IN THE SUPREME COURT OF FLORIDA

CASE NO. SC14-1701

LOWER TRIBUNAL NO. 16-2008-CF-002887

STATE OF FLORIDA,

Appellant/Cross-Appellee,

vs.

RAYMOND BRIGHT,

Appellee/Cross-Appellant.

On Appeal from the Circuit Court, Fourth Judicial Circuit, in and for Duval County, Florida

Honorable Judge Charles W. Arnold
Judge of the Circuit Court, Division CR-H

APPELLEE'S CROSS-APPEAL AND ANSWER BRIEF

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PRELIMINARY STATEMENT

This is a State appeal and Mr. Bright's cross-appeal of the Circuit Court's Order denying in part and granting in part Mr. Bright's motion for post-conviction relief under Florida Rule of Criminal Procedure 3.851.

Appellant/Cross-appellee, the State of Florida, will be referred to as "the state." Appellee/Cross-Appellant, Raymond Bright will be referred to as "Mr. Bright," or "Bright." Rick A. Sichta, appointed to represented Mr. Bright in his postconviction proceedings will be referenced as "undersigned."

The record on direct appeal will be referenced as "R" for citation purposes, preceded by the volume number and followed with the page number: (1 R 1.) The record on appeal for the 3.851 proceedings will be referenced as "PCR." References to the state's Initial Brief will be "IB" and the page number: (IB 1.) Citations to two loose exhibits, included with the postconviction record by the Clerk will be "PCR Exhibit 5" and "PCR Exhibit 23" followed by a page number if necessary.

INTRODUCTION

From the moment the nightmare in question began, Raymond Bright has unwaveringly declared that he acted in self-defense. Immediately following the events, Bright told his ex-wife that he acted in self-defense (10 R 517); he told his attorney that he wanted to go to the police (1 PCR 33-34); he told a co-worker he acted in self-defense (10 R 561); and he told a fellow inmate all the same story (10 R 582): Brown and King had taken over his home and were using it to sell drugs; the young men were violent gang members who threatened Bright on many occasions by pointing guns in his face and threatened to chop him up into little pieces should Bright inform the police of their drug operations, (15 PCR 2323).

All of Bright's prior attorneys believe Bright's rendition of what occurred, believe Bright acted in self-defense, and thus believe Bright is innocent. (e.g. 3 PCR 567, 591;13 PRC 1991-92).

In the early morning hours on the day in question, Bright got up for a drink of water. Brown accused him of stealing drugs and was waving a 9 mm gun at him. King took the gun from Brown, Bright attempted to disarm King and the gun discharged during the scuffle. Bright tried to fire the gun again, but it jammed, so he made for the back door. He tripped, and in a panic picked up the nearest weapon—a hammer. He struck King, and then struck Brown, who was reaching for an automatic rifle, from under the couch. (e.g. 11 R 751-752; 9 R 562-67.)

Despite that evidence found at the scene corroborated Mr. Bright's telling of events, all the jury heard at trial, due to defense counsel's failure to adequately investigate the case and present witnesses at trial, was that Bright surprise-attacked the victims while they slept in his living room for no apparent reason. (e.g. 9 R 296-310.)

Unlike what the jury heard, Bright presented numerous witnesses at evidentiary hearing who *confirmed* that Brown and King were gun-toting gang members (17 PCR 2750) who had reputations for violence (17 PCR 2749), and who took over Bright's house to sell drugs (17 PCR 2734); they threatened Bright on numerous occasions and he was deathly afraid of them (15 PCR 2323, 2327, 2329-30); and Brown confronted Bright about stealing drugs immediately prior to the events in question which started the deadly encounter. (16 PCR 2592-93, 2635.)

Furthermore, expert and lay witnesses testified at the evidentiary hearing about other critical matters: that the gunshot residue on the floor was deposited the day in question before a scuffle broke out (e.g. 16 PCR 2573); that there was a violent disturbance throughout the house, likely originating by the door, where Bright claimed. (e.g. 16 PCR 2649-50, 2656.) A disturbance was apparent due to overturned speakers, a fallen ashtray, toppled chess pieces, the pub table was table pushed against a wall, blood was found far away from the couch and recliner on a

piece of plexiglass by the back door and inside a door frame which wholly contradicted the prosecution's theory the attacks began and ended while the victim's were sleeping and/or in repose on their respective couches. (16 PCR 2510-2517; PCR Exhibit 23, Slides 33, 43-44, 56-58, 60-61, 65-67.)

The evidence at evidentiary hearing established what Mr. Bright has been saying all along – that he is *innocent* of first-degree murder because in harming Brown and King, he was protecting himself in his own home.

STATEMENT OF THE CASE

On February 19, 2008 the bodies of Derrick King and Randall Brown were found in the living room of Mr. Bright's residence at 9364 Sibbald Rd. (1 R 22). Bright was arrested for the deaths. (1 R 5.) Bright intended to go to the police immediately after the incident, but was advised against by attorney Michael Bossen, because Bossen wanted Bright to come to his office prior to turning himself in. (11 R 650; 1 PCR 33-34).

At trial, the prosecution presented 14 witnesses. The defense presented 2 witnesses, amounting to approximately 3 full transcript pages of testimony. (11 R 644-47, 49-50.) The jury returned guilty verdicts for first-degree murder as to both counts on August 26, 2009. (2 R 333-36; 11 R 788-89.)

The penalty phase occurred on September 1, 2009. (5 R 812-940.) The state presented 1 witness to establish the prior violent crime aggravator (for a 20-year-

old armed robbery where no one was hurt) (5 R 826) and victim impact statements of 6 individuals. (5 R 832-54.) Mr. Bright presented 8 witnesses. (5 R 854-940; 6 R 941-956.) The jury returned death recommendations by a vote of 8 – 4 for both counts. (5 R 221.) The Spencer hearing occurred on October 6, 2009. The state did not present any evidence but defense counsel put on four additional people including a mental health expert. (5 R 746-811.) The court followed the jury's recommendation, but expressed his hesitancy in having to do so. (4 R 710-32.)

This Court affirmed the convictions and sentences. Bright v. State, 90 So. 3d 249, 265 (Fla. 2012). The United States Supreme Court denied cert on October 1, 2012. Bright v. Florida, 133 S.Ct. 300 (2012).

Mr. Bright filed an amended 3.851 motion with 9 claims and numerous sub-claims. [1] (4 PCR 383-583.) An evidentiary hearing occurred on sub-claims, 1, 2, 3 and 4 of Ground I; Ground II; Ground IV; Ground VI; and Ground VIII (5 PCR 660-63.) The trial court denied evidentiary hearing on all of Mr. Bright's Brady allegations. (5 PCR 662.)

The trial issued a final Order agreeing that counsel was ineffective in the penalty phase and reversing the death sentence, but denying all guilt phase issues. (10 PCR 1381-1548.)

The state's appeal and this cross-appeal follow.

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1 **(I) Ineffective assistance of counsel in the guilt phase:** (1) failure to retain

STATEMENT OF THE FACTS

I. GUILT PHASE

The trial – State's case in chief

The prosecution's theory was that Mr. Bright launched an unprovoked, "surprise" attack (9 R 297) on his guests, Randall Brown and Derrick King, while they in repose in the early morning hours of February 19, 2008. According to the government, the young men were killed where Bright found them, i.e. sleeping and/or in repose, because there was no evidence of an altercation elsewhere in the home, and thus Bright's claim of self-defense was false. (e.g. 9 R 296-310.) The prosecution presented numerous witnesses to establish this narrative, the most critical being medical examiners Dr. Margarita Arruza and Dr. Hunt Scheuerman, and evidence technician, Deborah Brookins.

Among other witnesses, the prosecution also called Bright's friend, Mr. Lundy, and a jailhouse informant, and Mr. Graham, who both testified that Bright told him he acted in self-defense and was innocent of these crimes.

Dr. Margarita Arruza, the chief medical examiner who conducted the autopsy of Mr. Brown, opined that he died of blunt force trauma. He had 14 injuries, mostly to the right side of the head, including a skull fracture and injuries to his hands and arms. The state offered Dr. Arruza a hypothetical where she was asked whether the evidence was consistent with the victim being in a recliner when

he was initially struck and he attempted to defend himself while being struck "over and over again." She said "yes." (8 R 385.)

Dr. Eugene Hunt Scheuerman is a medical examiner who conducted the autopsy of Mr. King. King had 38 lacerations, bruises and contusions to the head. (8 R 394.) He also had at least 20 injuries to his extremities that were consistent with defensive wounds. (9 R 409, 415.) He died of "the constellation of the blunt impact to the head." (9 R 411.) He had cocaine and marijuana in his system, and it was parent cocaine, meaning it was recent ingestion. (9 R 415-16.) The prosecution asked Dr. Scheuerman whether King's injuries were consistent with being attacked while lying down. Dr. Scheuerman could not say whether the victim was lying down when the injuries occurred. However, the wounds were consistent with King defending himself and eventually losing the battle upon being hit in the head with a hammer. (9 R 418.)

On cross, the doctor clarified that King had probably done the cocaine within minutes to hours of his death because his body had not metabolized all the parent cocaine, but suggested that a toxicologist would have a better idea how soon before death King used cocaine. (9 R 420.)

Detective Deborah Brookins, a Jacksonville Sheriff's Office (JSO) evidence technician (ET), processed the scene with other ETs including Detective Tracy Stapp. (9 R 435-38.) She claimed she photographed the scene before

anything was moved.[2] (9 R 452.) Brookins alleged the blood and hammer marks were consistent with victim Brown sleeping in the chair when he was hit with the hammer. (9 R 465.)

They found an SKS assault rifle with a magazine and a 9mm Smith & Wesson pistol with its magazine in the yard (the weapons were loaded). (9 R 443-46.) A 9mm casing, which appeared to match the ammunition of the 9mm found at the scene, was found in the lower left front door frame of the living room. (9 R 471-74.) They removed a portion of carpet that appeared to have gunshot power residue (GSR) on it. (9 R 463.)

On cross-examination Det. Brookins opined the GSR demonstrated a weapon was fired inches from the floor and in all likelihood the shooter was on the ground. (9 R 484.) She said the attacks probably took place on the chair and the couch, though there may have been some movement. (9 R 488-89.) She clarified on re-direct that there was no evidence of a struggle anywhere other than the family room. (9 R 491.)

Ben Joseph Lundy, a friend of Mr. Bright's testified that he had a conversation with Mr. Bright on February 19, 2008 after the murders. Bright told Lundy the victims were doing things they should not have been, that he woke up in

[2] This assertion was refuted by Michael Knox in evidentiary hearing, who determined that items were shifted between photos, indicating that the evidence technicians were moving things. (16 PCR 2654-55.)

the middle of the night and when he went into the living room, they had the TV on and accused him of stealing their drugs. (9 R 562.) He thinks Bright said that they were asleep but that one woke up and accused him of stealing drugs, an argument broke out, the other fellow got up and a gun was produced. Bright told him he fired a gun, but it jammed, and he tripped and fell as he was trying to get out of the house. He found a hammer, and one of the guys started coming at him with a gun, so he hit him. The other guy was going for the other gun so Bright hit him as well. (9 R 563.) Bright told him that he planned to speak with the police. (9 R 567.)

Mickey Graham, who bunked with Mr. Bright at the Duval County Pretrial Detention Center testified that Mr. Bright told him about the events in question. (9 R 579.) The younger victim, who always had a gun in his hand, asked Bright what he was doing. The older one told the younger one to stop waving the gun around and took the gun from the younger one. Bright then tried to take the gun away. Bright put his hand over the slide so the gun would not fire, but during the struggle, the gun went off. He tried to shoot the kid, but the gun misfired. (9 R 585.) He dropped the gun, tried to run from the house, fell down, then came upon the hammer. He hit one kid, then the other as the second one reached for a weapon. (9 R 587.)

On cross, Graham acknowledged that Bright indicated he was afraid of the young men because they had guns. (9 R 595.) They took over Mr. Bright's house

and operated a crack dealing operation out of his house. He wanted them out of the house. (9 R 599.) Bright only struck out with a hammer when one of the men was reaching for an AK-47 under the couch. (9 R 599; 10 R 606.)

The trial – Bright's defense

Bright's attorney, Mr. Kuritz, proceeded to trial on a self-defense theory, but never consulted an expert to determine whether forensic evidence including the blood spatter on the walls, the GSR, and scattered items in the house supported Bright's claim of innocence in that he acted in self-defense.

In opening statements, counsel declared that Mr. Bright, was a "man defending himself in his own home," the young men had no business being there, Mr. Bright woke up at 2:00 a.m. only to have a 9mm with an extended clip waved in his face and an altercation ensued resulting in the deaths of Brown and King. (8 R 311-314.)

Defense counsel supported this defense theory through cross-examination of the state's witnesses, and very brief testimony of two lay witnesses – Janice Jones testified that her brother, Mr. Bright, was a Marine (10 R 645.) Attorney Michael Bossen testified that Mr. Bright contacted him on February 19, 2008. (10 R 650.) That was the totality of the defense's case in chief.

The defense did not present any experts to rebut the state's iteration of forensic evidence, despite that defense counsel knew that the state intended to

prove its case through Dr. Arruza, Dr. Scheuerman, and Det. Brookins; "whoever won the battle of interpreting the [forensic] evidence was going to win the case;" and the defense attorneys discussed the need for forensic experts and their intent to hire them. (12 PCR 1754, 55-76, 1769-70.) Neither did the defense present available witnesses who had been in and around Mr. Bright's house prior to the incident to prove that the victims owned guns, were rarely seen without firearms, threatened Bright with his life on numerous prior occasions, and were operating Lavalle Copeland's drug business out of Bright's house while Copeland served a jail stint. [3]

Closing arguments

In the prosecution's closing argument, they capitalized on the defense's lack of investigation and argued Bright's self-defense theory made "absolutely no sense" and was "completely ludicrous." (11 R 692.) According to the prosecution, there was no sign of a struggle because of the position of the chair, lack of toppled chess pieces, the position of the shoes and the concentration of blood on the chair and couch. (11 R 680, 682-83.) All the blood was resultant from him walking around the chair and couch striking the victims. (11 R 687.) "The physical evidence," said the state, "doesn't lie." (11 R 693.) The prosecution further argued that

[3] Lavalle Copeland rented a room from Bright and began operating a drug business out of the home. King and Brown worked for Copeland and began spending time at the house as well. When Copeland was arrested and serving time in jail, King and Brown took over the operation. (See e.g. 15 PNC 779-2452.)

Brown and King were his invited guests, that we do not know whether the gun that left the residue on the carpet was fired the same day, and that Bright's defense was a "false defense." (11 R 729, 746)

The defense's closing alleged Bright was innocent and acted justifiably in self-defense (11 R 698, 700), pointing to: the shell casing found in the wall near the floor (11 R 704-06); blood in other areas of the house, indicating that the altercation was not limited to living room couch and chair; Bright's calls to law enforcement prior to the homicides, attempting to get Brown and King out of his home; the drug operation King and Brown were running out of Bright's home; and pointed to the prosecution's own witnesses who testified that Bright told them he was threatened by Brown and King in the middle of the night prior to their deaths. (11 R 703).

II. THE POSTCONVICTION EVIDENTIARY HEARING

Evidence corroborating Mr. Bright's self-defense and innocence, which could have been presented at trial

Witnesses in the evidentiary hearing confirmed Mr. Bright's account of events that the victims were not invited guests, but were dangerous young men who were members of a Gang (17 PCR 2750) who had taken over his home and were operating a drug business all day and all night (e.g. 17 PCR 2791-92); that Mr. Bright was terrified of them (e.g. 15 PCR 2322); the victims had threatened to chop Bright up into little pieces on prior occasion (15 PCR 2323) that they were

not sleeping when struck by Mr. Bright and in fact made a phone call to Charity Kemp immediately prior to their demise (16 PCR 2592-93, 2635); that a struggle, likely originating by the back door, broke out between the parties; probably after Brown confronted Bright about stealing drugs (16 PCR 2592-93, 2635); that the gun was fired that day prior to the tussle was fired that day (e.g. 16 PCR 2573); and that the blood spatter in the kitchen area conclusively was not from an attack near the couch and/or recliner, completely disputing the prosecution's theory the attack occurred and ended in those two areas. (16 PCR 2596; Exhibit 23, slide 59.)

Valerie Kemp, an acquaintance of the victims, testified in evidentiary hearing that she knew Mr. Copeland, Mr. Brown, Mr. Majors, and Mr. King; she knew King as "DK," and Majors as "little Mike." (17 PCR 2734, 2736.) She offered several points that could have been presented at trial supporting Bright's innocence:

Ms. Kemp was at Bright's residence a day or two prior to February 19, 2008, (and "many times" before that) (17 PCR 2732), she testified that **the house was not usually in the condition it was in after the events in question.** When she was at the house, no more than 48 hours prior:

- The table was not arranged like it was in the picture [crime scene photo of the house], and was closer to the kitchen door and it was not turned like it was in the picture.
- The ashtray was not on the floor

- The CDS and speaker were not on the floor
- The lamp was not dented
- There was no gunshot residue on the carpet
- The bullet strike in the chair was not there nor in the wall
- There was no blood on the walls in the family room or the kitchen

(17 PCR 2739-2743.) Ms. Kemp explained she was intimately familiar with the layout of the house because not only because she was "always there" and used go over there to "tidy up" the house. [4] (17 PCR 2742,)

Ms. Kemp testified that **Brown and King took over Bright's home,** and ran a drug operation out of it[5] (17 PCR 2734), armed with weapons[6] (the 9mm and AK-47) (17 PCR 2734), and Bright was scared of these guys and wanted them out

[4] Valarie Kemp would go to Bright's house to either use drugs, clean, or determine whether there were any police at the home. (17 PCR 2772) Upon cross-examination by the prosecution, she provided answers to all their questions concerning the layout of Bright's house. (17 PCR 2779.)

[5] Bright had nothing to do with the drug operation being run out of his own home (6 PCR 1068) and did not own any of the guns in the house either. (17 PCR 2738.)

[6] Importantly, Valarie Kemp testified that Brown owed the AK-47, and King ("DK") owed the 9mm, and the weapons were kept in the family room underneath the couch – exactly where Bright proclaimed King was reaching the night of the incident, and just like Charity Kemp stated the weapons were kept. The weapons were kept underneath the couch for "easy access." (17 PCR 2737).

of the house. (17 PCR 2745.) King and Brown were there a lot.[7] (17 PCR 2734.) The house was open for business 24 hours a day, seven days a week, and there would be a light on for people so they knew they could come by and purchase drugs. (6 PCR 1121).

Mr. Majors was also at Bright's house "a lot," and hung out with King and Brown. (17 PCR 2738) The trio was selling weed, crack cocaine, and powder cocaine out of Bright's house. They kept the drug paraphernalia in the kitchen, where Brown would cut up the drugs. There were drugs and drug paraphernalia at the house when she was last at the house, around the time of the incident. (17 PCR 2752).

48 hours before the incident, Bright cried on Valarie's shoulder and told her that he wanted King and Brown out of the home but they would not leave. (17 PCR 2744.) Bright was usually in his room. (17 PCR 2738.) Bright was scared of these guys – "scared for his life." (17 PCR 2745.) Ms. Kemp testified she talked to Bright "about three or four times" about his desire to get these people out of his house, even before Mr. Copeland was arrested.[8] (17 PCR 2747.) Bright was not even allowed to stay in his own room anymore or answer his own front door. (17

[7] Ms. Kemp admitted frequented Bright's house to purchase drugs from the boys. (17 PCR 2734).

[8] Lavalle Copeland was arrested in Valerie Kemp's car. Ms. Kemp came to the scene and the police gave her car back. She saw the police put Copeland in the police cruiser. (17 PCR 2772.)

PCR 2735, 2738.) He talked to them about leaving, but they would not go. (17 PCR 2748.) She told Bright to call the police. (17 PCR 2746.)

Brown and King had reputations for violence. Ms. Kemp knew Brown and King because they took over her house prior to moving on to Bright's. (17 PCR 2747). At the time, she was living in the Picketville area of Jacksonville with her daughter, Charity Kemp. She was "a part of that community" in 2008 and 2009. (17 PCR 2749.)

Ms. Kemp knew Brown and King as members of this community as well, and knew that they had a reputation for violence in that community. (17 PCR 2749.) They also had a reputation for being violent drug dealers and carrying guns. (17 PCR 2750.) They were further known to associate with the Picketville Gang. (17 PCR 2750.) People talked about Brown and King's reputation for violence. (17 PCR 2752, 2783.) These people told her to "be careful" of them. (17 PCR 2784.) "Everybody" in Picketville knew Brown and King's reputation for violence. "Everybody in that community knew what they were capable of doing." (17 PCR 2792.)

Charity Kemp was Brown's girlfriend at the time of the incident and testified at Bright's evidentiary hearing on numerous points that would have supported Bright's innocence at trial:

Charity was at Mr. Bright's house 3-4 times a week in 2007-2008. (17 PCR

2803). Brown, Copeland,[9] and sometimes King, who was known to her as "DK" were often there. At night, King and Brown would be there "all the time." (17 PCR 2795.) She recognized the assault weapon found at Bright's house as Brown's, because he actually lent it to her for protection while she was riding by herself. (17 PCR 2796.) She recognized the 9mm as also belonging to Brown. Both of these guns were usually under the couch in Bright's family room. (17 PCR 2797.)

Charity stated Copeland, King and Brown were running a drug operation out of Bright's home. (17 PCR 2798, 2801.) They would make the drugs in the kitchen. Bright was always in his room. He did not own any weapons and did not participate in the drug operation. (17 PCR 2799.) After Copeland was arrested, Brown, "DK," and Majors would stay at the house and run the drug operation. (17 PCR 2803).[10]

Moments prior to the incident in question Brown called Charity and told her he was going to confront Bright about stealing drugs:

Mr. Sichta — You talked to Randall Brown at 1 or 2:00 in the morning before this murder happened?

[9] Charity testified she dated both Copeland and Brown at different times in 2007 and 2008, and would go to Bright's house to "pop up," meaning to check to see if there were girls at the house. (17 PCR 2816-17.)

[10] Mr. Kuritz testified at the postconviction hearing he did not find any information that Mr. Majors was a part of the drug operation. (12 PCR 1813). This testimony could have been used to impeach Mr. Major's credibility, and the prosecution's inference that he was just an innocent party who stumbled upon King and Brown the next morning.

Charity Kemp: Yes.

Mr. Sichta: What did Randall tell you?

State: Objection. Hearsay.

Court: Overruled.

Charity Kemp: Um, we were on the phone. We were talking because he was supposed to go to the hotel with some girls, and I called him because I was in Orlando and I said, you're going to cheat on me. And he was like, no, I'm not about to go to no hotel, I'm going to take my mom the rental car and I'm going to get back dropped off over here, but before I go, I'm going to confront Ray about my package being missing- about my package. Like, some stuff missing out his package. And I said, that man not going to steal. I said, um, that's little Mike. Little Mike was always stealing from you and always trying to blame somebody else.

Mr. Sichta: And when—is Ray Raymond Bright that you're referring to in this conversation?

Charity Kemp: Yes.

(17 PCR 2804-05). Shortly after telling Charity that he was going to confront Mr. Bright, Brown and King were dead.

Mr. Brown and King had reputations for violence. "Numerous" people from the Picketville community told Charity Kemp to quit hanging around Brown and King. They had reputations for dealing drugs and wielding weapons. At least 5-10 people told her this. King and Brown are also members of the Picketville

Gang. (17 PCR 2708.)

Mostly older people would stop her and discuss their reputation. People would tell her:

> I need to be more careful that I'm hanging around Lavelle and Randall and Mr. King because of they're—they're known to do reckless things to people and—

Charity also said they "always used to throw up gang signs, Picketville Gang, they used to say there were in the gang." (17 PCR 2827-29).

Dr. Harry Krop, a mental health expert hired by Mr. Nolan to conduct a competence evaluation at trial, gave a detailed account of Mr. Bright's explanation of the events leading up the incident, during the incident, and after, indicating that he had killed Brown and King in self-defense because he was afraid of them. Bright also told Dr. Krop about Valerie and Charity Kemp. (15 PCR 2421, 2449-55.) However, he was unable to pass any of this information, including the names of potential witnesses, to defense counsel because he was unable to reach Mr. Nolan. Dr. Krop never spoke to either of Bright's attorneys. (15 PCR 2422, 2432, 2486.)

