

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Appellant,

v.

Case No. SC14 – 1701

RAYMOND BRIGHT,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTEENTH JUDICIAL CIRCUIT,
IN AND FOR BAY COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

PAMELA JO BONDI
ATTORNEY GENERAL

PATRICK M. DELANEY
ASSISTANT ATTORNEY GENERAL
Florida Bar No. 85824

Office of the Attorney General
PL-01, The Capitol
Tallahassee, Fl 32399-1050

Primary E-Mail: capapp@myfloridalegal.com
Secondary E-Mail: Patrick.Delaney@myfloridalegal.com
(850) 414-3300 Ext. 4583
(850) 487-0997 (FAX)

COUNSEL FOR APPELLEE

RECEIVED, 01/14/2015 03:58:44 PM, Clerk, Supreme Court

TABLE OF CONTENTS

	PAGE#
TABLE OF CONTENTS.....	ii
PRELIMINARY STATEMENT.....	1
STATEMENT OF THE CASE AND FACTS.....	2
SUMMARY OF THE ARGUMENT	14
ARGUMENT	14
1. THE POST-CONVICTION COURT USED AN INCORRECT ANALYSIS IN EVALUATING BRIGHT’S CLAIM FOR POST-CONVICTION RELIEF AND THEREFORE ERRED IN FINDING BRIGHT’S TRIAL COUNSEL INEFFECTIVE IN THE PENALTY PHASE.....	14
CONCLUSION	49
CERTIFICATE OF SERVICE	49
CERTIFICATE OF COMPLIANCE	49

TABLE OF CITATIONS

Cases

<i>Adams v. Wainwright</i> , 709 F.2d 1443 (11th Cir. 1983).....	17, 42
<i>Blake v. State</i> , -- So. 3d --, 2014 WL 6802715. *14 (Fla. 2014).....	32
<i>Bright v. Florida</i> , 133 S.Ct. 300 (2012).....	10
<i>Bright v. State</i> , 90 So. 3d 249 (Fla. 2012)	passim
<i>Callahan v. Campbell</i> , 427 F.3d 897 (11th Cir. 2005).....	passim
<i>Chandler v. United States</i> , 218 F.3d 1305 (11th Cir. 2000).....	17, 21
<i>Dingle v. Sec’y Dept. of Corr.</i> , 480 F.3d 1092 (11th Cir. 2007)	17, 42, 45
<i>Evans v. Sec’y, Dept. Corr.</i> , 703 F.3d 1316 (11th Cir. 2013)	32
<i>Gaskin v. State</i> , 822 So. 2d 1243 (Fla. 2002)	18, 29
<i>Gore v. State</i> , 964 So. 2d 1257 (Fla. 2007)	passim
<i>Harrington v. Richter</i> , 131 S.Ct. 770 (2001).....	passim
<i>Hildwin v. Dugger</i> , 654 So. 2d 107 (Fla. 1995).....	18
<i>Hoskins v. State</i> , 75 So. 3d 250 (Fla. 2011).....	48
<i>Johnson v. State</i> , 104 So. 3d 1010 (Fla. 2012).	48
<i>Johnson v. State</i> , 921 So. 2d 490 (Fla. 2000)	16
<i>Mansfield v. State</i> , 911 So. 2d 1160 (Fla. 2005).....	17
<i>Patton v. State</i> , 878 So. 2d 368 (Fla. 2004).....	15
<i>Peede v. State</i> , 955 So. 2d 480 (Fla. 2007).....	46

<i>Pietri v. State</i> , 885 So. 2d 245 (Fla. 2004).....	16
<i>Porter v. McCollum</i> , 558 U.S. 30 (2009).....	passim
<i>Porter v. State</i> , 788 So. 2d 917 (Fla. 2001).	15
<i>Provenzano v. Singletary</i> , 148 F.3d 1327 (11th Cir. 1998).....	17
<i>Reed v. State</i> , 875 So. 2d 415 (Fla. 2004).....	passim
<i>Rutherford v. State</i> , 727 So. 2d 216 (Fla. 1998).....	18, 29, 34, 35
<i>Spencer v. State</i> , 691 So. 2d 1062 (Fla. 1996).....	14
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984).	16, 17, 18
<i>Wheeler v. State</i> , 124 So. 3d 865 (Fla. 2013)	46
<i>Williams v. Head</i> , 185 F.3d 1223 (11th Cir. 1999).....	21
<i>Wyatt v. State</i> , 78 So. 3d 512 (Fla. 2011)	45
<i>Yarborough v. Gentry</i> , 540 U.S. 1 (2003).	passim

PRELIMINARY STATEMENT

This is a State appeal in a capital case from the post-conviction court's order granting in-part and denying in-part the defendant's motion for post-conviction relief. Appellant, the State, was the prosecution and will be referred to as "the State." Appellee, Bright, was the defendant and will be referred to by proper name, e.g., "Bright."

References to the record from Bright's direct appeal to the Florida Supreme Court will be as follows "(R##: ####)" with a corresponding volume and page number. References to the penalty phase from Bright's trial will be "(Penalty at ##)," with a corresponding page number.

Bright's post-conviction record will be referenced by "(PCR##: ####)" with a corresponding volume and page number. The record in Bright's post-conviction appeal is divided between 18 volumes which are numbered consecutively with beta stamps at the bottom of each page.

STATEMENT OF THE CASE AND FACTS

The relevant facts concerning the February 18, 2008, murder of Derrick King and Randall Brown are recited in this Court's opinion on direct appeal:

On February 18, 2008, Michael Majors went to the home of fifty-four-year-old defendant Raymond Bright in Jacksonville, Florida. Twenty-year-old Derrick King, and sixteen-year-old Randall Brown, and Bright were in the house. At approximately 8 p.m., Majors and Brown both left the home.

Brown returned to his mother's home and, after receiving a phone call, borrowed his mother's rental vehicle and left her house between 9 and 9:30 p.m. At approximately 11 p.m., Brown spoke with his mother by phone and advised that he would be home shortly; however, he never returned. At around 8 a.m. the next morning, Majors attempted to call Brown on his cellular phone, but there was no answer. Majors called Brown's mother and was advised that Brown had not returned. Majors then went to Bright's house and, having no response to his knock at the door, Majors climbed into the house through an open window. Upon entering the family room, Majors discovered the bodies of King and Brown.

Derrick King was lying face down on the carpet next to a sofa, partially wrapped in a sleeping bag or comforter. The sofa was saturated with blood on one end, which was adjacent to where King's head rested on the floor. The wall behind the sofa and the ceiling above the sofa evidenced blood. An evidence technician testified during trial that the blood on the ceiling was cast-off blood, and the pattern was consistent with someone being on the couch and swinging his arm back.

Randall Brown was found seated sideways in a recliner with his head leaning up against a wall and a blanket covering his head. The wall against which Brown's body rested presented a pattern of blood that radiated from his head, and there was also blood on the ceiling. When crime scene technicians moved the recliner away from the wall, a pool of blood was discovered on the floor. Above Brown's head was a framed picture with one side of the frame broken away. That one side

was indented, consistent with having been struck by something round, such as a hammer.

Outside the house, the crime scene technicians located a loaded nine-millimeter Smith & Wesson pistol, a loaded assault rifle, and a pair of mechanic's gloves. During a subsequent search of Bright's yard, technicians recovered a hammer that had been buried. DNA testing on the hammer revealed two separate DNA profiles, one of which was a major contributor and the other of which was a minor contributor. During trial the parties stipulated that the DNA of the major contributor matched the known profile of Derrick King. Randall Brown could not be excluded as the minor contributor. The gloves did not test positive for blood. Further, no latent fingerprints of value were found on the hammer, the nine-millimeter handgun, the assault rifle, or their magazines or ammunition. No foreign DNA was detected on the fingernail clippings of either victim.

At 7:30 a.m. on the morning of February 19 (the day that the victims were discovered), Bright's ex-wife picked him up at a church near his home. The ex-wife testified that she and Bright had made plans to secure the admission of Bright to a United States Department of Veterans Affairs clinic for treatment of his cocaine addiction. She testified that they had agreed to meet at the church because she "was in fear of what was going on" at Bright's house. During the *Spencer* hearing . . . the ex-wife testified that she and Bright had previously made multiple calls to law enforcement – including the narcotics division of the Jacksonville Sheriff's Department and Crime Stoppers – to report that Bright wanted certain individuals removed from his house because they had essentially taken over the house for the purpose of selling drugs. While one officer suggested that Bright accompany the police to the house and identify the persons who were allegedly dealing drugs, Bright and his ex-wife refused to agree to this proposal because they feared retaliation.

After the ex-wife met Bright at the church on the morning of February 19, she called a lawyer and arranged for Bright to speak with homicide detectives the next day. However, at 1:45 a.m. on February 20, law enforcement arrived at the home of the ex-wife and Bright was placed in custody. Subsequent to the arrest, the ex-wife disposed of Bright's bloody clothes because she did not want them in her

house.

