No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

BRANDON WARD,
Petitioner,

v.

MARK S. INCH,
SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
Respondent.

On Petition for Writ of Certiorari to the Eleventh Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

MICHAEL UFFERMAN
Michael Ufferman Law Firm, P.A.
2022-1 Raymond Diehl Road
Tallahassee, Florida 32308
(850) 386-2345/fax (850) 224-2340
FL Bar No. 114227
Email: ufferman@uffermanlaw.com

COUNSEL FOR THE PETITIONER

A. QUESTIONS PRESENTED FOR REVIEW

1. Whether the court of appeals improperly denied the Petitioner a certificate of appealability under 28 U.S.C. § 2253(c) on his claim that his trial counsel rendered ineffective assistance of counsel by failing to retain and present a "use of force" expert.

2. Whether the court of appeals improperly denied the Petitioner a certificate of appealability under 28 U.S.C. § 2253(c) on his claim that his appellate counsel rendered ineffective assistance of counsel by failing to argue on direct appeal that the state trial court erred by preventing him from presenting witnesses to testify regarding one of the alleged victim's character trait of violence.

B. PARTIES INVOLVED

The parties involved are identified in the style of the case.

C. TABLE OF CONTENTS AND TABLE OF AUTHORITIES

1. TABLE OF CONTENTS

2. TABLE OF CITED AUTHORITIES

a. Cases

b. Statutes

c. Other Authority

The Petitioner, BRANDON WARD, requests the Court to issue a writ of certiorari to review the judgment/order of the Eleventh Circuit Court of Appeals entered in this case on April 20, 2021. (A-3).[1]

D. CITATION TO JUDGMENT/ORDER BELOW

The order below was not reported.

E. BASIS FOR JURISDICTION

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254 to review the final judgment/order of the Eleventh Circuit Court of Appeals.

F. CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence." "[T]he right to counsel is the right to the effective assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771, n.14 (1970).

[1] References to the appendix to this petition will be made by the designation "A" followed by the appropriate page number.

G. STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

1. Statement of the case.

The Petitioner was charged with one count of second-degree murder and one count of attempted second-degree murder.[2] The incident occurred during the early morning hours on June 25, 2006, pursuant to an altercation between the Petitioner and the alleged victims (Joseph Hall and Joseph Ruinato). At trial, the Petitioner's defense was self-defense. At the conclusion of the trial, the jury found the Petitioner guilty as charged for the attempted second-degree murder count and guilty of the lesser offense of manslaughter. The state trial court sentenced the Petitioner to thirty years' imprisonment on each count (with the sentences to run consecutively). On direct appeal, the Florida First District Court of Appeal affirmed the convictions and sentence. *See Ward v. State*, 90 So. 3d 281 (Fla. 1st DCA 2012).

In 2013, the Petitioner timely filed a Florida Rule of Criminal Procedure 3.850 motion raising one of the claims that is the subject of the instant petition (i.e., trial counsel rendered ineffective assistance of counsel by failing to retain a "use of force" expert). An evidentiary hearing on the Petitioner's rule 3.850 motion was held on December 3, 2015. In 2016, the state postconviction court denied the Petitioner's rule 3.850 motion. On appeal, the Florida First District Court of Appeal affirmed the denial

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[2] The Petitioner was originally charged with one count of first-degree murder and one count of attempted first-degree murder. At the conclusion of the first trial, the jury found the Petitioner guilty of second-degree murder and attempted second-degree murder. On appeal, the Florida First District Court of Appeal reversed the convictions and remanded for a new trial on the charges of second-degree murder and attempted second-degree murder. *See Ward v. State*, 12 So. 3d 920 (Fla. 1st DCA 2009).

of the Petitioner's state postconviction motion. *See Ward v. State*, 224 So. 3d 217 (Fla. 1st DCA 2017).

In 2014, the Petitioner timely filed a Florida Rule of Appellate Procedure 9.141 petition raising the other claim that is the subject of the instant petition (i.e., appellate counsel was ineffective for failing to raise on direct appeal that the state trial court erred by preventing the Petitioner from presenting witnesses to testify regarding one of the alleged victim's character trait of violence). In 2015, the Florida First District Court of Appeal denied the rule 9.141 petition. *See Ward v. State*, 163 So. 3d 616 (Fla. 1st DCA 2015).

The Petitioner subsequently filed a petition pursuant to 28 U.S.C. § 2254. In his § 2254 petition, the Petitioner argued the same claims that he previously presented in his state postconviction filings. On October 10, 2019, the magistrate judge issued a report and recommendation recommending that the Petitioner's § 2254 petition be denied. (A-14). Thereafter, on September 10, 2020, the district court denied the Petitioner's § 2254 petition. (A-11, A-12).

The Petitioner thereafter filed an application for a certificate of appealability in the Eleventh Circuit Court of Appeals. On April 20, 2021, a single circuit judge denied a certificate of appealability on the Petitioner's § 2254 claims. (A-3).

2. Statement of the facts.

a. Trial Summary.

In 2006, the Petitioner was nineteen years old and a Marine stationed at the

Naval Air Station in Pensacola. (Doc 15-39 - Pg 100).[3] The events leading up to the incident began at a party that the Petitioner and his girlfriend (Samantha Sparling) attended on the evening of June 24, 2006. (Doc 15-38 - Pgs 74-77). Ms. Sparling lived in the area and the attendees of the party were other local people – many who were friends with Ms. Sparling. Alcohol was served at the party. (Doc 15-39 - Pg 120).

During the party, the Petitioner encountered Ms. Sparling with another man (Nick Cote). (Doc 15-39 - Pgs 134 & 136; Doc 15-30 - Pgs 210-211). Upon finding the two, the Petitioner pushed Mr. Cote away from Ms. Sparling and to the ground (because he believed she was being assaulted by Mr. Cote); the Petitioner's push of Mr. Cote caused Ms. Sparling to fall back into a car. (Doc 15-39 - Pgs 134 & 136-137; Doc 15-30 - Pgs 210-211). Another man (Shane Gavaghan) claimed that he observed the Petitioner strike Ms. Sparling. (Doc 15-39 - Pg 139). Mr. Gavaghan then told Mr. Cote that "[w]e are going to have to beat this dude's ass" (Doc 15-39 - Pg 139) and Mr. Gavaghan proceeded to beat the Petitioner – striking him several times in the head and threatening to "kill" the Petitioner. (Doc 15-42 - Pg 26; Doc 15-33 - Pgs 20-21; Doc 15-30 - Pg 213). Mr. Cote pulled Mr. Gavaghan off the Petitioner and he then told the Petitioner and Ms. Sparling to leave the party. (Doc 15-42 - Pg 26; Doc 15-33 - Pgs 20-

[3] Because the trial and postconviction evidentiary hearing transcripts are voluminous, the Petitioner is not including those transcripts in the appendix to this petition. However, the transcripts are available on PACER/the Northern District of Florida's docket. References to these transcripts will be made by the designation "Doc," short for document, followed by a citation to the appropriate document number, followed by the designation "Pg," short for page, and then followed by a citation to the respective page number of the document.

21). The Petitioner left the party and went back to Ms. Sparling's house,[4] but Ms. Sparling stayed at the party. (Doc 15-42 - Pg 26).

After the Petitioner left the party, Ms. Sparling was given a ride home by Joseph Hall and Joseph Ruinato; Lacey Moores was also in the car. (Doc 15-38 - Pgs 90-91). During the ride, Ms. Sparling (who was intoxicated) told the group that the Petitioner hit her earlier in the evening – even though her allegation was not true. (Doc 15-38 - Pg 91; Doc 15-39 - Pg 149).[5]

After he arrived back at Ms. Sparling's house, the Petitioner had a telephone conversation with Mr. Gavaghan. (Doc 15-33 - Pgs 24-28; Doc 15-30 - Pgs 216-220). During the conversation, Mr. Gavaghan again threatened the Petitioner: "I'm going to kick your ass." (Doc 15-41 - Pg 160). The Petitioner told Mr. Gavaghan that he was at Ms. Sparling's house. (Doc 15-33 - Pg 27). Following the conversation, Mr. Gavaghan called Mr. Hall and informed him that the Petitioner was at Ms. Sparling's house. (Doc 15-33 - Pgs 29-30).

