IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Appellant,

v. Case No. SC14 – 1701

RAYMOND BRIGHT,

Appellee.

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

CROSS-ANSWER / REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This brief will serve as the state's cross-answer and reply to the issues Bright raised on cross-appeal and addressed in his answer. Appellee, Bright, was the defendant in the trial court, and will be referred to by proper name, e.g., "Bright."

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

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

This Court granted the state's motion to supplement the record on appeal, and therefore, there are two volumes of a supplemental post-conviction record. Each record is numbered individually with beta stamps at the bottom of each page. The supplemental record from Bright's post-conviction proceeding will be referred to as "(SPCR#: ##)" with a corresponding volume and page number.

The defendant's brief will be referenced by "(DB at ###)" with a corresponding page number.

BRIGHT'S STATEMENT OF FACTS

This Court should disregard Bright's "INTRODUCTION," and "STATEMENT OF THE FACTS" because they consist of argument and rely on a presumption of the facts not found by the trial court. (DB at 2, 6, 11, 12 – 30). As this brief discusses at length, Bright ignores the factual findings of the trial court that witnesses Valerie Kemp and Charity Kemp had "no credibility," and presents their testimony as conclusive proof of legal arguments. Bright also presents the testimony of Michael Knox, and Janice Johnson as conclusive proof he acted in self-defense, yet the trial court made a factual finding that Det. Brookins testimony during Bright's trial was more reliable. In addition, Bright continuously asserts his trial counsel, Richard Kuritz, conceded his own deficient performance during the evidentiary hearing, when in fact, no concession ever took place. Furthermore, the trial court noted more than once that Bright's counsel had mischaracterized or misrepresented the record on appeal to the trial court during the post-conviction proceedings. (PCR10: 1423, 1046, n. 12).

Accordingly, Bright's presentation of the facts are not a fair and accurate representation of the record, and thus should be disregarded.[1] *Gonser v. State*, --

[1] *See Hutchins v. Hutchins*, 501 So. 2d 722, 723 (Fla. 5th DCA 1987)(striking falsities and sanctioning counsel, the court states, "[w]e are concerned that counsel who appear before this court clearly understand that briefs submitted to us, upon

So. 3d --, 2015 WL 3793505. *1 (Fla. 5th DCA 2015)(commenting on "the appellant's improper insertion of alleged facts in both the statement of the facts and the argument." "The court . . . expressly found the testimony of the victim to be more credible than the testimony of the appellant. In spite of this explicit finding, the appellant's brief improperly presented as 'fact' the testimony of the appellant, and counsel based her legal arguments on those facts. Such practices are inappropriate and unprofessional"); *Avitia v. Metro. Club of Chi., Inc.*, 49 F.3d 1219, 1224 (7th Cir. 1995)(noting a statement of fact that "treats contested testimony of the losing party's witnesses as 'facts' violates" the appellate rules).

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which we must rely so heavily in the discharge of our appellate function, be truthful and fair in all respects"); *Hagood v. Wells Fargo N.A.*, 125 So. 3d 1012 (Fla. 5th DCA 2013)(cautioning that appellate attorney's filing of initial brief that was based entirely on a false assertion of fact constitutes an act of professional negligence); *Tita v. State*, 42 So. 3d 838 (Fla. 4th DCA 2010)(warning that a misrepresentation of the law can result in the imposition of sanctions); *Amstar Corp. v. Envirotech Corp.*, 730 F.2d 1476, 1486 (Fed. Cir. 1984)(criticizing counsel for deleting critical language from the record); *Hays v. Johnson*, 566 So. 2d 260, 261 (Fla. 5th DCA 1990)(criticizing counsel for omitting material facts from the record); *Octocom Sys., Inc. v. Houston Computer Servs., Inc.*, 918 F.2d 937, 941 (Fed. Cir. 1990)(criticizing counsel for misrepresenting the appealed decision); *In re Disciplinary Action Boucher*, 837 F.2d 869, 871 (9th Cir. 1988)(stating "misrepresentation of the record on appeal is a poor strategy").

SUMMARY OF ARGUMENT

1. Bright's argument is based on an unfounded view of the evidence and purports as fact that which was expressly rejected by the trial court. Here, trial counsel pursued a strategy which sought to prove self-defense through effective cross-examination over the potentially dry and damaging testimony of an expert. Trial counsel believed that Bright's version of the murders was the only logical explanation after viewing the crime scene photos. Trial counsel felt that to use an expert in this case would only confuse the jury and detract from what he believed was an obvious case for self-defense.

Even still, Bright presented the testimony of two forensic crime scene reconstruction experts, who ultimately contradicted each other on the substantive portions of their testimony. Bright also contends that evidence of Randall Brown and Derrick King's reputation for violence and specific bad acts should have been presented. But, neither trial counsel nor post-conviction counsel was able to produce any reliable or admissible evidence of character. Therefore, this issue does not merit any relief and the trial court's ruling should be affirmed.

2. Trial counsel vigorously cross-examined state's expert Detective Deborah Brookins regarding her investigation and opinion of the crime scene. Here, Bright's claim is admittedly based on a speculative assertion of "*what might have been*" had the defense employed an expert to assist in the investigation and

presentation of the defense. Speculative claims of ineffective assistance are not entitled to relief. Nevertheless, the evidence showed that trial counsel did impeach Det. Deborah Brookins' during cross-examination and was able to elicit answers which were beneficial to Bright's claim of self-defense.

3. Bright cannot show that juror M was actually biased when she served as a member of the jury. During voir dire juror M indicated that she would think Bright was hiding something if he did not testify during the trial. When asked to quantify her response, juror M said "a tiny bit." Nevertheless, trial counsel felt juror M had redeeming qualities which led him to keep her as a member of the jury. Had trial counsel suspected a problem with juror M, he would have struck her from the panel. Here, Bright's claim is purely speculative and not entitled to relief because Bright has failed to show juror M was actually biased in her service.

4. Bright is not entitled to relief based on a cumulative error analysis. Here, Bright asserts the investigation and presentation of his theory of self-defense and the inclusion of juror M on the panel resulted in an unfair trial. First, trial counsel made strategic decisions regarding the best presentation of self-defense which favored effective cross-examination over the use of experts. Second, Bright has failed to produce any reliable or admissible character evidence of Randall Brown and Derrick King. And third, Bright has not demonstrated juror M was actually biased in her service. Therefore, Bright has failed to prove deficient performance

or prejudice for any of the alleged errors and this claim should be rejected accordingly.

ARGUMENT ON CROSS-APPEAL

1. THE POST-CONVICTION COURT DID NOT ERR IN RULING THAT BRIGHT'S TRIAL COUNSEL WAS EFFECTIVE IN HIS PRESENTATION OF SELF-DEFENSE TO THE CHARGES OF FIRST-DEGREE MURDER.

On cross-appeal, Bright avers the trial court erred in denying his claim that his trial counsel was ineffective in presenting his theory of self-defense. (DB at 50). Bright maintains a position of actual innocence, and believes his trial counsel should have used various experts and additional lay-witnesses to add support for his defense. (DB at 50).

Bright's argument is based on an unsupported view of the evidence, and repeatedly relies on witnesses testimonies which the trial court found not credible. (DB at 74 – 96; PCR10: 1438, 1149). Many of the statements or positions Bright attributes to witnesses are taken out of context and cannot be trusted as a fair representation of the record.[2] In addition, Bright confuses and misapplies the

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[2] Notably, page 51 of the defense brief states that Mr. Kuritz was "admittedly deficient in investigating and preparing for the most important portion of Bright's case. . ." and cites to (PCR12: 1769 – 70). Bright also attributes these pages to a supposed admission that Mr. Kuritz wanted to hire or consult with experts; however, a cursory review of the record shows neither of Bright's positions are true. (DB at 53).

Mr. Kuritz plainly states a forensic expert could have been helpful, "but I really thought that I was able to get everything I needed out of Brookins, because I thought the testimony just clearly was, I didn't think believable." (PCR12: 1770).

requirements for use of character evidence in support of his argument for self-defense.

Here, the trial court considered all of the evidence presented at the evidentiary hearing and subsequently denied in-part Bright's motion for post-conviction relief because Bright failed to establish both deficient performance and prejudice during the guilt phase of his trial.

The Standard of Review.

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

The Test for a Claim of Ineffective Assistance of Counsel.