Bright made statements to separate individuals with regard to what allegedly occurred on the night of the murders. Prior to his arrest, Bright informed friend and former coworker Benjamin Lundy that he had “screwed up” and may have killed two people. Bright told Lundy that the murders occurred after a confrontation erupted when one of the victims accused Bright of stealing drugs. After his arrest, Bright also described the events to Mickey Graham, who was in jail at the same time with Bright on unrelated charges. According to Graham, Lavelle Copeland had moved in with Bright, and he and others were running a crack cocaine operation out of the house. Bright was afraid of them and felt threatened because they possessed guns. Bright did not want them there and had called the police in an attempt to remove them from the premises.

Bright told Graham that he went into the kitchen at 2 a.m. on February 19. King was on the sofa and Brown was in the recliner. Brown had a nine-millimeter handgun in his hand and started waving it around. King rose from the sofa and removed the gun from Brown’s hand. Bright saw an opportunity and attempted to take the gun away from King. The men struggled and the gun discharged. The gunshot startled King and caused him to release the handgun. Bright then pointed the gun at King and attempted to shoot him, but the gun misfired. Bright dropped the weapon and attempted to run out of the house, but he tripped and fell. He grabbed a hammer that was within reach, turned around, and commenced striking King, knocking him back toward the sofa where King had previously been lying down. When Bright turned around, he saw that Brown was about to pick up the handgun. Bright then began to strike Brown with the hammer. The next time Bright turned toward the sofa, he saw King reaching for an assault rifle. At that time, Bright again struck King with the hammer. When Bright stopped, he could still hear King and Brown breathing and gurgling, but then the room became silent. Bright described his actions to Graham as having “lost it.”

The autopsies of King and Brown were conducted by different medical examiners. However, both independently concluded that each victim died from blunt impact trauma to the head. King was struck thirty-eight times about the neck and head, and twenty

additional times on his body, for a total of fifty-eight individual injuries. The wounds were consistent with a hammer-type instrument, and injuries were present on the front, back, top, left, and right sides of King's head. Further the injuries to his body were consistent with defensive wounds. The medical examiner testified that the injuries were consistent with King defending himself against being hit in the head with a hammer and eventually succumbing to the attack. Toxicology results were positive for cocaine and marijuana in King's system.

Brown's skull was fractured in eight to ten separate locations, and he also received fourteen other independent injuries to his body. The injuries to the body, which included a fractured ulna, were consistent with defensive wounds. Based upon the number of injuries to Brown's body, the medical examiner opined that the attack was not brief, but lasted for minutes. Based on the nature of the defensive wounds, the medical examiner concluded that the only injury that would have been fatal on its own, and would have rendered Brown unconscious immediately – a depressed skull fracture – could not have been the first injury inflicted. The medical examiner testified that all of the injuries inflicted upon Brown would have been painful, and they were consistent with a scenario in which Brown was either sitting in a recliner, or fell back onto a recliner, and was repeatedly hit with a hammer as he tried to defend himself. No alcohol or drugs were detected in Brown's system, the jury found Bright guilty on two counts of first-degree murder.

During the penalty phase, the parties stipulated that in 1990, Bright was convicted of armed robbery. A Pensacola police sergeant testified that Bright was arrested for robbing a convenience store while using a knife. During the robbery, Bright leaned over the counter in an attempt to remove money from the register, but he never went behind the counter. The State also introduced victim impact statements from Randall Brown's mother, aunt, and sister, and Derrick King's grandmother, cousin, and sister.

Bright presented the testimony of his sister, Janice Jones, who stated that Bright and another brother had taken care of her when she was young. Bright had also stepped in and served as the father that her daughter never had. She testified that Bright repaired the roof on her

house and saved her \$3000 after Hurricane Ivan caused damage. There was an eighteen-month waiting list for roofers when Bright performed the repairs.

Attorney and former marine James Hernandez testified that Bright served nine-plus years in the United States Marine Corps (USMC), during which he served as a fighter jet mechanic. Hernandez described Bright's multiple promotions during his service in the USMC. Hernandez testified that Bright received two separate awards for good conduct, a prerequisite of which is three continuous years of honorable service in the USMC. Hernandez also explained that Bright received a Meritorious Mast Award for noticing a problem on a jet upon take-off which required it to land thereby preventing a "tragic mishap." Bright received two separate honorable discharges from the USMC, and one general discharge under honorable conditions. The reason for the general discharge was listed as "Alcohol Abuse Rehabilitation Failure."

Bright's girlfriend and two of his former coworkers, Benjamin Lundy and Brian Williams, testified that Bright struggled with drugs and alcohol. The girlfriend stated that when she first met Bright, he was smart, intelligent, hardworking, and clean. However, in November and December of 2007, she noticed that he was continuously fatigued and no longer wanted to do anything. She stated that "[a]fter the drugs took him over he couldn't do nothing, his whole life was just gone." The girlfriend testified that when Bright was away from his house, he wanted to seek assistance and clean up his life. However, she observed that as soon as he returned to this house, "that was it." Brian Williams testified as to one incident where Bright's ex-wife called and asked him to come to her house to check on Bright. When Williams arrived, Bright was intoxicated and upset, and he threatened suicide. Williams contacted the police, who responded and spoke with Bright, but then left. Lundy testified that he suspected Bright was involved in something more serious than alcohol when Bright started to miss work, which was out of character for him. In addition to being coworkers, Williams and Lundy also considered Bright to be a friend. Lundy stated that when he or anyone else needed help, Bright was always available. Bright helped Williams surprise his children one Christmas by bringing the children bicycles that Williams had previously hidden.

Lester Baker, who supervised Bright at a mattress manufacturing company during the early 1990s, and Lundy and Williams, who previously worked with Bright at a commercial diesel truck shop, testified that Bright was likeable, dedicated, and a hard worker. Lundy and Williams stated that Bright mentored young mechanics and would often volunteer to stay late to complete a project but not charge the shop for the time. They also testified that Bright never appeared to be under the influence of drugs or alcohol while at work.

Finally, Bright presented the testimony of the records custodian of the Jacksonville Sheriff's Office jail, who established that there was no record of any disciplinary reports for Bright.

On September 1, 2009, the jury recommended by a vote of eight to four [8 – 4] that Bright be sentenced to death for the murders of Derrick King and Randall Brown.

During the *Spencer* hearing, in addition to the previously discussed testimony of Bright's sister and his ex-wife, Bright presented the testimony of Dr. Ernest Miller, who diagnosed Bright as suffering from substance abuse along with a dependency problem involving alcohol and cocaine. Miller noted that there was a history of alcohol abuse in the Bright family, which made Bright five to eight times more likely to develop a substance abuse problem. Miller testified that during Bright's various attempts in rehabilitation, his addiction issues were treated, but the underlying emotional issues were not. Therefore, only half of the problem was addressed, and Bright would thereafter go through the "revolving door" of alcoholism. Miller stated that Bright's extensive criminal history – at least twenty-five convictions – appeared to be connected with feeding his drug habit. While Bright asserted to Miller that he acted in self-defense when he killed King and Brown, Miller explained that use of alcohol and cocaine could have caused Bright to be paranoid and led him to believe that the victims intended to harm him even if they did not.

Bright's sister, Janice Jones, testified that their father was a binge drinker who would disappear for several days at a time. She first noticed Bright's drinking problem when he was discharged from the Marines. She believed that he became involved with cocaine after a

trip to North Carolina, when an attempt to reconcile with his wife failed. Jones testified that when Bright is sober, he is “amazing,” but when he drinks or is on drugs, she does not like him, and he does not like himself.

Attorney James Hernandez, who briefly represented Bright in these proceedings, and attorney Michal Bossen, whom Bright and his ex-wife called the morning after the murders, both testified that Bright was remorseful and cried when he tried to recount the events surrounding the murders. Bossen also related what Bright told him:

That these people were dealing drugs out of the house. That they paid the rent in drugs, some money but mostly drugs [Bright] was threatened all day the day before the killings. And then he was – he himself was threatened, that they were threatening to kill him if he didn’t basically comply with whatever they were doing. So he basically told me that he tried to get them out they threatened him, there were guns And then basically he said that between 5:00 and 7:00 [a.m.] there was an altercation, he used the hammer to defend himself, the hammer was still in the house. And that he believed that he as a former Marine he fought to eliminate that threat.

Finally, a letter from inmate Charles Ferguson was placed in evidence. In the letter, Ferguson stated that Bright had taught him how to read and write, and about God. He also stated that Bright had become a father figure to him.

On November 19, 2008, the trial court sentenced Bright to death for the murders of King and Brown. The court found the same aggravating and mitigating circumstances for each victim. In pronouncing Bright’s sentence, the trial court determined that the State had proven beyond a reasonable doubt the existence of the following statutory aggravators: (1) He had previously been convicted of a felony involving the use or threat of violence to the person, § 921.141(5)(b), Fla. Stat. (2008) (the 1990 conviction for robbery) (great weight); (2) He had previously been convicted of a felony involving the use or threat of violence to the person, § 921.141(5)(b), Fla. Stat. (2008) (the contemporaneous murder of the other victim)

(great weight); and (3) the murder was especially heinous, atrocious, or cruel (HAC), § 921.141(5)(h), Fla. Stat. (2008) (great weight).