Mr. Hall, Mr. Ruinato, Ms. Sparling, and Ms. Moores subsequently arrived at Ms. Sparling's house. Both Mr. Hall and Mr. Ruinato were intoxicated. (Doc 15-38 - Pg 156; Doc 15-33 - Pgs 73 & 101). Mr. Hall and Mr. Ruinato approached the front

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[4] Ms. Sparling's house was the Petitioner's weekend residence (i.e., when he was off duty on the weekends, the Petitioner brought his clothes and stayed at Ms. Sparling's house). (Doc 15-37 - Pg 154; Doc 15-38 - Pg 23; Doc 15-39 - Pg 102).

[5] Ms. Sparling lied and claimed that the Petitioner hit her in an effort to get sympathy from the other people in the car (and in order to cover her sexual encounter with Mr. Cote). (Doc 15-39 - Pg 158).

door of the house with Ms. Sparling (Doc 15-38 - Pg 105) and the Petitioner walked toward the group and directed Mr. Hall and Mr. Ruinato to "get away" from his girlfriend. (Doc 15-38 - Pg 107). Mr. Hall and Mr. Ruinato then ran toward the Petitioner and a fight ensued. (Doc 15-38 - Pgs 108-109; Doc 15-39 - Pg 24; Doc 15-39 - Pgs 171-172; Doc 15-30 - Pgs 230-231). During the fight, Ms. Sparling heard someone say "I'm going to kill you" (Doc 15-39 - Pg 177) and the Petitioner testified that Mr. Hall attacked him and yelled that he (i.e., Mr. Hall) was going to kill the Petitioner. (Doc 15-30 - Pgs 230-231). At trial, the Petitioner explained that he defended himself from this attack with a knife. (Doc 15-30 - Pgs 230-231). During the altercation, both Mr. Ruinato and Mr. Hall suffered stab wounds (and Mr. Hall died as a result of his wounds).

b. The December 3, 2015, state court postconviction evidentiary hearing.

Roy Bedard. Mr. Bedard, a former law enforcement officer with the Tallahassee Police Department, testified that he has previously been qualified as a "use of force" expert to testify in three Florida criminal proceedings (i.e., cases where the defendant was raising the defense of self-defense). (Doc 15-4 - Pgs 111-113). Mr. Bedard has been qualified as an expert in the areas of use of force, defensive tactics, survival stress, and physiology of combat. (Doc 15-4 - Pgs 50 & 114).[6] Mr. Bedard stated that he was qualified as a "use of force" expert in a criminal proceeding that

[6] Notably, Mr. Bedard has testified on behalf of the defense and the State. (Doc 15-4 - Pg 117).

occurred *before* the 2010 trial in the Petitioner's case. (Doc 15-4 - Pgs 115 & 169). Mr. Bedard testified that the field of "use of force" expertise has been in existence since the 1990's. (Doc 15-4 - Pg 189).

Mr. Bedard explained that "use of force is the legal and philosophical underpinnings of when that force is allowed to be used." (Doc 15-4 - Pg 45). He added that "it structures the guidelines under which defensive tactics can be applied for self-defense." (Doc 15-4 - Pg 51). Mr. Bedard has been qualified as an expert under both the *Frye*[7] and *Daubert*[8] standards. (Doc 15-4 - Pg 51). Mr. Bedard stated that "use of force" theories are generally accepted throughout the country. (Doc 15-4 - Pg 62).[9]

Since 2000, Mr. Bedard has taught law enforcement courses on the "use of force" continuum. (Doc 15-4 - Pgs 49 & 51). Mr. Bedard explained that the Florida Department of Law Enforcement (hereinafter "FDLE") has created a model regarding the use of force for making arrests and for self-defense, and the model is called the "force continuum." (Doc 15-4 - Pg 46).[10] Mr. Bedard stated that the "force continuum" is based upon the perception of a person who is facing a threat and how they would properly react to that perception. (Doc 15-4 - Pg 46). A copy of the "force continuum"

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[7] *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

[8] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

[9] Mr. Bedard testified that his area of expertise has been tested in the community and subjected to peer review. (Doc 15-4 - Pgs 118-126).

[10] Mr. Bedard testified that he has sat on an FDLE committee since 2002 as a subject-matter expert on the "use of force." (Doc 15-4 - Pg 54).

was admitted during the evidentiary hearing as Defense Exhibit 2. (Doc 15-4 - Pg 190). Mr. Bedard testified that when considering the threat of deadly force, the "force continuum" applies equally to law enforcement officers and civilians. (Doc 15-4 - Pg 55).[11]

Mr. Bedard stated that had he been called as a witness during the Petitioner's trial, he would have been able to assist the trier of fact in the following ways:

> Well, I would have described to the triers of the fact what I just described to you. I think it is – it's a misunderstanding to think that people know how a fight occurs. I think in our civilized society most people don't get in fights, and those who do, probably don't get in fights to the degree that they believe their life is in danger.
>
> The physiology, the psychology for a person who is under the effects of what's often called, wrongly called, but often called, fight flight is something that I understand, not only academically, but based on my experience. I have been in deadly-force situations. I know first hand about this particular thing, and those are the things that help unmuddy the waters.
>
> When we look for an objective review which is what the Court requires, we have to pull people out of their subjectivity. We have to pull a juror out of the position of saying, well, I wouldn't have done that. That's not the question.
>
> The question is, was the force appropriate under the given set of circumstances, and sometimes even in my opinions, I think, well, I wouldn't have done that, but nonetheless, the force is still objectively reasonable under the circumstances.
>
> So this is where my testimony, I think, would have helped in – certainly in a stand-your-ground immunity hearing, and then subsequent to that, in the trial to help people who are not that familiar with this area of psychological and physiological distress, anxiety and arousal understand what the defendant was actually feeling and going through at the moment that they chose to use force.
>
> In other words, we don't look at it with the benefit of 20/20

[11] Mr. Bedard noted that in 2005, the law in Florida changed and, as a result of the change, civilians in Florida are permitted to "stand their ground" and meet force with force. (Doc 15-4 - Pg 61).

hindsight. We look at it with the benefit of trying to take a snapshot of that moment so that others can understand what decisions were made and why.

. . . .

I think I can talk about force modeling. I believe I can talk about proportionality of force, perception of threat. I can talk about escalation and deescalation. I can talk about the prefight ritual that I mentioned to you. I can talk about reactionary gap and why that's important. There's a lot of science behind that.

(Doc 15-4 - Pgs 74-76 & 114-115). Mr. Bedard added:

I can talk about the antecedents of the fight and explain how those affect psychology an[d] physiology, and the jury can draw for themselves their own opinion and conclusion as to whether or not this particular case fits within the parameters of what we know about use of force in a deadly-force situation.

(Doc 15-4 - Pg 79). Finally, Mr. Bedard stated:

Q [By Mr. Elmore]: You said that you believe your opinion could help the jury understand what Brandon Ward was going through. What do you mean by that, understand what he was going through?

A. Again, this situation that arises when somebody is in fear for their life or is fighting for their life, is extraordinarily unusual. I think it's a mark of a civilized society. When most people have problems, they call people like me; they call the police to deal with their problems so they don't have to face their problem alone.

There's no rule book on what to do. There's [a] statute that says what you can't do, but there's no rule book that says what you can do, so most people don't know what you can do. They don't understand not only legal components, but they also don't understand what I've spent most of the morning talking about which is the psychological and physiological components.

If I can make a comparison, it's a bit like talking sex education to a bunch of virgins. You can talk about it. You can have a class on it, but it's just not the same until you experience it, and I think the reason for that is because there's so much involved in it. It's not the sexual act of intercourse that is involved. It's the act of the emotion. It is the effect that is associated with it.

There may be political issues involved. There may be reputational

> issues involved, so a person who actually experiences it for the first time would probably say what I'm saying, which is, it's not what I thought it was going to be.
>
> Yet sex education is still important and it does curb behavior. It does, we hope, cause people to make good decisions, and I think the purpose that I serve is to help the jury, the triers of the fact, make good decisions by expressing to them information about an area that perhaps they know something about, but most likely don't, and that's where I feel I can help.

(Doc 15-4 - Pgs 162-163).

