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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC14-1701
LOWER TRIBUNAL NO. 16-2008-CF-2887

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 CORRECTED CROSS-REPLY BRIEF

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ARGUMENT ONE IN REPLY

RAYMOND BRIGHT'S ACTIONS AGAINST BROWN AND KING WERE MADE IN SELF-DEFENSE, AND TRIAL COUNSEL WERE INEFFECTIVE IN FAILING TO PRESENT DEFENSE EXPERTS AND LAY WITNESSES TO PROVE THAT FACT, WHICH WOULD HAVE RESULTED IN AN ACQUITTAL (restated)

The State refuses to recognize that overwhelming evidence now demonstrates that the theory presented to Mr. Bright's jury by the prosecution – that King and Brown were suddenly murdered in their sleep – was wrong. Due to counsels' deficient performance, the jury and this Court on direct appeal took the prosecution's word that the forensic evidence was consistent with Bright premeditatedly killing two people while they slept; this Court found that although Bright's motive was a "mystery," the forensic evidence was "consistent with a scenario in which Bright waited until the victims were asleep, and then attacked them." Bright v. State, 90 So. 2d 249, 258, 263 (Fla. 2012).

Indisputable evidence found in the postconviction investigations verifies that there was an altercation **away** from the couch/recliner which began near the kitchen area[1] supporting Bright's account that Brown pointed a gun in his face prompting a violent struggle that continued through other areas of the home as he

1 When presented with the previously overlooked blood spatter evidence near the kitchen entryway, both experts Knox and Johnson opined this evidence was consistent with the incident starting in the doorway near the kitchen, not on a recliner or a couch. (16 PCR 2526-2529 (Johnson); 16 PCR 2666-68 (Knox).)

attempted to defend himself.[2] This evidence is completely ignored in the State's brief and the trial court's order below.

The State and trial court continuously err in focusing on the blood where the altercation ended (near the couch and recliner), while failing to consider the most important issue – that there was a struggle and that it began in the kitchen. Indeed, neither the trial court's order nor State's briefs consider whether the following new evidence undermines confidence of the outcome: the blood droplet deposited near

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[2] Unlike Det. Brookins' testimony at trial that it was possible that there was some movement or a struggle, the previously overlooked evidence discussed by Knox and Johnson in postconviction proves that both occurred. There was a blood droplet on plexiglass near the back door (16 PCR 2592; PCR Exhibit 23, Slide 60-61)) (Exhibit 2), blood drops on an end table on the left side of the couch (16 PCR 2625-27; PCR Exhibit 23, Slides 6, 32-33), and blood spatter near the kitchen entryway (16 PCR 2645-49; PCR Exhibit 23, Slides 56-59) – all consistent with impact spatter or coming from a blood source, and not blood dripping from a weapon. (16 PCR 2649-51 (Plexiglass), 2625-27 (end table), 2645-49 (kitchen entryway).) Also corroborating Mr. Bright's statements were the dining table was moved significantly (PCR Exhibit 23, slides 6, 10; 16 PCR 2597-98), chess pieces are displaced (PCR Exhibit 23, Slide 66) (Exhibit 3), lampshade is displaced (16 PCR 2594-95; PCR Exhibit 23, Slide 31), speaker on the floor near king most likely knocked over because two surfaces are void of blood (16 PCR 2603-4; PCR Exhibit 23, Slide 42-43), dripped blood on both end tables indicating it is coming from somebody with an injury (16 PCR 2625-27, 36; PCR Exhibit 23, Slides 33-34), blood on an envelope on the table (PCR Exhibit 23, Slide 33), blood spatter near King shows movement (16 PCR 2610-11, 29, 31-32; PCR Defense Exhibit 23, Slides 35, 37), bloodstains found near back door next to Plexiglass on floor most likely from a blood source and not dripping of a weapon because no other blood spatter 16 PCR 2592, 2649-51; PCR Exhibit 23, Slide 60-61), no "real evidence" of impact spatter on the comforter on Brown (16 PCR 2528- 29, 60-61); Brown's sagging position of his pants and underwear, the lack of impact spatter on the front of his pants (16 PCR 2558-59, 2641, 2658; PCR Exhibit 23, Slide 69-70), and ashes still on the table and ashtray on the floor. (16 PCR 2605; PCR Exhibit 23, slide 10, 20, 29.)

the back door (PCR Exhibit 23, Slide 60-61) (Exhibit 2), blood spatter around the kitchen door (PCR Exhibit 23, Slides 56-59) (Exhibit 1), on the dining table (PCR Exhibit 23, Slide 65-67) (Exhibit 3), on a pizza box (PCR Exhibit 23, Slide 65) (Exhibit 3); the indentation in the carpet caused by the movement of the table, blood on the chess piece, and toppled chess pieces. (PCR Exhibit 23, Slide 66) (Exhibit 3.)

The State seems to suggest this evidence does not establish prejudice because it is supposedly cumulative to what Mr. Kuritz elicited in cross-examination of Det. Brookings. (e.g., Cross AB 12, 15.) However, this argument omits the obvious fact that the postconviction evidence just mentioned was not presented to the jury at trial through cross-examination or otherwise. Instead, using Det. Brookins' testimony as a platform, the prosecution repeatedly criticized Bright's defense, overlooking or feigning ignorance to this exonerating evidence, and arguing that the evidence proved there was no struggle and King and Brown were attacked in their sleep. (11 R 680, 682-83, 687, 690, 692-93, 746.)