The trial court found that one statutory mitigating circumstance had been established – the murders were committed while Bright was under the influence of an extreme mental or emotional disturbance, § 921.141(6)(b), Fla. Stat. (2008) (some weight). In support of this mitigating circumstance, the trial court relied on Dr. Miller's testimony that Bright's underlying emotional problems were never treated, and the testimony of Bright's girlfriend and Brian Williams with regard to the changes in Bright's behavior toward the end of 2007, including the threat of suicide.

The trial court also found nineteen nonstatutory mitigating circumstances: (1) a long and well-documented history of drug abuse (some weight); (2) Bright repeatedly sought help for his problems (some weight); (3) remorse (little weight); (4) Bright was afraid of the victims and took steps to removed them from his house (little weight); (5) ten years of service in the USMC with two honorable discharges and a third discharge under honorable circumstances (considerable weight); (6) Bright has skills as a mechanic and served as an aviation mechanic in the USMC (some weight); (7) Bright's actions as a USMC aviation mechanic likely saved lives (some weight); (8) Bright mentored young mechanics (some weight); (9) Bright was a good employee (some weight); (10) Bright was a loving and giving boyfriend (slight weight); (11) Bright is a good brother (some weight); (12) Bright was a good father, and imposition of the death penalty would have serious, negative impact on others (slight weight); (13) Bright shares love and support with his family (slight weight); (14) Bright was a good friend (slight weight); (15) Bright has been an exceptional inmate (some weight); (16) Bright exhibited good behavior throughout the court proceedings (slight weight); (17) Bright maintained gainful employment (considerable weight); (18) Bright is amenable to rehabilitation and a productive life in prison (slight weight); and (19) Bright has bonded with another inmate and taught him how to read (slight weight).

The trial court concluded that the established aggravating circumstance substantially outweighed the mitigating circumstances and imposed a sentence of death for each of the murders. However,

the sentencing order noted that, had the HAC aggravating circumstance not been present, “this Court may have found a life sentence to be appropriate.”

Bright v. State, 90 So. 3d 249, 252 – 57 (Fla. 2012) (footnotes and internal page numbers omitted).

On direct appeal the Florida Supreme Court addressed five issues: (1) the trial court erred in ruling the prosecutor’s comments during closing argument were not a comment on Bright’s right to remain silent; (2) the trial court erred in finding and weighing Bright’s prior 1990 conviction for armed robbery and the contemporaneous murders as two separate aggravating circumstances under § 921.141(5)(b), Fla. Stat. (2008); (3) the trial court abused its discretion in giving great weight to the HAC aggravating circumstance; (4) death sentence imposed was disproportionate; and (5) the trial court erred in not dismissing the death penalty as a possible sentence because Florida’s sentencing procedures are unconstitutional under the Six Amendment of the United States Constitution pursuant to *Ring v. Arizona*.

On May 31, 2012, after briefing, oral argument, and a rehearing, this Court rejected each of Bright’s issues on appeal, and found the record sufficient to support Bright’s convictions. *Bright*, 90 So. 3d at 265. Bright then filed for a writ of certiorati with the United States Supreme Court, which was denied on October 1, 2012. *Bright v. Florida*, 133 S.Ct. 300 (2012), *cert denied*.

Bright filed an amended and condensed motion for post-conviction relief, on November 6, 2013, after his first motion was struck because it violated the page limitations. This new motion raised nine claims for relief. An evidentiary hearing was held from May 19th through May 23rd 2014, whereby Bright presented the testimony of twenty-one witnesses.

Some of Bright's witnesses were presented to show the ineffective assistance of counsel during the penalty phase for failure to investigate and present adequate mitigation. This included the use of mental health experts who gave different diagnoses of Bright as suffering from post-traumatic stress disorder, obsessive compulsive disorder, severe depression, and anxiety. (PCR18: 2876 – 77). Bright presented the testimony of lay witnesses, some of whom previously testified, that told of Bright's abusive and impoverished childhood. (PCR14: 2177 – 2206). This included physical abuse from Bright's father as well as Bright being subjected to domestic violence. (PCR14: 2177 – 2206). Bright also presented the testimony of Dr. Krop, who was initially retained to perform a competency evaluation on Bright. (PCR15: 2413, 2456). Dr. Krop testified to his initial findings prior to Bright's trial, which included his belief that Bright did not suffer from any psychopathology or personality disorder. (PCR15: 2456, 2468). However, Dr. Krop did acknowledge that Bright has problems with anger management, and has a criminal history that includes robbery, and arrests for domestic violence and

domestic injunction violations. (PCR7: 979 – 80; PCR15: 2468).

Following written closing arguments from both the State and defense, the post-conviction court issued its order granting in-part and denying in-part Bright's motion for post-conviction relief on August 14, 2014. In granting in-part Bright's motion, the post-conviction court found trial counsel was ineffective during the penalty phase for failure to properly investigate and present mitigation. This appeal follows.

SUMMARY OF THE ARGUMENT

1. The post-conviction court erred in finding Bright's trial counsel ineffective during the penalty phase, because it used an incorrect analysis of both deficient performance and prejudice. In finding deficient performance, the post-conviction court determined it could not hold certain decisions made by trial counsel as reasonable strategy because trial counsel had died since he represented Bright and therefore was unavailable to testify. This analysis denied trial counsel the presumption of reasonable trial strategy to which he was entitled.

In determining prejudice, the post-conviction court's threshold was whether or not the information presented in the evidentiary hearing was heard by the jury during the penalty phase. The post-conviction court determined that any different information which was not presented to the jury established prejudice because it may have affected their verdict. This analysis did not properly evaluate a reasonable probability of a different outcome by reweighing the different presentation of mitigation with the established case for mitigation and aggravation. When properly reweighed, no reasonable probability exists that the jury would have recommended Bright receive a life sentence for the double murder of two young men with a hammer.

ARGUMENT

1. THE POST-CONVICTION COURT USED AN INCORRECT ANALYSIS IN EVALUATING BRIGHT’S CLAIM FOR POST-CONVICTION RELIEF AND THEREFORE ERRED IN FINDING BRIGHT’S TRIAL COUNSEL INEFFECTIVE IN THE PENALTY PHASE.

Bright’s post-conviction counsel pursued a different strategy of mitigation than the one used by Bright’s trial counsel, Mr. Nolan. Trial counsel used a strategy to humanize Bright and portray him as a kind, loving, dependable, and hardworking person who suffered from substance abuse. This included the presentation of eight lay witnesses to the jury, and a psychiatrist during the *Spencer*¹ hearing. *Bright*, 90 So. 3d at 254 – 55. In contrast, post-conviction counsel used a strategy which attempted to excuse Bright’s conduct through the use of mental health experts and detailing Bright’s abusive, neglectful, and impoverished childhood.

After hearing the different mitigation evidence, the post-conviction court found Mr. Nolan ineffective in the penalty phase for the failure to: (1) follow-up with and present Dr. Krop as a witness; (2) obtain additional records from the Veterans Affairs Administration, Escambia County school records, and records from the Lakeview Center, Inc. when Bright was held for a Baker Act; (3) present additional testimony from Janice Bright-Jones; (4) present a trauma expert as an expert

¹ *Spencer v. State*, 691 So. 2d 1062 (Fla. 1996).

witness to the jury; and (5) use a mitigation specialist. In ruling on each of these claims, the trial court made both findings of deficient performance and prejudice; however, the trial court's reasoning was misplaced.

The findings of deficient performance were based on an absence of testimony due to trial counsel's death, and not given the necessary presumption of strategy. The post-conviction court also found prejudice simply by noting the different mitigation was not presented to the jury. But, a proper prejudice analysis must consider whether the new information would have resulted in a reasonable probability of a different outcome after reweighing it against the established mitigation and aggravation. Therefore, the post-conviction court erred in granting Bright's claim of ineffective assistance of counsel in the penalty phase because it used an incorrect analysis of the evidence in the record.

The Standard of Review

Claims of ineffective assistance of counsel present a mixed question of law and fact and are therefore subject to a de novo review. *Patton v. State*, 878 So. 2d 368, 372 (Fla. 2004) (citing *Porter v. State*, 788 So. 2d 917, 923 (Fla. 2001)). The trial court's legal conclusions are subject to an independent review, but the factual findings must be given deference. *Patton*, 878 So. 2d at 373.

The Test for a Claim of Ineffective Assistance of Counsel

To establish ineffective assistance of counsel, a defendant must satisfy a two prong test, establishing both deficient performance and prejudice. *Strickland v. Washington*, 466 U.S. 668 (1984). To establish deficient performance, a defendant must show that counsel made specific errors so serious that counsel was not functioning as the “counsel” guaranteed to the defendant by the Sixth Amendment. *Strickland*, 466 U.S. 668; *Pietri v. State*, 885 So. 2d 245, 252 (Fla. 2004). “[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel’s challenged conduct on the facts of the particular case, viewed as of the time of counsel’s conduct.” *Strickland*, 466 U.S. at 690. “Judicial scrutiny of counsel’s performance must be highly deferential and must be conducted in a manner that eliminates the ‘distorting effects of hindsight’ and considers the conduct in light of the circumstances facing the attorney at the time.” *Johnson v. State*, 921 So. 2d 490, 500 (Fla. 2000) (internal citations omitted) (citing *Strickland*, 466 U.S. at 689 – 690. “. . . . [T]he court should keep in mind that counsel’s function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case.” *Strickland*, 466 U.S. at 690.