Maxine Singleton's additional information

Ms. Singleton was Mr. Bright's girlfriend. She testified in evidentiary hearing that Bright was afraid of the victims and was trying to get away from them. Bright asked Ms. Singleton if he could move in with her, but she said no. (15 PCR

2322.) Bright used to talk with her all the time about the situation in his house. (15 PCR 2326.) Bright told her he was scared of these guys because "they had threatened him that they was going to cut him up and put him in a suitcase and nobody would ever be able to find his body." (15 PCR 2323.) Bright told her that he was "really frightened" to contact the police about them because he was dealing with a gang. (15 PCR 2326.)

She would drive by Bright's house and see a lot of cars out front, and people coming and going from the house. (15 PCR 2324.) Prior to the incident, Lavalle Copeland and King came to her house looking for Bright. When Copeland knocked on her door Bright "was in a panic," "he was afraid," he was "frantic", "he was so scared that he hid in the bathroom." Maxine was also scared because "she could get killed." (15 PCR 2327, 2329-30.)

After Lavelle Copeland got arrested, "all the rest of them came in" to Bright's home. King moved in about a month before the incident. (15 PCR 2333-34.)

Brian Williams, Mr. Bright's former co-worker, also testified in evidentiary hearing regarding King and Brown's takeover of Bright's home:

> Mr. Williams: Ray had relapsed on drugs and he worked out a deal with the young men, I don't know their names, he worked out a deal with them to the fact that basically they would take over—they would live in the house in exchange for drugs, and the original arrangement was mutually a beneficial one, and

> then as the longer they were there, the more they took over the house, whereas at one point he wasn't even in the master bedroom anymore and he pretty much—he said, They took over my house.

(15 PCR 2300.) Williams said that after Copeland was arrested King and Brown took over. It was "kind of like going to the wolves or the young bucks...the little bit of respect that was there when Lavelle was present wasn't when he was gone, and that's when there was a lot of conflicts and problems." (15 PCR 2301.)

Bright told Williams he was concerned about his safety living with them, and would stay at either Maxine or Bridget's residence for a while. Bright appeared to be genuinely afraid when he talked about King and Brown having firearms. Bright told Mr. Williams he went to the police on a couple of occasions, but they did not help him. (17 PCR 2302.)

Michael Knox, a crime scene reconstruction expert,[11] who personally trained Det. Brookins in blood pattern analysis (14 PR 2106), found numerous errors in her work in Bright's case, such as her failure to find plainly visible areas of blood in multiple areas away from the couch and recliner, including on a pizza box, on a chess piece, on both end tables on either side of the couch, on a piece of

[11] Mr. Knox has a Master's Degree in forensic science from University of Florida is working toward his Ph.D. in Criminal Justice, and spent 15 years on the JSO force, 7 of which in the crime scene unit. (16 PCR 2581-2586.)

plexiglass near the back door, and around the door frame leading into the kitchen.[12] (16 PCR 2649-50, 2656.) He also opined that Brookins' conclusion that blood spatter analysis could not be conducted was wrong. (16 PCR 2507, 2521.)

Based on his careful examination of the evidence, Mr. Knox made several conclusions that would have supported Mr. Bright's claim of innocence at trial:

First, **King and Brown were not in repose when they clashed with Mr. Bright**. Mr. Knox did a comprehensive blood spatter analysis noting the points of convergence of various areas of blood. He agreed that although most of King's blood was shed on the couch, the scuffle did not necessarily begin there, and King was certainly not in repose during the attack, as theorized by the prosecution. He noted that that blood on the bottom of King's socks indicates that he was standing or crouched on the couch at some point during the struggle. (16 PCR 2611-31; PCR Exhibit 23, slides 26, 30, 34, 35, 37.)

Similarly, Mr. Knox concluded that Brown had been up and out of the recliner he was ultimately found lying in. Brown's position with his legs to the side of the recliner's extended footrest and his back against the wall indicates, not

[12] Mr. Knox pointed out several relevant errors in Det. Brookins' work, including that she should have questioned witnesses about the normal condition of the house to ascertain whether the room was normally in disarray or whether this was evidence of a struggle (16 PCR 2624.) Moreover, the crime scene photographs showed that the evidence technicians were handling and manipulating evidence while processing the scene without any making any notes or explanation for the movement – this was sloppy, particularly given the significance of exact placement of items in ascertaining whether a struggle occurred. (PCR Exhibit 23, slide 64.)

that he was attacked there, but that he likely jumped out of the chair in haste without lowering the footrest, then fell back into the recliner after tussling with Bright. (16 PCR 2641; PCR Exhibit 23, slide 51.) This scenario is supported by the fact that Brown's boxer shorts were pulled down below his buttocks, which likely occurred when he fell back into the recliner and his shorts caught the arm of the recliner. (16 PCR 2658; PCR Exhibit 23, slide 52.) The blanket, found over Brown's head by the police, was not there when Brown was struck. (16 PCR 2660-61.)

Second, **a struggle with significant movement around the house occurred**. The struggle was evidenced by items to the right and left of the couch, which had been knocked over or shifted. (PCR Exhibit 23, slides 32, 33, 42; 16 PCR 2591-92, 2635.) Additionally, a drag mark in the carpet indicates that the pub table was pushed approximately 90 degree from its usual spot, which was further supported by fact that a chair was pushed up against wall in a position where it would have been impossible to sit in it. The drag mark showed that the force that moved the table came from the back – the side near the back door and furthest away from the couch – the area where Bright says he fell to the floor and picked up a hammer to defend himself. (PCR Exhibit 23, slides 6, 10; 16 PCR 2597-98.) An ashtray was also knocked from the pub table onto the floor and the ashes were underneath a pillow that was found under King's body. (16 PCR 2605; PCR

Exhibit 23, slide 10.)

Blood on a pizza box, a chess piece, an envelope on the end table and a piece of plexiglass all the way by the back door also support evidence of movement. (16 PCR 2650; PCR Exhibit 23, slide 61.) Three crime scene photographs, never submitted to the jury at trial, show "impact spatter" on the kitchen doorframe that could not possibly have come all the way from the recliner area of the living room five feet, seven and a quarter inches away. (16 PCR 2596; Exhibit 23, slide 59.) Not only does the type and size of blood spatter indicate that it originated from a close proximity, but the location of the spatter inside the doorframe definitively shows that it came from a source near and directly in front of it. (5 PCR 975; PCR Exhibit 23, slide 27.)

Third, **the gunshot occurred prior to the struggle**. Mr. Knox agreed with the FDLE analyst that the 9mm gunshot was fired at an upward angle about 4 to 6 inches off the floor. However, he further opined that the shot occurred prior to a struggle because the residue was deposited under cigarette ashes and prior to a pillow falling on top of the ashes, which supports Bright's account that he only acquired a hammer to defend himself after a gun was discharged. (17 PCR 2573.) (e.g. 15 PCR 2452-53—what Bright told Dr. Krop.)

Janice Johnson, a crime scene and blood spatter expert,[13] also supported Mr. Bright's account of the events that occurred on the night in question. She focused her attention on two points:

The **gunshot in question was very likely fired on the night of the incident** because gunshot residue is "extremely transient evidence" that would have been readily disturbed through daily activity such as walking on or vacuuming the carpet. (16 PCR 2505.) The fact that the gunshot residue was in the middle of the family room where people had, according to the prosecution, been hanging out and playing chess earlier that day, indicates that very little time passed between the time that the gun was fired and the evidence was collected. Moreover, in examining the trajectory of the bullet, which passed through a chair, Ms. Johnson observed that the chair was still in the exact position it had been when the shot was fired, suggesting that very little time had elapsed since the gun was fired and the photograph of the chair was taken. (16 PCR 2551.)

Ms. Johnson also independently concluded that **neither King nor Brown were in a state of repose during the incident given the following signs of a struggle:** The lampshade was caved in; the speakers from the end table had been knocked off; impact spatter was found on the television; the pub table was shoved

[13] Ms. Johnson spent 10 years as a fingerprint examiner with the FBI and several decades as a crime scene analyst with FDLE. She trains others and constantly receives further training in her field. (16 PCR 2492.)

up against the end table, making it impossible to sit in the chair in that position; blood was found on the left end table; an ashtray was knocked onto the floor; chess pieces were knocked over; and blood was found on the pizza box. (16 PCR 2510-2517.)

Furthermore, Ms. Johnson, like Mr. Knox and contrary to Det. Brookins, found that blood pattern analysis was possible and that it was clear that King's head was above the back of the couch when the blows occurred given the impact spatter on the wall and the blood on his socks. Moreover, the five or six areas of impact spatter on the wall over the couch indicated that King was moving around from a position over the couch. (16 PCR 2512, 2547.) She concluded that the gunshot occurred, King and Bright struggled, crashed into the pub table, knocking over the ashtray and chess pieces, then the major bloodletting occurred in the sofa area. (16 PCR 2519.)

Brown was awake and active during the ordeal as well. She reasoned that he was likely struck near the kitchen door given the spatter on the doorframe – like Knox, she opined that the appearance of the blood on the kitchen doorframe must have originated from a source in front of the door frame, not from the recliner where Brown was found. It was most likely Brown's blood since he was closer to the kitchen. However, she could not be sure because JSO failed to preserve the blood for DNA analysis. The position of Brown's underwear that were pushed

down by the recliner's left armrest, and two points of convergence of blood on the wall at different heights, also indicated that he fell back onto the recliner, rather than sitting in the recliner the whole time. The comforter could not have been over Brown during the entire encounter but was likely pulled over him during the altercation or afterward. She concluded that Brown was most likely struck first while near the kitchen door, was driven backward toward the recliner, and the majority of the blood letting occurred after he had fallen into the recliner. (16 PCR 2523- 2527.)

Dr. Daniel Buffington, a toxicologist, [14] testified regarding the pharmacological significance of the parent cocaine in King's blood and urine at autopsy. As Dr. Scheuerman suggested (9 R 420), Dr. Buffington was able to pinpoint the time of King's cocaine use to two to four hours before his death. Dr. Buffington further opined that King was still experiencing the effects of cocaine at the time of his death, and that **he was not sleeping when the events in question began**. (14 PCR 2082-83.)

Michael Bossen, a Jacksonville area criminal defense attorney, testified that he received a call from Raymond Bright "literally a couple hours" after the incident. In fact, Bossen observed that Bright tried reaching him 2 or 3 times

[14] Dr. Buffington has his Doctor of Pharmacy from the College of Medicine of the University of South Florida and practices in clinical pharmacology, having licenses in both Florida and Georgia. (13 PCR 2059.)

earlier, when the office was still closed. Bright told Bossen he was threatened and got into an altercation with two people. He was distraught during the phone conversation, and said he acted in self-defense because the other people had automatic weapons.

Mr. Bossen stopped Bright from talking further and told him not to turn himself into the police – "[I] just told him to come to my office." (12 PCR 1699-1704.)

Counsel's testimony concerning his guilt phase performance

Richard Kurtiz was lead counsel in Mr. Bright's case. He and Mr. Nolan, second chair counsel, agreed that forensic experts should be retained for consultation and trial purposes, however they failed to call a crime scene expert or toxicologist. (13 PCR 1969-70.) He believed a crime scene or gunshot residue expert would be helpful, told Mr. Nolan as much in an email, and was led to believe that Mr. Nolan was working on it. (13 PCR 1756, 1786.) Kuritz did not retain an expert to rebut Det. Brookins because he was not given the assignment of handling her as a witness until the last minute. (13 PCR 1753.)

When Kuritz and Nolan debriefed about the trial during jury deliberations, Kuritz told Nolan that they should have hired forensic experts to assist with the self-defense theory. (13 PCR 1746-48.) In the words of Mr. Kuritz, the problem with he and Nolan's representation of Mr. Bright boiled down to role assignments:

> This was actually a weird case for me, um, because, you know, I was the one who was death qualified, they were doing the lion's share of everything. They had been on it for a long time, they were trying to get qualified so they could take death cases, so they were taking the lead, and I was kind of running a supervisory thing, like the memo I sent asking about gunshot residue and asking about those things, um, to make sure they were following up with it, but – I was being lead – I was being told, We're on it, you know, they were really giving – I mean, I thought they were. I mean, I thought – I mean every time I went over to their offices to look at it, they – they seemed to be working on it very diligently, so I – I trusted that they were doing a lot of things that they weren't.

(13 PCR 1791-93.)

As for the toxicologist, Dr. Scheuerman, the state's ME, indicated during his deposition (and at trial) that a toxicologist would be able to give the defense an accurate answer as to whether King was under the effects of cocaine when the incident began. Mr. Kuritz conceded that such an expert may have been helpful in Bright's trial. (13 PCR 1762-63.)

Mr. Kuritz also testified that he never determined whether the GSR on the carpet was fresh or not, but that was something "he threw to Mr. Nolan in an email," and he thought RCC was working on that aspect but "apparently they weren't" and "it was not done." Kuritz also recalled the prosecution arguing the GSR could have come from a different incident. Kuritz testified that proving the GSR was fresh would support Bright's theory of a struggle. (13 PCR 1756, 1759.)

Mr. Kuritz agreed that they should have tracked down the witnesses Bright told Mr. Nolan to track down (like the Kemps) to establish a reputation for

violence. (13 PCR 1988). He agreed that it would have helped his case if the defense could have found additional witnesses to prove King and Brown were threatening Bright with his life, or another person to testify about what was going on in the house. (13 PCR 1751). Kuritz also testified he "would have used" evidence of the victim's reputation had he found it because he "wanted to show that Mr. Bright was in fear of these kids and that's why he was calling law enforcement to catch them doing these things…" Kuritz considers this kind of evidence important because "we were running a self-defense case, so um, their reputation for violence in the past would have been helpful. He "wanted" this evidence, and asked RCC investigators to do it, but his recollection was "they never turned up anybody. (13 PCR 1764-65.)

III. PENALTY PHASE

The trial—Bright's sentencing

Mr. Bright was represented in penalty phase by RCC attorney, James Nolan. Mr. Nolan presented 8 witnesses (Charles Fisette, Lester Baker, Benjamin Lundy, James Hernandez, Brian Williams, Maxine Singleton, Sharetta Faulk, and Janice Jones) in penalty phase who testified collectively that Mr. Bright was a good man who served our country as a Marine but struggled with depression and addiction. (5 R 854-940; 6 R 941-956.) No evidence concerning Bright's horrific childhood or educational background was presented. Minimal evidence of Bright's struggle

with depression surfaced through lay witnesses, but the jury did not learn about his struggle with anxiety disorder, bipoloar disorder, PTSD, and other mental issues. (e.g. 6 R 1005-12.) As such, the jury recommended death for Mr. Bright. (6 R 1032.) Although defense counsel attempted to make up for its penalty phase performance in Spencer hearing and presented addition evidence including the testimony of mental health expert, Dr. James Miller, regarding Mr. Bright's history of substance abuse, it was too little, too late, and the trial court imposed death.

Postconviction evidentiary hearing

Mr. Nolan has unfortunately passed away since Bright's trial. However, as recognized by the trial court, there is significant evidence about what Mr. Nolan did and did not do in preparing for Bright's penalty phase:

Mr. Kuritz, described the penalty phase as "100 percent Mr. Nolan." (12 PCR 1828.) Like the guilt phase, Mr. Kuritz thought that Mr. Nolan was doing his job, but this turned out not to be the case. (13 PCR 1988). Following the penalty phase, Mr. Kuritz tried to pick up the pieces when he realized that a tremendous amount of work had not been completed:

> Mr. Kuritz: There were things not done in the guilt phase that I would have wanted done, and then at the end of the guilt phase—penalty phase, I felt that same way, and so began to try to take over the penalty phase, or at least I asserted myself more in to the penalty phase after that, and I think I might have even done the Spencer hearing.

(12 PCR 1830).

> Mr. Kuritz: The entire penalty phase that went to the jury was Mr. Nolan and RCC, and then, as you just seen through the emails, when I realized things were not being done, or did not get done, I began doing that.

(12 PCR 1843-44.)

Following the penalty phase Kuritz sent several emails to Mr. Nolan, imploring him to: get an expert to talk about Bright's substance abuse that "really tied into our theme" (12 PCR 1832); secure Mr. Bright's VA records;[15] and get a family history including "childhood issues…abuse in the home…dysfunctional home" because none of these things had been done prior to the jury's death recommendation. (12 PCR 1832-37.) Mr. Kuritz explained that Nolan never even retrieved Bright's school records, which was "kind of 101 stuff" that you "learn from the very beginning." Kuritz was "very surprised this investigation had not been done, or even started" and was "disappointed that these kinds of things were not obtained," because "these are kinds of things that I thought a juror should have seen…and here I am after an 8-4 death rec finding out" that basic things were not done. (12 PCR 1833-35.)

Mr. Kuritz saw Dr. Krop's reports for the first time at the postconviction hearing. Upon reviewing the reports, Kuritz declared that based on information

[15] Kuritz explained that RCC "didn't understand the difference between medical records and VA records, because I was asking for medical records and they're saying, Well, we only have—isn't that the VA records." (12 PCR 1837).

contained in Dr. Krop's reports (such as Bright running away from home, drug abuse, bipolar disorder, etc.) additional investigation should have been conducted. (12 PCR 1847-49.) If Kuritz had known about Dr. Krop's reports at the time of trial, he "absolutely" would have done a lot more in mitigation, because "those were…red flags." (12 PCR 1853). Kuritz considered the topics Dr. Krop discussed in his reports "important" mitigating factors. Kuritz could have used that information to diminish the prosecution's closing argument that Bright was a drug abuser with no explanation for his drug use. (12 PCR 1856.) Kuritz also stated that Dr. Krop's finding that Bright did not have Anti-Social Personality Disorder was "absolutely" beneficial to Bright's case – "that's good for you." (13 PCR 1986).

Mr. Kuritz was troubled by the fact that Mr. Nolan did not follow-up with Dr. Krop and "give [Dr. Krop] the things that he wanted, and that…after our penalty phase… [Dr. Krop] was still seeking the information that was never given to him. That causes me a big concern." (13 PCR 1986.)

Dr. Harry Krop testified that he first got involved in Bright's when Mr. Nolan asked him to do a competency evaluation. Bright was given the MMPI, Beck Depression Inventory, and Beck Anxiety Inventory. (15 PCR 2414.) There was no evidence to suggest any antisocial behavior, and "no significant clinical psychopathology;" Bright does not meet the ASPD criteria. (15 PCR 2417). The Beck testing indicated "considerable depression" and "considerable anxiety,"

"sleep issues," "extremely despondent," and "self concept issues." (15 PCR 2416).

Dr. Krop was going to contact Bright's wife to obtain additional records, like VA psychiatric records, and waited to hear whether the attorney wanted him to do mitigation work. He was eventually contacted by someone named "Jake" from Mr. Nolan's office. (15 PCR 2417.)[16] Jake's request was unusual, because he wanted an MRI or PET scan, which Dr. Krop could not do because he was a psychologist, not a neurologist. He called Jake back and left a message indicating that he could not do the brain imaging. Then Dr. Krop received a return call requesting that he see Bright for possible mitigation, which he did on July 15, 2009 and again at a later date. (15 PCR 2418, 2423.)

Dr. Krop asked Mr. Nolan for additional collateral records, including "all depositions and any kind of supplemental police reports, because all I had was just the real basic police report initially." Dr. Krop also asked for military records, records related to prior arrests and any medical records, and additional psychiatric records because Bright indicated he had been Baker Acted on two different occasions. Dr. Krop also asked to interview family members, and asked for Nolan's assistance in coordinating these interviews, and recommended "at least" a neuropsychological screening to determine whether further neuropsychological or neurological evaluations would be necessary. (15 PCR 2424.) At the time Dr. Krop

[16] "Jake" was an intern at Florida Coastal School of Law.

sent this letter, his mitigation investigation was not done, and what he had done was a "fairly superficial history" of Bright. (15 PCR 2426.)

Sometime later Dr. Krop received another message from "Jake" (15 PCR 2434) telling him not to do neuropsychological testing. Dr. Krop responded by letter, (which, unbeknownst to Dr. Krop, was sent after the penalty phase was over) seeking confirmation that no neuropsychological testing should be done, and again requested counsel's assistance in coordinating interviews with family members. Dr. Krop did not testify in penalty phase.

Dr. Krop "never heard back from Mr. Nolan or anybody from that office," and it was "a little embarrassing" that he did not know Bright had gotten a death sentence until undersigned told him. (15 PCR 2433.) He never got to interview the family members he requested, he was never provided the Baker Act and other records he requested. (4 PCR 763). The only records he ever received were the original police report, some VA records, and some depositions.[17] (15 PCR 2433.) Dr. Krop said there were "absolutely" a lot of red flags in mitigation that required more work. (15 PCR 2437.)

Janice Bright Jones is Mr. Bright's younger sister. (14 PCR 2177, 2187.) Mr. Bright was the middle of three children each born about 5 years apart. (14

[17] Bright's postconviction counsel showed him several documents he had never seen before, including Bright's Baker Act Records, school records, and a document titled DOC initial psychological screening. (4 PCR 765)

PCR 2187.) At the postconviction evidentiary hearing, she explained that there was a long history of mental illness in her family; two of her paternal aunts, Louise Johnson and Athelene Peoples, were so infirm that they were in psychiatric wards for most of Ms. Jones' adult life. (14 PCR 2182-83.)

Ms. Jones' father (Bright's father) was a hoarder who did not throw anything away. You did not touch anything for fear it might fall on you or "dad got you for messing with his stuff." The yard was also packed with junk and was covered in carpet rather than grass. (14 PCR 2202-04.)

When they were younger, their father drank "all the time." "Whiskey, alcohol, beer…home brew, moonshine." (14 PCR 2209.) As they got older, it turned to "binge drinking" and he would "be gone sometimes a day, two days, a week, two weeks." (14 PCR 2197.)

The Bright children, especially Raymond Bright, were severely abused by their father – their whippings were "quite brutal." The abuse started as far back as Ms. Jones can remember (14 PCR 2192.) Because of the abuse and because of the way they were raised, Mr. Bright was a nervous child who stuttered and wet the bed. This made his life even harder because it aggravated his father. (14 PCR 2187.)

Their father beat them with extension cords or he would take off his leather belt. Usually the beatings were planned: he added up everything the children had

done that he disapproved of, then called the children to his bedroom to be beaten – they were in there for hours. It "wasn't like we done something bad;" they were good kids who went to school, "went to church, we were on the Ursha Board, we were-sung in the choir." (14 PCR 2188-89, 2190.) Mr. Bright's father beat him "lots of times" for wetting the bed. (14 PCR 2198.)

Their father would recite the Bible, ask them questions, and make them recite things. Mr. Bright had a difficult time doing this because of his stutter, which in turn made there father angry. (14 PCR 2187.) Their father would "beat him and beat him." He would draw blood. Bright would pass out, and it "would just last for hours…" (14 PCR 2188.) The abuse "was just horrible. We did not have a normal childhood." (14 PCR 2189.) Their father told them they did not need friends, and, "nobody wanted to be our friend," "we grew up thinking that you can't trust anybody, you can't talk to anybody, you can't let anybody know what's going on in your house. No, we wasn't normal. We wasn't normal." The Bright children never got to talk on the telephone, go to movies, go to the playground, or play ball in the street. (14 PCR 2212.)

Their father would get angry and shoot his gun, so Ms. Jones would hide the gun when her parents were fighting- most of times this was when he was drinking (14 PCR 2197.) The father repeatedly told their mother "I ought to kill you, or "I'm going to have to kill you." (14 PCR 2210). Their dad was the most abusive to

Mr. Bright—a lot more abusive. (14 PCR 2211) "I just can't stress to you how brutal it got sometimes." (14 PCR 2212.) Mr. Bright was abused by his older brother, too. Bright told their mother that he was raped by his brother, Willie – mother said, "Junior [Willie] made him a punk." (14 PCR 2208)

Their father beat their mother, too. Ms. Jones described one incident:

> [M]y dad was in his wrecker truck and he had his window down and he had his arm out and he had his hand holding momma's hair and he was driving off, and so I just—I got a beating after that, because I picked something up and I hollered at him, "Leave my momma alone," and he turned her loose and he left, and then the next time we got a whooping he-- he talked to me about it and told me, you know, that I shouldn't have done that, I should stay out of it, it was between him and my mom and don't I ever do that again.