To establish ineffective assistance of counsel, a defendant must satisfy a two prong test, establishing both deficient performance and prejudice. *Strickland v. Washington*, 466 U.S. 668 (1984). To establish deficient performance, a defendant must show that counsel made specific errors so serious that counsel was not

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Mr. Kuritz also agreed, with the benefit of hindsight, that an expert could have been helpful in adding weight to his cross-examination, but again states "I thought I was able to cross [Brookins] and do what I needed to do with what I had." (PCR10: 1770; PCR12: 1786).

functioning as the "counsel" guaranteed to the defendant by the Sixth Amendment. *Strickland*, 466 U.S. 668; *Pietri v. State*, 885 So. 2d 245, 252 (Fla. 2004). "[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Strickland*, 466 U.S. at 690. "Judicial scrutiny in these cases must be 'highly deferential' and 'every effort . . . made to eliminate the distorting effects of hindsight.' Counsel's actions are to be judged under a standard of 'reasonableness under prevailing professional norms.'" *Bryant v. State*, 901 So. 2d 810, 820 (Fla. 2005) (quoting *Strickland*, 466 U.S. at 689 – 690).

"[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland*, 466 U.S. at 690. "When courts are examining the performance of an experienced trial counsel, the presumption that his conduct was reasonable is even stronger." *Chandler v. United States*, 218 F.3d 1305, 1316 (11th Cir. 2000); *see Provenzano v. Singletary*, 148 F.3d 1327, 1332 (11th Cir. 1998) (stating "Our strong reluctance to second guess strategic decisions is even greater where those decisions were made by experienced criminal defense counsel."). Importantly, "an attorney is not ineffective for decisions that are a part of trial strategy that, in hindsight, did not work out to the defendant's advantage." *Mansfield v. State*, 911 So. 2d 1160, 1174 (Fla. 2005). "Even if counsel's decision appears to have been

unwise in retrospect, the decision will be held to have been ineffective assistance only if it was 'so patently unreasonable that no competent attorney would have chosen it." *Dingle v. Sec'y Dept. of Corr.*, 480 F.3d 1092, 1099 (11th Cir. 2007) (quoting *Adams v. Wainwright*, 709 F.2d 1443, 1445 (11th Cir. 1983)).

In the absence of any testimony regarding trial counsel's strategy, a court presumes trial counsel exercised reasonable professional judgment in all decisions. *Gore v. State*, 964 So. 2d 1257, 1269 – 70 (Fla. 2007) (finding the defendant did not meet his burden of deficient performance when his lead counsel was not called to testify during the hearing, and defendant only presented testimony from co-counsel that criticized the strategy of the lead counsel); *see Callahan v. Campbell*, 427 F.3d 897, 933 (11th Cir. 2005). While courts may not indulge in *post hoc* rationalization, they also cannot insist that counsel "confirm every aspect of the strategic basis for his or her actions." *Harrington v. Richter*, 131 S.Ct. 770, 794 (2001). "There is a 'strong presumption' that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than 'sheer neglect.'" *Richter*, 131 S.Ct. at 791 (citing *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003) (*per curiam*).

To establish prejudice, the defendant must show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. This Court has determined that a reasonable probability is a probability sufficient to undermine confidence in the

outcome. *Rutherford v. State*, 727 So. 2d 216, 219 (Fla. 1998). "To assess that probability, we consider 'the totality of the available mitigation evidence – both adduced at trial, and the evidence adduced in the . . . [post-conviction] proceedings' – and 'reweig[h] it against the evidence in aggravation.'" *Porter v. McCollum*, 558 U.S. 30, 41 (2009).

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

Bright's Trial Counsel

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

appeals before the Florida Supreme Court. (PCR12: 1865).

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

Trial Counsel Made a Strategic Decision to Not Hire Experts.

Bright maintains a litany of experts should have been presented as defense witnesses including: crime scene, blood spatter, and gun-shot residue. (DB at 50). Bright claims had these experts been presented they would have conclusively refuted the physical evidence in the case and proven Bright's claim of self-defense. (DB at 50 – 52). At its foundation, this argument amounts to a desire for a different presentation of the same theory of defense. Much of this evidence was shown to be cumulative to what was already presented at trial, or did not support the argument that Bright presented.

The Presentation of Self-Defense at Trial.

Mr. Kuritz pursued a theory of self-defense at trial. The defense believed King

and Brown had threatened Bright with a gun, a struggle ensued over the gun, and the struggle went to the ground where the gun ultimately discharged. (PCR12: 1722 – 23, 1733 – 34, 1737 – 68). During the struggle, Bright grabbed the hammer, which had been left on the floor and used it in self-defense on both Brown and King. (PCR12: 1722 – 23, 1733 – 34, 1737 – 68).

Mr. Kuritz believed self-defense to be the only logical series of events, and was confident they had a winnable case. (PCR12: 1722 – 23, 1733 – 34, 1737 – 68). Mr. Kuritz openly admitted "[w]e were very hopeful. We truly thought we were going to get a not guilty verdict in this case." (PCR12: 1767). If Mr. Kuritz believes an expert can assist in the defense, he will consult with them, as he stated "I will consult with experts, not just because for – if I think it's appropriate to spend the money on, I will, because I think, if nothing else, they can help prepare me with cross if it's not somebody I can use to actually testify."[3] (PCR12: 1799).

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[3] Bright continuously asserts that Mr. Kuritz intended to retain experts in this case. (DB at 51, 59, 61). This position ignores Mr. Kuritz's actual testimony, is taken out of context, and is based on Mr. Kuritz's hindsight admission than an expert could have been helpful. In fact, the trial court made a specific finding that Mr. Kuritz "believed such an expert would have simply 'affirmed what [he] was getting out on cross-examination.'" (PCR10: 1395).

Moreover, Mr. Kuritz testified that his agreement an expert could have been beneficial to the defense case was based on hindsight. (PCR12: 1786)

> You know, in hindsight, um yes. . . . While it would have been great

In *Occhicone v. State*, 769 So. 2d 1037, 1048 (Fla. 2000), the Florida Supreme Court stated "[c]ounsel cannot be deemed ineffective merely because current counsel disagrees with trial counsel's strategic decisions. *Occhicone*, 769 So. 2d at 1048. Furthermore, "strategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct. *Id.* at 1048; *Rutherford*, 727 So. 2d at 223; *State v. Bolender*, 503 So. 2d 1247, 1250 (Fla. 1987).

Occhicone involved a strikingly similar scenario where defense counsel spurned the use of experts in favor of effective cross-examination. *Occhicone*, 769 So. 2d at 1048. The defense attorney's in *Occhicone* "consciously chose not to present evidence during their case because they believed they had presented enough

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> to have one, I thought we were able to get out through cross of the state's witness that, um, their theory was not plausible. But you know, in hindsight, could it have or would it have been better? Sure. (PCR12: 1786).

This is not the first time Bright's counsel has made such assertions or mischaracterizations of the evidence in this case. The trial court's order stated "This Court notes Defendant mischaracterized Dr. Scheurman's comment to counsel on page 421 of the trial transcripts regarding "instruction" for counsel to obtain a forensic toxicologist. Dr. Scheureman did not state such to counsel; he merely testified that he *suggested* a forensic toxicologist would be in the *best position* to tell at what point the victim King ingested cocaine prior to his death." (PCR10: 1046, n. 12).

evidence to the jury through cross-examination." *Id*. Here, Mr. Kuritz's style and strategic decisions favored effective cross-examination which presented an obvious story to the jury over the complicated and potentially dry testimony of an expert. (PCR12: 1769 – 70, 1775, 1777; PCR13: 1874, 1883 – 84, 1903, 1906). The trial court took notice of Mr. Kuritz's cross-examination of Det. Brookins and highlighted all the evidence which Mr. Kuritz elicited, that went towards proving Bright's theory of self-defense. (PCR10: 1396). Specifically, Mr. Kurtiz was able to show: (1) Bright's theory that the gun shot was fired from the ground at an upward angle (R10: 484); (2) Det. Brookins could not arrive at a definitive answer regarding exactly where the attacks took place (PCR10: 1396; R10: 488 – 89); (3) objected to Det. Brookins' testimony as not being a qualified expert in blood spatter; and (4) "impeached Det. Brookins' credibility during cross-examination when he questioned her comparing her trial testimony to her written report." (PCR10: 1422; R10: 482).

A maxim of seasoned attorneys is that more evidence does not always equal better evidence. *Woods v. State*, 531 So. 2d 79, 82 (Fla. 1988)(stating "more is not necessarily better"). In this case, Mr. Kuritz decided on a strategy which sought to use the state's evidence as a defense advantage by showing the jury how the evidence fit Bright's story through cross-examination. As an attorney for more than 20 years, Mr. Kuritz was confident in his abilities of cross-examination to get

the necessary information from the state's witnesses. *See Occhicone*, 768 So. 2d at 1048.