“[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.”

Strickland, 466 U.S. at 690. “When courts are examining the performance of an experienced trial counsel, the presumption that his conduct was reasonable is even stronger.” *Chandler v. United States*, 218 F.3d 1305, 1316 (11th Cir. 2000); *see Provenzano v. Singletary*, 148 F.3d 1327, 1332 (11th Cir. 1998) (stating “Our strong reluctance to second guess strategic decisions is even greater where those decisions were made by experienced criminal defense counsel.”). “[A]n attorney is not ineffective for decisions that are a part of trial strategy that, in hindsight, did not work out to the defendant’s advantage.” *Mansfield v. State*, 911 So. 2d 1160, 1174 (Fla. 2005). “Even if counsel’s decision appears to have been unwise in retrospect, the decision will be held to have been ineffective assistance only if it was ‘so patently unreasonable that no competent attorney would have chosen it.’” *Dingle v. Sec’y Dept. of Corr.*, 480 F.3d 1092, 1099 (11th Cir. 2007) (quoting *Adams v. Wainwright*, 709 F.2d 1443, 1445 (11th Cir. 1983)).

In the absence of any testimony regarding trial counsel’s strategy, a court presumes trial counsel exercised reasonable professional judgment in all decisions. *Gore v. State*, 964 So. 2d 1257, 1269 – 70 (Fla. 2007) (finding the defendant did not meet his burden of deficient performance when his lead counsel was not called to testify during the hearing, and defendant only presented testimony from co-counsel that criticized the strategy of the lead counsel); *see Callahan v. Campbell*, 427 F.3d 897, 933 (11th Cir. 2005). While courts may not indulge in *post hoc*

rationalization, they also cannot insist that counsel “confirm every aspect of the strategic basis for his or her actions.” *Harrington v. Richter*, 131 S.Ct. 770, 794 (2001). “There is a ‘strong presumption’ that counsel’s attention to certain issues to the exclusion of others reflects trial tactics rather than ‘sheer neglect.’” *Richter*, 131 S.Ct. at 791 (citing *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003) (*per curiam*)).

To establish prejudice, the defendant must show there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceedings would have been different. This Court has determined that a reasonable probability is a probability sufficient to undermine confidence in the outcome. *Rutherford v. State*, 727 So. 2d 216, 219 (Fla. 1998). “To assess that probability, we consider ‘the totality of the available mitigation evidence – both adduced at trial, and the evidence adduced in the . . . [post-conviction] proceedings’ – and ‘reweig[h] it against the evidence in aggravation.’” *Porter v. McCollum*, 558 U.S. 30, 41 (2009).

In the present case, Bevel must show that but for counsel’s alleged errors, he probably would have received a life sentence. *Gaskin v. State*, 822 So. 2d 1243, 1247 (Fla. 2002) (citing *Hildwin v. Dugger*, 654 So. 2d 107, 109 (Fla. 1995)). Unless a defendant can show both deficient performance and prejudice, it cannot be said the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable. *Strickland*, 466 U.S. at 687.

Bright's Trial Counsel

Bright was represented at trial by Richard Kuritz, and Jim Nolan. Mr. Kuritz was appointed as lead counsel and has twenty years experience as a criminal lawyer having worked as an Assistant State Attorney and a private defense lawyer. (PCR12: 1864 – 65). Mr. Kuritz has represented defendants in more than 50 murder trials, and 20 death penalty cases. (PCR12: 1864 – 65). Mr. Kuritz attends the “Death is Different” seminar each year and has been invited to speak at Florida Coastal Law School on death penalty litigation. (PCR12: 1864 – 65). In addition to his work as a trial lawyer, Mr. Kuritz has represented defendants in five capital appeals before the Florida Supreme Court. (PCR12: 1865).

Jim Nolan was second chair to Mr. Kuritz. Although Mr. Kuritz was not familiar with Mr. Nolan prior to this case, he quickly learned that Mr. Nolan was an experienced criminal defense attorney who was well respected within the community. (PCR13: 1880 – 81). Mr. Kuritz even watched Mr. Nolan try multiple cases with good results, felt Mr. Nolan was a “very qualified and competent lawyer.” (PCR13: 1881). Mr. Nolan was responsible for the penalty phase and therefore made all strategic decisions related to mitigation. (PCR10: 1515; PCR12: 1722; PCR13: 1878 – 80).

Improper Analysis of Deficient Performance and Trial Strategy

The post-conviction court determined Bright established deficient performance in the presentation of different mitigation evidence at the post-conviction hearing. (PCR10: 1471). This determination was made in error and did not afford the required presumption of reasonable trial strategy to which Mr. Nolan was entitled.

The post-conviction court noted that because Mr. Nolan had died since he represented Bright, no testimony was available concerning his actions. (PCR10: 1391 n.7). The post-conviction court was also prevented from referencing the testimony of Mr. Kuritz because Mr. Kuritz made it clear “that Mr. Nolan and the RCC completed most of the mitigation for the penalty phase.” (PCR10: 1471). The post-conviction court’s final conclusion regarding deficient performance therefore hinged on the lack of any testimony as to Mr. Nolan’s strategy at penalty phase; but, this was reached in error. (PCR10: 1471).²

² “[S]ince Mr. Nolan passed away between the trial and the filing of Defendant’s rule 3.851 motion, he was not available to testify and this Court cannot determine why he did not follow up with Dr. Krop.” (PCR10: 1477). “[T]his Court cannot find that counsel acted pursuant to trial strategy in failing to obtain the records at issue, especially since Mr. Nolan was unavailable to testify about why such mental health records were not uncovered or presented during the penalty phase.” (PCR10: 1484). “[T]his Court cannot find that counsel exercised strategy in refraining from obtaining and presenting the testimony of a trauma expert, particularly because Mr. Kuritz could not offer an explanation for why such an expert was not retained.” (PCR10: 1510).

In *Callahan v. Campbell*, the United States Court of Appeals for the Eleventh Circuit considered a claim of ineffective assistance of counsel during the penalty phase. *Callahan*, 427 F.3d at 933. The trial attorney focused his penalty phase argument on mercy for Callahan, and not the presentation of mitigation. *Id.* at 935 – 36. Unfortunately, trial counsel had died prior to any post-conviction claim, and as a result no testimony was available pertaining to trial counsel’s strategy. *Id.* at 933. In evaluating Callahan’s claim the Eleventh Circuit stated “[i]n a situation like this, we will presume the attorney ‘did what he should have done, and that he exercised reasonable professional judgment.’” *Callahan*, 427 F.3d at 933 (quoting *Williams v. Head*, 185 F.3d 1223, 1228 (11th Cir. 1999)). The Eleventh Circuit took notice that “[good] advocacy requires ‘winnowing out’ some arguments, witnesses, evidence, and so on, to stress others.” *Callahan*, 427 F.3d at 933 (quoting *Chandler*, 218 F.3d at 1319). In finding trial counsel’s strategy reasonable, the Eleventh Circuit placed themselves in the position of trial counsel at the time of the penalty phase, and considered the evidence and aggravation against the defendant. *Callahan*, 427 F.3d at 933. In acknowledging the correctness of the holding, Judge Wilson wrote a concurring opinion stating:

Whether Callahan was denied the effective assistance of counsel during the penalty-phase is a somewhat more difficult proposition, since, Callahan’s penalty-phase lawyer had died by the time of the post-conviction hearing. Consequently, there is no evidence regarding any preparation he did for the mitigation effort. There is no evidence that he performed any substantial investigation into Callahan’s

background, or attempted to call family members other than Callahan's aunt. Following *Chandler v. United States*, 218 F.3d 1305 (11th Cir. 2005)(en banc), we "presume that he did what he should have done, and that he exercised reasonable professional judgment." *Id.* at 1314 n.15. In *Wiggins v. Smith*, 539 U.S. 510, defense counsel investigated Wiggins' youth, were aware of his background, and hired a psychologist and criminologist (who testified at trial), and the Supreme Court still held their performance to be constitutionally ineffective. Here, we have no idea whether Knight did any of these things; but, since, we are bound by our circuit precedent, we presume that he did.

Callahan, 427 F.3d at 938 – 39 (Wilson, concurring).