(14 PCR 2195-96.) On another occasion, her mother was on the floor and her clothes had been torn off, her hair was standing on top of her head and she asked Ms. Jones get the neighbor for help. (14 PCR 2205.) Their father did not beat their mother as often as the children, but it still occurred "at least once a month." (14 PCR 2196.) Their dad also raped their mother at least twice that Ms. Jones recalls. Once was on a Sunday morning when they were getting ready for church. She and Mr. Bright got in the car, and their father told them to stay there, but they never made it to church, just sat there in the car, waiting. The children knew what was going on because they could hear her crying, saying "get off me, you're hurting me" (14 PCR 2205-06.)

The Bright's did not have much money and lived in impoverished conditions.

They did not have running water. (14 PCR 2189.) Instead, they had to fetch water from the neighbor's house. They filled up their bathtub with water and used it to flush the toilet when they did "No. #1." (14 PCR 2191.) They could not use the bathtub for bathing, so bathed in a washtub or in the sink.[18] When they were younger, they had a wood stove for heat, but it blew up, so they had two oil heaters – one in the living room and one in their father's bedroom. They washed up in the living room because the rest of the house was too cold. (14 PCR 2194.) Mr. Bright was picked on because he because he had to work in the junkyard in the morning and was always dirty when he went to school. His "fingernails would be dirty and with grease and oil." They did not have nice clothes. (14 PCR 2191.)

The Bright's brushed their teeth with baking powder and their finger – Ms. Jones had gum disease as a child and does not have any teeth now. She recalls the first time she received dental care or had a toothbrush was when dental students came to her middle school and gave them free cleanings and dental care items. (14 PCR 2192.)

Their mother was a "domestic" for three families. (14 PCR 2194.) Their father owned a junkyard – it was in their backyard. (14 PCR 2194.) Mr. Bright worked out there from a very young age – five years old. He hurt his eye in the junkyard at five years of age and that is why he blinks rapidly out of that eye now.

[18] The children "got beat severely one night" after forgetting the water. (14 PCR 2189.)

(14 PCR 2192-93). They would work in the junkyard all day "until he was done with us," "sometimes into the night." (14 PCR 2193.) The kids were never paid for their slave labor. The father told them "it's in a bank account somewhere." (14 PCR 2262).

Ms. Jones remembers the day Bright left the house for good. One day Raymond's job was to take the seats and other parts out of a car to be salvaged. He grabbed some clothes and told her to "Tell daddy bye," which made her "so afraid." She begged him to come back as he walked down the street with his little bag of clothes. (14 PCR 2215.) She thought she was going to get beat because the job was not done and because he was leaving. (14 PCR 2215.) When she told their dad, all he said was "Good riddance, then, he'll be back, he ain't going to amount to nothing, he'll be back." (14 PCR 2316.) Janice found out that Bright was at his grandfather's house and from there he went into the military. A couple days after Bright left, their dad beat their mother because he knew Bright did not have any money and "put two and two together," that she must have given him money to leave. (14 PCR 2216.)

Ms. Jones still suffers trauma from the abuse, and suffers from depression and took Atavan. She also used to drink and party a lot, and still suffers from flashbacks. She got pregnant at 15 because it was the first boy that told her he loved her and did not hit her. She had her second child at 17. She married an

abuser. She finally stopped drinking at 40 when she got pregnant with her last child. (14 PCR 2213-14, 2217.)

Although Ms. Jones testified in Bright's penalty phase and Spencer hearing, she explained that defense counsel did not adequately prepare her, so she did not know what she was supposed to say. (14 PCR 2235). An investigator "Mr. Kirby" interviewed her and their oldest brother, Willie Bright Jr., together in the same room for about an hour. (14 PCR 2178.) He did not explain what mitigation is or how it was relevant to Mr. Bright's case and did not ask them any questions about sexual or physical abuse. (14 PCR 2178.) She would not have volunteered the information because she was raised that, "our business is our business" and especially because Willie, who sexually abused Mr. Bright was right there in the room. (14 PCR 2177-79.) "[W]e just didn't talk about it. It was embarrassing." (14 PCR 2239.) "We didn't even talk about it among each other." (14 PCR 2178). Ms. Jones stated if someone had explained what mitigation is and the importance of this information (14 PCR 2178-79) or "if [Mr. Kirby] had asked her more specific questions she would have called him back outside the presence of her brother and told him everything. She would have testified in penalty phase as she did in postconviction. (3 PCR 2217.)

Unlike her experience at the time of trial, in postconviction Ms. Jones was interviewed by a mitigation specialist, Ms. Sara Flynn. Ms. Flynn explained what

mitigation was, its significance, and asked detailed questions – the interview lasted four or five hours. (14 PRC 2181.)

Ms. Jones confirmed that she would have testified about everything at the time of trial, even while her dad was alive, if she had known that it would have been helpful. (14 PCR 2218.) She explained, "I'm not going to lie for my brother," (14 PCR 2261), "the way we were raised was brutal, we were not kids, we were not raised as kids." (14 PCR 2263.) As Ms. Jones told the prosecutor in cross-examination:

> Sir, if you were to have seen our bodies when my daddy drew blood and seen the welts on our backs and legs, in 2014, my dad would be in prison.

(14 PCR 2264.)

Isidore and Samuel Knight, Mr. Bright's childhood friends and neighbors, provided third-party corroboration of Ms. Jones' testimony. (13 PCR 1996.) Isidore explained that even when Mr. Bright was as young as 6 or 7, Bright's father kept him busy in the salvage yard from sunup to sundown. (13 PCR 1997.) If a parent made a child work that much today, it would be called child abuse. (13 PCR 2038.) Bright had a severe stuttering problem – his dad put so much fear in him that it made it worse. He witnessed Bright's father strike him with an electrical cord. Isidore would turn away or leave when the beatings occurred, but he could hear Bright scream. He personally observed 3 or 4 beatings. (13 PCR 2027.)

Bright's father was verbally abusive as well. (13 PCR 2012.) He was more than a "strict disciplinarian," it was "more like torture." (13 PCR 2038.)

Samuel Knight observed that Bright's father was a heavy drinker and made and sold moonshine. (14 PCR 2133.) "Because of his habit of drinking he would take it out on his children." (14 PCR 2133.) He could hear Bright's dad take them into the junkyard and "whoop" them. (14 PCR 2135.) He heard the children hollering out in pain. (14 PCR 2135.) He observed Mr. Bright's father pick up a cord or piece of wire from one of the cars in the junkyard. He heard hollering and screaming back there. (14 PCR 2135.) The behavior was "abusive." (143 PCR 2136.) He heard Bright crying or watched him being whipped eight to nine times or more. (14 PCR 2136.) Mr. Bright had a severe stuttering problem – Samuel recalls that in second grade a teacher wanted to discipline Mr. Bright for something and he could not get it out, "he always used his hand, dah, dah, dah, dah, like that (slapping his leg) and stuttered real bad." Bright's brother, Willie Jr., stuttered too, but Bright was worse. (14 PCR 2138-39.) Bright's childhood was spent in the junkyard. (14 PCR 2137.) His father would make him work sometimes three or four hours after dark. (14 PCR 2138.)

Maxine Singleton, who dated Mr. Bright, corroborated Janice Jones' allegations that Mr. Bright's older brother sexually abused him. During their relationship, long before Mr. Bright had any reason to invent mitigation, he told

Singleton he was sexually abused by his brother and that his brother "choked him out." (15 PCR 2346-47). Singleton recalls that he told Bridget Bright (his ex-wife) about the abuse as well.

STANDARD OF REVIEW

GROUNDS 1, 2, & 3 ON CROSS AND GROUND 1 IN ANSWER: Strickland claims present mixed questions of law and fact. Where the trial court conducted an evidentiary hearing, the reviewing court will defer to the factual findings of the trial court that are supported by competent, substantial evidence, and will review the application of the law to the facts de novo. See Lynch v. State, 2 So.3d 47, 83 (Fla. 2008) (citing Sochor v. State, 883 So.2d 776, 785 (Fla. 2004)); Johnson v. State, 104 So.3d 1010, 1022 (Fla. 2012).

GROUND 4 ON CROSS: Where multiple errors are discovered in the jury trial, a review of the cumulative effect of those errors is appropriate because "even though there was competent substantial evidence to support a verdict . . . and even though each of the alleged errors, standing alone, could be considered harmless, the cumulative effect of such errors [may be] such as to deny to defendant the fair and impartial trial that is the inalienable right of all litigants in this state and this nation." McDuffie v. State, 970 So. 2d 312, 328 (Fla. 2007).

SUMMARY OF THE ARGUMENTS

GROUNDS 1 & 2 ON CROSS: Despite that defense counsel knew

Bright's fate at trial rested on the jury's interpretation of the forensic evidence, the defense was admittedly deficient in failing to present or even consult experts that would have eviscerated the prosecution's theory - that Bright "surprised" these "innocent" victims while they were sleeping, and brutally killed them for no reason. Even this Court questioned the "mystery" of why Bright inexplicably murdered Brown and King. See Bright v. State, 90 So. 3d 249, 263 (Fla. 2012.)

In postconviction, the question of why Bright did what he did was undeniably answered, demonstrating Bright's fervent declaration of innocence has always been correct. Prejudice cannot be any more apparent here, as the postconviction evidence established in direct contradiction to the state's theory, Mr. Brown first committed an aggravated assault by pointing a gun at Bright, like he had repeatedly done in the past, causing Bright to react in fear of his life, resulting in a violent struggle throughout the residence, ending in Bright exercising his right to self-defense. The postconviction experts also demonstrated that unlike the prosecution's argument the victim's were sleeping, King was *awake when the incidents began* because he was on cocaine. The postconviction experts also completely refuted the state's expert, ET Brookins' testimony and opinion that the victim's beatings began and ended where they lie - in the couch and recliner.

The evidence adduced during the postconviction hearing through previously undiscovered lay witnesses further painted a clear picture of self-defense,

corroborating much of the postconviction expert's above testimony, the forensic evidence found at the scene, and Bright's repeated statements to various witnesses as to what occurred in the night in question. Witnesses such as Valerie and Charity Kemp even supplied the intimate details of the on goings between Bright and the victim's for days leading up to the incident, and even moments before the victims were killed.

The Kemps provided conclusive evidence of Brown and King's membership in a gang, ownership of the very weapons in question, reputation for violence, prior threats against Bright, and account of Bright's residence prior to the incident occurring- wholly refuting the prosecution's speculation that the gunshot residue found in Bright's floor did not get there the day in question. The testimony of Charity Kemp was especially powerful, providing the missing link in this that moments to Brown's death, he called her and told her he was going to confront Mr. Bright for stealing his drugs – which is exactly how Mr. Bright always said the incident started. Indeed, the experts and lay witnesses presented at Mr. Bright's evidentiary hearing explained what all of Bright's prior attorney's already believed- that he was innocent and acted in self-defense.

This case is analogous and even stronger than State v. Fitzpatrick, where, just like Mr. Bright, the defendant's fate turned on the interpretation of forensic evidence. See State v. Fitzpatrick, 118 So. 3d 737, 742 (Fla. 2013). This Court

affirmed the trial court's decision to grant a new trial, finding trial counsel failed to conduct a reasonable investigation and consult with experts in serology and DNA testing; to have fingernail scrapings tested by the FDLE tested again, to investigate several witnesses and their relationship to Fitzpatrick's case; and to retain a forensic expert to review the hospital records and forensic evidence. See Fitzpatrick, 118 So. 3d at 746. In finding prejudice, this Court noted, based on a factual scenario almost identical to Bright's, that the strongest evidence of Fitzpatrick's guilt was the forensic portion of the evidence; the prosecution's "near exclusive reliance on forensic evidence" to support their theory; and "how substantially different Fitzpatrick's trial would have been if counsel did not provided constitutionally deficient representation on this issue." Id. at 778. This Court also noted, exactly like Bright's case, that the prosecutor would not have been able to assert many aspects of their theory but-for counsel's deficient performance. Id.

Truly, this is a rare case where this Court faces the real possibility, or as displayed by the postconviction evidence, fact, that an innocent man is continuing to be wrongfully convicted, where there is absolutely no credible evidence left that he committed a crime. A new trial must be granted.

GROUND 3 ON CROSS: Counsel was deficient in failing to strike "M," who candidly admitted she was biased because she would think a "tiny bit" that

Bright was hiding something if he did not take the stand and testify on his behalf. No follow-up questions were asked of this juror, and she served on Bright's jury. A new trial is required, as a biased juror sat on Bright's jury, unconstitutionally denying Bright his Sixth Amendment right to a fair and impartial trial and establishing prejudice under Strickland. See Titel v. State, 981 So. 2d 656, 658 (Fla. 4th DCA 2008).

GROUND 4 ON CROSS: But-for defense counsel's admittedly deficient performance(s) in both the guilt phase penalty phase portions of the trial, as demonstrated by the evidence introduced in postconviction, the prosecution had no case against Mr. Bright. There was no confession or eyewitnesses – the case came down to the jury's interpretation of the forensic evidence at the scene.

We know now the forensic evidence wholly refutes the prosecution's theory of Bright randomly attacking these two individuals in their sleep with no reason, and instead, acted in self-defense in fear of his life after repeated threats to kill Bright from Mr. Brown, Mr. Brown finally attempted to act on his threats, leading to a violent struggle that occurred throughout numerous areas of Mr. Bright's residence, ending in the death of his two violent aggressors. If there is any doubt that Bright did not act in self-defense, one only needs to look at the mountain of irrefutable exculpatory evidence produced during Bright's evidentiary hearing – and the prosecution's utter lack to produce a single witness in postconviction to

rebut it.

GROUND 1 IN ANSWER: The trial court's decision in granting Bright a new penalty phase is supported by competent and substantial evidence and should not be disturbed on appeal. The trial court had an easy decision here, as deficient performance is abundantly clear from the record - defense counsel conducted a majority of his mitigation investigation *after* the penalty phase had concluded; failed to provide his only expert with requested records and family contact information; failed to present readily available mitigation such as Bright's "horrific" abuse by the hands of his father and numerous mental illnesses; failed to investigate and retrieve numerous records; and failed hire numerous experts despite many "red flags" and were jumping out from the records counsel did have.

Prejudice is also very apparent, as Bright's jury heard nothing about why he developed his substance abuse disorders. The jury also heard nothing about Bright's "horrific" physical abuse by the hands of this father than lasted for many years and up until the time Bright ran away to join the Marines, or about the numerous mental illnesses Bright suffered, and yet despite these traumas and disabilities, how Bright managed to serve our country's military for many years. Given the jury's close 8-4 vote, it cannot be said that confidence in the jury's outcome was not undermined.

ARGUMENTS ON CROSS-APPEAL

GROUND ONE ON CROSS

COUNSEL WAS INEFFECTIVE IN THE GUILT PHASE IN FAILING TO PRESENT BRIGHT'S SELF-DEFENSE THEORY BY FAILING TO PRESENT EXPERTS AND LAY-WITNESSES WHICH DEMONSTRATES BRIGHT IS INNOCENT OF THESE CRIMES, UNDERMINING CONFIDENCE IN THE OUTCOME OF HIS TRIAL BECAUSE THE LOWER COURT'S FINDINGS ARE NOT SUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE IN VIOLATION OF HIS FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES AND FLORIDA CONSTITUTIONS

At the postconviction hearing, Bright presented considerable evidence, both from forensic and lay witnesses that easily could have been presented at Bright's trial to demonstrate his innocence, but counsel failed to do even consult with experts and conduct the basic investigations secure this evidence. The deficient performance in this case is glaringly apparent from the record, and the trial court's decision to find otherwise is unsupported by competent substantial evidence, particularly given that these readily obvious failures to investigate where corroborated by trial counsel's numerous admissions to this oversight and deficiency.

Further, in evaluating the evidence from evidentiary hearing corroborating Bright's account of self-defense, it is clear that the trial court's ruling that "confidence in the jury's verdict" was not undermined likewise was a misapplication of Strickland and should be reversed by this Court. Strickland v.

Washington, 466 U.S. 668, 692 (1984).

I. Law under Strickland

The two elements for an ineffective assistance of counsel claim under the Sixth Amendment are (1) counsel's representation fell below an objective standard of reasonableness, and (2) but for counsel's deficiency, there is a reasonable probability the result of the proceeding would have been different. Id. at 688-89.

A finding of prejudice under Strickland requires that a petitioner "must show that there is a reasonable probability that, but for counsels' unprofessional errors, the result of the proceeding would have been different." Id. at 694. Strickland defined "reasonable probability" as a "probability sufficient to undermine confidence in the outcome" of the proceeding. Id. at 692. cannot be confident that the outcome of the trial would have been the same.

II. Counsel failed to present or even consult with experts in Bright's case

The irrefutable evidence placed before the trial court at the postconviction evidentiary hearing was that Bright's counsel was *admittedly* deficient in investigating and preparing for the most important portion in Bright's case – the forensic evidence found at the scene, and the jury's interpretation of it. (12 PCR 1769-70.)

The importance of the jury's understanding of the forensic material found in Bright's home is undeniable. Two dead bodies were found in Bright's home, but

there were no eyewitnesses, Bright never confessed but instead has always maintained his innocence, and no DNA or forensic evidence linked Bright to the murder weapon or to the victims' bodies. In fact, to even survive a JOA, the prosecution had to call to exculpatory witnesses (Lundy and Majors) who stated the Bright told them in detail how he had killed the deceased persons in self defense, but argue that Bright was somehow lying to them to support their premeditated murder theory.

Irrefutably, the prosecution had nothing with which to disprove Bright's account of the events – which would constitute the justifiable use of deadly force – other than their interpretation of the forensic evidence at the crime scene, i.e., blood patterns on the walls, the nature of the injuries to the deceased, the condition of other items in the room, etc.

That this case hinged on forensic evidence was readily admitted by Bright's trial attorney Kuritz during the evidentiary hearing. (12 PCR 1752.) Kuritz stated that it was clear that the most important three witnesses for both parties in the trial would be the state experts who would be interpreting the forensic evidence – the evidence technician (Brookins) and the two medical examiners (Arruza and Scheuerman). (12 PCR 1752-53.) Kuritz emphasized that their testimony was the "crucial point in determining whether Bright acted in self-defense as opposed to whether" he committed first-degree murder, and that "whoever won the battle of

interpreting the [forensic] evidence was going to win the case." (12 PCR 1755-56.)

Given that this case was a battle of forensics, there is no question that the defense team should retained a crime scene reconstructionist that could evaluate the scene, blood spatter, and GSR residue to adequately challenge the state's theory. Additionally, despite the medical examiner's own advice that defense counsel hire a toxicologist to determine whether victim's recent use of cocaine meant he was awake (and not sleeping when attacked as inferred by the prosecution's theory), this was not done either. This was in part due to the failure of the defense to function as a coherent team. Kuritz testified at the postconviction hearing that Nolan had taken the lead challenging the state's forensic evidence, but at the "last minute" Nolan found that he had to work on another case, so he handed over the cross examination of Brookins to Kuritz. (12 PCR 1752-53.) Despite that Kuritz discussed the need to hire forensic experts with Nolan and was told by Nolan that they had the budget to do so, they failed get any forensic experts and by the time Kuritz took over, it was too late. (12 PCR 1769-70.)

The state then took complete advantage of the defense's negligent trial preparation by using their experts to present the theory that both young men were attacked while sleeping - "Even though they posed no threat to him, he just beat them over and over and over." (13 PCR 1966-67, 1980.)

Using the defense's utter lack of forensic investigation, the prosecution

further elicited their speculative theory of an attack to the victim's during their sleep through its three expert witnesses. Brookins, the evidence technician, was key in this regard:

> I can say that in the instance with the individual in the chair and his head against the wall and blood radiating all around it that, yeah, **I'm pretty sure that's where that one took place. And the same with the couch, although it was a larger area**. There might have been some movement involved with the parties.

(14 PCR 2158-59.) Brookins followed with up with the assertion that she observed no "blood on the floor in areas other than the area right around the couch and right around the chair." (14 PCR 2161.) The prosecution also elicited from the medical examiners that the injuries to the victims would have been consistent with the victims having remained in the recliner or the couch throughout the attack. (13 PCR 2055 (Arruza); 14 PCR 2087 (Scheuerman).)

And the government continued with this theory throughout closing argument, asserting that the concentration of the blood shows that both victims were attacked essentially where they were found (15 PCR 2352), and that the physical evidence shows that there was no struggle. (15 PCR 2360.) The State heaped its strongest certitude as to Brown, declaring that it is absolutely clear that Brown was killed right in that chair and that he never moved from that position. (15 PCR 2355.)

In the face of the prosecution's case, the defense was utterly incapable, without having consulted with experts or called them at trial on Bright's behalf, to

debunk the state's misguided theory. That this could and should have been done was shown at the evidentiary hearing, which established that there is no question that not one but both of the victims were up on their feet and engaged in a struggle with Bright in a separate part of the room from where they ultimately died. Truly, had defense experts been presented (or even consulted with) the jury would have been provided with an entirely different evidentiary picture, establishing that Bright was telling the truth all along and acted in self-defense.

A new trial is required, as under any objective standard of professional norms pursuant to Strickland v. Washington, this was clear ineffective assistance of counsel that severely prejudiced Bright's case, in violation of his Fifth, Six, and Fourteenth Amendments rights to effective counsel and a fair trial.

A. Deficiency

1. The duty to investigate

The duty to investigate is a basic, yet critical duty of defense counsel:

> One of the primary duties defense counsel owes to his client is the duty to prepare adequately prior to trial. Pretrial preparation, principally because it provides a basis upon which most of the defense case must rest, is perhaps the most critical stage of a lawyer's preparation.

Magill v. Dugger, 824 F. 2d 879, 886 (11th Cir. 1987). Equally critical is the duty to consult and present expert testimony in cases where the jury's interpretation of it is imperative. See Williams v. Thaler, 684 F. 3d 597, 604 (5th Cir. 2012), cert.

denied, 133 S. Ct. 866, 184 L. Ed. 2d 679 (2013)(counsel's performance was unreasonable where it failed to "obtain any independent ballistics or forensics experts, and was therefore unable to offer any meaningful challenge to the findings and conclusions of the state's experts, many of which proved to be incorrect.").

2. The testimony of trial counsel at the evidentiary hearing

Kuritz acknowledged at the postconviction hearing that Nolan and he agreed that forensic experts should be hired in this case, that Nolan had stated that RCC had the budget to hire experts, and that Nolan's failure to do so was in no way a strategic decision. (12 PCR 1769-70, 1775-76, 1786.) Kuritz also stated that having a crime scene reconstructionist and an expert in gunshot residue would have been helpful to the defense case, and he put this in an e-mail to Nolan and was led to believe that Nolan was working on it. (12 PCR 1756, 1768.) Kuritz agreed that having a toxicologist testify about the pharmacological significance of the parent cocaine in King's system might have helped in the trial. (12 PCR 1762-63.) Kuritz further testified that, although he did the cross examination of evidence technician Brookins, he never had the opportunity to hire an expert because he was not given the assignment of Brookins until the "last minute." (12 PCR 1753.)

Kuritz further informed the court that he informed Nolan during guilt phase deliberations that they should have called experts to assist with the self-defense theory. (12 PCR 1746-48, 1750, 1767.)

As to the toxicologist, the state's own medical examiner, Dr. Scheuerman, recommended in a deposition and at trial that the toxicologist could have given specific findings concerning the amount of cocaine in King's system. Kuritz agreed at the postconviction hearing that such an expert might have helped at Bright's trial. (12 PCR 1762-63.)

The reason why experts were not retained for the defense appears to have been a problem of miscommunication or work distribution between offices: Mr. Nolan of the RCC had taken the lead role and Mr. Kuritz, who became involved in the case last, but was still first-chair counsel by virtue of his capital experience, assumed they were doing the work. (12 PCR 1714-16.) Kuritz explained the work was divided this way because (1) Nolan and RCC were on the case first, (2) Nolan had relationship with Bright already, and (3) RCC had already worked a great deal on the case. (10 PCR 1391.)

In Kuritz's words at the postconviction hearing:

> This was actually a weird case for me, um, because, you know, I was the one who was death qualified, they were doing the lion's share of everything. They had been on it for a long time, they were trying to get qualified so they could take death cases, so they were taking the lead, and I was kind of running a supervisory thing, like the memo I sent asking about gunshot residue and asking about those things, um, to make sure they were following up with it, but – I was being lead – I was being told, We're on it, you know, they were really giving – I mean, I thought they were. I mean, I thought – I mean every time I went over to their offices to look at it, they – they seemed to be working on it very diligently, so I – **I trusted that they were doing a lot of things that they weren't.**

(12 PCR 1792-93) (emphasis added).