Crime Scene and Blood Spatter Experts for Self-Defense Claim

During the evidentiary hearing, Bright presented the testimony of Janice Johnson – Forensic Consultant, and Michael Knox – Forensic Crime Scene Reconstruction, to establish his claim of self-defense. While Bright maintains the use of these experts proved self-defense, the trial court correctly identified the contradiction in the testimonies of the experts and the strategic decision made by Mr. Kuritz to prove self-defense through effective cross-examination and use of the state's evidence to the defense benefit.

Det. Deborah Brookins, Florida Department of Law Enforcement, testified during both the trial and the evidentiary hearing.[4] At trial, Det. Brookins was presented as a state's witness, and testified regarding the crime scene investigation and collection of evidence. In Det. Brookins' opinion, the porous nature of the wall, the textured ceiling, and the copious blood spatter around the house made it difficult to get an accurate reconstruction based on blood spatter. (R10: 488 – 89; PCR14: 2150 – 51, 2153). Det. Brookins "further testified that whoever fired the weapon was 'very near to the carpet or on it.'" (PCR10: 1396; R10 484). In

[4] The trial court made a finding that Det. Brookins' testimony from the evidentiary hearing was no different when compared to her trial testimony. (PCR10: 1402),

addition, Det. Brookins could not say the struggle was limited to the living room, primarily because of the amount of blood throughout the crime scene. (PCR10: 1396 – 97; PCR13: 1902 – 03; R10: 488 – 89).

During the evidentiary hearing, the first expert Bright presented was Ms. Janice Johnson, a specialist in crime scene reconstruction. (PCR16: 2490). Ms. Johnson was trained by the Florida Department of Law Enforcement and the Federal Bureau of Investigation and previously worked for the FBI as a fingerprint technician. (PCR16: 2491 – 91). Ms. Johnson did not agree with Det. Brookins' testimony and conclusions regarding the blood spatter analysis. (PCR16: 2506).

In Ms. Johnson's opinion the crime scene investigation was inadequate and did not provide sufficient detail in photographs and blood sampling to determine the source of blood spatter in various parts of the house and room. (PCR16: 2507 – 08). Ms. Johnson looked at State Exhibit 77 and 78 (trial photographs) which show the sofa and area where King's body was found. (PCR16: 2509 – 10). Ms. Johnson testified the blood spatter on the wall behind the couch indicated King was likely standing, or crouched on top of the sofa when he was attacked with the hammer. (PCR16: 2510 – 11, 2540 – 41).

Ms. Johnson also examined State Exhibits 64 – 74, which are trial photos of the recliner where Brown's body was found. (PCR16: 2520 – 21). State Exhibit 74 is a photo of the blood spatter on the wall behind the recliner. (PCR16: 2521). There

is a distinctive horizontal void in the blood spatter just above the recliner which Ms. Johnson testified was consistent with Randall Brown's shoulders. (PCR16: 2521 – 22).

Ms. Johnson was unwavering in her testimony regarding the comforter underneath Brown's arms and body in State Exhibit 46 (trial photo). (PCR16: 2560 – 62). In her opinion, the comforter was placed overtop of Brown's body after the attack occurred. (PCR16: 2560). Ms. Johnson's conclusion was curious, because State Exhibit 46 clearly shows the comforter not just over top of Brown's body, but wrapped within it, specifically the comforter is between Brown's body and right arm. (PCR16: 2561 – 62). However, Mr. Johnson would not concede the potential errors in her opinion and maintained the comforter was placed on top of Brown following the attack, even though she admitted that her scenario of Bright lifting Brown's arm to place the comforter underneath it did not make sense. (PCR16: 2561 – 62). Ms. Johnson also stated she could not opine whether or not King or Brown was asleep or awake when the attack began, and there was no evidence either King or Brown tried to flee the crime scene. (PCR16: 2562 – 63).

Bright also presented the testimony of Michael Knox, a forensic consultant specializing in crime scene reconstruction. (PCR16: 2581). Slides 31 and 36 of his PowerPoint presentation (SPCR2: 32, 37) depict the sofa and area where King's body was found. Mr. Knox stated the blood spatter on the wall above the

sofa, in slides 31 and 36, indicated King's head was above the sofa when it was repeatedly struck with a hammer. (PCR17: 2679 – 80, 2704; SPCR2: 32, 37). In contrast to Ms. Johnson's testimony, Mr. Knox did not believe King to be standing on the sofa, merely, that his head was above, and not below the sofa cushions.[5] (PCR17: 2679 – 80).

Mr. Knox also examined the photos of Randall Brown. Slide 54 of his PowerPoint presentation (SPCR2: 51) shows the recliner and the blood spatter on the wall. (PCR16: 2643 – 44; SPCR2: 51). In Mr. Knox's opinion, the blood spatter pattern indicated, Randall Brown's head was in the middle of the wall, specifically the horizontal void in the blood spatter. (PCR16: 2643; PCR17: 2719 – 20; SPCR2: 51). This testimony was a direct contradiction to that of Ms. Johnson who placed Brown's shoulders in the horizontal void. (PCR10: 1400; PCR16: 2521 – 22). Mr. Knox believed the crime scene indicated a dynamic struggle between the victim's and Bright, but could not say whether either victim was awake or in a repose position when the attack began. (PCR17: 2685 – 87, 2694, 2718). According to Mr. Knox, there was a struggle, but the evidence could not show whether this struggle was mutual combat. (PCR17: 2718). In addition,

[5] It is important to note that Derrick King was 6'5" tall, thus had he been standing on the sofa his head would have been significantly higher than the top of the sofa. (PCR12: 1690).

while pictures of Bright showed abrasions on his back and arms, Bright did not have the classic defensive wounds to his hands or forearms one would expect. (PCR17: 2718).

In all, three crime scene analysts examined the room where Brown and King's bodies were found. Each of these witnesses had a different opinion regarding the blood spatter evidence. Det. Brookins' felt that an accurate reconstruction based on blood spatter was not possible. (R10: 488 – 89; PCR14: 2150 – 51, 2153). According to Ms. Johnson, the blood spatter placed Derrik King either standing or crouched on top of the sofa, and Randall Brown's head was above the large horizontal void area in the middle of the blood spatter on the wall. (PCR16: 2510 – 11, 2521 – 22, 2540 – 41). Finally, Mr. Knox placed Derrik King's head above the sofa cushions, but stated he was not standing or crouched on the sofa. (PCR17: 2679 – 80). In addition, Mr. Knox placed Randall Brown's head in the middle of the void area of blood spatter behind the recliner. (PCR16: 2643; PCR17: 2179 – 20).

As a result of the conflicting testimonies, the trial court found Det. Brookins' opinion to be the most reliable. (PCR10: 1402). Specifically, the trial court stated "the substance of Ms. Johnson's and Mr. Knox's conflicting evidentiary hearing

testimony did not differ from that offered by Det. Brookins at trial. . . ."[6] (PCR10: 1402). "Instead, their testimony corroborated Det. Brookins' trial testimony that it could not be stated where in the house the attacks or confrontations took place." (PCR10: 1402).

In *Reed v. State*, 875 So. 2d 415, 422 – 27 (Fla. 2004), the defendant alleged his counsel was ineffective in failing to hire various experts including a serology expert to challenge the state's blood evidence. The defendant argued that had his counsel retained a serology expert he would have been prepared to challenge the state's evidence based on a secretor versus a non-secretor theory. *Id*. at 424. But, trial counsel's strategy was to show that the blood evidence could not readily identify the source of the blood, and only identify someone as part of a large group. *Id*. at 425. On appeal this Court rejected the defendant's argument, because the testimony he presented from a serology expert "would not have changed the statistical numbers in any way." *Id*. Plainly, the presentation of a serologist did not assist the defense by providing new evidence.

Here, the presentation of Bright's two crime scene experts produced the same result. The conflicting testimonies from Ms. Johnson and Mr. Knox added

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[6] The trial court made a specific finding that "Defendant's two post-conviction experts presented conflicting testimony as to many points during the evidentiary hearing." (PCR10: 1400).

credibility to the testimony of Det. Brookins, resulting in the same evidence coming before the jury. Therefore, Bright failed to prove prejudice, because no reasonable probability exists that Bright would have been acquitted at trial, but for the conflicting testimonies of the new forensic experts. Thus, the trial court properly found that Bright failed to establish both deficient performance and prejudice, because Mr. Kuritz decision to not use experts was based on strategy and the substantive testimony from the new experts would not have affected the jury's verdict. (PCR10: 1402 – 03).