This Court acknowledged the presumption of trial strategy under similar circumstances in *Gore v. State*, 964 So. 2d 1257, 1269 – 70 (Fla. 2007). In *Gore*, the defendant alleged deficient performance by his trial counsel for presenting the testimony of a particular witness during his resentencing. *Id.* at 938 – 39. *Gore* never produced his lead counsel to provide insight into his trial strategy, but did call his co-counsel who criticized the decision of lead counsel in presenting said witness. *Id.* Despite the testimony from the co-counsel, this Court found no deficient performance on the part of *Gore's* lead counsel because multiple strategies could be inferred from the testimony of the witness in question. *Id.* In fact, because there was no testimony regarding trial strategy from the lead counsel, this Court developed three distinct strategies in evaluating *Gore's* claim and denying relief. *Id.*

This case bears a striking resemblance to *Gore*, but was not afforded the presumption of reasonable trial strategy. Although post-conviction counsel presented different mitigation evidence, deficient performance is not established because “[t]here is a ‘strong presumption’ that counsel’s attention to certain issues to the exclusion of others reflects trial tactics rather than ‘sheer negligence.’” *Richter*, 131 S.Ct. at 791 (citing *Gentry*, 540 U.S. at 8 (per curiam)). Here, trial counsel’s presentation of mitigation should have been presumed to have been reasonable trial strategy because we have no testimony to the contrary.

Mr. Nolan’s investigation began by requesting an evaluation from Dr. Krop regarding Bright’s competency to stand trial and other potential mitigating information. (PCR15: 2413). Dr. Krop returned a report stating Bright was competent to stand trial and that he did not suffer from any psychopathy or personality disorders. (PCR7: 978, 983). Dr. Krop’s report indicated that Bright was never exposed to domestic violence, was not abused, and was raised in a good home. (PCR7: 979). Dr. Krop made multiple references to Bright’s issues with anger management, criminal history and incidents of domestic violence which included violations of a restraining order. (PCR7: 979 – 80). Dr. Krop examined Bright’s psychiatric history and family psychiatric history noting that two of Bright’s family members had been hospitalized for mental illness. (PCR7: 979 – 80).

Simply, Dr. Krop's report explains Mr. Nolan's strategy because Dr. Krop did not uncover the mitigation evidence trial counsel was looking to acquire. Mr. Nolan therefore based his strategy on the humanization of Bright, which included presenting eight lay witnesses for purposes of mitigation. *Bright*, 90 So. 3d at 255 – 56. The substance of this presentation attempted to portray Bright as a good person who did a terrible thing under extreme emotional distress. This included testimony from Bright's relatives about his relationship with his family, long standing problems with substance abuse, more than nine years of service with the Marine Corps., his downward spiral into depression, good employment history, and absence of any disciplinary reports from the jail. *Id.* at 255 – 56. Mr. Nolan's strategy is further evidenced in his instructions to witnesses to "focus [their] testimony on Defendant's substance abuse/addiction, his attributes as a hard worker and being a good person, and how he cared for and helped her children." (PCR10: 1491).

Each of the witnesses who testified in the penalty phase described Bright as a hardworking person who took personal pride in himself and loved his family. (Penalty at 193 – 200). Mr. Nolan's theory was also thoroughly presented to the jury in his closing argument. (Penalty at 193 – 200). Mr. Nolan painted a picture which supported the position that the murders of Derrick King and Randall Brown were out of character for Bright. Such a presentation explains why Mr. Nolan did

not use a mental health expert in the penalty phase, or pursue a mental health evaluation until after the penalty phase was concluded, because it would not have fit with the defense strategy. *Richter*, 131 S.Ct. at 791 (citing *Gentry*, 540 U.S. at 8 (per curiam) (noting that the adherence to specific type of mitigation to the exclusion of other types of mitigation is presumed to be reasonable strategy)).

In contrast, post-conviction counsel presented the court with a distinctly different theory of mitigation. This new theory was based on the use of mental health experts to excuse Bright's conduct due to substance abuse, mental infirmity, physical abuse as a child, sexual abuse as a child, and an impoverished and neglectful upbringing.³ Most of this information came from Dr. Gold who diagnosed Bright with PTSD, obsessive compulsive disorder, severe depression, and anxiety disorder, and Ms. Jones, Bright's sister who provided the court with different testimony regarding a horrific upbringing. (PCR14: 2177 – 2206; PCR18: 2876 – 77). Regardless, all of the information post-conviction counsel

³ Two important points must be clarified. First, the jury did hear extensive testimony regarding Bright's substance abuse addiction and threats of suicide during the penalty phase. *Bright*, 90 So. 3d at 255. Second, it was never established that Bright was the victim of sexual abuse as a child. Bright did not testify, and did not report instances of sexual abuse to Dr. Gold, Dr. Miller, or Dr. Krop. (PCR7: 979 – 80; PCR18: 2879). In fact, during his initial competency evaluation with Dr. Krop, Bright outright denied being the victim of any abuse. (PCR7: 979). The only testimony post-conviction counsel presented alluding to sexual abuse consisted of hearsay.

presented was either contained in Dr. Krop's evaluation, or it was directly refuted by Bright. (PCR7: 978 – 83).

The presentation of this different evidence would have been directly in conflict with the mitigation Mr. Nolan prepared. During his post-conviction testimony, Mr. Kuritz conceded that a defense team must be careful to not present contradictory evidence, and there are many strategic reasons for pursuing the course of action used by Mr. Nolan. (PCR13: 1880, 1888, 1951 – 53, 1977 – 78). Primarily, much of the evidence Bright presented in post-conviction would have opened the door to damaging cross-examination regarding Bright's more than 25 felony convictions an incident of domestic violence, and Dr. Krop's report that Bright had trouble with anger management and violence. (PCR13: 1880, 1888, 1951 – 52, 1977 – 78). The testimony regarding Bright's abusive childhood was denied by Bright and never mentioned by Ms. Jones, even though she testified three times during the penalty phase. (PCR7: 979). And by all other accounts, Bright was a kind and dependable person who served his country for more than nine years as a decorated Marine. Nevertheless, the post-conviction court distorted the standard by which deficient performance is based, by finding the absence of an explanation as a basis for deficient performance. (PCR10: 1471, 1477, 1484, 1510).

Deficient performance is based on a totality of the circumstances as viewed by the trial lawyer at the time, and a lawyer is presumed to have considered all

strategies in preparation. *Callahan*, 427 F.3d at 938 – 39; *Gore*, 964 So. 2d at 1269 – 70. In this case, Bright was convicted of killing two young men aged 16 and 20 by beating them to death with a hammer. *Bright*, 90 So. 3d at 254. The jury saw bloody photographs of the crime scene, and heard testimony that established each victim endured an attack for minutes. *Id.* at 262 – 63. Mr. Nolan had a report from a well respected mental health expert that stated Bright did not suffer from mental illness, but he did have problems with anger management and violence. (PCR7: 979 – 80). And, the prosecution was going to present evidence of a prior violent felony for and an unrelated armed robbery. *Id.* at 254 – 55. When viewed with the aggravation, and Dr. Krop’s report, trial counsel’s strategy for the penalty phase becomes clear and reasonable.

In the wake of inhuman actions of violence, Mr. Nolan sought to humanize Bright to the jury and avoid the presentation of any evidence that could have been damaging to his case. Damaging information would have included Bright’s criminal history and Dr. Krop’s report from the initial competency determination stating that Bright had difficulties controlling his anger management and violence towards others. (PCR7: 979 – 80; PCR15: 2468). Empirical evidence that Mr. Nolan’s strategy was effective can be seen in the jury’s recommendation because four members voted for a life sentence. *Bright*, 90 So. 3d at 256. In addition, the trial court acknowledged this effect by stating “but for the heinous and atrocious

and cruel aggravator in this case, I would not be imposing [the sentences] that I am going to impose.” *Bright*, 90 So. 3d at 257.

Nevertheless the post-conviction court ignored every presumption of strategy guaranteed to Mr. Nolan and found deficient performance in the absence of Mr. Nolan’s testimony. Therefore, the post-conviction court used an incorrect analysis in finding deficient performance, because trial counsel had a clear strategy which considered a different presentation of mitigation from the one used by post-conviction counsel. As such, this Court should reverse the post-conviction court’s finding of deficient performance, and hold trial counsel effective.

Improper Analysis of Prejudice

The post-conviction court found Bright’s case was prejudiced due to the failure of Mr. Nolan to present different mitigation evidence, simply because the jury did not have the opportunity to hear the different case for mitigation. (PCR10: 1477 – 78, 1480, 1482, 1484, 1493, 1510).⁴ This reasoning represents an incorrect

⁴ The findings by the post-conviction court were as follows: “Even if Dr. Krop did not render a favorable opinion which counsel would have presented during the penalty phase, counsel did not even permit Dr. Krop to fully evaluate Defendant to make such an ultimate determination.” (PCR10: 1477 – 78); “[T]hese records, containing much evidence of defendant’s mental health struggles throughout his adult life, could have changed the outcome of his sentence had the jury and the trial court been able to view them, in tandem with Dr. Krop’s testimony, which was also not presented.” (PCR10: 1484).

analysis of prejudice. Under such a standard, all a defendant would need in order to prove prejudice is different evidence which was not presented to the jury.

To establish prejudice, the defendant must show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. This Court has determined that a reasonable probability is a probability sufficient to undermine confidence in the outcome. *Rutherford*, 727 So. 2d at 219. In the present context, this mean Bright must demonstrate that "but for counsel's errors, he probably would have received a life sentence." *Gaskin*, 822 So. 2d at 1247.