Mr. Bedard stated that prior to the time that Mr. Hall and Mr. Ruinato arrived at the Sparling residence on the date of the incident, the Petitioner had a "reasonable fear" that he was "in danger" based on the events that occurred prior to that moment in time (i.e., (1) earlier in the evening at a party, the Petitioner accepted the challenge to participate in four "friendly" fights, and he did not prevail in any of them; (2) the Petitioner then observed his girlfriend (Samantha Sparling) with another man (Nick Cote), and Mr. Cote was assaulting Ms. Sparling, and therefore the Petitioner knocked Mr. Cote off of Ms. Sparling, which caused numerous people to begin to beat the Petitioner – and some of the individuals alleged that the Petitioner had hit Ms. Sparling; and (3) the Petitioner retreated from the party back to the Sparling residence, but on his way back to the Sparling residence, the Petitioner had a cellphone conversation with Shane Gavaghan, and during the conversation Mr. Gavaghan threatened to kill the Petitioner – specifically telling the Petitioner "I'm going to cut your throat"). (Doc 15-4 - Pgs 81-89).

Mr. Bedard stated that the following occurred when Mr. Hall and Mr. Ruinato

arrived at the Sparling residence:

> When they arrived there, there was no police. There was no parents, and I think at that point, instead of just dropping her off at her home with her boyfriend, they chose instead to get out which was a provocation. They knew the situation with Miss –
>
> Q. Why do you say them getting out at this location was a provocation?
>
> A. Well, they knew the situation with Mr. Ward was tense and uncertain. They knew that they had previously engaged him. They knew that they weren't getting along and they had traveled across town to get to him, so I view that as a provocation.
>
> And my understanding is even Mr. Ward attempted at first to hide. He tried to avoid or avert their finding him by getting behind the car, but he also then heard them say, is this his car, is this his car, and he knew then that they were actively searching for him. That's a provocation.
>
> And it was then, I think, that he decided and told me all he could think about was the conversation he had had previously about getting his neck cut and being killed. That is what he told me led him to reach down and grab the knife that was in his pocket, which, by the way, had been in his pocket all night, and he had never previously used it, even probably when he could have as he laid across the top of his hood being beaten the first time.
>
> So he was now in a position to where the criticality was still high, but the time frame was much longer than it was when he was back at the party, and it gave him time to assess his options, and in assessing his options he decided, at the very least, I am going to protect myself.
>
> . . . .
>
> . . . As they started searching for him they were closing the time frame. Now, the criticality in his mind was still extremely high. We're going to cut your neck. We're going to kill you. He's already had four bouts of being beat up.
>
> He just escaped by jumping into his car at the last second and peeling out of there while they're still attacking him and banging on his windows. He's probably at a very high level of arousal and anxiety. I think most people would be under that set of circumstances.
>
> Q. A reasonable person?

A. Most reasonable people would be, so now what's happening is you're dealing with what we call appraisal, so stress is about appraising situations, and I think it's important to note this.

You could have two people who are facing exactly the same thing, and they react very differently to it, and the reason for that is because of they're appraisal. Appraisal deals with your coping mechanisms, so coping mechanisms mean are you able to handle whatever the stimulus is.

At the lowest level any stimulus that seems threatening would be considered a challenge. A good example would be a law enforcement officer that's making an arrest. I would submit to you that no officer has ever made an arrest where it wasn't a challenge. We didn't know if they were going to resist or they weren't.

But here's what we did know, our coping mechanisms, our pepper spray, our batons, our handguns, our training, our ballistic best, those are coping – that we're aware of. Another person standing, the officer that didn't have the training or the tools or the vest, might be a lot more afraid.

I did ride along as a youngster. I know that I was a lot more afraid than the officer was when he was masterfully dealing with resistance and threat. I come to know now that this is huge part of the psychological process.

I believe in our case, when they first got out of the car, that he started searching for coping mechanisms and he found his knife. He found that was about probably the only thing that might have made a difference between what he had already observed and experienced versus what may come in the next few moments.

So now the issue is, is he under threat? Well, the threat starts to become – when challenge moves to threat is when your coping mechanisms are overcome, when suddenly you are no longer able or you don't believe your appraisal of the situation is such that you don't believe you can manage it with whatever coping mechanisms you have so they're overwhelmed.

And this is the first time that you actually say scientifically – Richard Lazarus talks a lot about this who is a social psychologist – it's the first time you really can say, okay, now I'm threatened versus I'm challenged.

So what I observed in the testimony or the statements that were given by Mr. Ward, you know, accepting his version of events, at this final junction of the evening, is that he was getting more and more from challenge to threat as they started to move on to the property and started to say things like, is this his car, is this his car, and he realized they were

searching for him.

I think at that point he again tried to posture.[12] He made himself known. He stood up, and that didn't work probably because of the subject factors. They were also appraising. I would submit to you that they probably thought they could take him. There were two of them. One of them was significantly bigger.

One made a status of what a bad guy he was. Everyone seemed to know that, thus the MySpace profile that I mentioned previously, you know, Joe Hall will kill your whole family. I think that's alarming, and that doesn't even go on to the page yet. That's just the page name. He's aware of this. He knows this. He knows the reputation.

Q. You say he. You mean Mr. Ward?

A. Mr. Ward is aware of the reputation that this young man has. Now, it doesn't mean that he was capable of doing anything, and it doesn't matter because it's about perception. The question is, did he want people to think he was a killer, and I would submit to you that what I looked at suggests that he did. He attempted to get people to be afraid of him.

Q. As a killer?

A. As a killer. He had several references about killing this person and killing that person and beating this person up and even his name, itself, his pseudonym on the internet was suggestive of a guy that was, sort of, infatuated with the idea of killing.

Q. Now, Mr. Ward was aware of all this information at this juncture in time we're at now where he's now taking his final posture?

A. Right. So this works into the calculous of what a reasonable person would perceive – because when he sees who it is, he doesn't even expect Mr. Hall. He doesn't even see him at the party, but suddenly he pops out of the car. He recognizes him from his girlfriend's MySpace page, and he thinks, oh know, of all the people, and so he immediately

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[12] Mr. Bedard explained that posturing is "an attempt to avoid a fight." (Doc 15-4 - Pg 89). Mr. Bedard stated that prior to the time that Mr. Hall and Mr. Ruinato arrived at the Sparling residence, the Petitioner postured by telling Mr. Gavaghan that the police had been contacted about the situation (i.e., a lie that intended to diffuse the situation). (Doc 15-4 - Pgs 89-93).

goes into a panic state. He feels high arousal, high anxiety.

Now, what happens when you go from challenge to threat is you go from deliberate thought and weighing out options and considering alternatives to what's called heuristics, which I mentioned to you previously. We all do.

When the stress is very high, what we do is we react based on pattern recognition. It worked in the past; it might work in the future. If it didn't work in the past, it probably won't work now, and those are snap decisions known as heuristics.

The problem – and this is the real important thing for triers of the fact, if you've never been in that position before, you don't have anything to rely on so there's no recognition. So what you have is a novel circumstance that involves what is called meta recognition. It's pulling pieces from your past to try and formulate a solution to this problem, that fast, because it's on top of you.

And so the meta recognitional aspects of everything that I just said is, he's thinking, I'm going to be killed. My defensive mechanism against this is to use my knife. I don't have fang; I don't have claw, and I'm not very big, so I'm going to use the knife that I carry with me.

They immediately seize upon him, as I understand, both of them. Again, based on what he told me, and he starts to fend them off with the use of the knife.

Now, I did speak to Mr. Shaker who was the doctor who analyzed the bruising and the cuts on the decedent's body,[13] and he actually showed me on face time, how the knife must have been held, and the knife was held, he said, defensively. I'm not sure that he's qualified to say that, but he was right.

The knife was held much in the way that one would hold, kind of, a steak
knife before cutting meat with the blade extended off the top of the hand.

Offensively, if you're a knife fighter – and this goes back, perhaps, to my martial arts background you generally turn the knife, the blade, around, mostly so it can't be taken from you. You have better control of it, and it's much more powerful with these downward stabs than it is with the flailing.

We do know that the first cut was a slash. He later told me that he was attempting to slash, but they got so close to him, that this wide movement of the arm was essentially taken out of the picture.

He doesn't recall stabbing each of them three times. I thinks he

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[13] Mr. Bedard stated that there were "some pretty significant bruises on the decedent's hands" (which is consistent with Mr. Hall having been an aggressor). (Doc 15-4 - Pg 135).

recalls stabbing one of them once and one of them twice. Not uncommon. I see that all the time under high levels of arousal. It goes back to the 15 bullets that get emptied out of a magazine when a police officer is taught to shoot two.