Moreover, following defense counsel's cross-examination of Brookins at trial, the State argued that Mr. Bright's self-defense proclamation "[wasn't] credible" (11 R 750), made "absolutely no sense," was "completely ludicrous" (11 R 692), and was a "self-serving story" that did not "match with the physical evidence in any way shape or form." (11 R 690.) The State argued that the

evidence depicted King and Brown as "lying down" and "defenseless" (9 R 296); that there was no sign of a struggle (11 R 682, 686, 690), that there was nothing consistent with a struggle; and that the evidence was consistent with King lying on the couch at the time upon attack. (11 R 683.) With these comments, the State was apparently able to neutralize counsel's ineffective cross-examination, thereby proving Bright's entire postconviction point: that he needed his own witnesses to establish his defense and interpret the evidence.

Although Janice Johnson and Knox may have disagreed regarding tangential issues (such as whether Brown was sitting, standing, or crouching when he was hit on the couch, and where Brown's head was in relation to the chair when he was hit, see State's Cross AB at 17-19), they agreed about the fact that blood elsewhere in the apartment was indicative of a struggle before Brown and King received fatal blows and that the scene was consistent with Mr. Bright's defense, not the state's version of events.

Critically, the state has never offered, nor does it now offer, an explanation for the blood all over the house, as far away as the kitchen and back entrance, if Mr. Bright simply approached two sleeping men in the living room and hit them with a hammer until they died, struggle or no struggle. The State cannot simply turn a blind eye to the evidence found in postconviction that completely discredits

their theory and witnesses at trial.[3] See Hildwin v. State, 141 So. 3d 1178, 1181 (Fla. 2014) (In vacating the conviction and death sentence, this Court focused on the fact that, "at trial, the State prosecuted the case based on a false theory of scientific evidence that was woven throughout its presentation of evidence and argument—scientific evidence that has now been totally discredited." (emphasis added).

A. Appellee's brief relies on trial court findings that are not supported by the record, or competent and substantial evidence

Bright produced powerful evidence in postconviction supporting his innocence. In his initial brief, Mr. Bright argued that the trial court's order ignored the significance of this new exculpatory evidence, failed to make findings consistent with the evidence presented at the evidentiary hearing, and failed to accurately cite any record support that rebuts Mr. Bright's claims. (see Cross IB 61).

Mr. Bright also maintained in this instant appeal that the trial court unreasonably discounted the relevance of the new evidence, and failed to consider what was presented and argued by the prosecution in Mr. Bright's trial in drawing

[3] Also missing from the state's Brief is any mention of postconviction expert Dr. Buffington. His testimony would have been critical for the jury to hear, as his testimony was consistent Mr. Bright's statements that King was awake and the aggressor because of his recent cocaine usage. Also telling is the state presented no witnesses at Mr. Bright's evidentiary hearing refuting any this new evidence.

a conclusion whether confidence in the outcome was undermined. (Cross IB 68-71); Porter v. McCollum, 130 S. Ct. 947 (2009). Mr. Bright further argued that the trial court failed to consider this new forensic and lay witness evidence cumulatively (Cross IB 108-122) and to consider its impact on a jury. (Cross IB 121.)

In no way are Mr. Bright's arguments "based on an unsupported view of the evidence." (Cross AB 7.) Instead, Mr. Bright highlighted all the irrefutable postconviction evidence the jury did not hear. (Cross IB 113-121.)

The State's suggestion that the trial court conducted a valid Strickland analysis of deficient performance and prejudice is belied by the order itself, which contains an incorrect "strategy" determination and no substantive analysis as to whether the new evidence would have undermined confidence from the perspective of the jury. (10 PCR 1404, 1405, 1409, 1436, 1438); see Porter, 130 S. Ct. at 454-55. The trial court's order further fails to explain how the State can now abandon its theory set forth in opening and closing arguments that was contradicted by the evidence shown in postconviction.[4] See Hildwin, 141 So. 3d at 181.

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[4] Although the prosecution's theory at trial, as argued in opening and close, was that the victims were sleeping or in repose when attacked by Bright and that there was no evidence of a struggle (see 11 R 682, 686, 690), (9 R 296) the trial seemingly reinvented this theory in postconviction, stating that it was known all

Instead, the trial court repeatedly analyzed Strickland's prejudice prong under an improper outcome-determinative approach, repeatedly stating its belief the outcome would not have been different, as opposed to whether confidence in the outcome was undermined. (10 PCR 1402-05, 1409, 1411, 1436, 1438, 1441, 1449, 1454, 1466.) See Strickland v. Washington, 466 U.S. 688, 694 (1984)(A reasonable probability for prejudice is a probability sufficient to undermine confidence in the outcome); see also Williams v. State, 161 So. 3d 459 (Fla. 2nd DCA 2014); McQuitter v. State, 103 So. 3d 277, 280 (Fla. 4th DCA 2012). Because the lower court's analysis is legally flawed and not supported by competent and substantial evidence, its findings are not entitled to deference here. See Hardwick v. Crosby, 320 F. 3d 1127 (11th Cir. 2003).