Those things that they "weren't" doing should have been the first steps out of the gate for the defense team in a case that hinged on the forensic evidence. Everyone on the defense team agreed with that assessment, including Kuritz, former counsel Eler[19] (13 PCR 2021), and even Nolan. In Nolan's record of his work on this case, the following entry appears for April 12, 2008:

> Went to the scene with Dave and the client's ex-wife. Pretty bad scene. A lot of blood on the couch and a chair…. It is clear to me that the State is going to argue the deceased were sleeping, but the blood spatter indicated to me that there was a real struggle not an ambush…. In addition, if the defendant wanted to kill them in their sleep he could and should have used a knife from the kitchen. It would have been faster and more efficient. The hammer was clearly a weapon of opportunity after the gun misfired.

(Defense Exhibit 3, p. 5) (6 PCR 948.)

The main point for Bright's postconviction claim is not to establish whether the primary blame for the deficiency in hiring a crime scene reconstructionist should be placed on Kuritz or on Nolan. The point is that, that due to a breakdown in the defense team, no one took the initiative to get necessary experts involved in

[19] Eler, who withdrew from this case upon his employment with the Public Defender's Office also agreed that at the very least he would have consulted with a crime scene reconstructionist after he had done the deposition of Brookins, had he stayed on this case. (14 PCR 2092.) Eler further acknowledged that juries in today's society frequently rely heavily on forensic evidence given the influence of various television programs, so a defense expert could have had a significant impact on the trial. (14 PCR 2132.)

the case and this in no way can be considered objectively to constitute effective representation guaranteed by the Sixth Amendment.

In finding that Bright had not shown deficiency, the trial court erroneously focused on whether the attorneys made due with what they had at trial versus the question Bright posed in his 3.851: whether counsel was deficient for failing to investigate and to consult with forensic experts *prior* to the trial. This investigation should have been done before making any decision as to the cross-examination of the state's experts was and whether rebuttal experts were needed for the defense case. As to that specific point—failure to conduct pre-trial investigation—attorney Kuritz explained during the evidentiary hearing that he believed that the defense team *should* have consulted experts beforehand and that they were disadvantaged because RCC, unbeknownst to Kuritz, had not followed through in reaching out to the experts he and Nolan had discussed. (12 PCR 1769-70, 1775, 1786.)

Further, while the trial court considered in its analysis the pros and cons of whether the attorneys should have called an expert as a witness for a trial (10 PCR 1393-94), it is uncontested that there would be *no* negative ramifications from *consulting* with experts for the potential of both utilizing their analysis of the scene in cross-examination and gaining the insight of the experts prior to making that decision.

The second step would be to decide if the experts could assist by *testifying* in the trial. On the contrary, the trial court's order considers reasons that Kuritz gave in the abstract for why an attorney *might* choose not to call an expert at trial (10 PCR 1393) and this is beside the point for whether counsel was deficient in failing to consult with experts in this particular case. This post ad hoc rationalization of why Mr. Kuritz might have not done something is also improper and erroneous according to our United States Supreme Court. See Harrington v. Richter, 131 S. Ct. 770, 790 (2011) and Wiggins v. Smith, 539 U.S. 510, 526-27 (2003)(Criticizing the state court's and government's post hoc rationalization for counsel's decision-making that contradicts the available evidence of counsel's actions).

While Kuritz himself believed that his cross-examination of Brookins was sufficient to present Bright's theory of self-defense to the jury, it is clear from the oral arguments and this Court's written opinion on direct appeal that a common sense viewing of the record made it appear that Bright was clearly the aggressor. Of course, Kuritz's view of his own cross-examination of Brookins was made based on the limited investigation conducted, and if he would have been aware of all the available evidence and consulted the experts that would have entirely blown the prosecution's case out of the water, his opinion of how well he covered the interpretation of the crime scene would definitely been different.

The trial court's holding that Kuritz's "decision" to use cross-examination rather than experts to "prove" self-defense, was tactical is patently erroneous, because Kurtiz plainly admitted that he intended to retain experts, but it did not happen. Therefore, counsel's failure to investigate and consult with experts strips any trial decision from the deference entitled to a truly strategic decision. See Strickland, 466 U.S. at 690-91; Rose v. State, 675 So. 2d 567, 573 (Fla. 1996)("Case law rejects the notion that a 'strategic' decision can be reasonable when the attorney has failed to investigate his options and make a reasonable choice.").

The decision of whether the failure to investigate was deficient cannot be made from hindsight or by a trial court assuming facts not in the record to manufacture a reasonable strategic decision, but rather it must be analyzed in light of what the attorney knew at the time of trial preparation. See Alcala v. Woodford, 334 F. 3d 862, 871 (9th Cir. 2003)("We will not assume facts not in the record din order to manufacture a reasonable strategic decision for trial counsel.").

The trial court's order wholly ignores Kuritz' acknowledgement under oath at the postconviction hearing that the defense team planned on getting experts, that Nolan dropped the ball, and that Kuritz would even had liked to listen to the postconviction experts to see how he could have done better. Id. The trial court further erred in finding that the defense team was not deficient in failing to hire

experts under the theory that this constituted a *failure to investigate* in violation of the Sixth Amendment. Kuritz and Nolan knew at that point was that consultation with experts needed to be done, but through team dysfunction they failed to secure that to happen. As such there can be no strategy Bright has established counsel's deficiency and this Court's analysis should move to the prejudice analysis.

The trial court's order referred Occhicone v. State, 768 So. 2d 1037, 1048 (Fla. 2000), for the proposition that defense counsel is not necessarily deficient for deciding to use cross-examination rather than expert witnesses to prove its defense at trial. However, that case is distinguishable on numerous grounds, including that defense counsel in Occhicone ***had*** hired and consulted with experts, lost a motion in limine related to the expert testimony, and ultimately chose the advantage of first and last closing over presenting the restricted version of their expert's mental health testimony. In Occichone, unlike Bright's case, the defense lawyers had conferred with experts and made a strategic decision after thorough investigation.

A critical case for this Court to compare to Bright's case, both in the deficiency and prejudice prongs of failure to present defense experts, is that of State v. Fitzpatrick, 118 So. 3d 737 (Fla. 2013). In Fitzpatrick, just like Bright, whether the defendant would be found guilty or innocent turned on the interpretation of forensic evidence. Id. at 742. Finding defense counsel failed to investigate, consult, and present expert testimony concerning the forensic evidence,

this Court affirmed the trial court's decision to grant the defendant a new trial. Id.

In Fitzpatrick, the critical issues alleged by post conviction counsel were that trial counsel failed to conduct a reasonable investigation and consult with experts in serology and DNA testing; to have that the fingernail scrapings tested by the FDLE tested; to investigate several witnesses and their relationship to Fitzpatrick's case; and to retain a forensic expert to review the hospital records and forensic evidence. See Fitzpatrick, 118 So. 3d at 746.

This Court affirmed that trial counsel for Fitzpatrick "had a professional obligation to investigate any potential impeaching or exculpatory evidence that may have assisted Fitzpatrick's defense," and the defense failed in this regard, which resulted in deficient performance. Id. at 753-757. In light of the prosecution's own admissions during their closing argument at trial, prejudice was found in Fitzpatrick - that the strongest evidence of Fitzpatrick's guilt was the forensic portion of the evidence. Id. at 757. The prosecution's closing argument also demonstrated the "State's near exclusive reliance on forensic evidence to support Fitzpatrick's guilt," and "how substantially different Fitzpatrick's trial would have been if counsel did not provide constitutionally deficient representation on this issue." Id. at 778. The Court also found that but-for counsel's deficient performance, the prosecutor would have been able to assert many aspects of their theory. Id. As such, Fitzpatrick was given a new trial.

Like Fitzpatrick, Bright's attorneys violated the basic rights under the Sixth Amendment by failing to investigate and challenge the prosecution's theory that the victims were surprise attacked while dozing in Bright's living room, constitutionally poisoning Bright's trial. Prior to Bright's trial, Mr. Nolan visited Bright's residence, opining there were holes in the prosecution's theory and finding "very plausible" self-defense case, particularly observing that the blood pattern on the walls appeared to him to contradict the state's theory of the victims being attacked in their sleep. (Defense Exhibit 3, p. 5; 16 R 2605.) Given the fact that Brookins in her deposition told Nolan that she was not qualified to conduct a blood pattern analysis on the walls because of the texture of the walls, this created a golden opportunity for Nolan to investigate further and to find out whether a crime scene reconstructionist could in fact interpret the blood pattern analysis in a way that would blow the state's theory out of the water. However, while the defense attorney whose pre-trial investigation was found deficient in Fitzpatrick both conducted research into scientific journals himself and spoke on the phone for thirty minutes with a medical examiner, Bright's counsel didn't contact *anyone* prior to trial to discuss the forensic aspects of the case – not for thirty minutes, but zero minutes. Id. at 754.

B. Prejudice

This Court must conduct a plenary review of whether the new evidence rises

to the level of undermining confidence in the original trial verdict. Bailey v. State, 151 So. 3d 1142, 1148 (Fla. 2014)(citing Stephens v. State, 748 So. 2d 1028, 1033 (Fla. 1999)). While this Court must defer to the trial court's factual findings and credibility determinations, no deference is owed to the legal conclusion of whether prejudice has been established. Id.

At the postconviction hearing, experts Knox, Johnson, and Dr. Buffington presented powerful and persuasive evidence that corroborated Bright's account that he acted in self-defense. This was not merely a case of having better experts to more articulately re-state what the jury heard at trial. The jury not only did not hear ***any*** defense experts to corroborate Bright's account of self-defense, but significant new testimony, observations, and analyses were presented by these experts, derived from the forensic evidence, that never passed through the jury's ears, such as:

- It is "not conceivable" that Brown and King were attacked in their sleep. (Knox)(16 PCR 2667)

- Blood in the kitchen entryway *could not have come* from Bright hitting Brown in the chair or King on the couch. Not consistent with the impacts occurring from the recliner, as you "never" see small impact drops (like the ones found in the kitchen entryway) go more than a couple feet. (Knox)(16 PCR 2645)(emphasis added)

- Impact spatter on kitchen doorway area higher than the spatter found next to Brown, and could not have "come straight in from the chair of Brown." (Knox)(16 PCR 2646)

- Bloodstains were found near the back door. (Knox)(16 PCR 2649)

- Defense Exhibit 20 and 22- the entryway to the kitchen was not "in great proximity" to Brown and King, and Brookins does not know who the blood belongs to that was found in the entry to the kitchen, and does not see "any linear activity in this blood." (Brookins)(14 PCR 2167)

- Close up Plexiglass appears to have a *drop* (as opposed to cast-off) of blood on it, and King and Brown were "a good bit across the room from this." (Brookins)(14 PCR 2159)

- The struggle with Brown could have begun at the side of the room (other than the recliner) with both parties *standing on their feet* (Brookins) (14 PCR 2151)

- There were blood drops on the pizza box, and the drops have tails indicating a range of travel. (Knox)(17 PCR 2654).

- The chess piece has a drop of blood on it. (17 PCR 2656)

- Defense Exhibit 17- There was a drop of blood that "stands out" on the end table left of the couch, and does not know whether it was possible to conduct a blood analysis on this and does not know whose blood it is (14 PCR 2165).

- Brookins could have done blood spatter analysis as surface was suitable for testing, and the stains were well-defined (Knox, Johnson)(16 PCR 2507, 2621)

- The investigation was sloppy, they did not collect blood for identity, did not do adequate measurements, did not test the blood they did collect, draw convergence lines of blood, and did not do blood spatter analysis (Knox, Johnson)(16 PCR 2508, 2593, 2622.)

- Table leg left impression in the carpet indicating the table was moved recently, indicating "pretty obvious movement of the table…and fairly recent" indicating a violent struggle occurred. (Knox)(16 PCR 2597).

- It would be almost impossible to sit in the chair by the table, suggesting the table was moved at the time of the struggle (Johnson)(16 PCR 2515)

- The ashtray found on the floor was on the table, but knocked over, as demonstrated by the ash still on the table, which indicates this could have occurred during the struggle (Johnson, Knox)(16 PCR 2517; 16 PCR 2598)

- Brown's comforter is consistent with being put on him after the struggle. If Brown was sleeping with the comforter over him, one would "definitely" expect to see impact spatter on it. (Johnson) (16 PCR 2528-29)

- The evidence is inconsistent with state's theory that the gun discharged on a different day, because the chair the bullet went through was not moved at all since the discharge of the firearm, and all the traffic through the house would have likely removed GSR (Johnson)(16 PCR 2505, 2551, 2599)

- The chair in which the bullet passed through *has not been moved* and still had the exact trajectory of the bullet's path, consistent with the gun discharging the night of the incident and not sometime in the past (Knox, Johnson)(16 PCR 2505, 2599)

- GSR is "extremely transient," meaning it removes itself as a result of normal activity, like walking or vacuuming, and this GSR would not have lasted that long with all the people in the house (Johnson)(16 PCR 2504)

- Blood on the tip of Brown's shoes was consistent with him standing, because blood would be coming straight down. (16 PCR 2575)

- The postconviction photos not shown by the state at trial were important in interpreting the crime scene (Johnson)(16 PCR 2575)

- Blood on King's socks are transfer blood meaning that he stepped on blood. King's socks are inconsistent with him being in a lying position during the altercation. (Knox)(26 PCR 2611, 2616).

- The pharmacological effect of the cocaine in King's body is "*obviously consistent" with King being awake at the time of the incident.* The ingestion was probably from a half hour, most likely two to four hours. (Dr. Buffington)(13 PCR 2066, 405)

- Dr. Buffington is unaware of any individuals with the pharmacologic properties found in King who could be sleeping. (14 PCR 2079).

- King's use of cocaine could have had pharmacological effects such as being more alert, energized, feeling stronger, having a better self-esteem, as well as some unanticipated effects, such as anxiety, paranoia, and sometimes "abnormal behavior, bizarre and violent behavior." (Dr. Buffington)(13 PCR 2069).

The trial court did not dispute the qualifications of Bright's experts or challenge the conclusions and observations cited above, but rather drew the legal conclusion that their testimony would not have changed the outcome of the trial. As to that legal conclusion, the trial court's reasoning went awry by failing to appreciate how the theory that the State presented to the trial jury was completely undermined and rebutted by the evidence presented at the postconviction hearing.

Part of the problem with the trial court's reasoning is that it focused only on specific testimony by the prosecution's witnesses while ignoring how the State, through opening statement and closing argument, weaved those statements together to argue that the victims were sleeping when Bright attacked them refuting Bright's self-defense claim. Unlike the trial court's reasoning that the state's theory was broad, it is clear from the prosecutor's closing argument that the what was argued to the jury was very specific – that Bright sneak attacked the men while they slept in his living room.

Another issue that led the trial court to deny prejudice is its erroneous

conclusion that crime scene experts Know and Johnson contradicted each other. Every instance cited by the trial court of alleged "contradiction" turns out not to be a contradiction at all. For example, the trial court points out that Johnson testified that Brown's pants being pushed down was consistent with him being pushed over the chair, and that Knox thought that this was plausible as well. (10 PCR 1399.) Knox also noted that this was not absolute proof of whether the altercation with Brown initiated with Brown in or out of the chair, but that it did decisively prove that Brown was out of the chair at some point during that struggle.

Further, the trial court stated that Johnson said that the victim was standing nearby the kitchen door when the blood spatter was deposited there, and the court asserts that Knox could not say where the victim would have been. However, Knox was precise and emphatic that the source of the blood was "coming from just in front of the plane of the door and hitting this area (indicating)." (16 PCR 2647-48.) Thus, Johnson and Knox consistent on this point as well. The blood around the kitchen door is critical in shattering the prosecution's case, as it definitely places one of victims (more likely than not Brown, given his proximity) at the other end of the room towards the beginning of the altercation. Thus, the trial court's findings are not supported by competent and substantial evidence and must not be given deference by this Court.

The trial court not only found contradictions where there were none, but

incorrectly found no difference between the defense experts' testimony in evidentiary hearing and Det. Brookins' testimony at trial, where clear divergence existed. The trial court seems to agree it was proven at the evidentiary hearing that the struggle took place in different areas around the room that night. However, the court concludes this was the same picture presented at trial. Again, this interpretation focuses a lot Brookins' trial testimony (which again was decisively refuted in postonviction) and fails to consider the prosecution's closing argument that unambiguously stated that the victims were attacked in their sleep—a theory that was conclusively refuted in postconviction with **unrebutted expert testimony.** The prosecution called no additional experts, nor were they able to contradict the findings of Knox and Johnson through Brookins, who spent most of her evidentiary hearing testimony attempting to defend the statements that she made in the original trial.

As to the toxicologist, the trial court's ruling is in a similar posture as to the crime scene reconstructionist: it does not dispute the credibility of the expert's testimony, but rather unfairly discounts its significance. The trial court is correct in noting that the Dr. Buffington's testimony in the postconviction hearing did not *contradict* the testimony of Dr. Scheuerman in the trial, but the trial court failed to appreciate that Dr. Buffington established that King was *not* sleeping when attacked, a conclusion which, if presented at trial, would have absolutely

eviscerated the prosecution's case and repeated contentions that the victims were sleeping or in repose when bludgeoned by Bright.

In its order, the trial court failed to fully consider the Defendant's position—supported by numerous citations to the trial transcript—which the prosecution's case was that Bright did not act in self-defense because the evidence established beyond a reasonable doubt that both victims were killed in their sleep. Rather than considering this narrow theory relied upon by the prosecution,[20] the trial court solely considered whether State witnesses left open the possibility that the crime *could have* occurred some other way.

However, the State's theory was conclusively *disproven* beyond a reasonable doubt at the evidentiary hearing. One factual point that the Defendant would invite the Court's attention to is that in its order the trial court stated that the defense made "heavy" efforts to highlight the blood spatter upon the piece of plexiglass near the backdoor (10 PCR 1402), which the Court speculates *could*

[20] The state's theory was clearly that the victims were resting and utterly defenseless when attacked. In opening statement, the State proclaimed, "As they both were lying down, as they both were defenseless, he beat them to death." (13 PCR 1966.) The State continued, "They weren't able to fight back—or they tried, but they weren't successful because he had the upper hand. He had the weapon. He had the element of surprise, and he succeeded in total to murder each one of the victims." (13 PCR 1966-67.) And further the State asserted, "Even though they posed no threat to him, he just beat them over and over and over." (13 PCR 1970.) And the State continued with this theory throughout closing argument, asserting that the concentration of the blood shows that both victims were attacked essentially where they were found (15 PCR 2352), and that the physical evidence shows that there was no struggle. (15 PCR 2360.)

have been moved by someone, though it is unclear who would have or why they would have done that. However, while the blood on the plexiglass (which was utterly ignored at trial), is difficult for the State to explain, the most critical point that Bright established through his experts, is the blood around the door leading into the kitchen. Both Bright's experts concluded that the blood pattern analysis unquestionably indicated that one of the two victims was standing up next to the kitchen door at some point towards the beginning of the struggle—a point diametrically opposed to the State's trial theory.

The new expert testimony presented in Bright is as compelling as or stronger than the new evidence presented in several recent cases before this Court in which this Court granted a new trial. In Swafford v. State, 125 So. 3d 760 (Fla. 2013), this court found that a new trial was needed based upon new evidence relating to acid phosphatase that undermined the State's proof that a sexual battery occurred, a crime used by the state to establish a motive for the murder. In another newly discovered evidence case, this Court found that a new trial was necessary in Hildwin v. State, 141 So. 3d 1178 (Fla. 2014), based upon evidence that the victim's boyfriend's DNA was found in sperm on the victim's underwear found in her car. For Bright as well, compelling evidence has been presented that undermines confidence in the interpretation of the forensic evidence and theory that the State presented at trial, and the prejudice standard for Strickland claims

("undermines confidence" in the original trial) is less demanding than that for newly-discovered evidence claims ("would probably produce an acquittal on retrial"). Bright is every bit as entitled to a new trial as these other defendants.

Finally, Bright would invite this Court's attention back to the case of Fitzpatrick, 118 So. 3d 737, in which this Court upheld a new trial based on a Strickland claim of not presenting expert testimony in serology and DNA testing. The reasoning in that opinion applies equally to Bright's case:

> The prosecutor's closing argument demonstrates the State's near exclusive reliance on forensic evidence to support Fitzpatrick's guilt. These statements also demonstrate how substantially different Fitzpatrick's trial would have been if counsel did not provide constitutionally deficient representation on this issue. If counsel had performed effectively with respect to this claim, the prosecutor would not have been able to argue to the jury….

Id. at 758. The deficiency of Bright's defense counsel allowed the prosecution to make their damning claims based on faulty interpretations of the forensic evidence – claims that were absolutely essential to have a shot at convincing the jury that self-defense was not a reasonable possibility.

Based on the new expert testimony alone, this Court should reject the trial court's conclusion and find that prejudice has been established in light of the inescapable truth that for Bright to have disproven the prosecution's central theory in the postconviction hearing *must* create more than sufficient question as to undermine our confidence that the jury's verdict. Under any construction of

Strickland, Bright is entitled to a new trial. Under the evidence we know now, Bright's repeated declarations that he acted in self-defense and is innocent rings true.

III. Failure to investigate and to present witnesses in support of Bright's continued declaration of self-defense and innocence

From day one, Raymond Bright has consistently stated how the victims attacked him in his residence on the night of their deaths, and how they had taken over his residence as a crack house in the weeks prior to that incident and had threatened to kill him repeatedly if he attempted to throw them out. However, the trial attorneys did *nothing* to present this evidence before the jury, other than cross-examining the State's witnesses regarding what Bright had told them. Nothing was presented—not a single witness—to corroborate Bright's account that he had been afraid of the victims and had taken action, including going to the police, to attempt to remove them from his residence.

On the contrary, a mountain of witnesses and evidence was presented at the postconviction hearing from lay witnesses who established Bright's genuine and actual fear of these two persons, prior threatening acts of the young men toward Bright and others, and their general reputation of violence and gang membership. All of these critical witnesses were either known to the defense, or their names had been provided to them, and the trial court's finding of a lack of deficiency in counsel's failure to investigate is inexplicable. On the other hand, the trial court's

finding that prejudice had not been established, despite the compelling corroboration of Mr. Bright's account that the jury never heard, was largely based on the trial court's erroneous legal conclusion that no evidence an "overt act" on the part of the victims was shown at trial. This finding is not supported by competent and substantial evidence – in fact, the evidence elected through the state's own witnesses Mr. Graham and Mr. Lundy, and now through Charity Kemp, unmistakably demonstrates an overt act occurred. This Court should find both deficiency and prejudice and should reverse and remand for a new trial.

A. According to the professional norms of the community and the clear case law, trial counsel was deficient in failing to investigate and present witnesses

"Pretrial preparation, principally because it provides a basis upon which most of the defense case must rest, is, perhaps the most critical stage of a lawyer's preparation." House v. Balkcom, 725 F.2d 608, 618 (11th Cir. 1984). Counsel for Bright provided ineffective assistance of counsel in this basic manner by failing to investigate and present witnesses in support of a self-defense theory. In Mr. Kuritz's file was an April 9, 2008, interview conducted by Bright's prior counsel attorney. The interview mentions Valarie Kemp's name *at least nine times, and also mentions her daughter, Charity Kemp.*[21]

[21] Mr. Kuritz conceded he did not see Bright much, and he "probably" could have seen him more. His billing indicates he saw Bright in jail once for 1½ hours. (12 PCR 1811).

Another note within Kuritz's file indicating that he should have known about several helpful witnesses states:

> Brian, Joe, Maxine. Client knew Lavelle and he was thought to be a small time dealer but was a leader of a large number of people. Lavelle was also associated with Valarie Kemp.

(13 PCR 1946). Again, this information was not read or ignored.