Scientifically, it's called critical incident amnesia, and it's very common, even after all these years now, he still doesn't remember it so it's just a part of his memory that's missing, that's gone. That happens under high arousal under the belief that you are about to be seriously injured or killed.

So all of these things together suggest, if you go to my chart now [Defense Exhibit 2], that he was facing what's known as aggravated threat or aggravated resistance. If you draw a line straight across, the solution to that is deadly force.[14]

So the proportionality of what he perceived he was facing, that I think reasonable people would agree, is met with deadly force, and that

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[14] Using the "force continuum" (Defense Exhibit 2), Mr. Bedard opined that in the Petitioner's case, the resistance level was "aggravated physical" – meaning that the use of deadly force was reasonable. (Doc 15-4 - Pgs 152-154). When asked how he arrived at this conclusion, Mr. Bedard stated:

> It has to do with all the antecedents, what he believed going into this fight. The belief that he not only escaped being hurt very seriously, but was now being approached by two men at night, not precisely what they were going to do at his home. A reasonable conclusion would be that this was not going to be a fair fight. And I think that's what the evidence shows, that there were two on one, that the subjects did come to find him, that they did search the parking lot saying, is this his car; is this his car, as I understand.
>
> All of those things, I think, would reasonably cause a person to believe that they weren't there for a good talking, but rather for a use of force. Sometimes it's true, you don't know that it's deadly force until you're dead, and I don't think – and I'm sure that the law does not require that.
>
> So the reasonable belief based on what happened previously that night, the fact that they had pursued this individual to his house, the fact that were two of them, the fact that one person on the telephone said, I'm going to – we're going to kill you, we're going to cut your throat, would leave him with a reasonable belief that he was facing an aggravated attack.

(Doc 15-4 - Pgs 154-155).

> proportionality is what I rely on to give the opinion that it was an appropriate use of force, at least objectively appropriate.

(Doc 15-4 - Pgs 93-94 & 98-104) (footnotes added).

Ultimately, Mr. Bedard gave the following opinion:

> Q. So using the reasonable-person standard, and based on the information, would your opinion have been that his perception at that time would justify the use of deadly force under a force matrix analysis?
>
> A. Yes.

(Doc 15-4 - Pg 105). Mr. Bedard opined that the Petitioner's actions were consistent with someone who was acting in self-defense and inconsistent with someone who was acting with ill-will, hatred, or malice. (Doc 15-4 - Pgs 107-110).

Leo Thomas. Mr. Thomas, the Petitioner's trial attorney, testified that prior to the Petitioner's trials, he had never heard of a "use of force" expert. (Doc 15-4 - Pg 196). Mr. Thomas claimed that the first time he heard of a "use of force" expert was in 2013 watching the Trayvon Martin case on television, and he explained that while he was watching that case, he was thinking that the prosecution should be objecting the "use of force" testimony presented by the defense because he (Mr. Thomas) did not believe that such testimony was admissible. (Doc 15-4 - Pgs 196-197). Mr. Thomas alleged that as part of his practice, he monitors appellate decisions issued by Florida appellate courts in criminal cases. (Doc 15-4 - Pg 196). Mr. Thomas opined that use-of-force testimony is not admissible, but he stated that such testimony may be admissible in "a year or five years from now." (Doc 15-4 - Pgs 198 & 204).

H. REASON FOR GRANTING THE WRIT

The questions presented are important.

The Petitioner contends that the Eleventh Circuit erred by denying him a certificate of appealability on his ineffective assistance of counsel claims. As explained below, the Petitioner has made "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Both of the Petitioner's claims are addressed in turn below.

1. Trial counsel rendered ineffective assistance of counsel by failing to retain a "use of force" expert.

In his § 2254 petition, the Petitioner alleged that trial counsel rendered ineffective assistance of counsel for failing to retain a "use of force" expert. As a result of trial counsel's ineffectiveness, the Petitioner was denied his right to effective assistance of counsel in violation of the Sixth Amendment to the Constitution.

a. Mr. Bedard's testimony satisfies both the *Frye* standard and the *Daubert* standard.

At the time of the Petitioner's trial (2010), the *Frye* standard was the applicable standard for determining the admissibility of expert testimony in Florida. Pursuant to the *Frye* standard, expert testimony is admissible if the basis for the testimony is generally accepted in the relevant field/community. *See Williams v. State*, 710 So. 2d 24, 26 (Fla. 1998). Moreover, in *Marsh v. Valyou*, 977 So. 2d 543 (Fla. 2007), the Florida Supreme Court explained that "pure opinion" testimony is exempt from the *Frye* standard (i.e., "pure opinion" testimony is admissible).

Mr. Bedard's testimony meets the test for admissibility under *Frye*. During the

state court postconviction evidentiary hearing, Mr. Bedard specifically stated that "use of force" theories are generally accepted throughout the country (Doc 15-4 - Pg 62), and the State did not offer any evidence to the contrary.[15] Moreover, Mr. Bedard had been accepted as a "use of force" expert in at least one criminal case in Florida *prior* to the Petitioner's 2010 trial. (Doc 15-4 - Pg 115).

Even if the *Daubert* applies, Mr. Bedard's testimony satisfies the *Daubert* standard. The focus of a *Daubert* inquiry is whether the expert's reasoning is valid and whether that reasoning can be properly applied to the facts in issue. *See Daubert*, 509 U.S. at 592-593. As explained by Mr. Bedard, his reasoning has been developed and utilized by FDLE for all law enforcement officers in Florida, and indeed, the "force continuum" is relied upon across the country. (Doc 15- 4 - Pgs 46-51).[16]

During the state court postconviction evidentiary hearing, Mr. Bedard pointed out that in 2005, the law in Florida changed and, as a result of the change, civilians

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[15] During the state court postconviction evidentiary hearing, the State did not present any evidence or witnesses to refute Mr. Bedard's assertion that "use of force" theories are generally accepted throughout the country. *See, e.g., Correll v. State*, 523 So. 2d 562, 567 (Fla. 1988) ("[A]ny inquiry into its reliability for purposes of admissibility is only necessary when the opposing party makes a timely request for such an inquiry supported by authorities indicating that there may not be general scientific acceptance of the technique employed."); *State v. Hoffman*, 768 So. 2d 542, 566 (La. 2000) ("[T]he defendant offered no experts or other supporting evidence to rebut the expert's claim that her methods were reliable and generally accepted by the scientific community.") (citations omitted).

[16] This exact issue was recently considered by a federal judge in the United States District Court for the Eastern District of Louisiana – wherein *the Government/prosecution* sought to introduce a "use of force" expert – and the federal judge ruled that the expert's testimony satisfied the *Daubert* standard. *See United States v. Warren*, 2013 WL 5674153 (E.D. La. Oct. 17, 2013).

in Florida are permitted to "stand their ground" and meet force with force. (Doc 15-4 - Pg 61). *As a result of the 2005 change*, "use of force" experts are admissible in "stand your ground" cases in Florida for the same reasons that such experts are admissible in law enforcement excessive use of force cases.[17] The Petitioner's trial took place *after* Florida adopted the 2005 "stand your ground" law.

b. Mr. Bedard's testimony would have been admissible at trial.

In recommending that the Petitioner's § 2254 petition be denied, the Magistrate Judge concluded that Mr. Bedard's testimony would not have been admissible at trial. (A-34-35). As explained below, this conclusion is at least "debatable."