The State, in its Cross-Answer, then follows the trial court's footsteps in unreasonably discounting the exculpating evidence never heard by Mr. Bright's jury, although there is little dispute that Mr. Bright's fate rested on the jury's interpretation of this forensic evidence. See id. at 455 (Holding it was unreasonable to discount to irrelevance the evidence of Porter's abusive childhood, especially when that kind of history may have particular salience for a jury evaluating Porter's behavior in his relationship with Williams. It is also unreasonable to conclude that Porter's military service would be reduced to "inconsequential

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along that there may have been a struggle. (10 PCR 1396-97, 1400) (10 R 488-89, 491) (13 PCR 1902-3.)

proportions," simply because the jury would also have learned that Porter went AWOL on more than one occasion).

This is not a case where the postconviction presentation at evidentiary hearing merely skimmed the surface of some trivial evidence that could have been presented at trial. Here, Bright set forth substantial and compelling evidence in postconviction, that was available at trial but not put on, that would have proven his innocence via self-defense. Bright's jury should have heard this information. If it had, there is a reasonable probability that outcome of Bright's trial would have been different; in denying Bright guilt phase relief, the lower court "failed to engage" with what happened during Bright's trial and conduct a meaningful analysis of how the new information would have affected the jury's decision. See Sears v. Upton, 130 S. Ct. 3259, 3266 (2010)(Requiring court to "speculate as to the effect of the new evidence").

B. The forensic evidence presented in postconviction is exculpatory and significant to the jury's decision.

1. Blood Spatter on the doorway into the kitchen, the Plexiglas near the back door, the table and pizza box, and other forensic evidence in Mr. Bright's home was exculpatory and material.

The state seems to suggest the blood spatter in the kitchen, blood droplets near the back door, table and pizza box, and other new forensic evidence found in various areas of Mr. Bright's residence are insignificant and/or cumulative because Det. Brookins did not testify conclusively that Brown and King were sleeping

when attacked, and admitted there could have been a struggle before they died. (Cross AB 12, 15, 17.)

The state's argument ignores two important issues. First, this exonerating evidence (that was not brought out on cross-examination or otherwise), demonstrates, without a doubt, that Brown and King were standing up and struggling in numerous areas of Mr. Bright's home, including the entryway to the kitchen (where Mr. Bright has always contended the altercation began), the back door, and the dining area – a dramatically different evidentiary picture than the one portrayed to the jury at trial.

Second, the State ignore**s** what actually happened in this trial, chiefly, that the prosecution relied on Brookins' testimony to support its argument in opening and closing that King and Brown were killed while sleeping on the recliner and couch **without** any struggle or movement to other areas of the house. (11 R 682, 686, 690; 9 R 296.) Not only did the State ignore the blood evidence elsewhere in the house, it argued that Mr. Bright's self-defense theory is "completely ludicrous." (11 R 692.) Thus, whether or not defense counsel elicited some helpful equivocation from Brookins and other experts at trial, the State argued successfully that such equivocation should be ignored in favor of the State's theory because self-defense was implausible. (11 R 750) ("[wasn't] credible") ("absolutely no sense")

("completely ludicrous) (11 R 692) ("self-serving story" (did not "match with the physical evidence in any way shape or form") (11 R 690.)

The State's recollection of Brookins' trial testimony is also flawed. Brookins did not directly address the new forensic evidence presented in postconviction. She never testified regarding the blood in the kitchen; defense counsel never showed her and the jury close-up photographs of the blood throughout the house; and most importantly, defense counsel never asked her the significance of the blood throughout the house. The jurors were given no alternative theory through defense expert testimony, and were presented only with Brookins' assessment that the blood splatter was centralized around the couch and chair, that there was little blood anywhere else (e.g. 10 R 453, 456-57, 464-70), and supported the conclusion that the drug dealers were killed lying down, in their sleep.

While Brookins' testimony referenced generally the pub table and pizza box, she failed to tell the jury there was blood spatter on each item and the significance of that fact. (10 R 453.) Rather than talking about the exculpatory blood evidence on this table, she discussed a "push rod" commonly used for drug activity (10 R 460) and repeatedly informed the jury there was "minimal" blood in areas other than the living room. (10 R 453-54.)

Brookins next testified there was blood on an envelope found on a table but there was no blood elsewhere in the area:

A: Placard 11 would be the envelope with the drop of blood on it.

Q: Besides the drop of blood on that envelope, was there much at all, if any, blood in this area besides that?

A. There wasn't. This shows a little bit on the right side of the lampshade but other than that, no.

(10 R 460-461.) Brookins then testified the cast off pattern near couch was "consistent with someone being around the couch they're bringing their arm back," implying that Mr. Bright hit King with a hammer on the couch. (10 R 466.) Brookins stated that Detective Stapp took care of a couple of drops located in the hallway,[5] but no follow up questions were asked about the hallway blood, presumably because it contradicted the State's theory. (10 R 471.)

During Kuritz's brief cross-examination of Brookins,[6] whom Kuritz dubbed one of the most critical witnesses in this case (12 PCR 1754-55), he did not ask a single question about the blood spatter in the kitchen, blood on the Plexiglas, table and pizza box, chess piece, or otherwise, leaving the jury with the impression the

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[5] The State did not ask Mr. Stapp questions about the blood on the table or in other areas of Mr. Bright's home either. Instead, they focus again on the push rod. (10 R 499.)