Trial Counsel Could Not Present Evidence of Victim's Character.

Bright maintains trial counsel was deficient in failing to present evidence of Derrick King and Randall Brown's character to provide corroborating testimony for his claim of self-defense. (DB at 74). Here, Bright's argument merges the two types of available character evidence in a claim for self-defense, and still fails to produce any reliable evidence of the victim's character which would have been admissible at trial. Still, Bright maintains evidence of his fear of the victims and his version of the murder should have been presented regardless of the source or admissibility.

a. Prosecution's Motion in Liminie Against Self-Serving Hearsay

Prior to trial, the prosecution filed a motion in liminie seeking to exclude Bright's statements of self-serving hearsay. This included Bright's statements

regarding his general fear of the victims and his version of the murders where he claimed self-defense.

"A defendant's out-of-court exculpatory statements are inadmissible hearsay." *Stafford v. State*, 956 So. 2d 525, 525 (Fla. 4th DCA 2007)(citing *Cotton v. State*, 763 So. 2d 437, 439 (Fla. 4th DCA 2000)(holding "when a defendant seeks to introduce his own out-of-court exculpatory statement for the truth of the matter stated, it is inadmissible hearsay."); *Jenkins v. State*, 50 So. 62, 65 (Fla. 1909)(finding "[t]he defendant cannot show self-serving acts before or subsequent to the crime; for this would permit him to make evidence for himself). Thus, statements by Bright to other witnesses which would have been presented to show that Bright was in fear of his life inside of his own home because of Derrick King and Randall Brown's presence fit soundly within the definition of self-serving hearsay and were properly excluded.

The prosecution's motion was ultimately granted, and Mr. Kuritz intended to abide by the court's direction, and "'got as close as he could' to showing the victims were not 'saints,' without 'breaching the court's order.'" (PCR10: 1432).

Nevertheless, when Mr. Kuritz cross-examined state's witness Mickey Graham, he was able to present Bright's version of the murders.[7] At that point, Bright had

[7] *Bright v. State*, 90 So. 3d 249, 253 – 54 (Fla. 2012) (noting Bright's version of

met the threshold for establishing "an overt act on the part of the victims at or about the time of the incident which reasonably indicates a need for the accused to act in self-defense." C. Ehrhardt, Fla. Evd. § 404.6 (2014 Ed.) (citing *Berrios v. State*, 781 So. 2d 455, 458 (Fla. 4th DCA 2001). But, there was neither reliable nor admissible evidence of Derrick King or Randall Brown's reputation for violence or evidence of specific bad acts which Bright could rely on at trial.

b. Victim's Reputation for Violence

"Character is distinct from reputation, the latter being merely evidence of the former; but reputation is merely what is reported or understood from report to be the communities [sic] estimate of the person's character." *Fine v. State*, 70 So. 379 (Fla. 1915). When a criminal defendant alleges self-defense, evidence of the victim's reputation for violence may be admissible to prove the victim was in fact the aggressor. C. Ehrhardt, Fla. Evd. § 404.6. Such evidence "is offered to prove that, at the time of the alleged crime, the victim acted in conformity with a pre-existing character trait. C. Ehrhardt, Fla. Evd. § 404.6 (citing *Love v. State*, 971 So. 2d 280, 287 – 88 (Fla. 4th DCA 2008)). "Section 90.405(2) [of the Florida statues] does not alter the general rule in Florida that if self-defense is alleged as a defense, only character evidence in the form of reputation testimony is admissible

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self-defense was presented through cross-examination of inmate Mickey Graham).

as circumstantial evidence to prove the victim's conduct." C. Ehrhardt, Fla. Evd. § 404.6.

A victim's reputation for violence must be proven by witnesses who are aware of that reputation. C. Ehrhardt, Fla. Evd. § 405.3 (2014 Ed.). "In order to be a reliable assessment of character, the reputation must be based on a broad-based section of the community or the person's associates." C. Ehrhardt, Fla. Evd. § 405.1 (2014 Ed.). "The reputation must be based on discussions among a broad group of people so that it accurately reflects the person's character, rather than the biased opinions or comments of two or three persons or of a narrow segment of the community." C. Ehrhardt, Fla. Evd. § 405.1.

During the evidentiary hearing, Bright presented two witnesses, Valerie Kemp and Charity Kemp, who each testified that Brown and King had a reputation for being violent drug dealers, and were known to carry guns. (PCR17: 2750, 2806 – 08). However, following cross-examination and review of their prior recorded statement, the trial court found both Valerie and Charity to have "absolutely no credibility." (PCR10: 1438, 1449).

Valerie Kemp is an admitted crack addict who would frequently use drugs with Bright, and although she was unemployed at the time of the murders, she would spend $70 on crack every two days. (PCR17: 2760 – 63). Valerie also has at least three felony convictions and one crime of dishonesty on her record. (PCR17:

2764). During the evidentiary hearing, Valerie testified that Brown and King were known as violent drug dealers, but could not produce any additional facts about such conversations with other persons within the community. (PCR17: 2749 – 50). When asked during direct examination how many people knew Brown and King as being violent, Valerie's response was "one, two, three, a hundred." (PCR17: 2750). Valerie's flippant attitude was pervasive throughout her testimony[8], and the trial court noted in its order, that Valerie appeared under the influence or impaired while testifying. (PCR10: 1438, n. 23).

Regardless of Valerie's personal shortcomings, the most damaging contradictions to her in-court testimony came from the prior recorded statement during an interview with post-conviction counsel's investigator. In that interview Valerie states plainly that Randall Brown was "very quiet," he was "a good dough boy," "he didn't bother nobody, he didn't mess with nobody, or nothing [sic] like that." (SPCR1: 6 – 7). In fact, Valerie had never seen Brown become violent. (SPCR1: 7). Valerie also never saw any confrontation between the victim's and Bright in her numerous trips to Bright's home. (SPCR1: 12). Valerie also never

[8] The trial court stated: "this Court finds [Valerie Kemp] has absolutely no credibility, as specifically demonstrated through her combative, sarcastic, and borderline rude demeanor and behavior *and* her self-reported unknown number of prior felony convictions for drugs and crimes of dishonesty." (PCR10: 1438) (emphasis in original).

heard Brown or King threaten Bright. (SPCR1: 12).

Regarding Derrick King, Valerie stated he was mostly quiet and she had no real knowledge of him because he did not talk to anyone. (SPCR1: 17). Finally, Valerie concluded her interview by stating she believed Bright just "snapped" in attacking Brown and King. (SPCR1: 18).

Charity Kemp presented the same evidence as her mother. Charity has been convicted of at least two felonies and a few crimes of dishonesty. (PCR17: 2832 – 33). Charity stated that Brown and King had a reputation for violence within the community. (PCR17: 2806 – 07). "Numerous people" told her this . . . "like five, ten people," but the detailed information about Brown and King's reputation ended there. (PCR17: 2806 – 07).

Much like her mother, Charity's testimony did not hold up on cross-examination and was completely discredited by her prior recorded statement. On cross-examination, Charity stated she did not know of King's reputation because he was an outsider to the community. (PCR17: 2826 – 27). During her prior recorded interview, Charity said she had never seen Brown threaten Bright. (SPCR1: 27). Each time Bright confronted Brown and King, the response was not violence, but Brown and King would furnish Bright with more drugs. (SPCR1: 31). According to Charity, Randall Brown was not confrontational, and would only get violent with people that owed him money. (SPCR1: 23, 33). In reference

to Derrick King, Charity again stated that she did not know King, and had no knowledge of his reputation. (SPCR1: 32). Finally, Charity's availability was questionable, because she was more than likely incarcerated in Orlando on burglary charges at the time of trial. (PCR10: 1448).

When presented with this testimony and the stark contradictions within the previously recorded statements, the trial court's ruling becomes obvious. Valerie and Charity Kemp did not have any credibility as witnesses, and therefore their testimony did not establish either deficient performance or prejudice.[9] (PCR10: 1436, 1438). Although Bright argues the compelling differences in Valerie and Charity's testimonies serves as "powerful *corroboration* that their post-conviction testimony was honest, accurate, and not fabricated," he has failed to present any legal support for such a position. (DB at 84) (emphasis in brief).[10] Bright maintains the Kemp's testimonies are evidence of King and Brown's reputation for violence, yet Bright failed to overcome the first hurdle being "the court must find

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[9] The trial court found Bright failed to establish deficient performance because Mr. Kuritz testified "the Defense team was *unable* to locate any witnesses to provide non-hearsay statements about the victim's reputations." (PCR10: 1436).