Despite this clear roadmap to Bright's innocence that was *literally at defense counsel's fingertips*, Bright's trial attorneys either failed to read these documents, or read the documents and ignored the names contained therein – either possibility is a grossly deficient performance.[22]

Indeed, Mr. Kuritz agreed at evidentiary hearing that it would have been important to Bright's case to have found witnesses that were in and around the house during the time leading up to the events in question (12 PCR 1751),

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[22] Bright's bill was the "lowest bill" Mr. Kuritz has ever submitted in a death penalty case. (12 PCR 1716.) Mr. Kuritz also conceded he talked to less witnesses in the instant case than he normally does in homicide cases (12 PRC 1718), and had only one box of case material in this case, as opposed to the thirteen boxes he generated in another capital case, Mosley v. State, 2004-CF-6675. (12 PCR 1719.) Mr. Kuritz explained his reduced involvement was because Mr. Nolan, his co-counsel, had been on the case for a while and it seemed he had everything under control, only later to find out it was not the case. (12 PCR 1792-93) Kuritz opined in cross-examination that it was "hard to say" (13 PCR 1877) he was the lead [attorney] in Bright's case, because he "got in late in the game," "at the end of the day." (13 PCR 1882).

established that the victims had a reputation for violence[23] (12 PCR 1747), or that King and Brown had been threatening Bright prior to this incident. (12 PRC 81). Kuritz also explained that he is a firm believer in calling as many credible witnesses as possible to establish a client's innocence:

> Mr. Kuritz: [A]nd once that rule changed [the rule concerning rebuttal closing arguments] there was pretty much no reason to not try to call as many witnesses as possible…if I can add something to my arguments or confirm something I said in my opening or in my cross, then yes, I will.

(12 PCR 1800.) Mr. Kuritz's co-counsel, Mr. Nolan, also wanted to find additional evidence to support Bright's "very plausible self-defense case," and wanted to establish that King and Brown took over Bright's home against his will and that they were "bad characters." (12 PCR 1742.)

Kuritz's testimony, however, also supports an assertion that neither he nor Nolan ever read preceding counsel's documents because he had never heard Valerie of or Charity Kemp:

> Mr. Sichta: You've never heard of Charity or Valerie Kempt, correct?
>
> Mr. Kuritz: Correct.

(12 PCR 1818.) Kuritz did not recall ever speaking with anyone named Brian

[23] Mr. Kuritz says it was Mr. Nolan and RCC's responsibility to find witnesses to establish Brown and King's reputation for violence or specific acts of violence, and that is why he was sending emails to Mr. Nolan asking him if they investigated certain things. (12 PCR 1818.) Regardless of whose job it was, the record is clear many aspects of Bright's case went uninvestigated.

Williams, either. (12 PCR 1844.) In fact, Kuritz only spoke to attorney Michael Bossen regarding Bossen's representation of Bright on two "brief" occasions "maybe" the day before Mr. Bossen testified at Bright's trial. (12 PCR 1703.)

Counsel's failure to perform even a basic investigation of the case (e.g. reading prior counsel's case notes) resulted in their failure to present critical witnesses like Valarie and Charity Kemp at trial – witnesses that blew the prosecution's case completely out of the water while backing up Bright's claim of self-defense in the most intimate and vivid way: by providing a look into the residence just prior to the incident, establishing Bright's state of mind, establishing personal knowledge of Brown and King's reputation for violence and ownership of the firearms, and most crucially, allowing the fact-finder to hear Brown's statements immediately before his death, that he intended to confront Bright about his missing drugs.[24]

If the Kemps and other lay witnesses were presented at trial, the jury would have learned the true nature of the case – that it is a factually-intense self-defense

[24] This failure (as was the failure to investigate and present defense experts) was especially prejudicial because had the defense been armed with this critical information prior to trial, they could have walked it over to the State Attorney's Office and presented the glaring fact to the prosecution that their case against Bright was very weak. This common maneuver often results in dismissal of the charges against defendants, or an agreed upon disposition with a plea to lesser charges. Because of the defense's failure to investigate and present these critical expert and lay witnesses, the defense missed another opportunity to effectively represent their client.

case populated with credible defense experts and lay-witnesses who would lay to waste any "ridiculous" theory the prosecution could think of.[25] Truly, had these witnesses been discovered at the time of trial, the prosecution would never have filed this self-defense case, as the state's tenuous first-degree murder theory would have been no theory at all.

Mr. Kuritz conceded that he rendered a deficient trial performance (12 PRC 1718) even though he adamantly believed in Bright's innocence and that he "never doubted" Bright's version of events:

> Mr. Sichta: And finally, as you sit here today, is it your testimony you still think Bright acted in self-defense?
>
> Mr. Kuritz: Yes.
>
> Mr. Sichta: Does that trouble you?
>
> Mr. Kuritz: Does it trouble me that I believe that?
>
> Mr. Sichta: Does it trouble you that he is on death row based on that opinion?
>
> Mr. Kuritz: Yes.
>
> Mr. Sichta: Um, does it also trouble you that everything that could

[25] Mr. Kuritz testified at the postconviction hearing that he thought the prosecution's case "had holes in it," that he "didn't believe the State's theory at all." (12 PCR 1724-25); that prosecution's argument "makes zero sense," and that he thought the prosecution's theory in general was "ridiculous." (12 PRC 1752). **Conversely, he is troubled Bright is on death row because to this day he believes Bright acted in self-defense**. (13 PRC 1992).

> have been done on his case, like hiring experts of consulting with experts both in the guilt and penalty phase were not done and everything was not presented to this jury?
>
> Mr. Kuritz: I would rather it have been done more thoroughly.

(13 PRC 1991-92).

To be sure, failing to even read documents generated by Bright's prior counsel and attempting to locate witnesses who provided both powerful exculpatory and impeachment evidence is clearly deficient performance, and well below the professional norms in *any community.* See e.g. Blackburn v. Foltz, 828 F.2d 1177, 1183 (6th Cir.1987) (holding that counsel's failure "to investigate a known and potentially important alibi witness" constituted ineffective assistance because "counsel did not make any attempt to investigate this known lead, nor did he even make a reasoned professional judgment that for some reason investigation was not necessary"); Yarbrough v. State, 871 So. 2d 1026 (Fla. 1st DCA 2004); Honors v. State, 752 So. 2d 1234, 1234 (Fla. 2d DCA 2000) (reversed and remanded where appellant's trial counsel was ineffective in failing to secure the attendance of an exculpatory witness in a circumstantial evidence case as it would have cast doubt on the only evidence linking appellant to the crime.)

Deficient performance is not a difficult finding to make here. Yet, the trial court declined to find deficiency due to the mistaken assumption that counsel made a "tactical" decision that (1) he could get enough information in through the cross-

examination of the State's witnesses about Bright's statements and that (2) he concluded that the other testimony would not have been admissible. First, all that counsel was able to elicit through cross-examination was Bright's own post-incident statements regarding his pre-incident fear of the victims. Second, Kuritz it would have been impossible for Mr. Kuritz to determine that any such testimony would have been inadmissible because he had not done the investigation to ascertain what the testimony could be. When counsel never attempted to contact or to have an investigator contact witnesses who his client repeatedly said had valuable information to corroborating his claim of self-defense, it is constitutionally impossible that his omission was "strategic." This Court should reject the trial court's legal conclusion and should find that deficiency was in fact proven.

B. Prejudice

In the context of assessing the prejudicial effect of a failure to investigate multiple witnesses, a court acts unreasonably if it engages in a piecemeal assessment. See Elmore v. Ozmint, 661 F. 3d 783, 868-69 (4th Cir. 2011)(rejecting state postconviction court's adjudication of IAC claims because state court engaged in a piecemeal assessment of prejudice). This Court must evaluate prejudice by looking at the prejudicial effect of counsel failing to present *all* of these witnesses, not just one or two of them.

It would be hard to imagine anything more ineffective and prejudicial than failing to present even Valerie Kemp, Charity Kemp, and Michael Bossen, whose irrefutable testimonies directly support Bright's claim of innocence, and undermine virtually every argument made by the prosecution as to why Bright was guilty. This especially so when Bright did not testify at the trial, forcing defense counsel to present a case of self-defense by other means, or in Bright's case, by, no means at all.

If one also inspects the prosecution's opening statement and closing arguments in Bright's case, it is apparent that the testimonies of the above defense witnesses would have transformed the prosecution's merely passable theory into something that might not now not survive a Stand-Your-Ground-Motion or JOA. See Dausch v. State, 141 So. 3d 513 (Fla. 2014) (vacating Dauch's convictions and sentence of death because the record lacks sufficient evidence of the perpetrator's identity); see also De Groot v. Sheffield, 95 So. 2d 912, 916 (Fla. 1957)("[T]he evidence relied upon to sustain the ultimate finding should be sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached.").

1. Credibility of the Valerie Kemp and Charity Kemp

Credibility findings are entitled to "deference" but not blind acceptance—they still must be supported by "competent substantial evidence." Bell v. State,

965 So. 2d 48, 63 (Fla. 2007); Feldpausch v. State, 826 So. 2d 354, 356 (Fla. 2d DCA 2002) (finding that because there was no conflicting testimony that required postconviction court to assess credibility of different witnesses, postconviction court erred by rejecting testimony of attorney simply because it did not wish to believe him).

Even if the trial court's description of the Kemps' courtroom demeanor were perfectly accurate, it is not reason to find their testimony totally unbelievable. Even if they were "combative, sarcastic," and had a "borderline rude demeanor," this does not provide any basis to believe they simply fabricated numerous detailed accounts and descriptions, most of which were verified by other sources – including the attorney's own interviews prior to trial where he provided Valerie Kemp as a witness. If anything, their courtroom presence indicates that they were their true selves that day in court, not lawyer-coached iterations of themselves. And even if they were frequently unemployed and used illicit drugs on a regular basis, this does not make them unqualified to talk about their observations and relationships with Bright, King and Brown.

There is no reason to suspect that the Kemps had a motive to lie (in fact, one would assume their allegiance was with the deceased, who supplied them drugs and whom Charity dated). Moreover, the women could not have possible been under the influence to the degree that they were unable to accurately recall *any* of

the matters to which they testified. Indeed, the prosecution's cross-examination utterly failed to impeach the Kemp's clear description of Bright's residence, the number of rooms, where the computer was stored, the furniture, etc.

Finally, despite the state's attempts to use a recorded interview of the Kemps by Bright's postconviction investigator as impeachment, the unrehearsed first recording of the Kemp's interview served as powerful *corroboration* that their postconviction testimony was honest, accurate, and not fabricated. (PCR Exhibit 5.) Even the prosecution's own post-hearing memorandum did not go so far as the trial court to argue that the Kemps had *no credibility*.

Although the fallback rule is that this Court should defer to the trial court's findings on competence if competent substantial evidence exists, this Court cannot do so here given the trial court's hasty and complete dismissal of the Kemp's testimony simply because he did not like them. Although the Kemps may be imperfect as human beings, they were truthful human beings and the record and corroborating evidence proves it impossible their testimony was not credible. Indeed, one can imagine the unbelievably powerful effect the Kemps would have had on Bright's jury – testimony literally providing the missing link of what transpired days before the incident – even moments before the incident, completely supporting Bright's passionate proclamation of innocence.

2. Testimony of Michael Bossen and Brian Williams

Further, the trial court improperly concluded that it can disregard the testimony of Michael Bossen and Brian Williams, simply because their names were not specifically mentioned in Bright's 3.851 motion, citing the "good cause" requirement under Rule 3.851 to amend the motion. (10 PCR 1440-41.) Certainly where Bright's claim is that counsel failed to investigate the case and present evidence that he was in genuine fear of the victims and that he had good reason to be so he is entitled to provide evidence of same at the evidentiary hearing.

Moreover, the defense provided the parties with notice of what witnesses would be testifying at the postconviction evidentiary hearing, and neither the court nor the state objected to these witnesses testifying on these matters. Indeed, Bossen **did testify at trial**, so his involvement in the case has been known to all the parties for years; it would have been pointless exercise for Bright to have explicitly stated in his 3.851 motion that counsel should have called Michael Bossen to support a claim that not counsel was ineffective in failing to call Bossen, but that counsel was ineffective in failing to adequately present a self-defense claim.

3. This evidence would be admissible at Bright's new trial

It is appropriate for courts to "give wide latitude in allowing evidence to support a theory of self-defense." Singh v. State, 36 So. 3d 848, 851 (Fla. 4th DCA 2010). Nonetheless, the trial court, based on the assumption that no evidence was

presented at Bright's trial of an overt act of the victim(s) against Bright, found that all of this evidence would have been inadmissible. However, even "the slightest evidence" of an overt act by the victim is sufficient to allow admission of the victim's reputation for violence, as stated by the court in Quintana v. State:

> We are further persuaded by the line of cases holding that the fact that a claim of self-defense may be **tenuous** should not bar introduction of evidence of the victim's reputation for violence or of his prior specific acts of violence, if such evidence will explain or otherwise give "meaning, significance, or point to, the conduct of the deceased at the time of the killing." Hunter v. State, 378 So.2d 845, 846 (Fla. 1st DCA 1979). See also Anderson v. State, 362 So.2d 361 (Fla. 4th DCA 1978). As this court has previously stated, where there is even the "**slightest evidence**" of an overt act by the victim "which may be reasonably regarded as placing the accused apparently in imminent danger of losing his life or sustaining great bodily harm," **all doubts** as to the admissibility of evidence bearing on his theory of self-defense must be resolved in favor of the accused. Hawthorne v. State, 377 So.2d 780, 787 (Fla. 1st DCA 1979) (e.s.).") (reversing first-degree murder conviction, because defendant erroneously precluded from offering reputation and specific-act evidence relative to self-defense claim).

452 So. 2d 98, 101 (Fla. 1st DCA 1984)(emphasis added).

The trial court's conclusion that there was no evidence of an overt act is clearly unfounded, as two witnesses testified at length about Bright's account of how Brown pulled a gun on Bright, and then King took possession of the gun, and the gun was discharged during a struggle between Bright and King. These witnesses presented Bright's account, which was presented by the *prosecution at trial* as substantive evidence, and the jury relied at least in part on these statements in reaching their verdict because without them, there was no evidence that Bright

was responsible for King and Brown's death. Thus, the jury **did** hear evidence through Bright's very own prosecution that the victims committed an overt act against Bright by threatening him with a firearm, and thus the threshold was laid for evidence of prior threats, violence, and reputation of the victims to have been presented. Even the prosecution conceded through its argument in its post hearing memorandum that evidence of self-defense was presented at trial through Lundy and Graham. (9 PCR 1256.) Kuritz also testified that he thought he had gotten in evidence of self-defense, including the fact that a gun was utilized by the victims, through the cross-examination of Graham. (13 EH 1901-05, 1907). Indeed, the trial court's *own order finds that Kuritz presented evidence of self-defense* to the jury through Graham, Lundy, and Edgerton, then amazingly turns around and finds that same evidence did not demonstrate the "slightest" evidence of an overt act. (10 PCR 1445.) This finding is plainly incorrect and the record is clear it is not supported by competent and substantial evidence.

a. The victims' reputation for violence (Valerie Kemp; Charity Kemp)

As helpfully articulated by the court in Berrios v. State:

> Evidence of the dangerous character of the victim is admissible to show, or as tending to show, that the defendant [458] acted in self defense. See Smith v. State, 606 So. 2d 641, 642 (Fla. 1st DCA 1992); see also § 90.404(1)(b), Fla. Stat. (1999). The victim's character becomes relevant to resolve an issue as to the reasonableness of the defendant's fear at the time of the incident. See Lozano v. State, 584 So. 2d 19, 23 (Fla. 3d DCA), rev. denied, 595 So. 2d 558 (Fla. 1992).

> Evidence of the victim's reputation is admissible to disclose his or her propensity for violence and the likelihood that the victim was the aggressor, while evidence of specific acts of violence by the victim is admissible to reveal the reasonableness of the defendant's apprehension at the time of the incident. See Smith, 606 So. 2d at 642-643; State v. Smith, 573 So. 2d 306 (Fla. 1990)("A defendant's testimony that he or she knew about specific acts of violence committed by the victim is relevant to show . . . the reasonableness of the defendant's apprehension to support a self defense claim. . ."). Before a defendant may offer either type of character evidence, however, he or she must lay a proper predicate demonstrating some overt act by the victim at or about the time of the incident which reasonably indicated to the defendant a need for action in self defense. See Smith, 606 So. 2d at 643; Quintana v. State, 452 So. 2d 98, 100 (Fla. 1st DCA 1984); Williams v. State, 252 So. 2d 243, 247 (Fla. 4th DCA), cert. denied, 255 So. 2d 682 (Fla. 1971).

781 So. 2d 455, 457-458 (Fla. 4th DCA. 2001).

Charity and Valerie Kemp provided exactly the type of testimony that is contemplated behind the rational for allowing reputation evidence to be proven by hearsay, as explained by Ehrhardt, "[W]hen many people in the community discuss and compare an issue, it is felt that the resulting community opinion is trustworthy." Charles W. Ehrhardt, Florida Evidence § 404.5, at 201 (2009 ed.). The Kemps described a community where gossip and discussion about the good, the bad, and the ugly were commonplace. This is the type of dialogue inside a neighborhood that lays the foundation for proving reputation.

The trial court oddly seemed to disregard the reputation evidence presented by the Kemps because it was based on hearsay (10 PCR 1437), but hearsay is the proper and only way to prove evidence for reputation for violence, per Ehrhardt.

The trial court erroneously found this evidence inadmissible.

Reputation evidence may be laid for **violence** (Smith v. State, 606 So. 2d 641, 642 (Fla. 1st DCA 1992); Arias v. State, 20 So. 3d 980, 983 (Fla. 3d DCA 2009)), **aggressiveness** (Id.; Dwyer v. State, 743 So. 2d 46, 47 (Fla. 5th DCA 1999)), **being in a gang** (K.L.T. v. State, 561 So. 2d 338, 338-339 (Fla. 5th DCA. 1990); Lusk v. State, 498 So. 2d 902, 905 (Fla. 1986)), and **carrying guns** (Dean v. State, 843 So. 2d 926, 927 (Fla. 5th DCA 2003)), among other things.

In addition, it should be noted that the rules are more permissible in allowing this type of evidence if it has been shown that the defendant was aware of the victims' reputation, which is not required for reputation evidence. See Dias v. State, 812 So. 2d 487, 490-491 (Fla. 4th DCA 2002)("At trial, appellant claimed self-defense and defense of burglary. He testified that he knew the victims were members of motorcycle gangs and that Verret had a violent nature. Therefore, when he heard Verret outside the music room speaking belligerently with his wife, he was afraid for the both of them. The trial court denied a motion for judgment of acquittal, and the jury found appellant guilty of two counts of attempted second-degree murder.").

b. Evidence relevant to the reasonableness of Bright's fear of these two persons

- **Brown's statement of intention to confront Bright in the early morning hours of his death (Charity Kemp)**

Florida Statutes Section 90.803(3) sets forth the exception that an out of court statement offered to prove the truth of the matter asserted, i.e., hearsay, is admissible if it consists of a statement of "Then-Existing Mental, Emotional, or Physical Condition." That exception is delineated as follows:

> (a) A statement of the declarant's then-existing state of mind, emotion, or physical sensation, including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health, when such evidence is offered to:
>
> 1. Prove the declarant's state of mind, emotion, or physical sensation at that time or at any other time when such state is an issue in the action.
>
> 2. Prove or explain acts of subsequent conduct of the declarant.

If Brown told someone that he intended to – in the middle of the night – confront the man who would ultimately kill him with the accusation that the man had stolen Brown's drugs, this would be incredibly relevant to the question of whether Bright's statement that he was acting in self-defense was truthful. Brown's statement to Charity Kemp was a revelation of his "then-existing state of mind" and a statement of his "plan and motive" to confront Bright. See D.M.L. v. State, 976 So. 2d 670 (Fla. 2d DCA 2008)("[Statement] was offered to prove the alleged victim's state of mind – that he was looking for defendant – or to explain his swinging a bat at defendant, which was relevant to the defendant's claim of self-defense."); see also Combs v. State, 133 So. 3d 564 (Fla. 2d DCA 2014) ("At defendant's trial for two counts of masked robbery, the trial court erred by

sustaining hearsay objections to out-of-court statements two men made just before the robbery to support the defense theory that they planned and committed the robbery together. The statements were admissible under the then-existing state of mind hearsay exception."); Wolfe v. State, 34 So. 3d 227, 232-233 (Fla. 4th DCA 2010)("For example, the victim's state of mind may be relevant to an element of the crime," admitting a letter under Section 90.803(3) that the victim wrote stating his intention to reconcile with his wife)(citation omitted); Brooks v. State, 787 So. 2d 765, 771 (Fla. 2001)("[O]rdinarily, a victim's state of mind is not a material issue, nor is it probative of a material issue in a murder case. However, there are some exceptions to this general rule.")(citation omitted).

- **Bright's statements to various persons regarding his fear of the victims (Singleton; Williams; Teneka Bright; Valerie Kemp)**

The same hearsay exception of "Then-Existing Mental, Emotional, or Physical Condition" is also relevant to Bright's statements regarding the fear that he felt given the victims' prior actions and threats; in fact, proving the defendant's reasonable apprehension of the victim(s) in a self-defense case is a crucial application of this hearsay provision. Section 90.803(3), Florida Statutes; Smith, 606 So. 2d at 643.

Smith v. State explains, "This result does not offend the hearsay rule, because the evidence is not offered to prove the truth of the matter asserted, but is

offered to show only that the defendant believed those incidents had occurred. Under the circumstances, the trial court erred in excluding the proffered evidence relating to specific instances of violent conduct by Newton that had occurred in appellant's presence or had been communicated to him prior to the stabbing." Id. (citations omitted).

Further, the instances described were close in time to the incident in question, and are relevant to showing Bright's reasonable apprehension of fear. See Wilson v. State, 971 So. 2d 963, 965 (Fla. 4th DCA2008)("More specifically, he proffered testimony regarding three prior incidents: (1) six months earlier, there was a verbal altercation between Wilson and the youths; (2) three months after that, they tried to entice Wilson into a fight, using a highly provocative racial epithet; and (3) they had driven past Wilson's house every day for the entire six months leading up to the incident in question. Nevertheless the trial court granted the State's request and excluded Wilson's proposed evidence, allowing him to renew the issue at trial. Wilson was convicted by the jury, who did not hear his evidence of the history between him and the youths. We reverse for a new trial.").

In its order (10 PCR 1453-55), the trial court ignored the arguments and caselaw cited above and ruled in a perfunctory manner that these pre-incident statements by Bright would have been inadmissible as self-serving hearsay. This fails to consider the obvious fact that at the time the statements were made, they

were not self-serving for Bright because he had not killed these men and thus had no reason to manufacture a story about him being genuinely afraid of them, other than the reason that he truly did fear them and needed help to protect himself and to rid his house of these persons. This is precisely the type of hearsay statement allowed under the "Then-Existing Mental, Emotional, or Physical Condition" exception to the hearsay rule.

- **Testimony that the victims sold drugs out of Bright's house, and that Bright had been trying to get them out by contacting the police (Valerie Kemp; Charity Kemp; Singleton)**

At trial, the prosecution presented Bright's prior statements regarding the victims taking over Bright's house, running drugs out of it, refusing to leave, and threatening Bright. After presenting this testimony (presumably to get past a JOA), the prosecution then proceeded to call Bright's statements to these witnesses manufactured in light of impending prosecution, and suggested that the victims were innocent, invited guests. All of this served to make the context of the dynamic of the relationship between Bright and these unwanted intruders in his house absolutely relevant to his claim of self-defense. The fact that they were running a crack house should have given him much more reason to fear retribution should he cross them than if they were merely having a friendly chess game, as the prosecution suggested at trial. See Dean, 843 So. 2d at 927 ("Dean's entire defense was that he shot and killed the victim in self defense. According to Dean, the

victim was known as a drug dealer in the community and had a reputation for violence.").

- **Testimony that the victims routinely carried guns (Valerie Kemp; Charity Kemp)**

Testimony was also presented that Bright was aware that they carried these guns around, thus tying this fact to Bright's reasonable apprehension of both the victims' capacity and opportunity for violence. See Dean, 843 So. 2d 926 ("To support that part of its position concerning the victim's reputation, the defense called as a witness, Robert Gross, a customer of the Bellots. He testified that he had seen weapons at the victim's apartment, including a handgun and shotgun. He further stated that the victim always kept a weapon close by."); Williams v. State, 982 So. 2d 1190, 1193 (Fla. 4th DCA 2008) (Here, defense counsel attempted to elicit testimony from the defendant that he had seen the victim with a gun on two prior occasions and knew the victim had a reputation for carrying a gun.).

In the oral argument for Bright's direct appeal, concern was expressed by this Court for the fact that no evidence had been presented proving that the guns, particularly the 9 millimeter that was fired during this altercation, in fact belonged to the victim. Bright, 90 So. 3d at 263 n.6 ("the record fails to demonstrate that the nine-millimeter handgun and the assault rifle located in Bright's yard belonged to either of the victims.") We know now, without a doubt, the weapons belonged to the victims- but Bright's trial counsel failed to reach out to witnesses that Bright

had listed to find this fact out. Instead, they assumed the victim's owed the weapons.