[6] The cross-examination consisted of only twelve (11) pages in the record. (10 R 479-490.) Kuritz was given the job of attacking the forensic DNA and Det. Brookins "at the last minute" by his co-counsel, so the short and deficient cross-examination was unfortunately expected. (12 PCR 1753.) Also telling is Mr. Bright's case was the lowest bill Mr. Kuritz has ever submitted in a capital case. (12 PCR 1716.)

attacks were localized near the couch and recliner as Brookins explained. (e.g. 10 R 453, 456-57, 464-70.)

Instead, Kuritz's cross-examination of Brookins missed its mark and at times actually supported the state's theory, including opening the door to Brookins' opinion that the attack on Brown probably started and ended in the recliner:

> Q: So when you're looking at this scene and though it seems to be localized in the two different areas, you're not able to tell the jury that that's where the attacks only happened, or are you able to provide any opinion to that?
>
> A. **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.
>
> Q: And I guess what I mean is you're not able to say – well, it's clear they're localized around the bodies.
>
> **A. Yes.**
>
> Q: But you're not able to say that's the only place where that person was struck? You're not able to say that, you know, it didn't – this guy in the chair was not hit over by the couch or anything like –
>
> A: No. I'm not able to say that, no.

(10 R 488-489)(emphasis added.)[7] The prosecutor's re-direct took advantage of Kuritz's deficient cross, actually getting Brookins, incorrectly and contrary to the evidence we know now, to testify there was "no" evidence of "a struggle in any room other than the family room":

> Q: Now, Detective, the defense was asking you a question about whether or not you were checking for struggles in other rooms. Was there any evidence of a struggle in any room other than that family room where the murders occurred?
>
> A: No, there wasn't.
>
> …
>
> Q: So besides the family room area, the rest of the house did not look disturbed the way that family room did, is that right?
>
> A: That's right.

(10 R 491.) When presented with an opportunity to ask evidence technician Stapp on cross about blood evidence in the hallway (which Brookins alluded to on direct), Kuritz also failed to ask a single question about any forensic evidence in the residence; Stapp's cross-examination was less than a page in the record. (10 R 506.)

The record demonstrates that the State and trial court's position that the evidence set forth in postconviction was cumulative of Brookins' testimony or that

[7] The last question Mr. Kuritz on his re-cross was whether there was blood spatter "everywhere," wherein Brookins replied it was. No follow up or specific questions concerning other areas of blood spatter were asked. No questions as to blood droplets, found on the table, pizza box, or Plexiglas near the back door were asked either, so the jury could have inferred the beatings remained localized.

Brookins is more reliable than Knox and Johnson (10 PCR 1400, 1402) is simply wrong, as Knox and Johnson utilized numerous undiscovered pieces of forensic evidence that Brookins and the prosecution did not.

The State and trial court ignore the incriminating effect of Brookins' testimony on direct and cross, and instead cherry-pick her single redeeming statement that there "might" have been "some" movement with the parties. (Cross AB 39) (10 R 1400.) The trial court and state continually step away from the fact that the prosecution used Brookins' testimony (as argued by the State in opening and closing) to say that the attacks began and ended in the couch and recliner.

Also ignored is that although Brookins' suggested there "might" have been a struggle and movement, Knox and Johnson's testimony demonstrated that there absolutely was movement and struggle, consistent with originating in the kitchen area, and moving throughout Mr. Bright's residence. The crime scene photos not brought to the jury's attention at trial prove that the State's theory and Brookins' testimony was deceptive and misleading.[8] (Exhibits 1-3) (PCR Exhibit 23, Slides 56-61, 65-67.)

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8 Importantly, the previously uninvestigated photos shown here (Exhibits 1-3) were the state's own photos, taken by Brookins and Stapp – pictures not shown to the jury. The prosecution stayed away from showing close-up pictures of this exonerating evidence.

Instead of addressing these evidentiary issues discovered in postconviction, the state suggests "counsel pursued a strategy" of self-defense through cross-examination of the state's witnesses, and the new evidence is merely cumulative. (e.g. Cross AB 4, 12). Again, the post conviction record and the case law refute these assertions.[9]

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[9] The State argues that Bright's claim that Kuritz admitted he was deficient and wanted to consult experts was not "true" or "taken out of context." (Cross AB 7.) But Kuritz's statements certainly implied exactly that:

> Q: And correct me if I heard this incorrectly, but, based on your understanding, Mr. Nolan nor yourself consulted any experts in this case?
>
> A: No, and I've got an e-mail in the file, I don't know if you've got it – or you've got it, because you have my file, um, or if it's going to be one of your exhibits, but there is an e-mail from Mr. Nolan, when I finally got involved in the case, where he had indicated that his office was working on the case, he had two investigators, one was -- had done previous death penalty mitigations, a mitigation specialist, and had put in there that they have a budget for hiring, I don't know if he used the word experts, or whatever the phrase is for -- **but basically they had the money in the funds to do that, and just that they would do that, but it didn't get done.**
>
> . . .
>
> Q: Do you agree that there were red flags that strongly suggested that you should have used experts?
>
> A: Well, like I said, you know, that when I got involved in the case, and it was the month or two, whatever the date of that **e-mail was that I sent out was the saying, hey, are we – have you guys been working on this, have you guys thought about these things? And so, yeah, I mean, I don't know if you**

would say the word, red flags, but did I want that investigated and looked into? Yes.

