion and not push their opinion on to others, but they do not ensure that each juror could potentially vote for life. The State points to Bynum's notes, which show that her strategy was to "empower" the "3s." (Answer at 147). Unfortunately there were no "3s" on the jury due to how she exercised her strikes (or failed to). In order for those questions and that strategy to work, she needed to empanel someone who was not strongly in favor of the death penalty, a "3," and have them remonstrate with the others, or at least hold their ground. Instead she had a jury composed solely of people whose views on the death penalty were adverse to Mr. Bright's interest; they were all enthusiastically in favor of the death penalty. This was not an impartial jury as envisioned by the Sixth Amendment.

The State takes issue with Justice Luck's opinion in *Guardado v. Sec'y, Fla. Dep't of Corr.*, 112 F.4th 958 (11th Cir. 2024), which found that this Court's heightened prejudice requirement under *Carratelli* of "actual bias" is inappropriate as it circumvents clearly established federal law. *Guardado*, 112 F.4th at 983 (11th Cir. 2024). What *Guardado* suggests is that actual bias may be one way to show prejudice, but not the sole way. *See*, *id*. at 991-94. The opinion also notes that the prejudice prong under *Strickland* is already a "highly demanding burden." *Id*. at 995.

All twelve of the jurors held beliefs that were adverse to Mr. Bright in that they were all biased in favor of the death penalty. Using Bynum's rating system, a "2" or "3" would have been someone who was neutral about the death penalty, and there was no one on the jury who had rated themselves that way.[8] In Bynum's examination of the potential jurors, there were several from whom she failed to get assurances that they could even consider mitigation.

For example, Juror Rhodes rated himself as a "5" and stated that he was in favor of the death penalty, that it was needed, and that "That's why we are a great country because we have laws." (PP.2.190). Even in light of these views, the only assurance Bynum got from him was that he would "listen to mitigation." (PP.2.514). She did not ask if he would consider the mitigation in sentencing, nor if he could vote for life under any circumstances.[9] (PP.2.514). Similarly, Juror Kenny only promised that he could listen to mitigation. (PP.2.515-16). Bynum did ask a few jurors if they could "consider mitigation," but even this questioning did not make clear whether they could consider mitigation in deciding the sentence. (PP.2.499,

[8] One alternate had rated themselves as a "3." (PP.2.548).

[9] Rhodes was himself a veteran and downplayed his service stating that he only saw combat from afar. (PP.2.189). "I was on aircraft carriers. So we saw the planes when they left with bombs and missiles, and we saw them come back without them." (PP.2.189).

503, 513, 514). This type of questioning was utilized with Juror Shannon, Juror Leonard, Juror Dixon, and Juror Gay. (PP.2.499, 503, 513, 514). This vague and ineffective questioning differs sharply from the questioning she did of Juror Lowe, Juror Dempsey, and Juror Arias, who were asked if they could listen and consider mitigation, and then asked if they could vote for life if they were swayed by the mitigation. (PP.2.525, 533-34).

As this claim was not granted an evidentiary hearing, it has not been fully developed. While the State cites Bynum's notes to help establish her "strategy" during jury selection, the notes further illustrate why an evidentiary hearing is needed. (Answer at 147). Another note suggests "turning 5's into police," but what that refers to is not made clear. (PCR2.3206). An evidentiary hearing was needed on this issue to determine whether counsel's omissions were tactical or negligent. Additionally, an evidentiary hearing is required to allow a defendant "the opportunity to prove actual bias." *Martin v. State*, 322 So. 3d 25, 34 (Fla. 2021). The circuit court erred in denying an evidentiary hearing on this claim, as it is not conclusively refuted by the record. "An evidentiary hearing on a rule 3.851 motion should be held whenever the movant makes a facially sufficient claim that requires a factual determination." *Pardo v. State*, 108 So. 3d 558, 560 (Fla. 2012) (quoting *Parker v. State*, 89 So. 3d

844, 855 (Fla. 2011) and *Gore v. State*, 24 So. 3d 1, 11 (Fla. 2009)) (internal quotations omitted).

Prejudice is shown in that the same mitigation was presented to both the 2009 jury and the 2017 jury and yet the 2009 jury was not unanimously in favor of death. *Bright v. State*, 90 So. 3d 249, 256 (Fla. 2012); *Bright v. State*, 299 So. 3d 985, 995-96 (Fla. 2020).