In Florida, the standard for determining the admissibility of expert testimony is whether the expert's testimony "concern[s] a subject which is beyond the common understanding of the average person." *Courtland Group, Inc. v. Phillips Gold & Co. LLP*, 876 So. 2d 629, 630 (Fla. 3d DCA 2004). During the state court postconviction evidentiary hearing, Mr. Bedard specifically explained that most jurors do not have an

[17] There are numerous pre-2010 cases that held that the testimony of a "use of force" expert is admissible in excessive use of force actions. *See, e.g., Samples v. City of Atlanta*, 916 F. 2d 1548, 1551 (11th Cir. 1990) (holding that testimony by "use of force" expert indicating that police officer acted reasonably in discharging firearm was admissible in 42 U.S.C. § 1983 action wherein it was alleged that the police officer used excessive force when he shot and killed the decedent); *Zuchel v. City and County of Denver*, 997 F.2d 730, 742 (10th Cir. 1993) (same). In fact, this Court has permitted this type of testimony to be used by the prosecution in a criminal case. *See United States v. Myers*, 972 F.2d 1566, 1577-1578 (11th Cir. 1992). If a law enforcement officer is permitted to rely on a "use of force" expert when defending an allegation of excessive use of force, then certainly a Florida citizen is able to rely on a "use of force" expert when attempting to establish that the use of deadly force was justified pursuant to Florida's "stand your ground" law.

understanding regarding the applicable factors involved in a case involving the use of deadly force:

> Again, this situation that arises when somebody is in fear for their life or is fighting for their life, is extraordinarily unusual. I think it's a mark of a civilized society. When most people have problems, they call people like me; they call the police to deal with their problems so they don't have to face their problem alone.
>
> There's no rule book on what to do. There's [a] statute that says what you can't do, but there's no rule book that says what you can do, so most people don't know what you can do. They don't understand not only legal components, but they also don't understand what I've spent most of the morning talking about which is the psychological and physiological components.

(Doc 15-4 - Pgs 162-163). Thus, in the instant case, the question of how people react when under the stress of a violent attack is a subject which is beyond the common understanding of the average person (and subject for which a "use of force" expert would assist the trier of fact in understanding the evidence or in determining a fact in issue). To the extent that Mr. Bedard cannot give the ultimate opinion about whether the "use of force" was justified in this case, Mr. Bedard could at least testify regarding "the physiology and the psychology of a person who is under the effects of 'fight flight,'" "force modeling," "proportionality of force," "perception of threat," "escalation and deescalation," "prefight ritual," and "reactionary gap" – all things that Mr. Bedard explained would *not* be within the ordinary knowledge of the average juror (and all things that are necessary for properly assessing whether the Petitioner's use of force was reasonable in this case). (Doc 15-4 - Pgs 74-76, 79, 114-115, & 162-163).

Notably, in the high-profile case of *State v. Zimmerman*, case number 2012-CF-1083 (Eighteenth Circuit/Seminole County, Florida) – another case involving a charge

of murder and a defendant claiming self-defense – Mr. Zimmerman was permitted to present a "use of force" expert (Dennis Root) at trial.[18] In particular, in Mr. Zimmerman's case, Mr. Root opined (among other things) that Mr. Zimmerman's actions in shooting the alleged victim at close range was inconsistent with ill will, hatred, or spite. As in the *Zimmerman* case, Mr. Bedard should be permitted to testify that the Petitioner's actions in this case were inconsistent with ill will, hatred, or spite. (Doc 15-4 - Pgs 107-110).

In support of his argument, the Petitioner relies on *Fridovich v. State*, 489 So. 2d 143, 144-146 (Fla. 4th DCA 1986), wherein then-Judge Anstead (writing for the majority) held that a medical examiner's opinion that the circumstances of the victim's death were consistent with an accidental shooting were admissible:

> Appellant Edward Fridovich was charged with first degree murder of his father and, upon trial, convicted of manslaughter. Because we find the trial court erred in refusing to admit expert evidence as to whether the fatal wound was the result of an accident, we reverse and remand for a new trial.
>
> Fridovich admitted involvement in the shooting death of his father but contended that the shooting was an accident. Included in the evidence was a recording of Fridovich's call to the police immediately after the shooting. The main evidence against Fridovich on the first degree murder charge came from family members whose motivations and credibility were substantially challenged by other evidence. Extensive evidence was also admitted concerning the original investigation by police authorities and their initial conclusion that the shooting was accidental. One of the factors persuading Captain Hoffner, an investigator on the case, was the unusual angle of entry of the shot. Hoffner worked closely on the investigation with Dr. Tate, the county medical examiner, who performed the autopsy. Dr. Tate corroborated Hoffner's testimony about

[18] Mr. Root's testimony in the *Zimmerman* case is available on the Internet: https://famous-trials.com/zimmerman1/2314-root.

the upward angulation of the wound. Dr. Tate's autopsy report, which concluded that the shooting was accidental, was admitted into evidence. During the state's case and again during the defense case, the defense proffered the testimony of Dr. Tate that the circumstances of the shooting were consistent with accident. During each proffer, Dr. Tate detailed the basis for his opinion, including his autopsy findings, his familiarity with the police investigation, and his consultations with two other medical examiners with expertise in the area of gunshot wounds. After listening to the proffers and hearing argument of counsel, the trial court refused to permit Dr. Tate to discuss his opinion or the basis for it before the jury.

The court below determined that it was not within the medical examiner's expertise to testify to the manner of death, as opposed to the cause of death. In support of this ruling, the state cites Sections 406.11(1) and 406.13, Florida Statutes (1983), which define the scope of the medical examiner's professional duty. In our view these statutory provisions have a distinct and separate purpose and were not intended to supplant the provisions of the evidence code, which sets out the applicable guidelines for the admission of expert testimony in court proceedings. Section 90.702, Florida Statutes (1983) provides that expert testimony is admissible if it is relevant and would be helpful to the trier of fact in understanding the evidence or determining a fact in issue at the trial. In addition, section 90.703 permits the expert to offer an opinion on an ultimate issue to be decided by the jury. Applying those provisions to the circumstances of this case, we believe the trial court should have permitted the examiner to testify to his opinion, based upon evidence of the autopsy he performed on the victim, the examiner's education and experience, and his familiarity with the circumstances of the shooting. That this opinion as to the manner in which the fatal wound was inflicted was within Dr. Tate's area of expertise is reinforced by the fact that he included it in his official report, which was admitted in evidence.

Spradley v. State, 442 So. 2d 1039 (Fla. 2d DCA 1983), relied upon by the state, is not to the contrary. The court in *Spradley* held that it was error to admit the medical examiner's conclusion that the victim's death was a homicide, where an insufficient predicate was laid for that opinion. *Id.* at 1043. In the present case, defense counsel laid a thorough predicate covering Dr. Tate's knowledge of the circumstances surrounding the incident and his familiarity with the police investigation as well as his experience in investigating homicides. These crucial factors were lacking in *Spradley*. The state also cites *Spradley* for the proposition that an expert may not give an opinion as to the guilt or innocence of a person accused of a crime. This court has recently clarified this issue in *Kruse v. State*, 483 So. 2d 1383 (Fla. 4th DCA 1986), where we distinguished legal conclusions, which a medical expert may not offer, from expert opinions, which are admissible so long as the expert is qualified to render

> the opinion. *Id.* at 1386-87. *We do not believe that Dr. Tate's opinion that the circumstances of the death known to him were consistent with an accidental shooting constituted a direct comment on the guilt or innocence of Fridovich, any more than an expert's opinion as to the sanity of a defendant would do. Such opinions may support a conclusion that a defendant is not guilty, but the opinions themselves are directed to expert inferences to be drawn from a set of facts, not personal opinions of guilt or innocence.* Case law reflects that medical examiners are routinely called to offer the sort of opinion offered here*, see Handwerk v. State*, 404 So. 2d 828 (Fla. 3d DCA 1981). We also believe that Dr. Tate's opinion was admissible because his conclusion, but not the reasons therefor, had already been admitted in evidence as part of his report, and others had been allowed to express their opinions as to whether the shooting was accidental.
>
> We also believe the error was substantial and prejudicial, despite the fact that the medical examiner's report, including Dr. Tate's opinion, was admitted in evidence. As with most opinions, it is the reasoning behind the opinion that counts, rather than the opinion itself. *The appellant had the right to present live testimony in support of his theory of defense*. Further, since the credibility of the state's witnesses was in doubt, Fridovich might well have been prejudiced by the court's refusal to admit highly probative expert testimony in his behalf. *This is especially true here where the jury, by returning with a verdict for manslaughter, obviously rejected much of the state's proof as to a premeditated killing.*

(Emphasis added). Pursuant to *Fridovich*, Mr. Bedard would be permitted to testify that the circumstances of this case were consistent with self-defense.