Q: And as you stand here today and reviewed your records, you don't know why that was not done?

A: I don't.

(12 PCR 1764, 1774-76, 1797) (emphasis added); see also (12 PCR 1774) ("if I could have an expert come in and support my position on it, it could have assisted me.") (12 PCR 1775) ("Q: And do you agree that this is a case where experts would have been useful? A: Yes.").

Unfortunately, the State's brief also begins with an unsupported attack of undersigned's professionalism. (Cross AB 2-3.) It suggests Mr. Bright, through undersigned: 1) ignored the trial court's factual findings concerning the Kemps' credibility by presenting their testimonies as "conclusive proof of legal arguments"; (2) presented expert Knox and Johnson's testimony as conclusive proof that Bright acted in self-defense despite that the court found Det. Brookins trial testimony more reliable; (3) asserted that Kuritz conceded deficient performance when "no concession ever took place." The State also noted that the trial court found that Bright, through undersigned, mischaracterized the record. (Cross AB 2-3.) Bright addresses each point in turn.

With respect to the Kemps, the State ignores that regardless of whether the trial court believed the Kemps, it is a fact that the Kemps testified at evidentiary hearing as set forth in the Bright's statement of facts. (Cross IB 13-19.) The state did not mention that Mr. Bright later argued in his initial brief that the trial court's credibility finding as to the Kemps is not entitled to deference because it is not supported by competent, substantial evidence. (IB 82, 115 n.35.) The State apparently overlooks that this court is required to conduct a de novo review under Strickland's prejudice prong to determine whether all the new evidence introduced in postconviction, compared with the evidence at trial, undermines confidence in the outcome. See Bailey v. State, 151 So. 3d 1142, 1148 (Fla. 2014.) Notably, none of the cases cited by the state in support of its argument condemning undersigned were appeals from a postconviction case. (Cross AB 2-3.)

The same flaw applies to the state's argument concerning Knox and Johnson. Knox and Johnson testified at the evidentiary hearing, and a summary of their

Most noticeably, the State forgets that trial counsel's omission cannot be considered "strategic" because Kuritz nor Nolan ever contacted or discussed the case with any experts, thus could not make a reasoned decision about whether to call defense experts at trial. (12 PCR 1771.) Defense counsel did not know what experts in blood spatter, toxicology, crime scene reconstruction, or ballistics would

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testimonies is presented in Bright's statement of facts. (Cross IB 21-27.) Also, the state omits that the trial court did not find their testimony incredible, rather it found that Brookins was more reliable. As explained in Mr. Bright's brief, the trial court discounted to irrelevance much of Knox and Johnson's exculpatory testimony and overlooked the fact Brookins ignored significant evidence in conducting her investigation. See (Cross IB 69-70.) As for the State's third criticism – that Kuritz did not admit he was deficient – the record belies the state's suggestion as previously stated.

Finally, the state incorrectly follows the trial court's criticism that Bright mischaracterized the record regarding a statement made in his 3.851 motion concerning the cross examination of Det. Brookins, and the testimony of Dr. Scheuerman. (Cross AB 2.) As to Det. Brookins' cross-examination, the trial court quibbled about Mr. Bright's 3.851 claim that Brookins' opined "with certainty" that the attack on Brown originated in the recliner. But that is what her testimony inferred, stating that while she's not able to say Brown was not hit elsewhere, she was "pretty sure" that attack took place on the recliner. (10 R 488-89). The court further nitpicked Mr. Bright's assertion that Dr. Scheuerman, "instructed" the defense team to consult a toxicologist prior to trial, where Dr. Scheuerman had merely "suggested" consulting a toxicologist (10 PCR 1406 n. 12). Regardless of undersigned's choice of words, it is a fact that Brookins' testimony inferred Brown was killed where he was found, and that defense counsel did not heed Dr. Sheuerman's advice to consult a toxicologist as to the effect of cocaine on the victim.

say, and even admitted he was curious to see what Mr. Bright uncovered in post conviction in this regard. (12 PCR 1770-71, 1774, 1786.)

The fact that Kuritz wanted to know what experts could do for his case is especially troubling, given counsel's belief that Bright did act in self-defense and that he had a winnable case because the forensic evidence did he know about supported it. (12 PCR 1722-23, 1733-34, 1737-68); see Hurst v. State, 18 So. 3d 975, 1008 (Fla. 2009) (quoting Strickland, 466 U.S. at 691("Nevertheless, it is axiomatic that 'counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.'"); State v. Fitzpatrick, 118 So. 3d 737, 768 (Fla. 2013) ("[A] trial strategy cannot be considered reasonable unless it is executed properly. Thus, we conclude this failure which prevented the DNA results from the fingernail evidence recorded during the autopsy were not strategic choices made after thorough investigation of law and facts.").