[10] Footnote 35 of the Bright's brief asserts "the credibility of the Kemp's testimony at the postconviction hearing cannot be denied." Yet, this conclusory statement is refuted by the factual finding of the trial court, and the evidence of a prior inconsistent statement from both Valerie and Charity Kemp. Here again, Bright purports as fact that which was rejected by the trial court and does not address the legal reasoning of the trial court.

as a preliminary fact that the reputation is sufficiently broad-based." C. Ehrhardt, Fla. Evd. § 405.1.

Therefore, in raising this issue, Bright has collaterally attacked the trial court's legal determination on an evidentiary matter, which is subject to review for abuse of discretion. *Frances v. State*, 970 So. 2d 806, 813 (Fla. 2007)(noting that a trial court's ruling on the admission or exclusion of evidence is reviewed for an abuse of discretion). "[D]iscretion is abused only where no reasonable [judge] would take the view adopted by the trial court." *Buzia v. State*, 926 So. 2d 1203, 1216 (Fla. 2006). In this case, only the unreasonable judge would take the position put forward by Bright, as Valerie and Charity Kemp were not competent witnesses for purposes of reputation evidence and the trial court found they had no credibility. (PCR10: 1446, 1449). Accordingly, Bright failed to establish any reputation of Derrick King and Randall Brown, and the trial court correctly found Mr. Kuritz to have been effective counsel.

c. Specific Bad Acts of the Victims.

Unlike evidence of a victim's reputation, "[t]he purpose of specific act evidence in a self-defense case is to demonstrate the reasonableness of the defendant's fear at the time of the incident." C. Ehrhardt, Fla. Evd. § 404.5, n.2 (2014 Ed.) (quoting *Munoz v. State*, 45 So. 3d 954, 956 (Fla. 3d DCA 2010)). Because the purpose of this evidence is reflexive, the defendant must show prior knowledge of the specific

acts in laying the predicate for admission. *Id*.

Here, Bright presented Maxine Singleton to testify regarding the victim's specific bad acts.[11] At the evidentiary hearing, Ms. Singleton testified that Bright had previously told her, that "not long before the murders, the men had guns and they said they would 'cut him up and put him in a suitcase and nobody would ever be able to find his body.'" (PCR10: 1453). But, as the trial court recognized, such testimony would not have been admissible because Ms. Singleton could not testify to Bright's own self-serving hearsay statements. (PCR10: 1453).

Bright now asserts these statements were admissible as an exception to hearsay to show his existing state of mind. (DB at 90); § 90.803(3), Fla. Stat. (2014). However, such a position is true only if Bright himself testified to the threats from Brown and King. Courts in Florida have routinely prohibited a defendant's self-serving hearsay statements even when offered to show state of mind. *See e.g.*, *Cotton*, 763 So. 2d at 439 – 42 (en banc) (finding no error in trial court's refusal to admit defendant's self-serving hearsay statements during cross-examination of the arresting officer. Defendant attempted to introduce statements that he accepted package without knowing the contents); *compare King v. State*, 684 So. 2d 1388 (Fla. 1st DCA 1996) (noting the challenged out-of-court statement was not made

[11] Ms. Singleton did testify during Bright's penalty phase.

by the defendant but by a third party to the defendant and was offered to prove the defendant's state-of-mind, i.e., that the defendant had no reason to know that the check he passed was a forgery); *Duncan v. State*, 616 So. 2d 140 (Fla. 1st DCA 1993) (holding the improperly excluded out-of-court statement was not the defendant's, but the out-of-court statement of another who sold stolen tire rims to the defendant. The seller told the defendant that the tire rims had been salvaged from his wrecked pick-up truck. The appellate court concluded that the seller's statement was not hearsay because it was offered to demonstrate its effect on the defendant in tending to dispel any suspicion about the unusually low price of the tire rims); *Hansman v. State*, 679 So. 2d 1216 (Fla. 4th DCA 1996) (finding reversible error in a burglary and theft prosecution, where the trial court excluded testimony of the defendant's girlfriend that she heard the owner of the baseball card collection give the defendant permission to take the collection so that he could recover insurance benefits).

In this case, the out-of-court statement was made by Bright, and told to Ms. Singleton. Ms. Singleton had no independent knowledge of the supposed threats from Brown and King. Simply, Bright told her that Brown and King had threatened her. Such evidence is not admissible as self-serving hearsay and the trial court properly concluded Bright failed to establish prejudice because the

evidence would have been excluded. (PCR10: 1453).[12]

Bright also presented Valerie Kemp and Charity Kemp who each testified Brown and King frequently carried guns. As discussed above, both Valerie and Charity Kemp were found to have no credibility. (PCR10: 1446, 1449). In addition, this testimony did not show Bright's personal knowledge of Brown and King carrying guns, and is not indicative of Bright's reasonableness to fear either King or Brown. Accordingly, the trial court correctly concluded that "any evidence of the victim's prior bad acts or conduct would have constituted inadmissible character and reputation evidence without exception. . . . Therefore, counsel was not ineffective for failing to introduce such evidence because there would have been no lawful basis for its admission at trial." (PCR10: 1435).

Common Scheme or Plan/Similar Act Evidence.

Bright claims the trial court erred in denying relief based on the presence of "Reverse Williams Rule" evidence. (DB at 95). Bright asserts evidence of Brown and King's prior drug operations should have been presented to show they frequently took over homes to manufacture and sell drugs. (DB at 95). In raising

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[12] Additionally, the trial court found Bright failed to establish deficient performance under these circumstances. The trial court noted that Mr. Kuritz was aware of Ms. Singleton's potential guilt phase testimony, but could not see a way to overcome a hearsay objection, had concerns with Ms. Singleton's mental health issues, and was difficult to reach. (PCR10: 1452).

this issue Bright grossly misapplies the basis and use of the Reverse Williams Rule.

"Reverse Williams Rule evidence permits a defendant to introduce evidence of prior similar crimes involving another person, if a proper predicate is laid, to show the defendant's innocence by proof of guilt of another." 23 Fla. Jur. 2d Evd. And Witnesses § 217 (2014 ed.). "Where a defendant's purpose is to shift suspicion from himself . . . to another person, then evidence of past criminal conduct of that other person should be of such a nature that it would be admissible if that person were on trial for the present offense." *Id*. "For other crimes to be relevant as evidence that the defendant did not commit the charged offenses, a close similarity of the facts is required." *Id*.

In this case, the only type of Reverse Williams Rule evidence Bright could have presented during his trial would be a collateral crime by another person who was either charged, or convicted of, bludgeoning someone to death with a hammer. No such evidence exists. If Bright is claiming there is Reverse Williams Rule evidence of the victims', then a proper application of the Reverse Williams Rule would mean Bright is asserting the victims murdered themselves. The trial court properly found there was no merit to this argument, and denied relief

accordingly.[13]

[13] The trial court specifically stated that Bright's attempt at use of the Reverse Williams Rule was simply an allegation that "counsel should have presented evidence of the victims' prior bad acts to prove that because they 'took over' a home in the past to sell drugs, they 'took over' Defendant's home, as well – which qualifies as classic reputation evidence."

2. TRIAL COUNSEL CONDUCTED A COMPLETE AND EFFECTIVE CROSS-EXAMINATION OF DET. DEBORAH BROOKINS.

Bright claims Mr. Kuritz was ineffective in his cross-examination of FLDE crime scene evidence technician, Det. Deborah Brookins. (DB at 97). This argument is part-and-parcel with Bright's first issue on cross-appeal, and Bright plainly links the claims together. (DB at 97 – 98). At best, this claim is characterized as Bright's belief that Mr. Kuritz failed to investigate the theory of self-defense and his resulting cross-examination of the Det. Brookins was deficient. But, as the testimony from the evidentiary hearing showed, Mr. Kuritz felt self-defense was the only logical explanation based on the crime scene photos. As a result, Mr. Kuritz pursued a strategy based on effective cross-examination to paint an obvious picture of self-defense to the jury, and rejected the presentation of expert testimony. Therefore, Bright has failed to show both deficient performance and prejudice and this claim should be rejected.

The Standard of Review.

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

The Cross-Examination of Det. Brookins – No Deficient Performance

In order to prove deficient performance during the cross-examination of Det. Brookins, Bright must show that Mr. Kuritz's made specific errors during his cross-examination, so serious, that no reasonable attorney would have pursued a similar strategy. *Pietri*, 885 So. 2d at 252; *see Bryant*, 901 So. 2d at 820 (quoting *Strickland*, 466 U.S. at 688). In raising this issue, Bright openly admits his argument is not based on the deficiencies of Mr. Kuritz's cross-examination, but that the failure to investigate Bright's claim of self-defense and consult with forensic experts lead to a deficient cross-examination. (DB at 98). In Bright's own words, "*what might have been done*" had Mr. Kuritz consulted with experts.[14] Nevertheless, Bright's argument ignores the strategic decision Mr. Kuritz made to not use experts in this case.