Alternatively, at the very least, Mr. Bedard is permitted to testify as to general principles of self-defense (i.e, a reasonable person would respond in a particular manner when faced with a specific type of danger). In support of this argument, the Petitioner relies on the following opinion issued by the Honorable Royce C. Lamberth:

> *The government asks this Court to prevent Mr. Patrick from speaking on the use of deadly force in self-defense cases.* The government has three main arguments for disallowing this speech: that it will not help the jury determine the facts of the case; that it will involve the

witness reciting legal standards of self-defense, which is prohibited; and that it will involve evidence as to defendants' state of mind, which is banned under Fed. R. Evid. 704(b).[19] Mot. at 5-10.

The government claims that Mr. Patrick's testimony on self-defense would not aid the jury because the government already plans to introduce documents laying out the standards for use of deadly force that Blackwater provided to its employees. It seems a stretch, however, to say that the mere introduction of these documents will provide the proper context within which the jury will be able to evaluate any self-defense claims. *The use of deadly force in self-defense is something that is often outside the ken of the ordinary juror.* To simply point jurors to manuals detailing appropriate procedures and expect them to understand it well enough to make a determination of guilt or innocence strikes this Court as insufficient. Mr. Patrick's testimony would help provide jurors with the context of the use of self-defense in the Baghdad of September 2007.

Additionally, the government's claim that allowing Mr. Patrick to testify on self-defense would usurp this Court's role does not withstand closer scrutiny. *Mr. Patrick intends to give testimony on general principles of self-defense and use of force*, as well as to place them within the context of Iraq in 2007. There is no indication that he will be telling the jurors what standard they should be applying to this specific case. This is as it should be; as the government correctly points out, providing legal standards is the Court's role. Mot. at 9. While this Circuit has not dealt specifically with the propriety of admitting a "use-of-force" expert, the Court agrees with the Ninth Circuit's decision allowing that type of testimony in *U.S. v. Koon*, 34 F.3d 1416, 1434 (9th Cir. 1994). Mr. Patrick will not offer a legal standard; instead, he will offer general principles of self-defense, which is very different. The advisory committee's note to Rule 702 echoes this – "it might also be important in some cases for an expert to educate the factfinder about general principles, without ever attempting to apply these principles to the specific facts of the case." Fed. R. Evid. 702 advisory committee's note.

. . .

The Court will therefore allow Mr. Patrick's testimony on

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[19] Although Judge Lamberth also addressed Federal Rule of Evidence 704(b), the Petitioner excludes this discussion from this petition because Florida has not adopted this provision in the Florida Evidence Code. *See* Charles W. Ehrhardt, *Florida Evidence* § 703.1 at 936 (2021 ed.) ("Florida has not adopted Fed. R. Evid. 704(b).").

self-defense and the use of deadly force.

United States v. Slough, 2014 WL 3859644 at *2-3 (D.D.C. June 16, 2014) (emphasis added) (footnote added). Pursuant to *Slough*, Mr. Bedard would be permitted to testify at a trial "on general principles of self-defense and use of force."

Undersigned counsel notes that in 2019, the Florida First District Court of Appeal *specifically cited* Mr. Bedard's "use of force" expert testimony in one of its appellate decisions. *See Moorer v. State*, 278 So. 2d 181, 186 (Fla. 1st DCA 2019) ("The defense called Roy Bedard as an expert in self-defense, and he testified that Appellant recounted features he commonly sees in cases of fear-based stress response. Bedard opined that Appellant felt his life was in imminent danger and that Appellant's actions were objectively reasonable and the use of deadly force in response to his perceived deadly threat was appropriate. On cross-examination, Bedard agreed that Appellant sounded very educated on the use of force."). Moreover, in August of 2019, the State presented Mr. Bedard as its "use of force" expert in the high profile case of *State v. Drejka*, case number 2018-CF-9851 (Sixth Circuit/Pinellas County, Florida).[20] *See* Eric Glasser and Tamika Cody, *Drejka jury sees gunman interrogation hours after fatal shooting*, WTSP-TV 10 News (August 22, 2019, 6:11 PM), https://www.wtsp.com/article/news/local/drejka-jury-sees-gunman-interrogated-hours-after-fatal-shooting/67-b3d1cc19-120e-4f8e-b8a3-32e8c036dff3 ("When use-of-force expert Roy Bedard was called to testify, he was

[20] In *Drejka*, the defendant shot the victim in a Clearwater convenience store parking lot after the victim's girlfriend parked in a disabled persons' space.

curious about Drejka's training and why he used the term '21-foot rule.'"); WFTS Digital Staff, *LIVE BLOG: Michael Drejka found guilty of fatal Clearwater shooting*, WFTS ABC Action News (August 24, 2019, 12:10 AM), https://www.abcactionnews.com /news/region-pinellas/live-blog-trial-for-michael-drejka-man-who-fatally-shot-man-over -handicapped-parking-spot-underway ("The state has decided to call up a witness who testified yesterday: Roy Bedard. He is the police trainer who gives expert opinions on use of force and defensive tactics. Bedard is using the actual weapon Drejka fired in the shooting to talk about how this particular gun works including line of sight, trigger control etc.").

Hence, for all of the reasons set forth above, Mr. Bedard's testimony would have been admissible at trial.

c. Trial counsel was ineffective for failing to retain a "use of force" expert.

During the state court postconviction evidentiary hearing, trial counsel claimed that he was not aware of "use of force" experts until 2013 when he was watching the Trayvon Martin/George Zimmerman case on television. (Doc 15-4 - Pgs 196-197). Yet, trial counsel claimed that as part of his practice, he monitors decisions issued by Florida appellate courts in criminal cases. (Doc 15-4 - Pg 196). In 2007 – three years *before* the Petitioner's 2010 trial – the Florida Fifth District Court of Appeal specifically referenced a "use of deadly force" expert in a published opinion:

> Also at the evidentiary hearing, in support of Mr. Alessi's claim, postconviction counsel called an expert in "officer-involved shootings, homicide investigation protocols, the dynamics of violent encounters and the use of deadly force," to demonstrate the kind of testimony that could

> have been developed to support Mr. Alessi's theory of self-defense.[FN2]
>
> [FN2: We note that determining whether a subject is appropriate for opinion testimony is a matter left to the trial judge's discretion. *See, e.g., Simmons v. State*, 934 So. 2d 1100, 1117 (Fla. 2006). Here, the trial court made no findings on the extent to which this expert's wide-ranging testimony at the evidentiary hearing would have been admitted at trial.]

Alessi v. State, 969 So. 2d 430, 435 (Fla. 5th DCA 2007). The *Alessi* opinion put defense counsel on notice of the existence of "use of force" experts. "Counsel's duty to know the applicable law, at least when it matters to his client's defense, has been clearly established by *Strickland*[21] and its progeny." *Osagiede v. United States*, 543 F.3d 399, 408 n.4 (7th Cir. 2008).[22] Thus, trial counsel was ineffective for failing to present a "use of force" expert during the Petitioner's trial (just as was done in the Zimmerman trial).

d. The Petitioner was prejudiced by trial counsel's failure to present a "use of force" expert.

The Petitioner was prejudiced by trial counsel's failure to retain a "use of force"

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[21] *Strickland v. Washington*, 466 U.S. 668 (1984).

[22] "Permissible trial strategy can never include the failure to conduct a reasonably substantial investigation." *Douglas v. Wainwright*, 714 F.2d 1532, 1556 (11th Cir. 1983). 'The relevant question is not whether counsel's choices were strategic, but whether they were reasonable.'" *Putman v. Head,* 268 F.3d 1223, 1244 (11th Cir. 2001). In *Biagas v. Valentine*, 265 Fed. Appx. 166, 172 (5th Cir. 2008), the Fifth Circuit Court of Appeals stated that "[w]e have recognized the distinction between strategic judgment calls and plain omissions, and we have emphasized that we are not required to condone unreasonable decisions parading under the umbrella of strategy . . . ." Additionally, in *Horton v. Zant,* 941 F.2d 1449, 1462 (11th Cir. 1991), the Eleventh Circuit Court of Appeals stated that "our case law rejects the notion that a 'strategic' decision can be reasonable when the attorney has failed to investigate his options and make a reasonable choice between them." Without even being aware of "use of force" experts, trial counsel could not properly evaluate whether such an expert was viable in the Petitioner's case.

expert. *See Lee v. State*, 899 So. 2d 348, 354 (Fla. 2d DCA 2005) ("*Strickland* requires this court to consider whether there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A 'reasonable probability' is defined as one that is sufficient to undermine confidence in the outcome.") (citations omitted). The Petitioner submits that had Mr. Bedard's testimony been presented during the trial, there is a "reasonable probability" that the result of the proceeding would have been different. The key issue in this case was whether the Petitioner was justified in using deadly force. As explained by Mr. Bedard, this is an issue that is beyond the common understanding of the average juror. Mr. Bedard's testimony – had it been presented – would have caused (at the very least) reasonable doubt as to whether the Petitioner acted with criminal intent. Mr. Bedard is a very credible witness – as demonstrated by the fact that he was recently used by the prosecution in the *Drejka* case. Clearly the Petitioner was prejudiced by not having Mr. Bedard testify during his trial.