- **Testimony that the victims ran another drug house in the same way that they did Bright's house (Valerie Kemp)**

This is classic reverse-Williams rule testimony to show that, given the victims executed this exact scheme on a prior occasion – i.e., taking over Valerie Kemp's house, bullying her, and using it as a trap house to sell drugs – it makes it much more likely that they did so again and that Bright's account is truthful.

- **Testimony regarding Bright's fear in response to Copeland/King's visit to Singleton's house to confront Bright (Singleton)**

This, rather than being hearsay to prove Bright's then-existing state of mind, is direct testimony of Bright exhibiting visible signs of fear in response to the actions of Copeland, who was acting in concert with King. See Antoine v. State, 138 So. 3d 1064 (Fla. 4th DCA 2014) ("Although the reputation evidence pertained to Hammond and not to Thompson, the two men acted in concert and the reasonableness of Antoine's conduct must be evaluated by his response to both men.").

- **Opening the door**

The prosecution also created an additional reason for authorizing Bright to present evidence related to the victims' violent character and other nefarious activities by opening the door through the presentation it made through the jury.

Specifically, the prosecution asserted that Bright "wants you to overlook the fact that these two innocent victims were there by his invitation" and "posed no threat to" Bright. (9 R 310; 11 R 728.) The prosecution challenged, "Weren't the victims invited guests? What evidence was there that they broke in? Don't we have evidence of really drugs?" (11 R 751.) All of this allowed the jury to be left with a false impression regarding the character and lifestyle of these victims, and the defense could and should have rebutted this with the evidence cited in this section.

c. Conclusion

Absolutely no evidence whatsoever was introduced at trial concerning any of the above testimonies by these new defenses witnesses. Undeniably, the picture painted of the truth now stands in stark contrast to what was presented at trial – Raymond Bright is innocent of these crimes.

GROUND TWO ON CROSS

COUNSEL WAS INEFFECTIVE IN THE GUILT PHASE IN FAILING TO ADEQUATELY IMPEACH DETECTIVE BROOKINS IN VIOLATION OF HIS FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES AND FLORIDA CONSTITUTIONS

As was argued in the claim immediately above and as was conceded by the defense attorney during the postconviction hearing, the jury's understanding of this forensic material found in Bright's home was the central focus of this trial for both the prosecution and the defense. The defense team's deficiency in not hiring experts, which was thoroughly argued in the claim above resulted not only in Mr. Bright being prejudiced by the absence of defense experts from testifying at his trial, it also resulted in prejudice because defense counsel was not adequately prepared to cross-examination that state's evidence technician Brookins. See Kegler v. State, 712 So. 2d 1167 (Fla. 2d DCA 1998) (finding appellant met both prongs of Strickland and reversing appellant's first-degree murder and armed robbery conviction because defense counsel failed to impeach a state witness).

I. Brookins' testimony on direct examination

Brookins was the evidence technician who processed the scene of the crime. Brookins testified to the jury that "I can say that in the instance with the individual in the chair and his head against the wall and blood radiating all around it that, yeah, I'm pretty sure that's where that one took place. And the same with the

couch, although it was a larger area." (10 PCR 488.) Given the damning nature of this opinion, and particularly given that the state did not have the lead detective testify at the trial, defense counsel should have known that Brookins was the most important state witness to be impeached if the defense were to undermine the state's theory of a surprise attack while the victims were asleep or in repose.

II. Deficiency

The Defendant's position on this sub-claim is similar to the first one—that the Court focused on whether Kuritz made a skillful use of his trial skills in conducting this cross-examination on the fly after he was assigned it last minute by Nolan and without any of the critical evidence abuse that destroyed the prosecution's theory of the case, as opposed to comparing the cross-examination with what *might have been done*, had he consulted with experts during his preparation for cross-examination and with the knowledge that he could call them to rebut Brookins based on her inadequate investigation and unfounded conclusions. Again, this ad-hoc rationalization is improper and therefore the court's finding is contrary to law. See Harrington, 131 S. Ct. at 790 and Wiggins, 539 U.S. at 526-27. Again, this sub-claim must be re-examined under Bright's specific allegation: deficiency based on failure to investigate.

The failure of the defense team to consult with forensic experts in preparing for the cross-examination of the State's most important forensic witness resulted in

another missed opportunity to undermine the State's central theory: that these victims were killed in their sleep, there was "no evidence of a struggle," and the attacks began and ended on the couch (King) and recliner (Brown). The fact that the jury did not hear this powerfully exculpatory challenge to the State's expert undermines the jury's verdict and dictates that Mr. Bright be granted a new trial.

III. Prejudice occurred where Brookins' cross examination was not as it should have been due to counsel's failure to properly investigate the case resulting in a constitutionally deficient cross examination that was given at the trial

A mere recital of the testimony provided by Knox and Johnson shows that forensic evidence existed to obliterate the state's theory, advanced primarily by Brookins, that both victims remained stationary in a reclined position throughout the fight. However, given that the defense team failed to hire a crime scene constructionist, Brookins was never confronted with contradictory evidence when she made the following statements related to the blood, and therefore the incident, being basically limited to the areas where the two bodies were found:

- "But did you note any blood on the floor in areas other than the area right around the couch or right around the chair?" "No, I did not." (10 R 491)

- In State Exhibit 45 (left end table), there was some blood spatter on paper. Didn't see any blood on the wall. If any, it was minimal. (10 R 454)

- State Exhibit 62 (also of left end table) shows envelope with blood on it. Besides that drop, not much if any other blood in that area, other than on the right side of the lampshade. (10 R 460-61)

Even without a crime scene reconstructionist, a close examination of the JSO photographs should have provided ample means to contradict those statements, and certainly no competent forensic expert would have missed them, had one been hired. Blood spots appeared all over that room – on both end tables, on the television, on the lamp shades, the speakers, on the pizza box, the chess piece, the Plexiglass near the back door, and most importantly all over the door frame leading into the kitchen. (PCR Exhibit 23, Slides 33, 43-44, 56-58, 60-61, 65-67.) Although at one point in her testimony mentioned the plexiglass (10 R 448), the defense missed a brilliant opportunity to confront her with the powerful evidence of blood popping up in two areas where, according to the state, neither victim ever was after the attack began.

On the contrary, Brookins was allowed to opine that both victims were likely attacked in the positions where there bodies were found without ever moving from that location.

> I can say that in the instance with the individual in the chair and his head against the wall and blood radiating all around it that, yeah, I'm pretty sure that's where that one took place. And the same with the couch, although it was a larger area.

(10 R 488.) The best the defense could muster was to have Brookins concede that it was theoretically possible that the victims were up at some point during the struggle, but the defense, having not hired an expert to evaluated Brookins'

findings and review her work, missed the mountain of contradictory evidence that Knox and Johnson provide:

- The blood pattern above the couch indicates five to six different points of convergence, indicating that King was moving all around the couch during the struggle. (16 PCR 2629, 31-32; PCR Defense Exhibit 23, Slides 35, 37.)

- The blood pattern above the couch indicates that King's head was above the couch when he was being struck with the hammer (16 PCR 2610-11; PCR Exhibit 23, Slide 25)

- The blood covering the bottom of King's socks indicate that he standing was on top of the couch during the struggle. (16 PCR 2611, 15-17; PCR Defense Exhibit 23, Slide 26)

- The blood on the Plexiglass was dropped blood rather than cast off blood, meaning that the blood source would have been directly above it, and that the absence of a trail leading to the Plexiglass indicates that the blood was likely from a bleeding person rather than a dripping hammer. (16 PCR 2597, 2651)

- Brown's underpants were pressed down in exactly the way they would have been had he been pushed into the recliner from over the left armrest. (16 PCR 2559, 2641, 2658)

- The blood pattern above the recliner indicates two points of convergence, with one being higher than the other, indicating that Brown was not in a state of repose when the higher convergence pattern was made. (15 PCR 2521-23)

- The blood on the outside frame of the kitchen doorway was "impact spatter," its source was directly in front of it and only a short distance away, and there is no possibility that that blood was deposed by a person sitting or lying upon the recliner (or the couch). (16 PCR 2645)

Had Brookins been challenged with this mountain of evidence of a violent

and transitory struggle throughout that family room, Brookins would have had no adequate response by which could have sent the jury to deliberate with that theory that the victims had been attacked in their sleep without ever rising from the recliner/couch.

Further, Brookins' mistaken conclusion that blood pattern analysis could not be done would have been challenged, and a common sense explanation of that science, such as was presented by Knox and Johnson, would have been highly persuasive to a jury, and would have allowed the defense to have thoroughly impeached Brookins' competence in her failure to do any sort of analysis of the blood pattern at this scene, other than drawing the strings for the cast off blood on the ceiling.

Further points the defense should have made regarding the thoroughness of Brookins investigation should have been her failure to include any room measurements in her diagrams and the clear goof up with moving the pizza box around and photographing it without any record to assure that the location of the box (which had a blood stain on it) in the manipulated photo was not mistaken to be the original location of the box.

Instead, all the defense was able to do on cross examination was to challenge Brookins for (1) not looking for fingerprints on the victims' bodies (10 R 480), (2) not trying to do touch DNA on the weapons (10 R 485), (3) not searching for

additional blood in other areas of the house with luminal lights (10 R 482), and (4) not testing some of the blood to determine which victim it belonged to. (10 R 487-88.) As to number (3), the defense did not need to discover blood invisible to the unaided human eye because it could have used blood plainly visible in the state's own photographs to blow the state's theory out of the water. Specifically if the defense had only latched onto the blood around the kitchen doorframe and the blood on the Plexiglass near the back door the state would have been forced to abandon its central theory in this case, without which their ability to disprove self-defense beyond a reasonable doubt would have been neutralized to the point of impotency.

In summation, this cross examination was less than a shadow of the full barrage that should have awaited Brookins and that would have been essential in derailing the state's unfounded and unsupportable theory of an attack in the victims' sleep.

As Kuritz noted during the evidentiary hearing, an expert could have been hired at least to examine things, and then decide afterwards whether to use him/her at trial – at the very least it can help to prepare for cross examination. (12 PCR 1758-59.) Unfortunately, the defense team did not take advantage of that reality, and Mr. Bright thereby received deficient representation in the cross examination of the state's most crucial witness. Finally, it must be concluded that this

inadequate challenge to the central piece of the state's evidence – when such a strong a truly devastating challenge could have been raised – undermines confidence in the jury's verdict and entitles Bright to a new trial.

GROUND THREE ON CROSS

COUNSEL FOR BRIGHT WAS INEFFECTIVE IN FAILING TO REMOVE JUROR "M" DUE TO HER ACTUAL BIAS RESULTING IN VIOLATIONS OF BRIGHTS FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS UNDER THE U.S. CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLA. CONSTITUTION

In Florida, a postconviction claim of ineffective assistance of counsel relating to jury selection requires a finding that a juror served who had actual bias against the defendant. Carratelli v. State, 961 So. 2d 312 (Fla. 2007). A new trial is required here, as a biased juror sat on Bright's jury, unconstitutionally denying Bright his Sixth Amendment right to a fair and impartial trial and establishing prejudice under Strickland. See Titel, 981 So. 2d at 658("if the statement, without rehabilitation, would justify a 'for cause' challenge, then this constitutes 'actual bias'").

In Bright's jury selection, the defense attorney posed several questions related to the Defendant's constitutional right to remain silent during the trial. (8 R 172-76.) The defense attorney went row by row with the jurors to learn their opinions, and Juror "M," who ultimately served as the seventh juror in the trial, stated that she would think a "tiny bit" that the Defendant was hiding something if

he did not testify. (8 R 173; 9 R 275.) The defense attorney thanked Juror "M" for her candor, and then asked the rest of the panel if anybody else thought "just a tiny bit" that the Defendant may be "hiding something" if he did not testify, but no other jurors indicated that they felt that way. (8 R 173.) One person on the panel, Mr. Mabb, stated that he would like to hear from the Defendant, but the defense attorney readdressed Mabb and Mabb gave a very succinct and clear affirmation that the burden was on the prosecution to prove the case beyond a reasonable doubt. (8 R 173, 175-76.) On the other hand, neither the defense attorney, the state, nor the Court ever asked a follow-up question with Juror "M" to attempt to rehabilitate her clear statement of bias against the Defendant. (8 R 173 – 9 R 259.) Although Mabb was later challenged for cause by the defense and stricken from the jury panel, no such challenge was made against Juror "M", as the attorney appears to have completely forgotten about the candid response given by her. (9 R 262-63.) Further, the attorney failed to remove Juror "M" with a peremptory strike, even though he had six of ten peremptory strikes remaining when he accepted the jury. (9 R 262-63.)

I. Deficient performance

In Bright's case, defense counsel readily admitted that Juror "M" was biased against his client because she stated that she would hold it against Bright if he did not testify – and at the time of jury selection, counsel for Bright knew that

he was not going to testify, and Bright *did not testify.* Despite this clear bias, counsel inexplicably performed below professional norms and failed to move to strike this juror for cause. This is grossly deficient conduct. Davis v. State, 892 So. 2d 1073 (Fla. 2d DCA 2004). Mr. Kuritz testified at the postconviction hearing he "absolutely" agrees that if he leaves a person on a jury that holds it against your client if he does not take the stand this constitutes be reversible error. (1 PCR 154.) Kuritz conceded he had a problem with Juror "M" and the burden of proof in Bright's case. (1 PCR 157.) However, when it came to moving to strike Juror "M," Kuritz said there "must have been a reason I chose to keep her on there." (1 PCR 157.)

Defense counsel's post hoc rationalization for his decision for not striking this juror – that he thought she was a good juror otherwise because he "thinks" she was a 3 out of 5[26] on the death scale, and she had some other "redeeming characteristics"[27] -- cannot be taken seriously, and must be viewed as a post rationalization of an oversight, rather than some well-thought out decision. The trial court erred in its unjustified acceptance of defense counsel's speculation as to why he *might have* kept a juror who stated such clear prejudice.

[26] Which means she was middle of the road as to her views on the death penalty, which is certainly not as good as somebody that is a 1 or a 2 on the scale. This reason cannot be considered realistic in deciding whether counsels rationalize for retaining juror "M" was strategic.

[27] Mr. Kuritz could not provide a single redeeming characteristic.

II. Prejudice

The trial court's order seems to acknowledge that the court recognized that, had defense counsel moved to strike Juror M for cause, it would have been necessary to grant that challenge (e.g., citing Hamilton v. State, 547 So. 2d 630, 632-33 (Fla. 1989), for the proposition that any expression of equivocation by a juror about the Fifth Amendment right to remain silent requires that the juror be dismissed for cause). (10 R 1535.) However, the trial court erroneously drew the conclusion that the juror's explicit statement – that she would think that Bright was hiding something if he did not testify – did not prove that she was biased. Although not explicitly stated by Carratelli, it appears from its progeny of cases that the "actual bias" standard is primarily about shifting the burden of proof, i.e., rather than the state having to prove beyond a reasonable doubt that the juror was not biased, in postconviction the defense has to affirmatively prove from the face of the record by a preponderance of the evidence that the jury was biased. However, proof is not an issue in the case at hand. Juror "M" came right out on the record and stated her biased opinion, and the trial court erred in disregarding her sworn admission of some degree of bias.

III. Conclusion

The trial court's erroneous conclusion that actual bias was not apparent from the record should be rejected by this Court, and a new trial should

accordingly be awarded to Mr. Bright.

GROUND FOUR ON CROSS

THE CUMULATIVE ERROR RESULTANT FROM ERRORS IN BRIGHT'S CASE RESULTED IN AN UNFAIR TRIAL IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE U.S. CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLA. CONSTITUTION

The cumulative effect of the errors committed in Bright's case resulted in prejudice, even if the errors, viewed individually, did not. As such, Bright's case must be reversed and remanded for a new trial. See Suggs v. State, 923 So. 2d 419, 441 (Fla. 2005)(stating the cumulative effect of evidentiary errors and allegations of ineffective assistance of trial counsel will be considered together); Simmons v. State, 105 So. 3d 475, 503 (Fla. 2012); Robinson v. State, 95 So. 3d 171, 177 (Fla. 2012); Franqui v. State, 59 So. 3d 82, 98 (Fla. 2011).

I. The prosecution's case would have been completely discredited

The state was unable to produce any witnesses to the murder, a confession, or even competent substantial evidence that supported their inference that Bright murdered these people in their sleep (and ignored the physical evidence that refuted their theory). The prosecution had to rely on predominantly two things- Brookins testimony about her interpretation of the crime scene evidence, and their own overzealous opening statements and closing arguments – both riddled with inconsistencies, speculation, and ignorance of the evidence. Indeed, the pictures

taken at the crime scene that tended to exculpate and support Bright's theory of self-defense were not shown to the jury. Armed with these defense witnesses' testimony and decisive evidence above, the defense could have made the prosecution's theory of guilt against Bright look even more "ridiculous" than Bright's counsel believed it to be.

The prosecutions arguments were the following, which were all refuted by the evidence at Bright's postconviction hearing: (1) Bright was lying to Mr. Graham and Mr. Lundy[28] that he acted in self-defense and did so because he was accused of stealing drugs and threatened (10 R 690) (refuted by Charity Kemp); (2) Bright got up in the middle of the night and bludgeoned Brown and King to

[28] The prosecution introduced witnesses Mr. Graham and Mr. Lundy at trial for the sole purpose of eliciting statements Bright made to them after the incident. Both witnesses testified that Bright told them he acted in self-defense. However, the prosecution inferred Bright's statements were fabricated to cover up their theory that he killed Brown and King in cold blood. Had Valarie and Charity Kemp been presented at trial, the prosecution's case crumbles even more. Not only does their testimony add credence to Bright's statements to Lundy and Graham, it weakens any argument by the prosecution that Bright somehow murdered two people in cold blood, then made up some wild self-defense story about Brown threatening him with a gun initially.

Indeed, Charity Kemp's testimony was the one of the prosecution's Achilles heel (with Valarie Kemp being the other), as it corroborated the fact that Brown's intent was to confront Bright moments before his death, and Brown was widely known to carry the exact same gun Bright said was used to threaten him prior to Bright acting in self-defense. This testimony is insurmountable to the prosecution, as it would have provided the jury with a glimpse of what occurred immediately before the incident – a violent gun-wielding trespasser who stuck a gun in Bright's face and threatened to kill him in his own home.

death while they were sleeping[29] (13 PCR 1966) (refuted by Charity Kemp, Dr. Buffington, Mr. Knox, Ms. Johnson); (3) the gunshot residue and bullet in the wall of Bright's home was fired by a gun on a different day than the incident in question[30] (6 R 747) (refuted by Valerie Kemp, Mr. Knox, and Ms. Johnson; (4) King and Brown were "innocent" victims (9 R 310; 11 R 728) (refuted by Charity and Valerie Kemp); (5) King and Brown were invited guests into Bright's home (6 R 728) (refuted by Charity and Valerie Kemp); (6) Bright had time to make up a story (6 R 691) (refuted by Mr. Bossen); (7) Bright "hid" and did not turn himself in (6 R 679-680) (refuted by Mr. Bossen); (8) No evidence of a struggle (4 PCR 690) (refuted by Valerie Kemp, expert(s) Knox and Johnson); (9) King and Brown "laying essentially where they were found, " and "It's absolutely clear Brown was killed right there in that chair" and "didn't move from that position" (6 R 682, 685) (refuted by Charity Kemp, and expert(s) Knox and Johnson); (10) King's shoes "are sitting here perfectly besides each other" and "haven't moved at all" (6 R 683)

[29] This was the prosecution's central and most repeated argument in this case, which would have been severely undermined with Charity Kemp's testimony.

[30] The prosecution understood that if the jury believed that a gun was fired during the incident in question, that fact would corroborate Bright's statement that after he was a victim of Brown's aggravated assault, a struggle for the weapon ensued, where by it was discharged, fired again but jammed, and discarded. So, the prosecution made up another story, not supported by the evidence, that the gun was possibly fired on a different day. Without having Valerie Kemp's testimony (or hiring a GSR expert above), defense counsel was powerless to defend this statement.

(refuted by state's own pictures); (11) Brown had no blood anywhere except where he was found (4 PCR 684-85) (refuted by expert(s) Knox and Johnson- blood on kitchen wall, plexiglass, table, and chess piece); (12) Bright's "self-serving story does not match the physical evidence in any way, shape or form," (6 R 690) (refuted by Valerie Kemp, and expert(s) Knox and Johnson; and (13) Bright does not own his home (6 R 733) (refuted by Mr. Kuritz and the foreclosure exhibit introduced into evidence at the postconviction hearing).

The cumulative effect of the errors committed in Bright's case resulted in prejudice, even if the errors, viewed individually, did not. As such, Bright's case must be reversed and remanded for a new trial. See Suggs, 923 So. 2d at 441. In Bright's case, there can be no doubt that individually and cumulatively, the multiple errors prejudiced Bright's trial, as only a fraction of what was available was presented to the jury. Counsel's deficient performance left Bright in a trial without the most important exculpatory evidence to his case – experts and witnesses to explain the crime scene and demonstrate that everything he had been saying the whole time was the truth – that he acted in self-defense.

II. **What the jury heard at trial pails in comparison to what was presented at the postconviction hearing.**

At trial, the jury heard:[31]

[31] This is separate and apart from the prosecution's multiple inaccurate arguments in opening and closings that have been thoroughly discredited by various defense experts and witnesses, as explained in prior claims in this memorandum.

- Besides blood on the envelope found on the table, there was not much blood in that area at all (Brookins, 10 R 461)[32]

- Brown's attack took place in the chair, and King's attack took place on the couch (Brookins, 10 R 489)

- The evidence would be consistent with Brown sitting on a recliner or falling back on a recliner and a man comes up to him and hits him with a hammer over and over and Brown attempts to defend himself until he finally succumbs to the final blow (Arruza, 9 R 385)

- There "might" have had some movement with the parties (Brookins, 10 R 489)

- There was no evidence of a struggle in any other room other than the family room. (Brookins, 10 R 491)

- Besides the family room, the rest of the house did not look disturbed the way it did (Brookins, 10 R 491)

- Brookins could not provide any relevant formal trajectory because of the construction of the walls was not conducive to blood spatter analysis (Brookins, 10 R 491)

- King had "a trace" of cocaine and "a trace" of breakdown product of cocaine called benzolecgonine. It was recent ingestion – minutes to hours. (Scheuerman, 10 R 416, 420)

- Cannot say who was the aggressor, but there was some struggle (Arruza)(9 R 388)

- The blood on the walls near the couch was consistent with someone being on the couch when they are slinking there arm back (Brookins, 10 R 466)

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[32] Brookins missed the blood on the chess piece and the plexiglass, and so did defense counsel.

III. <u>In postconviction, Bright presented a different picture of what the jury *could have heard:*</u>

In his postconviction evidentiary hearing, Bright presented evidence establishing that:

- Blood in the kitchen entryway *could not have come* from Bright hitting Brown in the chair or King on the couch. Not consistent with the impacts occurring from the recliner, as you "never" see small impact drops (like the ones found in the kitchen entryway) go more than a couple feet). (Knox)(16 PCR 2645)

- Brown repeatedly would wave his gun in front of Bright's face "every time" he would talk to Bright, committing aggravated assaults against Bright in the past.[33] (Graham)(13 PCR 2043)

- King was not killed while asleep in the sofa. (Knox)(16 PCR 2666)

- Brown was not killed while asleep in the recliner (Knox)(16 PCR 2667)

- It is "not conceivable" that Brown and King attacked in their sleep. (Knox)(16 PCR 2667)

- Bright called an attorney almost immediately after the incident on multiple occasions. That attorney told him to visit his office before he turned himself into the police. (Bossen)(12 PCR 1703-04)

- Wound on King's hands consistent with him striking a blow to somebody. (Scheuerman)(12 PCR 1686)

- Does not know whether King was asleep, but in most people cocaine is a stimulant rather than puts somebody to sleep. (Scheuerman)(12 PCR 1683)

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[33] Graham was the prosecution's witness at trial, but trial counsel failed to ask Graham about *all* of he and Bright's conversations at the jail. Graham wondered at his cross-examination in Bright's trial where the defense was asking him about his prior criminal records, and not the prior acts of violence of Brown and King. (2 PCR 387).