Similar to the facts and this Court's opinion in Fitzpatrick, Kuritz's opinion of what the evidence showed does "not end counsel's obligation to his client. Counsel must apply that knowledge gained in a way that provides his or her client with evidence and constitutionally adequate legal representation." 118 So. 3d at 757. In Fitzpatrick, this Court disagreed with the State's assertion, which parallels the State's argument here, that trial counsel's failure to hire experts was strategic:

> The State contends that Fitzpatrick cannot establish deficient performance in light of counsel's independent investigation and contemporaneous strategic decisions. The record does not support this contention because counsel's independent investigation was ill conceived, improperly executed, and added nothing to Fitzpatrick's defense. Counsel testified that he conducted his own forensic investigation at the University of South Florida library. He found an article from the Metropolitan Police Forensic Academy in London, which would have supported an extended timeline for the sexual encounter between Fitzpatrick and Romines. **However, instead of presenting scientific studies through his own expert, counsel attempted to introduce the study during his cross-examination of McMahan.** This attempt was prevented by the prosecution's objection, which was sustained by the trial court. **While it is counsel's responsibility to educate themselves about the aspects of a case they do not understand, gaining personal knowledge of a subject does not end counsel's obligation to his or her client. Counsel must *apply* the knowledge gained in a way that provides his or her client with evidence and constitutionally adequate legal representation. Here, even if we were to assume that counsel spent hours independently researching the scientific aspects of Fitzpatrick's case, he did not utilize this scientific knowledge in a way that meaningfully benefitted Fitzpatrick during his trial**.

Id. at 757 (emphasis added). Like trial counsel in Fitzpatrick, Kuritz "thought" he did what was "needed to do with what I had," but admitted he did not know what else he could present because he did not investigate – this is not effective representation. See Bell v. State, 965 So. 2d 48, 62 (Fla. 2007) (Counsel has a professional obligation to investigate any potential impeaching or exculpatory evidence that may have assisted the defense); see also Magill v. Dugger, 824 F.2d 879, 886 (11th Cir. 1987) (quoting House v. Balkcom, 725 F.2d 608, 618 (11th Cir. 1984)("One of the primary duties defense counsel owes to his client is the duty

to prepare himself 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.'")

The United States Supreme Court has also previously criticized the post hoc rationalization the State and trial court make here; that because Kuritz expressed a personal belief in postconviction that he adequately cross-examined Brookins, his failure to investigate to determine whether experts would have been beneficial to his defense is somehow excused.[10] See Harrington v. Richter, 131 S. Ct. 770, 790 (2011) and Wiggins v. Smith 539 U.S. 510, 526-527 (2003)(Criticizing the state court and respondent's post hoc rationalization for counsel's decision making that contradicts the available evidence for counsel's actions); see also Rompilla v. Beard, 545 U.S. 374, 383 (2005).

The State's sole reliance on Occhicone v. State, 768 So. 2d 1037 (Fla. 2000) suggesting that it is analogous to Bright misplaced (AB 14) where this Court found Occhicone's defense counsel consciously chose not to present experts "in favor of

[10] The state suggests that Kuritz's statements that using a crime scene reconstruction expert would "only confuse the jury," detracting from what counsel believed to be an "obvious" case for self-defense, is flawed. (Cross AB 4.) Again, the state ignores the case law that this statement is an improper ad hoc rationalization condemned by Porter, which cannot be used to justify counsel's failure to talk to a single expert in a case where the interpretation of forensic evidence was concededly was the crux between guilt or innocence. (10 PCR 1754-55.)

effective cross-examination." The State's analysis fails to consider that the defense attorneys in Occhicone actually **spoke** with experts prior to trial, knew what the substance of their testimony would be, decided there would be potential "harmful rebuttal" evidence had they been utilized, and chose to use them in the penalty phase instead.[11] Id. at 1046-1048.[12]

Where Mr. Bright's attorney never spoke to an expert, had no idea how expert(s) could benefit his defense or what they would say, much less contemplated using one (established by the fact he was handed the forensic portion of the case at the last minute) (10 PCR 1753), the state's reliance on Occhicone and its comment that it is a "strikingly similar scenario" is problematic, and should be disregarded. (Cross AB 14.) A decision cannot be "strategic" where it was made without previously investigating the alternatives. See Douglas v. State, 141 So. 3d 107, 122 (Fla. 2012).

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[11] Occhicone alleged that his defense counsels provided ineffective assistance in failing to present Dr. Fireman and Dr. Mussenden during the guilt phase portion of his trial, even though they were presented at his penalty phase. Occhicone, 768 So. 2d at 1046. The state completely disregards this fatal difference in their brief. (Cross AB 14-15.)

The state also disregards Mr. Bright's initial brief, where it distinguished Occhicone from his case based on these obvious differences. (Cross IB 62.)

[12] The state only relies on this flawed "strategy" argument to argue against Mr. Bright's other claim that defense counsel was deficient in failing to cross-examine Det. Brookins with facts pointing to Bright's innocence. (AB 35.) That "strategy" argument should also be disregarded.

The state's argument fails to appreciate the difference between defense counsel suggesting to Mr. Bright's jury there was some evidence Bright acted in self-defense, and defense counsel actually presenting conclusive blood spatter, other forensic evidence, and corroborating laywitness testimony demonstrating Bright did in-fact act in self-defense. Although the State infers that this was an obvious self-defense case based on the crime scene photos (Cross AB 4), it is clear from the verdict that the jury disagreed, and additional evidence establishing self-defense was critical to a jury's analysis in this case.