2. Appellate counsel was ineffective for failing to argue on direct appeal that the state trial court erred by preventing the Petitioner from presenting witnesses to testify regarding one of the alleged victim's character trait of violence.

In his § 2254 petition, the Petitioner alleged that appellate counsel rendered ineffective assistance of counsel for failing to argue on direct appeal that the state trial court erred by preventing him from presenting witnesses to testify regarding one of the alleged victim's character trait of violence. As a result, the Petitioner was denied his right to effective assistance of counsel in violation of the Sixth Amendment to the United States Constitution.

During the trial, the Petitioner's counsel proffered the following testimony from witness Kelly Crain:

PROFFERED TESTIMONY

BY MR. THOMAS [the Petitioner's counsel]:

Q Would you state your name [], please?

A Kelly Crain . . . .

. . . .

Q All right. Now, where – where were you raised?

A Milton.

Q Milton. Where did you go to school?

A Milton High.

Q And did you know Joe Hall?

A Yes, sir.

Q Did you go through classes with him?

A We had a couple, yes.

Q And have you been in the company of Joe Hall at different venues that bands play, like Sluggo's and Hickey Doodle, things like that?

A Yes, sir.

Q Okay. And over the years that you've been in Milton based on – have you heard talk about Joe Hall in the community back then, about – about any acts of violence?

A Not – I mean, I can't – know anything specific. It's been a couple years.

Q It's been a couple years?

A Yes, sir.

Q Okay. Had you heard about the dispute between he and Joe [sic] Laird, that he was –

A Josh Laird?

Q Josh, yeah.

A Yes, sir.

Q All right. And did you know or hear – did you hear about him to threatening to beat him up?

A Yes, sir.

. . . .

Q (By Mr. Thomas) Did you ever have a discussion with Samantha Trimm and/or Samantha Sparling about Joe Hall?

A About what in particular?

Q About some of these – about the – specifically about you heard that he had slashed the tires?

A Yes.

Q Okay. And had you ever had a conversation with Samantha Sparling about Joe Hall told you he was paid $1,000 to hit somebody with a bat or beat somebody up with a bat?

A I'm not sure if me and Samantha spoke about it, but Joe told me.

Q Okay. Now, based on your living here in Milton all of those years did you know what Joe Hall's reputation was for peacefulness or violence against young men, who he believed abused women?

A Yes.

Q And what was that?

A He was very much a protector of women. He –

Q And towards the young men, who abused them, what was his reputation?

A He didn't really stand for that at all. He – he was very outspoken about how he didn't feel that it was right, and he would get very angry about it.

Q But so as far as peacefulness or violence?

A He's very peaceful towards women.

Q And what about towards the young men?

A Not so much.

. . .

BY MR. ELMORE:

Q Ms. Crain, Mr. Thomas asked you generally about the Josh Laird dispute or incident. If I am stating it correctly, you let me know.

A Okay.

Q There came a time when Josh Laird was your boyfriend, right?

A Yes.

Q And there came a time when you and he had some kind of argument or tiff and were standing near a motor vehicle, correct?

A Yes.

Q And that Josh Laird apparently shoved the door, and it knocked you down, or something of that nature?

A Yes.

Q Is that right?

A Yes.

Q Okay. And apparently at some time to your knowledge at least Joe Hall became aware that Josh Laird in this argument with you

pushed – either was he in the car closing the door or was he pushing out?

A I was standing in front of his door, because he was trying to leave.

Q Okay.

A And he reached around me to try to open his door. And it knocked me over in the process.

Q Okay. And so – in other words, he's trying to get in his car?

A Yes.

Q And when he opens the door, it knocks you down?

A Yes.

Q Okay. And so apparently Joe Hall learned of this and didn't like it?

A Yes.

Q Okay. Now, was that something that you and Joe Hall talked about?

A Not at the time.

Q Okay. Did you and Joe Hall ever talk about it?

A Yes.

Q Okay. And did Joe Hall tell you it did anger him to know that your boyfriend had – whether accidentally or not knocked you down with a car door?

A Yes.

. . .

Q (By Mr. Elmore) At some time you and Joe Hall talked about it.

A Yes.

Q What did Joe Hall say about it?

A That he didn't believe that it was an accident and that he wanted to hurt Josh.

Q All right. Well, did he ever hurt Josh?

A No. I asked him not to.

Q Okay. And so fact did you talk to Josh about it, too?

A Yes.

Q And you're aware that Josh said and has testified in this case that Joe Hall never actually approached him or threatened him?

A Yes.

Q Okay. So Joe Hall made some kind of statement – hearsay statement that because of what he believed at the time he would, what, like kick his tail or something like that for what he did to you?

A Yes

Q Okay. But he never did, and he never even threatened Josh.

A Well, he did slash Josh's car tires.

Q Okay. Well, that's something else that happened.

A Okay.

Q That didn't involve violence to Josh. There's an allegation that he was involved in the slashing of one of Josh's car tires, correct?

A Yes.

Q Okay. Now, this issue about the ball bat, Joe Hall, who is dead now, you say he told you that somebody paid him $1,000 to beat someone with a baseball bat?

A He told me.

(Doc 15-29 - Pg 195 – Doc 15-30 - Pg 3). The Petitioner's counsel also proffered the

following testimony from the Petitioner:

PROFFERED TESTIMONY

BY MR. THOMAS:

Q All right. Mr. Ward, prior to the incident on June 25th, of 2006, had you heard about any specific acts of violence on the part of Joe Hall?

A Yes, sir.

Q And what were those that you heard?

A There was a story that Samantha Trimm and Kelly Crain told me about when he was going to beat up Kelly's boyfriend, and another time where he accepted money to beat somebody up with a baseball bat, and slashed – and he slashed Kelly's boyfriend's tires.

Q Okay. Any others?

A No, sir.

Q Okay. Now, when in relation to the incident, was it before or after the incident?

A It was before.

Q And where was it that you heard that?

A It was over at Samantha's house.

Q Do you remember who was there?

A It was myself, Samantha, Samantha Trimm, and Kelly Crain.

Q Okay. And the first one that you said, was – the first specific act of violence was what?

A It was where Joe Hall – it was where Joe Hall was going to beat up Kelly's boyfriend because he thought that he pushed her.

MR. THOMAS: Okay. Judge, that's my proffer.

(Doc 15-30 - Pgs 10-11). Ultimately, the state trial court ruled that the Petitioner could not present Ms. Crain's testimony to the jury. (Doc 15-30 - Pgs 21-22).