In *Porter v. McCollum*, 558 U.S. 30, 41 (2009), the United States Supreme Court stated:

[A defendant] must show that but for his counsel's deficiency, there is a reasonable probability he would have received a different sentence. To assess that probability, we consider "the totality of the available mitigation evidence – both adduced at trial, and the evidence adduced in the habeas proceedings" – and "reweig[h] it against the evidence in aggravation."

Porter, 558 U.S. at 41. Here, the post-conviction court did not reweigh the evidence against the established aggravation and evaluate the totality of the circumstances. The post-conviction court found prejudice because a different form of mitigation evidence was not heard by the jury. (PCR10: 1477 – 78, 1480, 1482, 1484, 1493, 1510).).

A proper analysis of prejudice must reweigh the evidence against the established aggravation. *Porter*, 58 U.S. at 41. In this case, the prosecution presented a substantial case for aggravation. Bright was convicted of the double murder of Randall Brown and Derrick King, aged 16 and 20 respectively. *Bright*, 90 So. 3d at 254. The evidence showed Bright attacked these boys with a hammer while they were sleeping. *Id.* at 262 – 63. Derrick King was struck 38 times with the hammer and suffered a total of 58 individual injuries to his body. *Id.* at 254. There was evidence of defensive wounds which indicated King fought back as he was repeatedly hit in the head with the hammer. *Id.* Randall Brown’s skull was fractured in at least eight separate locations in addition to fourteen other independent injuries to his body. *Id.* There were a number of defensive wounds, and the medical examiner’s opinion was that the attack lasted for minutes. *Bright*, 90 So. 3d at 254 – 55. The trial court found two aggravators of HAC, and prior violent felony for an unrelated armed robbery and the contemporaneous murders. *Id.* Each aggravator was assigned great weight. *Id.*

Trial counsel presented a case for mitigation that humanized Bright, which included calling eight lay witnesses to testify about Bright’s good character, hard working nature, love for his family, honorable service in the Marine Corps which included the Meritorious Mast Award, and his issues with substance abuse. *Bright*, 90 So. 3d at 255 – 56. Trial counsel was careful to avoid any mention of Bright’s

more than 25 felony convictions, which included drug offenses and allegation of domestic battery from Bright's ex-wife, opinions regarding Bright's difficulty with anger management, and any mention of disciplinary actions Bright acquired while he was in the military. (PCR13: 1951 – 52; PCR15: 2468). The jury recommended a death sentence for each murder by a vote of eight to four. *Bright*, 90 So. 3d at 256. During the *Spencer* hearing trial counsel presented the testimony of Dr. Miller, who discussed Bright's substance abuse problems, the history of alcoholism in the family, and Bright's extensive criminal history. *Id.* at 256. Bright's sister Janice Jones, testified for the third time during the *Spencer* hearing and also discussed Bright's issues with substance abuse and their father's struggles with alcoholism. *Id.* By Ms. Jones' account "when Bright is sober, he is 'amazing,' but when he drinks or is on drugs, she does not like him, and he does not like himself." *Id.* The trial court found one statutory mitigator of extreme mental or emotional distress to apply and also assigned weight to 19 non-statutory mitigators. *Bright*, 90 So. 3d at 257. In delivering its sentence the trial court stated "had the HAC aggravating circumstance not be present, 'this court may have found a life sentence to be appropriate.'" *Id.*

In post-conviction, Bright pursued a different theory of mitigation based on Bright's deprived, abusive, impoverished social background and history of mental illness. Bright's new mitigation presentation involved the use of mental health

experts who testified that Bright suffered from PTSD, severe depression, obsessive compulsive disorder substance abuse and social anxiety. (PCR18: 2876 – 77).

The post-conviction court also placed a great deal of emphasis on the testimony of Dr. Krop, but such reliance was misguided. Dr. Krop was never retained to perform as neuropsychological evaluation on Bright during either the trial or in post-conviction. (PCR15: 2456). In post-conviction, Dr. Krop merely testified as to his involvement for the purposes of competency. Dr. Krop's report and testimony are quite clear; Bright suffers from anger management problems and has a history of prior violent incidents including domestic battery. (PCR13: 1951 – 52; PCR15: 2468).

Bright's sister, Janice Jones, gave different testimony that detailed their abusive upbringing, exposure to domestic violence, the mental health history of their family, and Bright's difficulty in school. (PCR14: 2177 – 2206). Additional records were produced that highlighted Bright's mental health history, and difficulty in elementary school receiving D's and F's and showing that Bright had a possible speech impediment. (PCR10: 1481 – 84).

Nevertheless, this new theory would have resulted in conflicting mitigation evidence being presented to the jury. *Blake v. State*, -- So. 3d --, 2014 WL 6802715. *14 (Fla. 2014) (noting that counsel cannot be held ineffective for failing to present evidence which would have been a double edge sword); *Evans v. Sec'y*,

Dept. Corr., 703 F.3d 1316, 1324 – 25 (11th Cir. 2013). Here, use of a mental health expert to show mental or cognitive infirmities would have cut against the presentation of Bright as a decorated Marine who served his country, was a dependable employee, and a loyal family member who suffered from terrible substance abuse issues. *Bright*, 90 So. 3d at 254 – 55. In addition, Mr. Kuritz acknowledged there are strategic reasons for not providing mental health experts all of the available records. (PCR13: 1880, 1888). This is because if a mental health expert is given information which could be harmful to a defendant's case that information will be brought out on cross examination by the state. (PCR13: 1880, 1888). This could include prior arrests, injunctions, prior acts of violence, disciplinary actions within the military, and additional evidence of substance abuse disorders, which is exactly what trial counsel avoided from being presented in this case. (PCR13: 1880, 1888).

In *Reed v. State*, the defendant brought a claim of ineffective assistance of counsel claim for failing to adequately investigate and present evidence of mitigation in the penalty phase. *Reed*, 875 So. 2d at 437. This included information regarding Reed's family and social background which contained facts that painted Reed in a negative light. *Id.* Such information included Reed's drug abuse, prior arrests and convictions, and instances of domestic violence. *Id.* This Court found counsel was not ineffective in presenting this evidence and stated that

“[n]ot only was this evidence negative in general but was also particularly disadvantageous in light of the facts of the crime. It would have opened the door for the State to draw a parallel between Reed’s violent reaction to being evicted . . . to his drug use . . . and the victim’s murder . . .” *Id.*

In the present case, Bright’s elementary school records which showed grades of Ds and Fs, would have been contradicted by the fact that Bright graduated from high school, was a participant in the ROTC, and had a successful career in the military. *Reed v. State*, 875 So. 2d 415, 437 (Fla. 2004). Post-conviction counsel produced records from the Lakeview Center which showed Bright was Baker Acted by his ex wife for “erratic behavior, throwing furniture, and walking in front of cars.” (PCR10: 1483). But, Mr. Kuritz acknowledged that presentation of these records from the Lakeview Center could have resulted in contradictory evidence of mitigation to the jury when compared to Bright’s military record, and would have opened the door to other impeachment from the state. (PCR13: 1980 – 81). Primarily, that Bright has anger management problems and is prone to explosive violence. (PCR13: 1951 – 52; PCR15: 2468).

In *Rutherford v. State*, 727 So. 2d 216, 221 (Fla. 1998), the defendant was convicted of armed robbery and murder. The jury recommended death by a vote of seven to five. *Id.* at 218. In post-conviction Rutherford alleged his counsel was ineffective in failing to produce and present expert mental health testimony and

failing to investigate, develop and present “substantial mitigating evidence regarding Rutherford’s harsh childhood and Vietnam war experience.” *Rutherford*, 727 So. 2d at 221 – 22. In post-conviction Rutherford produced evidence he suffered from PTSD, was alcohol dependent, and was raised by an abusive father who was also an alcoholic. *Id.* at 222. Still, this Court found Rutherford suffered no prejudice, even with a seven to five jury recommendation, given the substantial aggravators present (HAC, CCP, Robbery/Pecuniary Gain). *Id.* at 223.

In this case, the aggravators of HAC, and prior violent felony for two separate offenses (armed robbery and the contemporaneous murder) are present. *Bright*, 90 So. 3d at 254 – 55. The jury recommended the death penalty by a vote of eight to four. Given the substantial aggravation no reasonable probability exists that Bright would have received a life sentence had the different mitigation been presented to the jury. *Id.* at 256. This case is remarkable similar to *Rutherford* and *Reed*, but here the post-conviction court used an incorrect analysis in evaluating prejudice, because it failed to reweigh the different mitigation against the established case for aggravation and mitigation. *Porter*, 558 U.S. at 41. To affirm the post-conviction court’s finding of prejudice would undo 31 years of jurisprudence related to *Strickland* and the analysis of prejudice. As such, this Court should reverse the post-conviction court’s finding of prejudice.