ISSUE 14: The Circuit Court Erred in Denying Bright's Claim (13) of Ineffective Assistance of Trial Counsel for Failing to Reschedule Trial Date or Move for A Mistrial Due To Hurricane Irma.

Hurricane Irma was, in its time, one of the largest hurricanes to ever hit Florida. (PCR2.3958-4085). The comments made during jury selection reflected that it was already a Category 5 hurricane at that time. (PP.2.208). Even with non-torrential rain, flooding is an unfortunate reality of Jacksonville, Florida, as the city is situated with the St. Johns River winding its way through and ultimately emptying into the Atlantic Ocean. Flood it did, with the neighboring areas of Orange Park and Folkston Georgia receiving nearly twelve inches of rain. (PCR2.4024, 4044). The circuit court's woefully uninformed and out-of-touch comments regarding the hurricane do not reflect the reality of what occurred in Jacksonville. But, this insensitivity is not novel; both prosecutor Mr. de la Rionda and Judge Healey repeatedly mocked a potential juror who expressed concern over

the incoming hurricane. (PP.2.208-09, 212, 454). Ultimately the courthouse was forced to close due to flooding downtown. (PCR2.5219).

The lower court credited Bynum's excuses as to why she did not move for a continuance or mistrial. Her testimony is not competent, substantial evidence under *Green* as it is directly contradicted by the contemporaneous statements from trial as well as being contradicted by her co-counsel's testimony at the evidentiary hearing. *See*, *Green v. State*, 975 So. 2d 1090, 1107-08 (Fla. 2008). Co-counsel Williams testified that he had wanted a continuance and that he and Bynum had an "exasperated kind of call," where he communicated that they should ask for a continuance as the storm was "bearing down on Florida," but Bynum wanted to "get it over with and do it." (PCR2.5220-21). The hurricane ultimately made the decision for them, and the trial was delayed. Bynum testified that delay was generally beneficial to the defense, but she gave no explanation of the reasoning or origin of this opinion. (PCR2. 5416). It also contradicts her opinion that the jury should be sequestered. (PCR2. 5216-17). If delays and time away from court inure in favor of the defendant, why would she think sequestration was necessary?[10]

[10] The circuit court heard from Mr. Bright that he and Bynum had differing views on sequestration and that, even though Bynum did not agree, Bynum was going to defer to Mr. Bright's wishes and not ask for sequestration. (PP2.1128-29).

Bynum also testified that she and Mr. Bright "liked" the jury and wanted to proceed with this jury. This was contradicted by Williams' testimony that neither he nor Mr. Bright liked the juror who became the foreperson. That juror had rated himself a "5" out of 5 for favoring the death penalty. (PP.2.514). In addition to this, Williams testified that he did not like the manner in which the juror was looking at Mr. Bright. Once again, his concerns were ignored by Bynum, who "didn't want to hear it." (PCR2.5220). This critique of the jury is not meant to be a separate attack, but is offered to show how absurd it is for Bynum to claim that she and Mr. Bright liked the jury.

When it comes to prejudice the most obvious issue is that Dr. Gold had to testify via Skype and not all of his testimony was audible. It is not so much, as the State argues, an advantage of being in person or not, but really the advantage of being heard as opposed to inaudible. A continuance would have allowed Dr. Gold to appear in person. As for the mistrial, the lower court's order states that it did not want to grant a mistrial. (PCR2.4260) While no court wants a mistrial, the lower court did specifically address the issue with Mr. Bright. (PP2.1103). Why would the Court ask Mr. Bright about a mistrial if it had no intention of allowing a mistrial?

The circuit court should have found that Bynum was ineffective for not rescheduling the trial or moving for a mistrial due to Hurricane Irma because the prejudice of not continuing the hearing is clear both individually and cumulatively, from Dr. Gold's stunted and incomprehensible testimony, Dr. Ouaou and Dr. Gold's lack of preparation by counsel prior to testifying at the retrial, and that several jurors/alternates were in evacuation zones. Bynum's choice could not have been strategic because her supposed strategic decision was patently unreasonable—the jury composition was clearly disadvantageous to Mr. Bright—and it is apparent that her own schedule had influenced her decision not to continue the retrial.

ISSUE 15: The Circuit Court Erred in Denying Bright's Claim (14) That Attorney Bynum Had A Personal Conflict of Interest.