Here, Mr. Kuritz felt Bright's version of self-defense was the only logical series of events that explained the physical evidence. (PCR12: 1722 – 23, 1733 – 34, 1737 – 68). While Mr. Kuritz has hired experts in the past, "if he believes a point of evidence or theory of the case is 'obvious' to a layman from the photographs or otherwise, he does not believe an expert is necessary to explain the issue or matter to a jury and he will not hire one." (PCR10: 1393; PCR12: 1798; PCR13: 1874).

[14] *See Lebron v. State*, 135 So. 3d 1040, 1052 (Fla. 2014) (noting a defendant must do more than speculate that an error affected the outcome).

Moreover, if Mr. Kuritz believes an expert can assist in the defense, he will consult with them, as he stated "I will consult with experts, not just because for – if I think it's appropriate to spend the money, I will, because I think if nothing else, they can help prepare me with cross if it's not somebody I can use to actually testify." (PCR12: 1799).

In Mr. Kuritz's opinion "if he is able to effectively cross-examine a witness, like Det. Brookins, and then point out the deficiencies of that witness' testimony during closing argument, he does not believe an expert is necessary to testify about the same matters." (PCR10: 1394). Stated another way, "[i]f Mr. Kuritz is able to adduce favorable testimony from a State's witness on cross-examination, rather than obtain his own expert, there exists no reason to retain another expert to testify about the same point." (PCR10: 1394).

In this case, Mr. Kuritz's style and strategy favored effective cross-examination which presented an obvious story to the jury over the complicated and potentially dry testimony of an expert. (PCR12: 1769 – 70, 1775, 1777; PCR13: 1874, 1883 – 84, 1903, 1906). Contrary to Bright's assertion, Mr. Kuritz "vehemently questioned the Detective during cross-examination by asking her questions favorable to Defendant's theory of the case." (PCR10: 1396; R10: 484 – 89). This cross-examination elicited: (1) Bright's theory that the gun shot was fired from the ground at an upward angle (R10: 484); (2) Det. Brookins "could not state where

the attacks took place in the house because there was blood everywhere" (PCR10: 1396; R10: 488 – 89); (3) Det. Brookins could not state the struggle only took place in the living room where the bodies were found (PCR13: 1902 – 03); (4) objected to Det. Brookins' testimony as not being a qualified expert in blood spatter; and (5) "impeached Det. Brookins' credibility during cross-examination when he questioned her comparing her trial testimony to her written report." (PCR10: 1422; R10: 482).

Here, Mr. Kuritz did not consult or employ a forensic expert because "he thought it was 'clear' the physical evidence did not match the State's theory of the case." (PCR10: 1396; PCR13: 1874 – 1904). As this court has repeatedly held "[c]ounsel cannot be deemed ineffective merely because current counsel disagrees with trial counsel's strategic decisions." *Occhicone*, 769 So. 2d at 1048 (finding trial counsel not ineffective because they "consciously chose not to present evidence during their case because they believed they had enough evidence to the jury through cross-examination"). The testimony from the evidentiary hearing is clear; Mr. Kuritz weighed many factors in deciding to not present or consult with an expert. (PCR10: 1393 – 94). Therefore, Bright failed to establish deficient performance for the cross-examination of Det. Brookins. (PCR10: 1394).

The Testimony of Bright's Forensic Experts Failed to Establish Prejudice.

Notwithstanding the failure to show deficient performance, the trial court also

conducted an analysis of prejudice from the cross-examination of Det. Brookins. In order to establish prejudice, Bright must show that but for the failure to consult with forensic experts, the cross-examination of Det. Brookins would have been materially different and there is a reasonable probability Bright would have been acquitted. *Gaskin*, 822 So. 2d at 1247 (citing *Hildwin*, 654 So. 2d at 109).

As discussed above, Bright cannot meet this standard, because the forensic experts he presented contradicted each other and simply corroborated the testimony of Det. Brookins. (PCR10: 1402). Specifically the trial court found "it troubling that Defendant's two postconviction experts presented conflicting testimony as to many points during the evidentiary hearing." (PCR10: 1400). The trial court stated:

> Mr. Knox and Ms. Johnson's conclusion that the victims struggled with their attacker and were in standing positions during portions of the struggle is not inconsistent with Det. Brookins' assessment of the crime scene at trial that '[t]here might have been some movement involved with the parties' but that they were likely struck in that room and near where their bodies were found."

(PCR10: 1400; R10: 488 – 89, 491). Thus, after evaluating the testimony of all three experts, the trial court concluded Det. Brookins' testimony to be the most credible of all the experts. (PCR10: 1402). Accordingly, Bright cannot show prejudice from the failure to retain experts who would not have assisted in the defense. *See Reed*, 875 So. 2d at 422 – 27 (finding trial counsel not ineffective in failing to hire various experts who would not have assisted in the defense).

Therefore, this claim should be rejected as Bright has failed to show both deficient performance and prejudice resulting from the cross-examination of Det. Brookins. (PCR10: 1402 – 03).

3. BRIGHT CANNOT SHOW AN ACTUALLY BIASED JUROR SERVED AS A MEMBER OF THE JURY.

Bright avers his trial counsel was deficient in failing to excuse Juror "M" who ultimately served on the jury. (DB at 104). During the evidentiary hearing Bright did not produce any evidence showing juror M was actually biased, or that trial counsel was deficient in not striking Juror M from the jury. Without proof of an actually biased juror having served, Bright's claim becomes speculative. A speculative claim that a biased juror may have served is not sufficient to establish prejudice under *Strickland*, and as such trial counsel cannot be found ineffective.

The Standard of Review.

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

To establish deficient performance for failure to properly strike a prospective juror, a defendant must show that his counsel made specific errors so obvious that no reasonable attorney would have taken a similar course of action. *See Strickland*, 466 U.S. at 689; *Pietri*, 885 So. 2d at 252. To establish prejudice for failure to strike a prospective juror, Bright must show a juror who was actually biased against him served on the jury. *Carratelli v. State*, 961 So. 2d 312, 324

(Fla. 2007); *Johnston v. State*, 63 So. 3d 730, 744 – 45 (Fla. 2011) (denying Johnston's claim that trial counsel was ineffective because Johnston did not show that jurors were actually biased). "Actual bias means bias-in-fact that would prevent service as an impartial juror." *Carratelli*, 961 So. 2d at 324 (citing *U.S. v. Wood*, 229 U.S. 123, 133 – 35 (1936)). ". . . [T]he evidence of bias must be plain on the face of the record." *Johnston*, 63 So. 3d at 744 – 45. Unless a defendant can show both deficient performance and prejudice, it cannot be said the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable. *Strickland*, 466 U.S. at 687.

Juror M – Defendant's Right to Remain Silent.

Bright points to Juror M's answer during voir dire regarding a defendant's right to remain silent as evidence of trial counsel's deficient performance and resulting prejudice. (DB at 104). During voir dire, Juror M said that if the defendant did not testify she would think the defendant was hiding something. (R8: 172 – 73; R9: 275). When asked to quantify her response, juror M said "a tiny bit." (R8: 172 – 73; R9: 275).

Trial Counsel Felt Juror M Would Be Fair and Impartial

"[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Strickland*, 466 U.S. at 690. Judicial

scrutiny of counsel's performance must be highly deferential and must be conducted in a manner that eliminated the "distorting effects of hindsight" and considers the conduct in light of the circumstances facing the attorney at the time." *Johnson v. State*, 921 So. 2d 490, 500 (Fla. 2000) (internal citations omitted).

In this case, Mr. Kuritz testified that he considered "several factors" in deciding to keep juror M on the jury panel. (PCR10: 1535). Mr. Kuritz felt juror M had several redeeming qualities which led him to keep her as a juror. (PCR10: 1535). Mr. Kuritz had no doubt juror M would remain fair and impartial, and did not believe that her response of "a tiny bit" warranted an automatic use of a peremptory challenged. (PCR12: 1868). Thus "Mr. Kuritz reasoned, juror M's statement, placed in the context of the conversation and having personally conducted the *voir dire*, did not 'offend' him, such to warrant him to strike Juror M from the jury panel." (PCR10: 1535). Mr. Kuritz was clear, that had he suspected a problem with Juror M, he would have struck her from the panel. (PCR10: 1535). Accordingly, Mr. Kuritz's decision to keep juror M as a member of the jury was strategic and cannot be said to have resulted in deficient performance.