Dr. Krop

The post-conviction court found Mr. Nolan was ineffective for failing to follow-up with and present Dr. Krop as a witness during the penalty phase which established both deficient performance and prejudice. (PCR10: 1471, 1477). First, the finding of deficient performance was directly tied to the absence of any testimony regarding strategy because Mr. Nolan has died and was therefore unavailable. (PCR10: 1477). As the post-conviction court stated “since Mr. Nolan passed away between the trial and the filing of Defendant’s rule 3.851 motion, he was not available to testify and this Court cannot determine why he did not follow up with Dr. Krop.” (PCR10: 1477). Such a finding is in error to established case law. *Gore*, 964 So. 2d at 1269 – 70; *Callahan*, 427 F.3d at 933.

Second, Dr. Krop was not retained to perform a neuropsychological evaluation on Bright, and was not presented as a witness who was now diagnosing Bright. (PCR15: 2456). Dr. Krop testified to his interactions with the case during the trial and his initial report from the competency evaluation performed on Bright prior to trial. In Dr. Krop’s opinion, Bright does not have an psychological or personality disorders, but does have anger management problems and a history of violent interactions including domestic battery and violation of a restraining order. (PCR7: 979 – 80; PCR13: 1951 – 52; PCR15: 2468). In essence the post-conviction court’s finding of deficient performance for failing to follow-up with

and present Dr. Krop as a witness defies logic, because Dr. Krop did not have any beneficial mitigation testimony for Bright.

Third, the post-conviction court also erred in its finding of prejudice. The court in this case found prejudice simply because the jury did not have an opportunity to hear Dr. Krop's testimony regardless of whether or not Dr. Krop would have had anything favorable testimony. (PCR10: 1477 – 78). The finding by the post-conviction court was as follows:

Even if Dr. Krop did not render a favorable opinion which counsel would have presented during the penalty phase, counsel did not even permit Dr. Krop to fully evaluate Defendant to make such an ultimate determination. The prejudice to Defendant's case is, therefore, abundantly clear. The presentation of Dr. Miller during only the *Spencer* hearing does not cure counsels' deficiency because the jury did not hear such testimony about Defendant's history of substance abuse and mental health disorders before it rendered its recommendation of death.

(PCR10: 1477 – 78). This reason disregards the prejudice standard of *Strickland*, and implies that trial counsel has an affirmative duty to consult with mental health experts in each case regardless of the circumstances.

Prejudice is only shown by a reasonable probability of a Bright receiving a life sentence after reweighing the case for mitigation against the aggravation. Here, the trial court found prejudice notwithstanding the fact that Dr. Krop's medical opinion mirrored that of Dr. Miller, the expert the defense did use. Even still, Dr. Krop was given the additional information, and arrived at the same findings as Dr.

Miller. (PCR15: 2414 – 16); *Reed*, 875 So. 2d at 437 (rejecting a claim of ineffectiveness when the failure to hire various experts would not have assisted in the defense). As such, Bright did not suffer prejudice from the failure to present Dr. Krop, because Dr. Krop would have presented similar testimony to Dr. Miller, who was used by the defense in the *Spencer* hearing. Therefore the post-conviction court’s reasoning is misplaced and should be corrected.

Additional Records

The post-conviction court found Bright’s counsel ineffective in failing to collect additional mitigation records. This included findings of both deficient performance and prejudice related to: (1) additional medical records from the Veterans Affairs Administration; (2) Escambia County School records from Bright’s childhood; and (3) Baker Act records from Lakeview Center, Inc.

The findings of deficient performance were directly tied to a lack of testimony regarding trial counsel’s strategy, which denied trial counsel the presumption of effective strategy to which he was entitled. *Gore*, 964 So. 2d at 1269 – 70; *Richter*, 131 S.Ct. at 791 (citing *Gentry*, 540 U.S. at 8). The post-conviction court stated “[t]his Court cannot find that counsel acted pursuant to trial strategy in failing to obtain the records at issue, especially since Mr. Nolan was unavailable to testify about why such mental health records were not uncovered or presented during the penalty phase.” (PCR10: 1484). The post-conviction court erred in this

determination, and therefore the finding of deficient performance should be corrected. *Callahan*, 427 F.3d at 938 – 39.

The finding of prejudice was dependent upon whether or not the jury heard the different information contained within the records. As the post-conviction court found “[t]hese records, containing much evidence of Defendant’s mental health struggles throughout his adult life, could have changed the outcome of his sentence had the jury and the trial court been able to view them, in tandem with Dr. Krop’s testimony, which was also not presented.” (PCR10: 1484). This is not a proper analysis of prejudice as required under *Strickland* and *Porter*. See *Porter*, 558 U.S. at 41. The post-conviction court did not reweigh the evidence and consider its effects on the already presented mitigation and the established case for aggravation. (PCR10: 1484).

Each of the records the post-conviction court points to would have presented conflicting evidence and potentially opened up the defense to detrimental cross examination. *Reed*, 875 So. 2d at 437 (stating “an ineffective assistance claim does not arise from the failure to presenting mitigation evidence where that evidence presents a double-edged sword”). The additional records from the Veterans Affairs Administration showing Bright was treated for Bipolar disorder, are refuted by the opinion of every doctor to evaluate Bright. (PCR7: 978 – 82; PCR18: 2876 – 77). Bright’s elementary school records which showed grades of

Ds and Fs, would have conflicted with Bright's graduation from high school a successful career in the military. *Reed v. State*, 875 So. 2d 415, 437 (Fla. 2004). Bright produced records from the Lakeview Center which showed he was Baker Acted by his ex wife for "erratic behavior, throwing furniture, and walking in front of cars." (PCR10: 1483). But, this information also could have conflicted with Bright's military record, and would have opened the door to other impeachment from the state. (PCR13: 1980 – 81).

Nevertheless, the post-conviction court's determination was based on whether or not the jury heard the different evidence, and because they did not the post-conviction court found prejudice. Such an analysis distorts the requirements of *Strickland*. Because the addition of the different records would have cut against Mr. Nolan's strategy for the penalty phase, it is unlikely the jury would have returned a recommendation for a life sentence. Therefore, the post-conviction court's finding of prejudice was based on an incorrect analysis and should be reversed.

Janice Bright Jones

The post-conviction court found both deficient performance and prejudice in Mr. Nolan's presentation of mitigation through the testimony of Bright's sister, Janice Bright Jones. (PCR10: 1492 – 93). The post-conviction court's finding of deficient performance was based on Ms. Jones' different testimony regarding their

abusive childhood, which was not presented to the jury. (PCR10: 1492). However, this ruling from the post-conviction court was erroneous because it failed to acknowledge any strategy by trial counsel, let alone afford trial counsel the presumption of effective strategy to which Mr. Nolan was entitled. *Richter*, 131 S.Ct. at 791 (citing *Gentry*, 540 U.S. at 8); *Callahan*, 427 F.3d at 938 – 39; *Gore*, 964 So. 2d at 1269 – 70.

Although Ms. Jones testified to different mitigation evidence in post-conviction, and claimed she was not prepared and never information what mitigation meant, she also provided direct evidence of trial counsel’s strategy. (PCR14: 2177 – 81, 2219 – 20). As the post-conviction court acknowledged Ms. Jones “testified that counsel told her to focus her testimony on Defendant’s substance abuse/addiction, his attributes as a hard worker and being a good person, and how he cared for and helped her children. (PCR10: 1491; PCR14: 2224, 2226, 2260 – 61).

Here, the post-conviction court found Ms. Jones’ new testimony mitigating, but neglected to account for trial counsel’s strategy evidenced in the testimony of Ms. Jones, and based its decision on what the court found more beneficial. *Richter*, 131 S.Ct. at 791 (citing *Gentry*, 540 U.S. at 8). “Even if counsel’s decision appears to have been unwise in retrospect, the decision will be held to have been ineffective assistance only if it was ‘so patently unreasonable that no competent attorney

would have chosen it.” *Dingle v. Sec’y Dept. of Corr.*, 480 F.3d 1092, 1099 (11th Cir. 2007) (quoting *Adams v. Wainwright*, 709 F.2d 1443, 1445 (11th Cir. 1983)).

Mr. Nolan in this case had a strategy which was different from the one pursued in post-conviction, and unless that strategy was so unreasonable that no lawyer would have chosen it Mr. Nolan’s performance cannot be deemed deficient. That strategy sought to humanize Bright in the face of unspeakable and horrendous violence. That strategy also was successful in preventing the jury from hearing testimony regarding Bright’s issues with anger management and criminal history including arrests for domestic violence. (PCR7: 979 – 81). Notably, four members of the jury voted for a life sentence, which shows that Mr. Nolan’s strategy did have an effect. *Bright*, 90 So. 3d at 254. Even still, the post-conviction court defied the standard and simply held Mr. Nolan’s performance deficient because it did not have his testimony.

The post-conviction court also found prejudice in trial counsel’s presentation of Mr. Jones. (PCR10: 1493). But again, this determination was based only on whether or not the jury heard the different mitigation presentation and not properly weighed against the established aggravation. (PCR10: 1493). The post-conviction court therefore used an incorrect analysis in finding prejudice.