"[A]n actual conflict of interest" is a "conflict that affected counsel's performance—as opposed to a mere theoretical division of loyalties." *Mickens v. Taylor*, 535 U.S. 162, 171 (2002) (emphasis omitted). To demonstrate an actual conflict, specific evidence in the record must be identified and adverse effect must be established. *See United States v. Williams*, 902 F.3d 1328,1333 (11th Cir. 2018); *State v. Larzelere*, 979 So. 2d 195, 208 (Fla. 2008) (internal citations omitted). If an actual conflict of interest exists, the defendant need not demonstrate *Strickland* prejudice in

order to obtain relief, and the defendant must merely show that the existence of the conflict "influenced [counsel's] basic strategic decisions." *Mickens*, 535 U.S. at 171-72 (2000); *see also Larzelere*, 979 So.2d at 208 (Fla. 2008) and *State v. Coney*, 845 So.2d 120, 133 (Fla. 2003) (both confirming that prejudice is presumed).

A conflict can be created when counsel breaches a duty owed to their client. *See Strickland v. Washington*, 466 U.S. 668, 688 (1984) ("Counsel's function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest."); R. Regulating the Fla. Bar Cmt. 4-1.7 ("Conflicts of interest can arise . . . from the lawyer's own interests."). "The relationship between an attorney and client is a fiduciary relationship of the very highest character." *Elkind v. Bennett*, 958 So. 2d 1088, 1091 (Fla. 4th D.C.A. 2007) (internal cites omitted).

There is evidence in the record that Bynum had breached her fiduciary duties to Mr. Bright, which created an actual conflict that adversely affected the 2017 penalty phase proceedings.

The circuit court should have found that Bynum's conflict hampered her from properly advising Mr. Bright of the advantages of a continuance or mistrial due to Hurricane Irma. The prejudice is clear from Dr. Gold's stunted and incomprehensible testimony, Dr. Ouaou and Dr. Gold's lack of

preparation by counsel prior to testifying, and that several jurors/alternates were in evacuation zones. Bynum's choice could not have been strategic because her supposed strategic decision was patently unreasonable—the jury composition was clearly disadvantageous to Mr. Bright—and it is apparent that her own schedule influenced her decision not to continue the retrial; she was ill-prepared and rushed the whole thing, including cutting corners on jury selection by doing minimal questioning.

ISSUE 17: The Circuit Court Erred in Denying Bright's Claim that Cumulatively, the Combination of Errors Deprived Bright of A Fundamentally Fair Procedure As Guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and His Corresponding Rights under the Florida Constitution.

Bright requests this Court grant him a new penalty phase based on the cumulative prejudicial effect of multiple and egregious instances of ineffectiveness by trial counsel and all other errors that occurred during his penalty phase. "The cumulative error doctrine provides that an aggregation of non-reversible errors (i.e., plain errors failing to necessitate reversal and harmless error) can yield a denial of the constitutional right to a fair trial, which calls for reversal." *United States v. Chalker*, 966 F.3d 1177, 1193 (11th Cir. 2020), citing *United States v. Margarita Garcia*, 906 F.3d 1255, 1280 (11th Cir. 2018) (quotation omitted). Under Florida caselaw, the cumulative effect of these errors denied Mr. Bright his fundamental rights

under the United States and Florida Constitutions. *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986). A series of errors may accumulate a very real prejudicial effect. The burden remains on the State to prove beyond a reasonable doubt that the individual and cumulative errors did not affect the verdict and/or sentence. *Chapman v. California*, 386 U.S. 18 (1967).

CONCLUSION AND RELIEF SOUGHT

Based upon the foregoing, Mr. Bright requests a new trial on his penalty phase issues. The failure to investigate and present additional mitigation and the failure to contextualize the killings to rebut the HAC throughout the proceeding were deficient conduct and prejudiced Mr. Bright, amongst other actions taken or omitted by his 2017 penalty phase counsel Ms. Kelli Bynum and Mr. Michael Williams. Additionally, Mr. Bright reserves argument for the claims pled in the initial Rule 3.851 postconviction motion, filed March 22, 2022, and its amendment, filed July 14, 2022.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by electronic service to Jason Rodriguez, Assistant Attorney General, (Jason.Rodriguez@myfloridalegal.com and capapp@myflorida.legal.com) on this 4th day of November, 2024.

/s/ Elizabeth Spiaggi
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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY this petition complies with the font and formatting requirements of Fla. R. App. 9.100 and 9.210(a)(2). Arial 14-point font was used.

/s/ Elizabeth Spiaggi
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