2. Knox and Johnson's testimonies concerning the blood spatter, GSR, and the crime scene reconstruction were exculpatory and material

The State does not dispute that experts Knox and Johnson were highly qualified and credible witnesses. Instead, it alleges that the testimonies contradicted each other, were cumulative to the evidence presented at trial, and that Brookins was somehow more credible (Cross AB 16-18), despite that she overlooked and did not testify at trial to significant forensic evidence that tended to exculpate Bright.

The State's recollection of the evidentiary hearing testimony of Knox and Johnson and the trial testimony is unsound. Knox and Johnson agreed on the main issue here – that the various items of forensic evidence the state and defense overlooked at trial renders it implausible that the incident occurred the way the

prosecution told the jury it did. Instead, the complete evidentiary picture now demonstrates that Mr. Bright's self-defense theory was the more accurate account between the parties, consistent with the altercation starting in the kitchen area after Brown pointed a gun in Bright's face and a violent struggled ensued after the gun was fired.

In order to make its argument, the State's ignored the agreed-upon portions of Knox and Johnson's testimonies that were never heard by Mr. Bright's jury, and focused singularly on Knox and Johnson's differing opinions regarding blood spatter near the two bodies. (Cross AB 16.) The State ignored that these experts were asked multiple hypotheticals as to how the incident could have occurred, so it is only normal to get multiple opinions.

The State then tries to argue that expert Johnson's opinion of the crime scene investigation was "inadequate" and did not provide certain detail. But the State fails to describe what exactly Johnson did not do to render her investigation inadequate. (AB 17-18.)

Ms. Johnson, a well-qualified expert in her field,[13] testified that the overlooked blood spatter and droplet evidence was consistent with Brown being first struck in the doorway near the kitchen, and the fight continued toward the

[13] Notably, neither the State nor the trial court attempted to refute Johnson's significant experience in crime scene reconstruction, and acknowledged her training by the FDLE and prior employment with the FBI. (Cross AB 17). Nor do they refute the fact Knox trained state witness Brookins in crime scene forensics.

recliner. (16 PCR 2525-26, 2595-96, 2644-49.) After testifying in exhaustive detail about the evidence that demonstrates a clear struggle and movement concerning all the parties involved, Johnson also opined there "is nothing scientific" that supports the state's theory that King was lying down on the sofa when on of the first blows were struck. (16 PCR 2549.). She then opined the evidence was consistent with a gunshot going off before the majority of the struggle occurred – as Bright has always stated.

Turning to Knox, the State does not challenge this expert's opinion that the forensic evidence refutes the prosecution's theory at trial, either. Instead, the State again argues that minor differences between Knox and Johnson'stestimony automatically makes Brookins' trial testimony more reliable. (AB 19.) Mr. Knox, who has extensive crime scene investigation experience and trained state expert Brookings, testified that contrary to Brookins' trial testimony, blood spatter analysis could be done in this case, and the evidence the jury never heard was consistent with a violent struggle starting near the kitchen, not the couch and recliner. (16 PCR 2526-2529.)

In fact, Knox obliterated the State's theory when he pointed out blood drops on Plexiglas near the back door (16 PCR 2649); on the pizza box and a chess piece on the pub table (16 PR 2653, 2656); and blood near the kitchen that "couldn't be coming from the chair, they'd have to be basically coming form the face of this

doorway, right by the plane of this doorway as you're entering into entering into the family room." (16 PCR 2646-48.)

Knox concluded his testimony by stating that King and Brown were not attacked and killed where they were found but that a "significant struggle [took] place," and there was a gunshot fired prior to the injuries being inflicted – mirroring Mr. Bright's statements as to how the incident occurred. (16 PCR 2665-2668.)

Equally important, both Knox and Johnson explained that a lack of blood spatter in certain areas of the comforter was consistent with Mr. Brown not being under when he was struck with the hammer (16 PCR 2660), and according to Johnson, is consistent with someone putting the comforter over Brown **after** the "bloodletting" was over. (16 PCR 2523-24.)

Instead of addressing whether this evidence creates a dramatically different evidentiary picture and the effect it would have had on Mr. Bright's jury, the State simply ignores it, cherry picks the testimony it wishes this Court to review, and suggests that Brookins is still the most reliable expert, though the record verifies she overlooked, was not asked, and/or ignored critical pieces of forensic evidence that pointed to Bright's innocence.

The State also cites the trial court's order, which minimized the substance of Knox and Johnson's testimony by concluding that it was not substantially different

than the evidence offered by Det. Brookins at trial – a finding wholly contradicted by the unrebutted post conviction evidence. (10 PCR 1402)(Cross AB 20-21.) The State takes the trial court's conclusion a step further, stating that Knox and Johnson's testimony produced the "same result" as Brookins' testimony; supported Brookins' credibility; and would have resulted in the same evidence coming before the jury. (Cross AB 21-22.)

The most obvious flaw in this argument is the State and trial court's failure to address the exculpatory evidence set forth in postconviction that the jury never heard that refuted Brookins' testimony, diminished her credibility, and demonstrated that the prosecution's theory of the case was spurious, at best.[14] No competent or substantial evidence existed to support the trial court's order because it ignored what a reasonable jury could have found credible. Porter, 558 U.S. 30.[15]

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[14] In Claim Two of Bright's initial brief, he alleges Kuritz was deficient in failing to cross-examine Brookins about the evidence presented here. (Cross IB CLAIM II beginning at 97.) The state similarly improperly defends this claim by stating Kuritz's actions were "strategic." Because the case law presented in this claim refutes the state's argument in Claim Two, Mr. Bright does not need to respond to the state's argument in this brief.