Bright Failed to Show Juror M Was Actually Biased in Her Service.

Bright must also show the failure to remove juror M, resulted in a juror, any juror, with actual biases serving as a member of the jury. *Carratelli*, 961 So. 2d at 323 – 24. Although Bright presented the conclusive proposition that the failure to

remove juror M automatically resulted in prejudice, this position is purely speculative.

Mere speculation into a juror's potential bias is not sufficient to rise to the level of ineffectiveness as required by *Strickland*. *See Solozano v. State*, 25 So. 3d 19, 23 (Fla. 2009) (finding claim of ineffectiveness based on speculation legally insufficient and properly denied in post-conviction); *Green v. State*, 975 So. 2d 1090, 1105 (Fla. 2008) (holding trial counsel did not render ineffective assistance in failing to ask prospective juror more questions "because an allegation that there would have been a basis for a cause challenge if counsel had followed up during voir dire with more specific questions was speculative") (citing *Johnson v. State*, 903 So. 2d 888, 890 (Fla. 2005); *Reeves v. State*, 826 So. 2d 932, 939 (Fla. 2002)). Here, there is simply no evidence which would give rise to a finding that an actually biased juror served. Therefore, because Bright cannot show juror M was actually biased in serving as a juror, Bright has failed to establish prejudice and this claim should be rejected. (PCR10: 1535 – 36).

4. NO ERROR OCCURRED DURING THE GUILT PHASE OF BRIGHT'S TRIAL AND THEREFORE BRIGHT IS NOT ENTITLED TO RELIEF UNDER AN ANALYSIS OF CUMULATIVE ERROR

Bright asserts the errors he presents in his cross-appeal resulted in an unfair trial. (DB at 108). While a defendant may raise a claim of cumulative error during post-conviction proceedings, Bright also presents an argument of actual innocence throughout his brief, in addition to his claim of ineffective assistance of counsel. Only errors related to the ineffective assistance of counsel may be considered cumulatively. Regardless, each of the errors Bright complains of are based on an unfounded view of the evidence and thus Bright is not entitled to any relief based on cumulative error.

Review of Cumulative Error.[15]

When this Court finds multiple harmless errors within a trial it considers

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[15] It is worth noting that the United States Supreme Court has never addressed the issue of cumulative error. *Derden v. McNeel*, 978 F.2d 1453, 1456 (5th Cir. 1992) (en banc)(noting the Supreme Court has not directly spoken regarding cumulative error). The problem with an analysis of cumulative error is that it constitutes an open admission that none of the individual errors warrant reversal, but somehow collectively the errors do merit reversal. The whole is greater than the sum of the parts according to the doctrine of cumulative error. *Derden*, 978 F.2d at 1456 (stating "[t]hat the constitutionally of a state criminal trial can be compromised by a serious of events none of which individually violated a defendant's constitutional rights seems a difficult theoretical proposition).

"whether 'the cumulative effect of [the] errors was 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.'" *Penalver v. State*, 926 So. 2d 1118, 1137 (Fla. 2006) (quoting *Brooks v. State*, 918 So. 2d 181, 202 (Fla. 2005)). In determining the cumulative effect of the errors within a trial, this Court considers "whether: (1) the errors were fundamental, (2) the errors went to the heart of the State's case, and (3) the jury would still have heard substantial evidence in support of the defendant's guilt." *Penalver*, 926 So. 2d at 1137. If "the individual claims of error alleged are either procedurally barred or without merit, the claims of cumulative errors also necessarily fails." *Israel v. State*, 985 So. 2d 510, 520 (Fla. 2008) (quoting *Parker v. State*, 904 So. 2d 370 (Fla. 2005)).

No Error Present During the Guilt Phase of Bright's Trial

Here, Bright has complained about the investigation and presentation of his theory of self-defense and the inclusion of juror M on the panel following her answer to one question during voir dire. First, the testimony of Mr. Kuritz shows the intent and repeated efforts to present Bright's theory of self-defense. Mr. Kuritz believed self-defense was the only reasonable explanation for the physical evidence at the crime scene. Mr. Kuritz felt the case for self-defense was so obvious that he did not consult with experts, because he feared the downside of presenting an expert would confuse the jury. When Bright did present expert

testimony during the evidentiary hearing, those experts contradicted each in their evaluations of the crime scene and the placement of Brown and King during the attacks, proving Mr. Kuritz's reasonable conduct under the circumstances.

In presenting character evidence of the victims, Mr. Kuritz "testified he 'got as close as he could' to attempting to demonstrate the victims were not 'saints' without 'breaching the court's order'" regarding self-serving hearsay. (PCR10: 1432). But, Mr. Kuritz was "*unable* to locate any witnesses to provide non-hearsay statements about the victims' reputations." (PCR10: 1436). Then when given the opportunity to find witnesses for the purpose of presenting reputation evidence, Bright was only able to produce Valerie and Charity Kemp. Two witnesses, who were each found to have "no credibility" by the trial court. (PCR10: 1446, 1449).

Second, Bright has not demonstrated juror M was actually biased against him in serving as a member of the jury. In order to establish an error for failing to strike juror M, Bright must show actual bias in-fact, which is plain on the face of the record. *Carratelli*, 961 So. 2d at 324; *Johnston*, 63 So. 3d at 744 – 45. No evidence of such bias exists, and Mr. Kuritz felt juror M had redeeming qualities that led him to keep her as a jury member. (PCR10: 1535). Mr. Kuritz was clear that had he suspected a problem with juror M, he would have struck her from the panel. (PCR10: 1535).

Therefore, when reviewing the record in this case each of the complained of errors have been proven to be meritless. Accordingly, Bright is not entitled to relief based on a claim of cumulative error and this issue should be rejected. *Israel*, 985 So. 2d at 520.

REPLY TO BRIGHT'S ANSWER

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

This court should disregard Bright's answer to the issue raised by the State's initial brief, as it constitutes an unprofessional personal attack on undersigned counsel and the Office of the Attorney General. (DB at 122 – 25). The entire "Introduction" to Bright's answer uses scurrilous rhetoric routinely discouraged by appellate courts, and implies the State should concede all arguments. (DB at 122 – 25); *see Davis v. State ex rel. Cromwell*, 23 So. 2d 85, 87 (Fla. 1945)(granting motion to strike for use of the words "unconscientious" and "offensive personality" when describing opposing counsel); *Easton v. Weir*, 228 So. 2d 396 (Fla. 2d DCA 1969)(expunging language in brief commenting on counsel's honesty and integrity); *Sabawi v. Carpentier*, 767 So. 2d 585, 586 (Fla. 5th DCA 2000)(stating the purpose of the facts is to inform the court of pertinent issues only). Moreover, Bright continues to assert as facts testimony which was openly rejected by the trial court. (DB at 144). Such tactics are unbecoming of an appellate attorney and the professionalism required by this Court. S*upra* pages 2, n.1, 3

Even still, Bright's argument is predicated on a theory that more mitigation evidence equates to better mitigation evidence regardless of the circumstances or

underlying facts.

In this case, trial counsel sought to humanize Raymond Bright and depict the murders of Derrick King and Randall Brown as conduct which was out of character for Raymond Bright. Accordingly, any evidence that would have opened the door to Bright's history of violence and more than 25 felony convictions would have been contrary to the defense theory of mitigation.

Trial Counsel Investigated and Presented a Theory of Mitigation.

"There is a 'strong presumption' that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than 'sheer neglect.'" *Richter*, 131 S.Ct. at 794 (quoting *Gentry*, 540 U.S. at 8). Here, Bright's claim that trial counsel failed to conduct even a basic investigation into mitigation is belied by the actual presentation of mitigation, and the testimony from the evidentiary hearing. (DB at 123, 149).

Mr. Nolan did consult with Dr. Krop, a mental health expert, and Dr. Krop returned a report stating Bright was competent to stand trial, and did not suffer from any psychopathy or personality disorders.[16] (PCR15: 2415 – 16). Dr. Krop

[16] To date, Dr. Krop has never been asked to perform a neuropsychological evaluation on Bright. (PCR15: 2456). This is not uncommon as Dr. Krop usually does not testify in cases which he is retained. (PCR15: 2457 – 58). Dr. Krop admitted there are many reasons he is not presented as a witness, but it primarily stems from an attorney's belief that his testimony would do more harm than good.

made multiple references to Bright's issues with anger management, criminal history and incidents of domestic violence which included violations of a restraining order. (PCR15: 2460, 2468). Mr. Nolan also interviewed and presented the testimony of eight different witnesses during the penalty phase who were instructed to "focus [their] testimony on Defendant's substance abuse/addiction, his attributes as a hard worker and being a good person, and how he cared for and helped . . . children." (PCR10: 1491). Then during the *Spencer*[17] hearing, Mr. Nolan presented the testimony of Dr. Ernest Miller, a psychiatrist, who testified to Bright's long standing substance abuse problems with cocaine and alcohol. *Bright*, 90 So. 3d at 256. Dr. Miller noted that Bright's repeated attempts at rehabilitation were futile when accompanied with the failure to treat the underlying emotional issues. *Id*. Finally, Dr. Miller believed Bright did act in self-defense. *Id*.