- Expert Knox does not concede Bright would have more injuries if it was a fair fight. If Brown and King repeatedly reaching for firearms, that would be consistent as to how Bright was able to strike them and not have hand injuries. (Knox)(17 PCR 2718, 22)

- King's wounds consistent with him bending over from the sofa and/or standing and turning around and looking back at somebody. (Scheuerman)(12 PCR 1684)

- Impact spatter on kitchen doorway area higher than the spatter found next to Brown, and could not have "come straight in from the chair of Brown. (Knox)(16 PCR 2646)

- Bloodstains were actually found near the back door. (Knox)(16 PCR 2649)

- Brown was going to confront Bright about stealing his drugs immediately prior to his demise. (Charity Kemp)(17 PCR 2804-05)

- Brown's state of mind concerning confronting Bright about stealing his drugs in calling Charity Kemp moments before the incident at "one or two" in the morning. (Charity Kemp)(17 PCR 2804-05)

- The condition of the house prior to the incident supports the fact that a violent struggle occurred, blood was dispersed, and a gun was discharged. (Valarie Kemp)(17 PCR 2739-2743)

- Cannot rule out a struggle did not begin in a separate room. (Brookins)(14 PCR 2251)

- Struggle with Brown could have begun at the side of the room (other than the recliner) with both parties *standing on their feet*. (Brookins)(15 PCR 2151-53)

- King's wounds consistent with him standing up and falling down at a later time. (Scheuerman)(12 PCR 1686)

- Close up Plexiglass appears to have a *drop* (as opposed to cast-off) of blood on it, and King and Brown were "a good bit across the room from

this." (Brookins)(14 PCR 2159)

- Bright immediately calling an attorney to turn himself in, but being told to see the attorney first. (Michael Bossen)(12 PCR 1699-1704)

- King and Brown threatened Bright with his life and were "going to cut him up and put him in a suitcase and nobody would ever be able to find his body."[34] (Maxine Singleton)(15 PCR 2323)

- Bright cried on Valerie Kemp's shoulder and told her he was "scared for his life," less than 48 hours before the incident occurred.[35] (Valerie Kemp)(17 PCR 2744)

- Observing PCR Exhibit 19, Brookins conceded that the table "could have been moved around," and a piece of pizza[36] was in one picture they took, and not the other, which is typically not what you want to accomplish in a crime scene photo. (Brookins)(14 PCR 2166)

- King's wounds consistent with him moving around the room and violent struggle occurring, even King standing and walking around.

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[34] The Florida Supreme Court in Bright v. State said there was no evidence in the record that Bright was threatened by King and Brown- now there is, from multiple witnesses, including Maxine Singleton and Valerie Kemp. See Bright, 90 So. 3d at 264.

[35] Again, the credibility of the Kemps' testimony at the postconviction hearing cannot be denied. Indeed, their testimony is corroborated by other witnesses, being: (1) Bright told his first defense counsel about Valerie Kemp being at the house (2) Teneka Bright her a female in the background when someone picked up her father's cell phones when she called a couple days before the incident. Ms. Kemps presence in Bright's home is irrefutable.

[36] Bright encourages this Court to view the picture of the pizza and recall Mr. Majors testimony that Bright was eating pizza with King the day of the incident. The pizza is more than a day or two old, again demonstrating how incredible Mr. Major's testimony at trial was, and how he could have been impeached but for defense counsel's deficient performance. (See 3.851 claim I, failure to impeach Mr. Majors)

(Scheuerman)(12 PCR 1685-86)

- King's wounds not inconsistent with him being the aggressor as opposed to him being on the defensive. (Scheuerman)(12 PCR 1686)

- PCR Defense Exhibits 20 and 22- the entryway to the kitchen was not "in great proximately" to Brown and King, and Brookins does not know who the blood belongs too that was found in the entry to the kitchen, and does not see "any linear activity in this blood." (Brookins)(14 PCR 2167)

- Brookins received training from the defense's expert, Michael Knox, who is "very proficient" in forensics.[37] (Brookins)(14 PCR 2169)

- Bright's daughter noticed something wrong with Bright's about three weeks prior to the incident. A couple days before the incident she called her father but another person answered- she heard a female in the background. She called so many times but the phone just kept "ringing and ringing." (Teneka Bright)(15 PCR 2277-78)

- The guns belonged to King and Brown, and they carried them everywhere and they were always armed.[38] (Charity and Valarie Kemp)(17 PCR 2736-37, 2797)

- In reference to PCR Exhibit 16, Brookins acknowledged that there was blood on the front end table that looks like a drop, and that she does not know whose blood it is. (Brookins)(14 PCR 2163)

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[37] Any argument that a crime scene reconstructionist was new or novel during Bright's 2009 trial is meritless. If any defense attorney (or State attorney) believes this, they are simply not reading the case law at the time of Bright's trial. See Evans v. State, 975 So. 2d 1035, 1046 (Fla. 2007)("Forensic expert Kenneth Zercie also testified at the evidentiary hearing that the evidence of the crime scene and the victim was not consistent with blood and brains splattering back on the shooter."; Lucas v. Sec'y, Dep't of Corr., 841 so. 2d 380 (Fla. 2003). Undeniably, crime scene experts had been utilized in Florida for many years prior to Bright's trial.

[38] The Florida Supreme Court in Bright v. State said there was no evidence in the record that the weapons belonged to King and Brown- now there is. See, 90 So. 3d at 264.

- Brookins does not recall the make-up of the table to do blood spatter analysis, but none was done. (Brookins)(14 PCR 2164)

- King and Brown were asked to leave by Valerie Kemp, but they did not. (Valerie Kemp)(17 PCR 2748)

- There were blood drops on the pizza box, and the drops have tails indicating a range of travel. (Knox)(16 PCR 2654)

- The chess piece has a drop of blood on it. (Knox)(16 PCR 2656)

- In reference to PCR Defense Exhibit 23, Slide 17, Brookins acknowledged that there was a drop of blood that "stands out" on the end table left of the couch, and she does not know whether it was possible to conduct a blood analysis on this and does not know whose blood it is. (Brookins)(14 PCR 2165)

- Referring to PCR Defense Exhibit 23, Slide 14, Knox observed blood on a broken Plexiglass in the front doorway. The blood that dripped on it "would be most likely from a blood source" not from a weapon, because there is not other blood spatter right there where a weapon would drip blood. (Knox)(16 PCR 2597, 2651)

- The chair in which the bullet passed through *has not been moved* and still had the exact trajectory of the bullet's path, consistent with the gun discharging the night of the incident and not sometime in the past. (Knox, Johnson, Valerie Kemp)(16 PCR 2505, 2599)

- Brookins could have done blood spatter analysis as surface was suitable for testing, and the stains were well-defined. (Knox, Johnson)(16 PCR 2507, 2621)

- The investigation was sloppy, they did not collect blood for identity, did not do adequate measurements, did not test the blood they did collect, draw convergence lines of blood, and did not do blood spatter analysis. (Knox, Johnson)(16 PCR 2508, 2593, 2622)

- Table leg has left impression in the carpet where the table has been moved recently, indicating "pretty obvious movement of the table…and fairly recent." (Knox)(16 PCR 2597)

- It would be almost impossible to sit in the chair near the end table, suggesting the table was moved at the time of the struggle. (Johnson)(14 PCR 2515)

- The ashtray, which had before been sitting on the table, was found on the floor and knocked over, as demonstrated by the ash still on the table, which indicates this could have occurred during the struggle. (Johnson, Knox)(16 PCR 2517, 2598)

- Blood on doorway consistent with Brown being upright at some point in time, and most likely struck in the kitchen doorway there where he is either pushed or falls back into the chair. Not consistent with Brown being asleep. (16 PCR 2529.) It was not King because no trial of blood documented on carpet leading back to him. (Johnson)(16 PCR 2526)

- Brown's comforter is consistent with being put on him after the struggle. If Brown was sleeping would you "definitely" expect to see impact spatter on it. (Johnson)(16 PCR 2528-29)

- Disagreement with prosecution's theory that the blows on King were inflicted on the right part of the sofa. (Johnson)(16 PCR 2548)

- There is nothing "scientific" about state's theory that when King was lying down, the first blow was struck on his head. (Johnson)(16 PCR 2549)

- The evidence is inconsistent with state's theory that gun discharged on a different day, the chair has not been moved since the discharge of the firearm, a lot of traffic in the house would have likely removed GSR, so more consistent occurring day of incident. (Johnson)(16 PCR 2551)

- The footrest of Brown's recliner out and position of where Brown was in couch, and pants and underwear pulled down, inconsistent with state's theory Brown sleeping. (Johnson, Knox)(16 PCR 2559, 2641, 2658)

- Mr. Brown did not wear his underwear the way he was found- suggesting they were pulled down during a struggle. (Valerie Kemp)(11 R 685)

- The comforter could not have been over Brown's head during all of the

altercation. (Knox)(16 PCR 2660)

- Blood on the tip of Brown's shoes consistent with him standing, because blood would be coming straight down. (16 PCR 2663)

- Bright had abrasions to upper arms, back, and some redness on his back.[39] (Knox)(16 PCR 2664)

- The postconviction photos were not shown by the state at trial that were important in interpreting the crime scene. (Johnson)(16 PCR 2575)

- The speakers on the floor are void of blood on to faces, indicating they were most likely on the table and probably knocked off it. (Knox and Valerie Kemp)(16 PCR 2595)

- Blood on King's socks are transfer blood not coming from while he's being beaten but stepping on blood. These socks are inconsistent with King being in a lying position during the altercation. (Knox)(16 PCR 2611, 16)

- The pharmacological effect of the cocaine in King's body is "*obviously consistent" with King being awake and not consistent with taking cocaine and going to sleep*. Dr. The ingestion was probably from a half hour, most likely two to four hours. (Dr. Buffington)(14 PCR 2066, 2075)

- Dr. Buffington is unaware of any individuals who would take cocaine, and based on the pharmacological properties found in King, would be also to sleep through it. (14 PCR 2079)

- Mr. Majors was involved in King and Brown's drug operation at Bright's home.[40] (Valerie and Charity Kemp)(17 PCR 2738, 2803, 2852)

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[39] The testimony of Knox points out the obvious- if King and Brown had attempted to fight him with their fists instead of constantly attempting to grab a firearm, there would have been a lot more injuries to Bright.

[40] Which goes to Bright's IAC claim regarding failure to impeach Mr. Majors, who said he'd only been to Bright's house 2-3 times. Obviously, that was untrue, as Majors had been there many times and partaking in the drug making and selling operation.

- Brown and King's reputation for violence in the community, including armed drug dealing and membership in the Picketville Gang. (Valerie and Charity Kemp)(17 PCR 2749-52, 2808)

- Brown was not sleeping the night of the incident – in fact is was awake right before he died (Charity Kemp)(17 PCR 2804-05)

- King would go with Copeland and follow Bright, telling him he owed them money. They came to Ms. Singleton's house prior to the incident, and she described Bright as "really frightened," "in a panic," "afraid," and "hid in the bathroom." (Maxine Singleton)(15 PCR 2323, 26, 29-30)

- The house was open for business 24 hours a day, and there would be a light on for people so they knew they could come and purchase drugs. (Valerie Kemp)(17 PCR 2791)

- Brown and King stayed up at night to sell drugs (Charity Kemp)(17 PCR 2791, 2798, 2801)

- King's use of cocaine could have had possible pharmacologically effects such as more alert, energized, feeling stronger, better self-esteem, and some unanticipated effects, the most common being anxiety, paranoia, and sometimes "abnormal behavior, bizarre and violent behavior." (Dr. Buffington)(13 PCR 2069)

- The pharmacological effect was intact at the time of King's death (the cocaine was pharmacologically active) based on the presence of parent cocaine. (Dr. Buffington)(13 PCR 2067)

- Bright appeared genuinely afraid when he was talking about King and Brown having firearms. (Brian Williams)(15 PCR 2300-02)

- Brown and King used to "camp up" near the recliner and couch and sell drugs after midnight. (Charity Kemp)(17 PCR 2791, 2798, 2801)

- The pillow, GSR, and King's body demonstrate a sequence of events consistent with a gun be discharged, a struggle ensuing, and King finally resting where he was found. (Knox and Johnson)(16 PCR 2503)

- GSR is "extremely transient," meaning it removes itself as a result of normal activity, like walking or vacuuming, and this GSR would not have lasted that long with all the people in the house. (Johnson)(16 PCR 2504)

- Bright would be in "his" room most of the time, and did not own any weapons or participate in the drug operation.[41] (Charity Kemp)(17 PCR 2799)

IV. The ensuing prejudice

According to the case law, it would simply be simply is impracticable to discount all of this evidence and say it would not have made an impact on this jury. Truly, Bright's case went from a mediocre self-defense case at trial to an innocence case after the postconviction hearing – the prosecution's theory has been entirely discredited, their experts' testimonies contradicted and impeached, and exculpatory evidence offered from both experts, lay witnesses, and physical evidence itself which directly substantiates Bright's repeated statements of innocence.

The Florida Supreme Court stated: "why Bright chose suddenly to attack the victims remains a mystery." Bright, 90 So. 3d at 263. We now know why Bright "attacked" these two people -- he did so because he was acting in self-defense and in fear of his life. The evidence supports it. The defense experts support it. The prosecution's experts support it. The defense's lay witnesses support it. The

[41] The prosecution did not call a single witness or expert to refute any of the evidence presented by Bright in the postconviction evidentiary hearing.

prosecution's lay witnesses support it. There is no longer any "mystery."

Bright's case is even more egregious that the recent new trials granted by the Florida Supreme Court in similar factual patterns spelled out above, like in Fitzpatrick, 118 So. 3d, and Dausch, 141 So. 3d 513.[42]

CONCLUSION ON CROSS-APPEAL

WHEREFORE, based on the foregoing, Mr. Bright respectfully requests this Honorable Court reverse and remand the trial court's denial of his guilt phase 3.851 claims set forth in his Motion for Postconviction relief and affirm the trial court's reversal of his death penalty.

ARGUMENT IN ANSWER

GROUND ONE IN ANSWER

THE POSTCONVICTION COURT DID NOT ERR IN GRANTING RAYMOND BRIGHT A NEW PENALTY PHASE

I. Introduction

Rather than conceding the obvious and *admittedly* deficient performance in this case, where the majority of the mitigation investigation was conducted *after the guilt phase was over*, appellant first incorrectly premises his argument that because Bright's postconviction counsel pursued a "different" mitigation theory than the one presented at trial, trial counsel was not ineffective, and thereby the

[42] The FSC actually granted Dausch's direct appeal, vacated his convictions and sentences, and directed the lower court to enter a judgment of acquittal.

trial court erred in granting a new penalty phase. (IB 14.)

Stating the obvious, because of trial counsel's deficient mitigation investigation that ignored their expert's request for records and interviews with Bright's family; failed to investigate "101" records such as school records, DOC records, and Baker Act records; failure to investigate numerous available witnesses including Bright's best friend; and failed to hire experts despite obvious "red flags," defense counsel only had one option at trial – because they were unaware of everything else. This Court in Rose made clear that counsel's decision is neither informed nor strategic where "there was no investigation of options or meaningful choice" Rose, 675 So. 2d at 572-73.

Equally unmistakable, the mitigation uncovered in postconviction was not at all "different" or contradictory to what was presented at trial; rather, it greatly expanded upon the jury's evidentiary picture – it went from an wholly incomplete picture of Bright's life to a complete and emotionally-powerful story of a child who was physically, emotionally, and sexually abused, suffered from several documented mental illnesses, and yet somehow, still managed to graduate high school and to serve our United States Marine Corps for many years. Indeed, appellant's opinion that trial counsel portrayed Bright as "a kind, loving, dependable, and hardworking person who suffered from substance abuse" does not suffer at all with the addition of the compelling mitigation presented in

postconviction. (IB 14.)

While ignoring the disaster that occurred in Bright's penalty phase investigation, appellant's brief instead focuses on arguing that instead of embracing trial counsel's incomplete penalty phase presentation, postconviction counsel's mitigation "strategy" was to "excuse Bright's conduct" through the use of mental health experts, mental illnesses, and abuse. (AB 14). Make no mistake, Bright is not attempting to "excuse" anything, as he innocent of this crime and the irrefutable evidence established in postconviction strongly supports Bright acted self-defense. Indeed, concerning the penalty phase, postconviction counsel went on to explain *how and why* Bright developed his previously unexplained substance abuse disorders, which stemmed from his mental illnesses and tragic physical, emotional, and sexual abuse he suffered through as child. See Douglas v. State, 141 So. 3d 107, 131 (Fla. 2012) (the "jury should have known that this defendant was under stress and suffered severe problems not of his own creation from his early elementary school days. Juries need to know 'who' the defendant is as they return the verdict in a capital case.")

Finally, appellant repeatedly speculates that the postconviction mitigation *might* have conflicted with the mitigation presented at the penalty phase. For example, appellant guesses the mitigation discovered in postconviction "could have" conflicted with Bright's military record. (AB 40.) This post hoc

rationalization for why counsel did not do something is exactly the type of argument the United States Supreme Court condemns, and should be disregarded by this court. See Harrington, 131 S. Ct. at 790, and Wiggins, 539 U.S. at 526-527 (Criticizing the state courts and respondent's post hoc rationalization for counsel's conduct decision-making that contradicts the available evidence of counsel's actions); see also Alcala, 334 F. 3d at 871("We will not assume facts not in the record in order to manufacture a reasonable strategic decision for trial counsel.").

Whatever argument appellant makes now, it is irrefutable that trial counsel's mitigation investigation was woefully lacking, and the powerful mitigation presented in postconviction radically altered the evidentiary landscape that undoubtedly undermines confidence in this close 8-4 penalty phase recommendation. The postconviction court's factual findings granting a new penalty phase trial are supported by competent and substantial evidence, and should not be disturbed on appeal.

II. Penalty phase proceedings and opinion on direct appeal

Penalty phase

Bright's penalty phase consisted of 8 witnesses discussing Bright's redeeming qualities, his service in the Marines, and his substance abuse problems. (5 R 854-940; 6 R 941-955.) Despite Bright being in his 60's, defense counsel's entire mitigation presentation, which should portray a defendant's life, comprised

less than 100 pages of the transcript. Virtually no evidence was introduced concerning the majority of Bright's background including his childhood and adolescence, leaving the jury to wonder what occurred during the majority of Bright's life and why Bright became a drug and alcohol addict. The prosecution took advantage of the defense's incomplete investigation and answered these uninvestigated areas of Bright's life for the jury:

> State: Defense may argue, well, he had a crack problem or had had an alcohol problem. Okay. He at one time did and maybe that night maybe he did some crack cocaine, does that mitigate that? Or maybe he was depressed at one time, does that mitigate that?

(6 R 971)

> State: That he was depressed at one point in his life, I think, I November or December? That he had an alcohol problem? [when discussing extreme emotional disturbance]

(6 R 985)

> State: Well, he knew he had a problem [alcohol problem], so what did he do? Tried to get help? Didn't work out. What happened? Oh, okay, he just decided to go rob a place in Pensacola.

(6 R 986)

> State: Did anybody force him to drink? People who are alcoholics, and that's a terrible thing, but is that mitigation?

(6 R 986)

> State: [T]he defendant, knew he had an alcohol problem and he tried to get help and he didn't, he kept whatever, didn't succeed in doing that.

(6 R 988.) Because of counsel's deficient performance, the jury was left to believe the prosecution's argument that Bright had a substance abuse disorder because he liked it.

The prosecution also regurgitated their interpretation of the guilt phase facts opining how the victims fought for their lives (6 R 981) and "this man savagely and brutally just beat this victim to death over and over." (6 R 983)

The penalty phase presentation also inferred Bright had some mental illnesses such as depression and substance abused issues, but no expert witnesses were presented to explain what these mental illnesses where and how they affected Bright's behavior. While an expert was presented in Spencer hearing for the singular purpose of discussing substance abuse (e.g. 5 R 7852), this was too little too late as the jury's recommendation had already been cast.

The jury recommended the death penalty by a narrow 8-4 margin. (6 R 1032.) The court found one statutory mitigating factor (extreme emotional disturbance) (5 R 719) and three aggravating factors (HAC, prior violent felony, and contemporaneous capital felony) (5 R 714-15.) However, the trial court expressed great hesitancy in sentencing Mr. Bright to death, stating "I don't mind telling you that I take no delight in imposing the sentence in this case. Quite frankly, but for the heinous and atrocious and cruel aggravator in this case, I would

not be imposing this sentence that I am going to impose." (7 R 1057.)

Direct appeal opinion from the Florida Supreme Court

The Florida Supreme Court's opinion on direct appeal questioned why Bright would suddenly attack the victim's with apparently no motive.[43] The court

[43] Florida Supreme Court relied on facts we now know were inaccurate. The Court upheld Bright's sentence stating:

> The number and location of the injuries inflicted on each victim, the multiple defensive wounds on their bodies, and the near complete absence of injuries to Bright demonstrate that the attack was not brief, but was instead prolonged and unilateral. **Moreover, the crime scene photographs contradict Bright's contention that he killed King and Brown in self-defense. Why Bright chose to suddenly attack the victims remains a mystery;** however, such ambiguity with regard to motive does not and cannot provide an independent basis for mitigation.
>
> **It may be true that Bright wanted the victims out of his house. It may also be true that the victims may have been involved in drugs and may have previously threatened him**. Nevertheless, these circumstances do not and **cannot justify the attack by Raymond Bright on Derrick King and Randall Brown while they were unarmed and vulnerable**. Although Bright has numerous redeeming qualities in mitigation—including his lengthy and admirable service in the United States Marine Corps, consistent periods of gainful employment, and kindness toward friends and family during those times when he abstained from drugs and alcohol—we conclude that those factors do not outweigh the fact that this case involved multiple, brutal murders. (Emphasis added)

Bright, 90 So. 3d at 264. The Footnote Six in Bright's opinion clearly demonstrates the Florida Supreme Court's mistaken analysis because of counsel's failure to investigate in both the guilt and penalty phase:

proportionality analysis also searched for mental health mitigation in deciding whether to commute Bright's sentence to life, but none was found and now we know why – because of counsel's deficient investigation in the penalty phase *and* the guilt phase. Bright, 90 So. 3d at 264.

III. Postconviction Proceedings – counsel's failure to conduct even a cursory mitigation investigation

Penalty phase counsel did not even conduct what his co-counsel Mr. Kuritz called a "basic 101" mitigation investigation, and a large share of the mitigation investigation that was conducted occurred *after the penalty phase had already concluded, after Mr. Kuritz noticed that many "red flags" were never pursued by his co-counsel.*

Despite the majority of Bright's family residing only four hours away in the State of Florida, counsel never gathered Bright's school records, Baker Act Records, DOC records, or a complete file on his military service. This was

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> Although Lavelle Copeland had previously threatened Bright's sister over the telephone, **there is no evidence in the record—other than Bright's self-serving statements—that King or Brown ever threatened him. Moreover, the record fails to demonstrate that the nine-millimeter handgun and the assault rifle located in Bright's yard belonged to either of the victims**. Further, Copeland was not present on the evening before or during these events.

Id. at 264 n.6.

probably the result of counsel's utter failure to visit with all of Bright's close friends and family, or spend a meaningful amount of time talking with the witnesses they did find.

Counsel did not even investigate the first twenty years of Bright's life, leaving the jury to guess what it was like – or worse, to allow the prosecution to make that up for them. Had counsel provided even the minimum allowable representation and followed the United States Supreme Court's case law and the ABA guidelines, a host of powerful mitigators would have emerged – as vividly described in Bright's statement of facts.

IV. The trial court's postconviction Order granting a new penalty phase

The Judge during Bright's postconviction case was also Bright's trial Judge – the same Judge who expressed hesitancy in sentencing Bright to death in the first place. (7 R 1057.)

The trial court's postconviction order readily recognized how the plethora of previously undiscovered mitigation would have been critical for jury in Bright to hear, as much of Bright's social history was unknown to them. The court referenced Mr. Kuritz's testimony that he was "very surprised," "very troubled," and "not happy," that after the guilt phase, "no family interviews had been conducted," and no one had spoken to Defendant's family. (10 PCR 1470.)

The court also acknowledged Mr. Kuritz's testimony that had he been aware

of the mitigation uncovered by postconviction counsel, he would have presented the evidence during Bright's penalty phase, including evidence of bipolar disorder and psychiatric disorders. (10 PCR 1471.) The trial court specifically found defense counsel's lack of investigation could not have resulted from trial strategy. (10 PCR 1471.)