A proper analysis of prejudice accounts for the reasonable probability of a different outcome by reweighing the mitigation presentation with the established

aggravation. In this case the aggravators of HAC, and prior violent felony were assigned great weight to the double murder of Derrick King and Randall Brown. *Bright*, 90 So. 3d at 255. Each victim was beat to death with a hammer. *Id.* at 262 – 63. They were attacked in their sleep, and somehow managed to fight back as evidenced by their injuries. *Id.* at 254 – 55, 262 – 63. The attack took minutes and each victim was hit multiple times about the head and body with the hammer. *Id.* at 254 – 55.

The different mitigation evidence from Ms. Jones did not account for the circumstances surrounding the crime, and could have alienated the jury in its presentation. For example, although Bright had an abusive childhood he was 54 years old when he murdered Derrick King and Randall Brown and had not lived at home since he was 18. *Bright*, 90 So. 3d at 249. Despite his abusive and difficult childhood Bright was able to have a successful career in the Marine Corps for more than nine years, and many witnesses testified to his hard working, kind hearted dependable nature. *Id.* at 254 – 55. In effect, the evidence of Bright’s childhood would have added little weight to the mitigation already presented to the jury. *Reed*, 875 So. 2d at 437. As such, there is no reasonable probability the different testimony regarding Bright’s abusive and impoverished upbringing would have changed the jury’s recommendation resulting in Bright receiving a life sentence.

Trauma Expert

The post-conviction court determined trial counsel was ineffective in failing to consult and use a “trauma expert” in its presentation of mitigation. (PCR10: 1510). The post-conviction court’s finding of deficient performance rested on the lack of testimony regarding trial strategy and did not afford Mr. Nolan the presumption of effective strategy to which he was entitled. *Richter*, 131 S.Ct. at 791 (citing *Gentry*, 540 U.S. at 8); *Callahan*, 427 F.3d at 938 – 39; *Gore*, 964 So. 2d at 1269 – 70. The post-conviction court stated it “cannot find that counsel exercised strategy in refraining from obtaining and presenting the testimony of a trauma expert, particularly because Mr. Kuritz could not offer an explanation for why such an expert was not retained.” (PCR10: 1510). It should be noted that this statement is misleading, because Mr. Kuritz repeatedly testified that Mr. Nolan was in charge of the penalty phase and as a result Mr. Kuritz was not privy to any strategy decisions for the penalty phase. (PCR10: 1515; PCR12: 1722; PCR13: 1878 – 88).

Nevertheless, the post-conviction court denied Mr. Nolan the presumption of effective trial strategy, simply because he was not available to testify regarding his strategy. (PCR10: 1510). Furthermore, Mr. Nolan’s strategy evident in his closing argument, and the testimony of Ms. Jones who stated that counsel instructed her “to focus her testimony on Defendant’s substance abuse/addiction, his attributes as a hard worker and being a good person, and how he cared for and helped her

children.” (PCR10: 1491; PCR14: 2224, 2226, 2260 – 61). Such a strategy does not focus on the presentation of mental health and expert witnesses, but was never acknowledged by the post-conviction court. *Richter*, 131 S.Ct. at 791 (citing *Gentry*, 540 U.S. at 8 (recognizing that counsel’s adherence to one course of conduct to the exclusion of others is deemed to have been trial strategy and not negligence)); *Gore*, 964 So. 2d at 1269 – 70.

Deficient performance can only be found if Mr. Nolan’s strategy was so unreasonable that no competent attorney would have chosen the same course of mitigation. *Dingle*, 480 F.3d at 1099. In this case, Mr. Nolan had a report from Dr. Krop that stated Bright did not suffer from any psychopathology or personality disorder. (PCR7: 978). Dr. Krop’s report showed Bright to have problems with anger management and a criminal history that included domestic violence and restraining order violations. (PCR7: 979 – 80).

Mr. Nolan’s strategy therefore, to not use a mental health expert but attempt to humanize Bright, cannot be said to have been unreasonable because the jury recommended death by a vote of eight to four. Meaning four people found Mr. Nolan’s strategy of mitigation effective enough to vote for life recommendation. *Bright*, 90 So. 3d at 254. As such, the post-conviction court erroneously found Mr. Nolan’s performance deficient. *See Wyatt v. State*, 78 So. 3d 512, 533 (Fla. 2011) (stating “a defendant cannot establish that trial counsel was ineffective in obtaining

and presenting mental health mitigation merely by presenting a new expert who has a more favorable report.”) (citing *Peede v. State*, 955 So. 2d 480, 494 (Fla. 2007)); *Wheeler v. State*, 124 So. 3d 865, 885 (Fla. 2013).

The post-conviction court also found prejudice in the failure to present a trauma expert to testify regarding Bright’s abusive childhood, and history of substance abuse; but the post-conviction court stated that this was “intensely intertwined with [Ms. Jones’] testimony.” (PCR10: 1510). The post-conviction court’s ultimate threshold was that because the testimony regarding Bright’s abusive childhood and substance abuse history was not heard by the jury, prejudice was established because the jury’s vote might have been different. (PCR10: 1510 – 11). However, this is not the correct analysis by which deficient performance is measured because it does not include a reweighing of the aggravation. *Porter*, 558 U.S. at 41.

As stated before, the case for aggravation was staggering given the nature in which Derrick King and Randall Brown were murdered. Both victims were attacked in their sleep with a hammer, and repeatedly hit about the face and body. *Bright*, 90 So. 3d at 254 – 55, 262 – 63. The attack lasted for minutes while the victims fought back resulting in defensive wounds to their hands and arms. *Id.* at 254 – 55. The state also presented evidence of Bright’s conviction for a prior armed robbery with a knife. *Id.* at 255. The jury recommended death by a vote of eight to four. *Id.* at 255.

Regardless of the evidence of Bright's abusive childhood, Bright was 54 years old when he Derrick King and Randall Brown and had not lived at home since he was 18. *Bright*, 90 So. 3d at 249. Despite his upbringing Bright was able to have a successful career for more than nine years in the Marine Corps, and many witnesses testified to his hard working, kind hearted dependable nature. *Id.* at 254. In effect, the evidence of Bright's upbringing would have cut against the mitigation already presented to the jury. *Reed*, 847 So. 2d at 437. Therefore, when viewed against the established aggravation, no reasonable probably exists that the jury would have voted for a life sentence, because the evidence of Bright's childhood was remote in time and would have presented a double-edged sword regarding mitigation. Accordingly, this Court should reverse the finding of the post-conviction court.

Mitigation Specialist

The post-conviction court improperly found Mr. Nolan ineffective in failing to hire a mitigation specialist for assistance in the penalty phase. (PCR10: 1515). This determination is faulty because the testimony regarding Mr. Nolan's investigation into mitigation established that Mr. Nolan had employed two dedicated investigators towards the penalty phase mitigation. In effect the post-conviction court has made a determination that Mr. Nolan was deficient in failing to retain Sara Flynn, the mitigation specialist used by post-conviction counsel, in

his investigation of mitigation specifically because of the rapport Ms. Flynn developed with Bright's sister Ms. Jones. (PCR10: 1515).

Once again, the finding of deficient performance denies Mr. Nolan the presumption of effective trial strategy. *Gore*, 964 So. 2d at 1269 – 70; *Callahan*, 427 F.3d at 933. In addition, no testimony was elicited from Ms. Flynn regarding her availability, and therefore whether or not Ms. Flynn was even available as a witness was not established. Nevertheless, the post-conviction court ignored this requirement and held it against Mr. Nolan for using dedicated investigators and not Ms. Flynn. Therefore the finding from the post-conviction court is clearly in error.

Finally, this court has previously held that failure to retain or use a mitigation specialist does not by itself constitute ineffective assistance of counsel. *Johnson v. State*, 104 So. 3d 1010, 1025 (Fla. 2012); *Hoskins v. State*, 75 So. 3d 250, 256 (Fla. 2011). To affirm the post-conviction court's ruling that Mr. Nolan was ineffective in failing to hire a mitigation specialist would create a de facto requirement that a mitigation specialist be retained on every capital punishment case. Therefore this Court should reverse the post-conviction court's finding of ineffective assistance of counsel for failing to retain a mitigation specialist.

CONCLUSION

For the aforementioned reasons, the State respectfully requests this Honorable Court reverse the post-conviction court's finding of ineffective assistance of counsel in the penalty phase, and affirm Bright's conviction and sentence.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Rick Sichta – Counsel for Appellee, by E-MAIL at Rick@Sichtalaw.com on January 14, 2015.

CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Times New Roman 14 point font.

Respectfully submitted and certified,
PAMELA JO BONDI
ATTORNEY GENERAL

/s/ Patrick M. Delaney
By: PATRICK M. DELANEY
ASSISTANT ATTORNEY GENERAL
Florida Bar No. 85824
Attorney for Appellee, State of Fla.
Office of the Attorney General
PL-01, The Capitol
Tallahassee, Fl 32399-1050
Primary E-Mail:capapp@myfloridalegal.com
Secondary E-Mail:Patrick.Delaney@myfloridalegal.com
(850) 414-3300 Ext. 4583
(850) 487-0997 (FAX)