Simply, trial counsel's attention to the positive aspects of Bright's life to the exclusion of the negative information cannot be regarded as neglect, but as strategy. *See Richter*, 131 S.Ct. at 794. Instead, Bright focuses only on what was presented during the evidentiary hearing, and ignores the original penalty phase, as if Bright's trial counsel did not present anything. (DB at 122 – 25, 149).

(PCR15: 2457 – 58).

[17] *Spencer v. State*, 691 So. 2d 1062 (Fla. 1996).

"Even if counsel's decision appears to have been unwise in retrospect, the decision will be held to have been ineffective assistance only if it was 'so patently unreasonable that no competent attorney would have chosen it." *Dingle*, 480 F.3d at 1099 (quoting *Adams*, 709 F.2d at 1445). But, in this case trial counsel's avoidance of Bright's felony convictions and violent background cannot be said to be unreasonable when viewed against the overarching argument of self-defense. Nevertheless, the trial court denied Bright's counsel the presumption of strategy because he was not present to testify. (PCR10: 1477, 1484, 1510). Therefore, the trial court erred in finding deficient performance on the part of trial counsel and this Court should reverse the lower court's decision and deny Bright a new penalty phase.

The Trial Court Did Not Properly Evaluate Prejudice

Bright's answer does not address the merits of the State's argument that the trial court did not conduct a proper analysis of prejudice as required by *Porter v. McCollum*, 558 U.S. 30, 41 (2009). (DB at 144). Bright's answer relies on dicta taken out of context from cases such as *Wiggins*, *Rompilla*, *Williams v. Taylor*, 529 U.S. 362 (2000), and even *Porter*. But each of these cases is distinguishable.

In *Wiggins v. Smith*, 539 U.S. 510 (2003), the question considered by the United States Supreme Court was "whether the investigation supporting counsel's decision not to introduce mitigating evidence of Wiggins' background *was itself*

reasonable." *Id*. at 523 (emphasis in original). Wiggins' defense counsel had not investigated his social history and limited the mitigation investigation to a one page Pre-Sentence Interview, a psychologist interview, and Documents from the Baltimore City Department of Social Services ("DSS"). *Id*. at 517, 523 – 24. The Supreme Court found this investigation unreasonable because information contained within the DSS records revealed a myriad of potential mitigation. *Id*. at 525. In this case, counsel did investigate Bright's social background including interviewing family members and friends who could speak directly to Bright's childhood. It was only after Bright was sentenced to death, that the testimony from those witnesses changed drastically.

In *Rompilla v. Beard*, 545 U.S. 374, 382 – 84 (2005), the Supreme Court acknowledged a specific error in trial counsel's performance. Namely, trial counsel had failed to examine the court file on Rompilla's prior conviction which the state used in its case for aggravation. *Id*. at 383 – 84. Trial counsel knew the prosecution would seek the death penalty by proving Rompilla's significant criminal history. *Id*. "Counsel further knew that the [prosecution] would attempt to establish this history by proving Rompilla's prior conviction for rape and assault, and would emphasize his violent character by introducing a transcript of the rape victim's testimony given in the earlier trial." *Id*. By not examining the readily available file counsel was "seriously compromising their opportunity to

respond to a case for aggravation." *Id*. at 385. "Rompilla's counsel had a duty to make all reasonable efforts to learn what they could about the [prior] offense." *Id*. In this case, Bright has not produced any record or prior court file which was readily available and relied on by the State in proving its case for aggravation. Therefore, the error in *Rompilla* is specific any not applicable to this case.

In *Williams v. Taylor,* 529 U.S. 362 (2000), the Supreme Court ordered a new penalty phase for the defendant due to the ineffective investigation by Williams trial counsel. The mitigation presentation at Williams' trial consisted of testimony from Williams' mother, two neighbors, and a taped statement from a psychiatrist. *Id*. at 368 – 69. In unanimously recommending a death sentence, the jury focused on the probability of Williams' future dangerousness. *Id*. at 370. But in post-conviction, it was discovered that Williams' attorneys had failed to investigate and uncover, "mistreatment, abuse, and neglect during [Williams'] early childhood, as well as testimony that he was 'borderline mentally retarded,' had suffered repeated head injuries, and might have mental impairments organic in origin. *Id*. Most troubling was that trial counsel "failed to conduct an investigation that would have uncovered extensive records graphically describing Williams' nightmarish childhood, not because of any strategic calculation but because *they incorrectly thought that state law barred access to such records*." *Id*. at 395 (emphasis added). This includes records showing Williams' parents had been imprisoned for

criminal neglect of him and his siblings, and evidence showing Williams was "borderline mentally retarded." *Williams*, 529 U.S. at 396. The error in *Williams* was apparent. Trial counsel in Williams did not conduct an investigation into Williams background. But in this case, Bright's lawyers did investigate his background and went well into his military service. No evidence has been presented showing Bright suffers from a cognitive disorder or organic brain injury, and Bright has never claimed he is intellectually disabled. Here, Bright's sister, who testified three times during the penalty phase, changed the substance of her testimony and focused on their abusive childhood only after Bright had been sentenced to death. In doing so, she also acknowledged that Bright's counsel instructed her to "focus her testimony on Defendant's substance abuse/addiction, his attributes as a hard worker and being a good person, and how he cared for and helped . . . children." (PCR10: 1491). Such actions are the product of trial strategy, not neglect and an incorrect understanding of the law as was the case with *Williams*.

Finally, in his conclusion Bright points to a quotation from *Porter* stating "[i]ndeed, the Constitution requires 'the sentence in capital cases must be permitted to consider any relevant mitigation factor.'" (DB at 148); *Porter*, 558 U.S. at 42 – 43. However, this statement is taken out of context, because the United States Supreme Court was not issuing a mandate as to what is required for a

presentation of mitigation. Instead, this line from the Supreme Court was a comment on the trial court and the Florida Supreme Court's refusal to consider the "the purpose of non-statutory mitigation. . ." in denying Porter post-conviction relief. *Id*.

Porter, requires the trial court to assess the totality of the mitigation evidence from both the trial and the evidentiary hearing and reweigh the evidence against the aggravation. *Porter*, 558 U.S. at 41. But here the trial court repeatedly arrived at the conclusive presumption that new evidence could have changed the jury's recommendation, without reweighing that evidence against the existing aggravation and mitigation. (PCR10: 1477 – 78, 1484, 1492, 1510 – 11).

In this case, the aggravators of HAC, and prior violent felony for two separate offenses (armed robbery and the contemporaneous murder) were proven. *Bright*, 90 So. 3d at 254 – 55. Contrary to Bright's argument, it was the trial court which placed great emphasis on the HAC aggravator when it stated "had the HAC aggravating circumstance not been present, 'this Court may have found a life sentence to be appropriate.'" *Bright*, 90 So. 3d at 257. The jury recommended the death penalty for each murder by a vote of eight to four. Given the substantial aggravation, Bright's different theory of mitigation during post-conviction would not have resulted in a reasonable probably of a different outcome, because the evidence would have contradicted the presentation by trial counsel. *Blake v. State*,

-- So. 3d --, 2014 WL 6802715, *14 (Fla. 2014)(noting that counsel cannot be held ineffective for failing to present evidence which would have been a double edge sword). Therefore, this Court should reverse the trial court's decision to grant Bright a new penalty phase, because Bright has failed to show prejudice sufficient to undermine confidence in the outcome.

CONCLUSION

Based on the foregoing discussions, the State respectfully requests this Honorable Court affirm the trial court's finding, that Bright's counsel was effective during the guilt phase of his trial, and reverse the trial court's rulings that Bright's trial counsel was ineffective during the penalty phase.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to the following by E-MAIL/E-Service on August 20, 2015: Richard A. Sichta, Esq. at rick@sichtalaw.com.

CERTIFICATE OF COMPLIANCE

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

Respectfully submitted and certified,
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