[15] The trial court's finding that Valarie and Charity Kemp were not credible also fails, because the court ignored what a reasonable jury would have found credible. Porter v. McCollum, 558 U.S. 30 (2009); see also Saranchak v. Beard, 616 F. 3d 292, 309 (3d Cir. 2010)(Pointing out distinction between judge's assessment of evidence while acting as fact finder and "the effect of the same evidence would have had on an unspecified, objective fact finder, as required by Strickland…'); Sanders v. Cook, 99 F. App'x 778, 780 (9th Cir. 2004) (unpublished memorandum) ("Given the standard reiterated in Wiggins, it is not the state judge's role to

3. Toxicologist-Pharmacologist Dr. Buffington's testimony was exculpatory

Also revealing is the State's omission of Dr. Buffington's evidentiary hearing testimony from its brief. Dr. Buffington concluded the pharmacological effects of King's cocaine ingestion are "obviously consistent with being awake" and "under the influence and impacted" by these effects, single-handedly refuting the prosecution's theory at trial King was sleeping when the incident began. (14 PCR 2075.) Dr. Buffington even went a step further, concluding that the effects of King's cocaine ingestion were consistent with Mr. Bright concerning King's behavior. (14 PCR 2075.)

On cross-examination, Dr. Buffington made his point even stronger, proclaiming King was "definitely on" cocaine (14 PCR 2078); "it would be not plausible" King was sleeping while his central nervous system accelerated (14

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determine at the post-conviction stage whether an eyewitness is credible to the judge. Rather, the judge may in appropriate circumstances consider whether there is a reasonable probability that a reasonable juror might find that witness credible. Thus, the state court erred with respect to the basis for its prejudice determination."); State v. Jenkins, 848 N.W.2d 786, 797 (Wis. 2014) ("In assessing the prejudice caused by the defense trial counsel's performance, i.e., the effect of the defense trial counsel's deficient performance, a circuit court may not substitute its judgment for that of the jury in assessing which testimony would be more or less credible."); Com. v. Johnson, 966 A.2d 523, 541 (Pa. 2009) ("credibility assessments in the Strickland context are not absolutes, but must be made with an eye to the governing standard of a `reasonable probability' that the outcome of the trial would have been different.)

PCR 2079); and that Mr. Bright's account of the incident of violent and aggressive behavior of King is consistent with his cocaine use. (14 PCR 2080.)

B. The scientifically refuted theory that the victims were sleeping and suddenly attacked in this highly circumstantial case is prejudicial

If the scientific evidence set forth in postconviction had been available at the time of trial, the State would have been unable to present flawed and incomplete expert testimony that strongly inferred the attacks began and ended where King and Brown lay; the prosecution's theory that Bright suddenly and with premeditation murdered two persons would have been unavailable; and the State would have been unable, in closing argument and elsewhere, to argue that Bright's account that he acted in defense of his person and home, was "absurd." None of the parties to this case have disputed that the State's interpretation of the "scientific" evidence at trial, now dispelled in postconviction, was critical to the jury. Certainly, the jury's interpretation of the forensic evidence determined whether Bright was convicted or acquitted.

Imagine how the jury would have assessed the prosecution and its witnesses' credibility had Mr. Bright used forensic evidence and expert testimony from Knox, Johnson, and Dr. Buffington that King and Brown were awake, they were the aggressors, the altercation started in the kitchen as opposed to the couch/recliner, and the prosecution's theory was unsupported by the evidence. Imagine if the jury knew the State and its experts did not reveal the complete evidentiary picture

including proof that there was blood in areas of the home that bolstered Mr. Bright's credibility.

Imagine the impact on the jury if Mr. Bright had presented Ms. Singleton, Mr. Graham, Ms. Teneka Bright, attorney Bossen, and Ms. Valarie Kemp, whose testimonies corroborated Mr. Bright's repeated claims that prior to this incident he was scared for his life, that King and Brown took over his home to run a drug operation out of it, threatened to kill him, had a reputation for violence in the community, owned the weapons in question, and Brown pointed a gun in Mr. Bright's face on prior occasions.

Finally, imagine the impact if the jury had known that Charity Kemp received a (non-hearsay) call from Brown, just moments before the events in question began, and Brown informed her he was going to confront Bright about stealing his drugs – all corroborating the sequence of events that Mr. Bright has consistently explained.

Effective counsel would have refuted the state's unfounded trial theory with this evidence establishing that Bright's account of the events was truthful, changing this case from a "mystery" as to why Bright "chose to suddenly attack" the way he did, to a near-certainty that he acted in self-defense. Bright, 90 So. 3d at 263 ("Bright chose to suddenly attack the victims remains a mystery…").

CONCLUSION

Mr. Bright was constitutionally entitled to a trial where the prosecution's case was subjected to available adversarial testing and a reliable guilt phase. Trial counsel had the obligation to provide a constitutionally sound performance for Mr. Bright and set forth his readily available defense to the jury, but failed to do so. A new trial should be granted.

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 28th day of October 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