The trial court also utilized Dr. Krop's testimony, noting Krop was never provided Bright's school records, Baker Act records, or the Department of Correction records of Bright's psychological screening – all records Krop acknowledged as being important in building a mitigation case. (10 PCR 1475-1476.) The order highlighted the fact neither defense counsel(s) even spoke to Dr. Krop, despite Krop being their only expert in Bright's case. Dr. Krop did not even know Mr. Kuritz was co-counsel on Mr. Bright's case. (10 PCR 1476-77.) Clearly, the trial court correctly concluded that counsel did not provide effective representation, nor could this failure be considered strategic, especially when both Mr. Bright's appointed counsel(s) utterly failed to even communicate with their only expert and provide him with records and family interviews he requested. (10 PCR 1477.)

The trial court also relied the Florida Supreme Court's decision in Hildwin v. Dugger, 654 So. 2d 107, 109-10 (Fla. 1995), in support of its finding concerning the Dr. Krop fiasco, especially since Mr. Kuritz testified that he been made aware

Dr. Krop was assisting in Bright's case, he would have followed up with Dr. Krop's requests. (10 PCR 1477.)

The trial court then found that the numerous records counsel failed to discover constituted deficient performance, which was an easy determination, as Mr. Kuritz opined that finding some of these records would have indeed been "easy. " (10 PCR 1480.) The court mentioned Kuritz was "very disappointed" Bright's VA medical records were not retrieved by his co-counsel, and had he known about them, he would have presented them at trial to rebut the prosecution's contentions that Bright was a "drug abuser" without explanation. (10 PCR 1480.)

The court found counsel's failure to discover Bright's school records and Baker Act records also constituted deficient performance, which according to Mr. Kuritz, "clearly needed to be looked into and considered by a jury, " as these records showed Bright was diagnosed with depressive disorder and alcohol abuse. (10 PCR 1483.) Similarly, the court found defense counsel deficient in failing to discover Bright's DOC records, which contained a psychological screening, something Mr. Kuritz stated he "would have liked Dr. Krop to see." (10 PCR 1484.)

Because of counsel's utter failure to uncover powerful mitigation found in records that Kuritz described as basic "101" mitigation, the court's finding of prejudice concerning this issue was "clear," "absolutely clear," holding:

> When viewed in light of the content of the aforementioned records and the lack of mental health mitigation which was presented during trial, this Court finds counsel was deficient in failing to obtain and present these mental health records during the penalty phase. These 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. Most notably, the additional statutory mitigating circumstance involving mental health may have been found had this evidence came to light. This 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. The prejudice to Defendant's case is clear.

(10 PCR 1484, 1478.) The court noted that defense counsel's last minute presentation of Dr. Miller at Bright's Spencer hearing did not cure its finding Bright was prejudiced, as Bright's jury never heard any of the evidence – properly recognizing that undermining confidence of the outcome means the outcome of the jury. (10 PCR 1478, 1510.)

The trial court also found deficient performance[44] and prejudice as the result of defense counsel's failure to investigate and present witnesses during the penalty phase, including Bright's sister Janice Jones, Dr. Krop, trauma expert Dr. Gold, and for failing to retain a mitigation specialist to assist and find red flags in the

[44] Concerning the witnesses counsel was aware of, the trial court found the deficient performance could not be considered strategic because counsel failed to follow up to the witnesses requests, like Dr. Krop or explain to lay witnesses what even mitigation was, like Janice Jones. (10 PCR 1491-1493).

meek mitigation counsel did uncover (10 PCR 1491, 1493, 1510, 1513.) The court found the traumatic facts of Bright's upbringing similar to the United States Supreme Court's findings in Rompilla v. Beard. 545 U.S. 374, 390-393 (2005) (10 PCR 1491). The trial court found appellant's prior argument in postconviction that the evidence was cumulative to be "misplaced," because Bright's jury heard "no" evidence of his "horrific upbringing or abusive childhood during the penalty phase."[45] (10 PCR 1492.)

The court found Bright was prejudiced in counsel's failure to find and/or properly utilize these witnesses, because the jury was not provided a complete social history of who Bright was, specifically finding that it could not "find that the outcome of Defendant's penalty phase would have been the same":

> This Court cannot find that the outcome of Defendant's penalty phase would have been the same had Ms. Bright Jones and a trauma expert such as Dr. Gold testified about Defendant's abusive childhood, horrific upbringing, and history of substance abuse.
>
> Specifically, a trauma expert would have offered an explanation for Defendant's substance abuse, which was not presented to the jury during the penalty phase, as well as diagnoses of Defendant's mental health issues and why he developed such issues..

(10 PCR 1510-11.) Finally, the trial court correctly cited Wiggins, 539 U.S. at 522, as well as the Florida Supreme Court's decision in Simmons, 105 So. 3d at 509, in

[45] Perhaps this is why appellant now switches their argument to Bright's postconviction mitigation from not being cumulative to "different" from the penalty phase mitigation – either argument clearly refuted by the record. (AB 14, 25).

holding that defense counsel's failure to uncover and present the voluminous mitigating evidence at sentencing cannot be justified as strategy, nor do the aggravating factors in Bright's case defeat the need for a new penalty phase considering the substantial mitigation that was not presented to the jury. (10 PCR 1515-16.)

Appellant's argument concerning the trial court's order granting relief

The trial court's own rationale for granting a new penalty in the present case wholly refutes appellant's argument the trial court completely relied on the absence of Mr. Nolan's testimony in determining whether his failure to investigate was strategic. Instead, the court's order discusses each witness and record evidence, co-counsel and Dr. Krop's testimonies - utilizing each to find that counsel's gross inactions could not be considered strategic. The fact that Mr. Nolan was deceased and could not rebut his obvious deficient performance was merely a passing comment in factual analysis demonstrating counsel performed below the professional norms. Appellant also omits the law that "patently unreasonable decisions" cannot ever be considered strategy – a tenant that completely undermines their argument now. See Rose, 675 So. 2d at 572-73, Light v. State, 796 So. 2d 610, 616 (Fla. 2d DCA 2001)("'patently unreasonable" decisions, although characterized as tactical, are not immune.")

Although appellant continues this "strategy" assertion by arguing this "new"

postconviction mitigation would have opened the door to damaging evidence such as Bright's anger management and/or criminal record (IB 42), he is vague and speculates as to exactly how this postconviction investigation would be damning. Appellant goes down the prohibited road of creating an "ad hoc rationalization" prohibited by the United States Supreme Court. See Wiggins, 539 U.S. at 526-27(Criticizing the state court's and government's post hoc rationalization for counsel's decision-making that contradicts the available evidence of counsel's actions).

Of course, even if appellant is correct that a minute portion of the postconviction mitigation would have appeared adverse, it is to be expected "given that [trial counsel's initial mitigation investigation was constitutionally inadequate." See Sears v. Upton, 130 S. Ct. 3259, 3264 (2010).

As demonstrated during Bright's postconviction hearing, competent counsel would have been able to turn most, if not all of any negative mitigation into positive. Id; see also Porter v. McCollum, 130 S. Ct. 447 (2010)(Evidence that Porter was AWOL consistent with the defense's theory of mitigation and did not diminish evidence of Porter's military service).

Next, in arguing Bright's trial court must presume trial counsel's actions were strategic because he was unavailable, appellant ignores the very cases they cite to in their Brief. In particular, appellant cites Gore v. State, in asserting "in the

absence of any testimony regarding trial counsel's strategy, a court presumes trial counsel exercised treasonable professional judgment in all decisions." 964 So. 2d 1257, 1269-70 (Fla. 2007) (AB 17). Appellant ignores that in Bright's case, there was definitely *not* an absence of testimony regarding strategy, but an overwhelming amount of evidence establishing an utter lack of strategy from Mr. Bright's co-counsel, Mr. Kuritz, and Mr. Bright's expert Dr. Krop. Of course, the numerous lay witnesses called in postconviction that counsel failed to investigate also corroborate the trial court's finding as to a lack of a strategic decision in Bright's case.

Appellant's reliance on Callahan v. Campbell, 427 F.3d 897, 933 (11th Cir. 2005) and again on Gore v. State, 964 So. 2d 1257, 1269-70 (Fla. 2007) is misplaced. (AB 21.) Although appellant heavily relies on Callahan, trial counsel there died prior to postconviction, and since "no testimony" was available pertaining to trial counsel's strategy, the Eleventh Circuit presumed the deceased attorney did what he should have done. See Callahan 427 F. 3d at 933. Callahan is completely distinguishable from Bright's case, the latter having many witnesses testify and evidence presented that unquestionably demonstrated counsel performed below the objective norms in conducting a mitigation investigation.

Similarly, in Gore, penalty phase counsel was not called in postconviction, but his co-counsel was. Co-counsel criticized his counsel's decision to call a

particular witness, and the court found strategy could be inferred from the testimony of the witness in question. In the present case, we are not talking about why or why not a certain witness was called, but why counsel completely failed to do a plethora of "101" mitigation investigations, including: failing to call back his expert, starting the majority of his mitigation investigation after the penalty phase had concluded, failing to investigate numerous records and witnesses, and failing to prep the mitigation witnesses they were aware of. There is no "striking resemblance to Gore," as appellate attempts to argue. (AB 23) While Gore *called* a witness, counsel failed to even find witnesses to make a decision whether to call them or not. Again, these patently unreasonable decisions can never been considered strategic. Light, 796 So. 2d 616.

Finally, appellant seems to attack not the factual finding of the trial court's order on deficient performance and prejudice, but the court's legal application of those facts to Strickland's deficient performance and prejudice prongs. (AB 28.) Again, the record refutes appellant's argument. As stated above, the trial court acknowledged in its order the burden of proving prejudice is on the defendant to show "but for counsel's errors, he probably should have received a life sentence." (10 PCR 1467.) The court also correctly stated, on numerous occasions, that because the postconviction mitigation would have shed light on why Bright suffered from substance abuse disorder, explained to the jury Bright's "horrific"

upbringing, and described Bright's mental illnesses, that confidence in the jury's recommendation was undermined (e.g. 10 R 1478, 1510, 1515). There was no error here.

Even assuming arguendo the trial court's order erred in form over substance using an "incorrect analysis" for both the deficiency and prejudice prongs of Strickland, the "Tipsy Coachman" doctrine applies, this court has repeatedly reversed cases for new penalty phases based on similarly significant mitigation uncovered in postconviction, as the result of an utterly deficient mitigation investigation at trial. E.g. Hurst v. State, 18 So. 3d 975 (Fla. 2009); Phillips v. State, 608 So. 2d 778, 783 (Fla. 1992); State v. Lara, 581 So. 2d 1288, 1289 (Fla. 1991) (prejudice established by evidence of statutory mitigating factors and abusive childhood that was not presented).

IV. The law as applied to Bright's case – new penalty phase required

Mr. Bright's penalty phase counsel's deficient performance

Prevailing professional norms required Bright's counsel to conduct a thorough investigation into his background. Porter, 130 S. Ct. 447. Counsel also must not ignore pertinent avenues for investigation of which he or she should have been aware. Id. at 453. "[I]t is axiomatic that 'counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.'" Hurst, 18 So. 3d at 1008 (quoting Strickland, 466

U.S. at 691). Counsel may be deemed ineffective at the penalty phase where the investigation of mitigating evidence is "woefully inadequate" and credible mitigating evidence existed which could have been found and presented at sentencing. See Hildwin v. Dugger, 654 So. 2d 107, 109 (Fla. 1995); see also State v. Lewis, 838 So. 2d 1102, 1113 (Fla. 2002) ("[T]he obligation to investigate and prepare for the penalty phase portion of a capital case cannot be overstated- this is an integral part of a capital case"); Ragsdale v. State, 798 So. 2d 713, 718-719 (Fla. 2001).

The Florida Supreme Court finds deficient performance in deficient mitigation investigations when the investigation involves brief contact with a few family members and a failure to provide experts with background information. See Sochor, 883 So. 2d at 772. Deficient performance has also been found when a defense expert requests background information and/or testing to be completed and counsel fails to contact the expert and provide him this information. Douglas, 141 So. 3d at 122.

Turning to Bright's case, it is undeniable that counsel failed under professional norms at the time of Bright's trial in his 'obligation to conduct a thorough investigation of the Defendant's background. Porter, 130 S. Ct. at 453; see also Sears, 130 S. Ct. at 4364; Wiggins, 539 U.S. 519; Simmons, 105 So. 3d 475; Robinson v. State, 95 So. 3d 171 (Fla. 2012); State v. Walker, 88 So. 2d 128

(Fla. 2012); Hurst, 18 So. 3d at 1014; Cooper v. DOC, 646 F. 3d 1328, 1352 (11th Cir. 2011); Ferrell v. Hall, 640 F. 3d 1199, 1226-27 (11th Cir. 2011); Johnson v. DOC, 643 F. 3d 907, 931 (11th Cir. 2011).

Counsel was required to present the jurors "the full picture"[46] of mitigation – yet counsel presented somewhere closer to a unfinished sketch of it. Concerning the mitigation counsel was *aware of* from his very limited knowledge from Bright's family, Bright's counsel had an obligation to recognize the "red flags" elicited from them[47] and to conduct additional investigation – which included talking more with Janice Jones, Teneka Bright, Maxine Singleton. See Rompilla, 545 U.S. at 392 (effective counsel would have conducted further investigation after discovering "red flags"); Gray v. Branker, 529 F. 3d 220, 229 (4th Cir. 2008)(counsel ineffective for ignoring "red flags" regarding petitioner's mental health issues; Mason v. Mitchell, 543 F. 3d 766, 768 (6th Cir. 2008)("trial counsel provided ineffective assistance by failing to… investigate the obvious red flags contained in state records"); Williams v. Allen, 542 F. 3d 1326, 1340(11th Cir. 2008)("the many red flags noted above would have prompted a reasonable attorney to conduct additional [mitigation] investigation.").

[46] Gray v. Branker, 529 F. 3d 220, 233, n. 2 (4th Cir. 2008).

[47] Penalty phase counsel also ignored other red flags, including Bridget Bright's testimony that Mr. Bright was depressed, had substance abuse problems, that the Bright family had a history of mental illnesses, and that the family was dysfunctional.

The information Mr. Nolan did have explained that Bright's family had a history of mental illness; Bright had suffered from depression; Bright had substance abuse issues; and there was abuse in the family. Mr. Nolan ignored these red flags and did not conduct additional investigation, including requesting records and further conversations with family members.

Counsel's inactions constitute deficient performance and mirrors the deficient performances found in prior FSC opinions reversing defendants' sentences. See e.g. Griffin v. State, 114 So. 3d 890, 908 (Fla. 2013)(At penalty phase at trial, counsel presented "good guy" defense which included family members and friends testifying about his good work ethic and law-abiding life until he got hooked on cocaine. However, at the postconviction hearing, a "wealth" of mitigation was introduced concerning the severity of Griffin's drug use, the use of drugs at the time of the offense, his family history of alcohol and drug abuse and mental illness, his history of depression, and the impact of his prior brain injury. Griffin's trial attorney conceded he did not compile a family, medical, or social history, did not request a neuropsychiatric evaluation, and did not hire the penalty phase mental health expert until late in the process and did not give any medical records to his expert. Griffin's death sentence was vacated and given a new penalty phase because on counsel's deficient performance and the prejudice it caused).

Again, nor does appellant's argument that trial counsel's decision to present

mitigation he was unaware constitutes sound trial strategy. To be sure, a reasonable, strategic decision must be based on *informed judgment*, something that was utterly lacking in Bright's case. The argument that some of counsel's tactics were "strategic" is meritless. See Wiggins, 539 U.S. at 527-28 (2003) (finding counsel's decision "to abandon their [mitigation] investigation at an unreasonable juncture ma[de] a fully informed decision with respect to sentencing strategy impossible").[48]

Again, counsel performed below the reasonable norms in the community and Mr. Bright has proven Strickland's first prong--- deficient performance. According, following discussion of the resulting prejudice, below, Bright's sentence should be

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[48]To make an informed strategic choice to limit presentation of mitigation, counsel and the defendant must know what mitigation *is* available and is being waived. "Case law rejects the notion that a 'strategic' decision can be reasonable when the attorney has failed to investigate his options and make a reasonable choice between them." Rose, 675 So. 2d at 573 (quoting Horton v. Zant, 941 F.2d 1449, 1462 (11th Cir. 1991)). The United States Supreme Court has rejected the suggestion that a decision to focus on one potentially reasonable trial strategy is justified by a "tactical decision" when counsel does not conduct a thorough investigation of the defendant's background. See Sears, 130 S. Ct. at 3265.

Moreover, the Supreme Court has held that "counsel's failure to uncover and present voluminous mitigating evidence at sentencing could not be justified as a tactical decision . . . because counsel had not 'fulfill[ed] their obligation to conduct a thorough investigation of the defendant's background.'" Sears, 130 S. Ct. at 3265 (citing Wiggins v. Smith, 539 U.S. 510, 522 (2003) (quoting Williams, 529 U.S. at 396)).

vacated. See Shellito v. State, 121 So. 3d 445, 459 (Fla. 2013)(Duval County case where death sentence reversed because postconviction evidence "shows a different picture of Shellito's upbringing than what was presented at trial. We conclude that based on consideration of the plethora of available mitigation and the dearth of mitigation actually presented, when reweighed against the aggravation in this case, our confidence in the outcome of the penalty proceeding is undermined.").

The Prejudice in Bright's case

Despite appellant's repeated attempt to reincorporate the guilt phase facts (which were eviscerated in postconviction) in an attempt to argue prejudice has not been established for the penalty phase, he forgets the Florida Supreme Court has rejected similar notions that the existence of HAC or other weighty aggravators will defeat the need for a new penalty phase when substantial mitigation exists, like in Bright's case, that was not presented to the jury. See Hurst, 18 So. 3d at 1014. This is especially the case where the only other mitigation is insubstantial. Id. In Parker v. State, 3 So. 3d 974 (Fla. 2009), The Florida Supreme Court reversed for a new penalty phase where counsel presented only "bare bones" mitigation at trial and substantial mental mitigation and mitigation concerning Parker's childhood were discovered and presented at the postconviction evidentiary hearing. See id. at 984.

In Bright's case, it also it true trial counsel presented only the barest bones

of mitigation at trial, and the scant mitigation that was presented was not particularly helpful to Bright – especially considering they did not offer any explanation of Bright's substance abuse to the jury. Bright is analogous to Simmons, 105 So. 3d at 509. In Simmons, the Florida Supreme Court vacated his death penalty based on the strikingly similar deficient mitigation investigation by defense counsel, even though the HAC aggravator was present:

> As noted above, at the evidentiary hearing, Simmons presented substantial evidence concerning both his mental condition and his personal and family background that was clearly mitigating. Even without convincing proof of the brain abnormality, Simmons established the existence of substantial mental mitigation that was not presented to the jury or the judge. Trial counsel had access too much of the family background and personal mitigation concerning Simmons, **and could have obtained more information upon reasonable inquiry of Simmons' family members. Even so, counsel did not have any significant conversations with Simmons' father, mother, or aunt; nor did counsel consider hiring a mitigation specialist to do an investigation.** Trial counsel Orr and Pfister received all the records compiled by the assistant public defenders who represented Simmons for almost one year, including school records, medical records, and forensic assessment forms. Therefore, they knew that Simmons was in several types of special education classes and that he had a low IQ. Because trial counsel were aware of the low IQ, special education, Simmons' limited oral, reading, and writing abilities, and his serious alcohol abuse, it appears that they did not perform an adequate mitigation investigation into possible mental mitigation based on those circumstances before making the strategic choice to present only "favorable" information about Simmons.
>
> The State is correct that there were three strong aggravators, including HAC—aggravators that were specifically found by the jury on an interrogatory verdict in this case—and this was a particularly cruel and gruesome murder. **However, this Court has rejected the notion that the existence of HAC will defeat the need for a new penalty**

> **phase when substantial mitigation existed that was not presented to the jury**. *See, e.g.*, *Hurst*, 18 So. 3d at 1014. This is especially the case where the only other mitigation is insubstantial. *See id*. In this case, the mitigation presented to the jury was minimal and actually presented Simmons in a bad light. If the intent was to present substantial evidence humanizing Simmons, that result does not appear to have been achieved. Very little was presented to show that Simmons was a good and valuable member of society. The jury did not hear how he worked hard in his father's business and helped his relatives. Although his sister said some good things about him, she undermined her mitigation testimony by criticizing the victim. (Emphasis added)

Simmons, 105 So. 3d at 509. Considering Bright's horrendous childhood filled with brutal beatings and rape, his debilitating mental illnesses, and despite these unbelievable uphill battles, managed to graduate from high school and serve our Country in the Marines for over ten years a powerful evidentiary picture is shown. Coupled with the previously unexplained reason for why Bright developed a substance abuse disorder (to cope with the trauma he suffered as a child and mental illnesses) and an explanation of why he was committing non-violent crimes to satisfy the drug addiction, a reasonable probability exists that jurors would have struck a different balance had they heard the complete history of this retired Marine. Wiggins, 539 U.S. at 537. Indeed, Bright has more mitigation than Simmons v. State, above.

Indeed, appellant fails to mention that this "new" evidence would have provided the jury an understating of why Bright became addicted to drugs and alcohol, in direct contradiction to the prosecution's argument at trial inferring

Bright simply liked drugs. Appellant also stays away from the fact that postconviction evidence proved much of the conclusions reached by the Florida Supreme Court on direct appeal were inaccurate because of defense counsel's deficient performance [49] - including the Court's finding when determining proportionality that Bright's case was lacking the mental mitigation required for a life sentence. Bright, 90 So. 3d at 263 ("we conclude there was a distinct lack of mental health mitigation in this case when compared to others where this Court vacated the death penalty.")

Along with the prejudice Bright suffered as the result of his counsel's deficient performance in the penalty phase, the deficient performance in the guilt phase also dramatically affected Bright's penalty phase. Instead of hearing compelling evidence of Bright acting in self-defense with the forensic and lay witness evidence backing that claim, the jury was again bombarded by the prosecutor's regurgitation of the guilt phase facts when determining what sentence to recommend. Truly, the undiscovered mitigation would have given the jury the complete evidentiary picture in Bright's penalty phase, but also provided them with an understanding of how Bright, who has always maintained his innocence, could allow himself to succumb to the underbelly of society and put him in this

[49] Appellant's brief does not even mention the United States Supreme Court's holdings in Wiggins, 539 U.S. 510, Rompilla v. Beard, 545 U.S. 374 (2005), Williams v. Taylor, 529 U.S. 362 (2000), etc.

position in the first place –entirely consistent with his fervent claim of innocence.

There is a reasonable probability that if trial counsel had not provided ineffective assistance at the guilt phase, Bright would not even be discussing the penalty phase here, as he would not have been convicted of first-degree murder, and in the improbable occurrence that he was convicted, the prosecution's case against him in the penalty phase become dramatically weaker. To be sure, Bright's case has gotten a lot less "absurd" and "ridiculous," much to the dismay of the prosecution.

The postconviction court had an easy decision concerning Bright's penalty phase 3.851 claims in finding that Bright was prejudiced, and this finding is supported by competent, substantial evidence which is entitled to deference. See Sochor, 883 So. 2d at 772.

CONCLUSION IN ANSWER

As the Supreme Court reiterated in Porter, "Indeed, the Constitution requires that 'the sentencer in capital cases must be permitted to consider any relevant mitigating factor.'" 130 S. Ct. at 454-55 (quoting Eddings v. Oklahoma, 455 U.S. 104, 112 (1982)). The evidence presented in Bright's evidentiary hearing -- much of which was not discovered by trial counsel but would have been critical for the jury to hear -- is sufficient to undermine confidence in the death sentence in this case, establishing the prejudice prong under Strickland. For these reasons, this

court should affirm the trial court's granting of Bright a new penalty phase hearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a copy of the foregoing has been delivered via email to the Office of the Attorney General at capapp@myfloridalegal.com and Patrick.Delaney@myfloridalegal.com on this 26th day of May, 2015.

/s/ Rick Sichta_____
A T T O R N E Y

CERTIFICATE OF COMPLIANCE AND AS TO FONT

I **HEREBY CERTIFY** that this brief is submitted by Appellant, using Times New Roman, 14-point font, pursuant to Florida Rules of Appellate Procedure, Rule 9.210. Further, Appellant, pursuant to Florida Rules of Appellate Procedure Rule 9.210(a)(2), gives Notice and files this Certificate of Compliance as to the font in this immediate brief.

/s/ Rick Sichta_____
A T T O R N E Y