In *Antoine v. State*, 138 So. 3d 1064, 1075-1076 (Fla. 4th DCA 2014), the Florida appellate court stated the following:

> First, in a self-defense case, "evidence of the victim's character trait of violence . . . may be offered on the issue of who was the aggressor." Charles W. Ehrhardt, *Florida Evidence* § 404.6 (2012 ed.). Under section 90.404(1)(b), Florida Statutes (2012), "evidence of a pertinent character trait of the victim is admissible when it is offered by the accused to prove that the victim acted in conformity with" his character. Ehrhardt, *supra*, § 404.6. Thus, "evidence of the dangerous character of the victim is admissible to show, or as tending to show, that the defendant acted in self-defense." *Smith v. State*, 606 So. 2d 641, 642 (Fla. 1st DCA 1992) (citing *Garner v. State*, 28 Fla. 113, 9 So. 835, 841 (1891)).
>
> In most self-defense cases, "[e]vidence of the victim's reputation is admissible to disclose his or her propensity for violence and the likelihood that the victim was the aggressor," *Berrios v. State*, 781 So. 2d 455, 458 (Fla. 4th DCA 2001), the notion being that reputation evidence demonstrates "the 'product of what is generally discussed in the community.'" *Johnson v. State*, 108 So. 3d 707, 709 (Fla. 5th DCA 2013) (quoting Ehrhardt, *supra*, § 405.1); *see also Larzelere v. State*, 676 So. 2d 394, 400 (Fla. 1996). Such reputation testimony is admissible in a self-defense case "as circumstantial evidence to prove th[e victim's] conduct," that at the crucial time the victim acted consistently with his reputation for violence. Ehrhardt, *supra*, §§ 405.3, 404.6. A defendant's prior knowledge of the victim's reputation for violence is irrelevant when the evidence is offered on the issue of who was the aggressor, "because the evidence is offered to show the conduct of the victim, rather than the defendant's state of mind." *Dwyer v. State*, 743 So. 2d 46, 48 (Fla. 5th DCA 1999); *see also Melvin v. State*, 592 So. 2d 356, 357 (Fla. 4th DCA 1992) (holding that deceased's reputation as a bully was admissible even though the defendant did not know of that reputation).
>
> A second purpose to offer evidence of the victim's character trait of violence in a self-defense case is "to prove that the accused was reasonably apprehensive of the victim and that the defensive measures of the accused were reasonable." Ehrhardt, *supra*, § 404.6; *see also Arias*

> *v. State*, 20 So. 3d 980, 983 (Fla. 3d DCA 2009); *Diaz v. State*, 747 So. 2d 1021, 1024-25 (Fla. 3d DCA 1999). When the evidence is offered for this purpose, "there must be evidence that the accused knew of the victim's acts of violence or aggression." Ehrhardt, *supra*, § 404.6.
>
> Reputation testimony about a victim of a crime is often confused with evidence of prior specific acts of violence by a victim, which must be known by a defendant to be relevant to a self-defense claim. "Evidence of prior specific acts of violence by the victim is admissible," if known by the defendant, "because it is relevant 'to reveal the reasonableness of the defendant's apprehension at the time of the incident.'" *Hedges v. State*, 667 So. 2d 420, 422 (Fla. 1st DCA 1996) (quoting *Smith*, 606 So. 2d at 642-43). "[S]pecific acts of aggression and violence by the victim are inadmissible to prove that the victim was the aggressor and that the defendant acted in self-defense." Ehrhardt, *supra*, § 405.3. For this category of evidence, a defendant's knowledge of a victim's specific acts of violence is a precondition to admissibility. *See Singh v. State*, 36 So. 3d 848, 851 (Fla. 4th DCA 2010); *Shreiteh v. State*, 987 So. 2d 761, 763 (Fla. 4th DCA 2008).

In light of the principles cited in *Antoine*,[23] the Petitioner submits that the state trial court erred by preventing him from presenting witnesses to testify regarding one of the alleged victim's (i.e., Joe Hall's) character trait for violence.[24] The Petitioner's sole defense at trial was self-defense. Pursuant to Ms. Crain's proffered testimony, Mr. Hall had a character trait of being violent towards men who allegedly abuse women. This character was especially relevant in the instant case in light of Samantha Sparling telling Mr. Hall just prior to the incident that the Petitioner had hit her. At trial, the Petitioner asserted that he was attacked by Mr. Hall and he acted in self-

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[23] All of the principles cited in *Antoine* were in effect at the time that appellate counsel filed the direct appeal brief in the Petitioner's case.

[24] The Sixth Amendment and the Due Process Clause of the Fourteenth Amendment guarantee a criminal defendant the right to present a defense. *See Taylor v. Illinois*, 484 U.S. 400, 408 (1988); *Washington v. Texas*, 388 U.S. 14, 23 (1976); *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973).

defense. Ms. Crain's proffered testimony would have corroborated the Petitioner's version of events (i.e., after Ms. Sparling told Mr. Hall that she had been hit by the Petitioner, Mr. Hall acted consistent with his character trait and attacked the Petitioner – because Mr. Hall had a character trait of violence towards men who allegedly abuse women). The state trial court's ruling – which prohibited the Petitioner from presenting Ms. Crain's testimony to the jury – was extremely harmful to the Petitioner's theory of defense.[25]

In the Report and Recommendation, the Magistrate Judge stated that a "reasonable appellate attorney" could conclude that "the reputation evidence claim was weak given the entirety of Ms. Crain's testimony, which reasonably could be perceived as lacking true familiarity with the purported reputation of Hall in the 'community,' as the statute requires." (A-48). The Magistrate Judge's conclusion is refuted by the state court record. During her proffer, Ms. Crain specifically stated the following about her knowledge of Mr. Hall's character trait:

> Q Okay. Now, based on your living here in Milton all of those years did you know what Joe Hall's reputation was for peacefulness or violence against young men, who he believed abused women?
>
> A Yes.

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[25] During his closing argument, the prosecutor stated the following to the jury:

> What does the evidence before you show about Joe Hall? That he did everything good and everything right that night. *That he has an impeccable reputation in the Milton community for peacefulness.*

(Doc 15-31 - Pg 208) (emphasis added).

Q And what was that?

A He was very much a protector of women. He –

Q And towards the young men, who abused them, what was his reputation?

A He didn't really stand for that at all. He – he was very outspoken about how he didn't feel that it was right, and he would get very angry about it.

Q But so as far as peacefulness or violence?

A He's very peaceful towards women.

Q And what about towards the young men?

A Not so much.

(Doc 15-29 - Pg 198). Clearly this testimony – combined with the other testimony quoted above – established a sufficient foundation/predicate to permit Ms. Crain to testify regarding Mr. Hall's character trait. In *Hoffman v. State*, 953 So. 2d 643, 645-646 (Fla. 3d DCA 2007), the state appellate court stated that more than 100 years ago, the Florida Supreme Court articulated the standard that applies to determining whether a party has laid the necessary predicate so that a witness can testify regarding a person's reputation/character trait:

> The inquiry should be whether the witness knows the general reputation of the person whose character is in issue in the given community, and as to the trait or quality in question. When the witness answers that question in the affirmative, the foundation for proving what that reputation is has been sufficiently laid, and the witness thus laying such foundation should be permitted to go on and testify as to what the reputation is, without being interrupted by a cross-examination to test the extent and sources of his information as to such character. The proper practice in testing, by cross-examination, the extent and sources of the knowledge or information. of such impeaching witness, is to defer it until

> the witness has been turned over in regular order for cross-examination in general at the close of the examination in chief.

(Quoting *Hinson v. State*, 59 Fla. 20, 21 (Fla. 1910)). Ms. Crain's proffered testimony satisfies the minimal threshold articulated in *Hoffman*/*Hinson*.

This issue was properly preserved by trial counsel and should have been raised on direct appeal by appellate counsel. This issue was plainly stronger than the other issues raised by appellate counsel on direct appeal. Had the issue been raised, the state appellate court would have remanded for a new trial due to the state trial court's error in preventing the Petitioner from presenting Ms. Crain to testify regarding Mr. Hall's character trait for violence. Therefore, the Petitioner's appellate counsel was ineffective for failing to raise this issue on appeal. The Petitioner has proven a specific error or omission committed by appellate counsel (the failure to raise this issue on appeal) and the Petitioner has established that the error had a prejudicial impact on the appeal. *See Cupon v. State*, 833 So. 2d 302, 304-305 (Fla. 1st DCA 2002) ("In the case on review, we conclude that appellate counsel's failure to raise a preserved and meritorious issue caused the representation to fall outside the range of professionally accepted performance.").

3. Standard for issuance of a certificate of appealability.

To be entitled to a certificate of appealability, the Petitioner needed to show only "that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327

(2003). The Petitioner has satisfied this requirement because he has (1) made "a substantial showing of the denial of a constitutional right" (i.e., his right to effective assistance of counsel) and (2) the magistrate judge's resolution of his claims (later adopted by the district court) is "debatable amongst jurists of reason." *See* 28 U.S.C. § 2253(c)(2). Thus, the Petitioner meets the standard for obtaining a certificate of appealability – the issues are "adequate to deserve encouragement to proceed further." *Miller-El*, 537 U.S. at 336.

Accordingly, the Eleventh Circuit should have granted a certificate of appealability for one or both of the Petitioner's claims. The Petitioner therefore asks this Court to address these important issues by either accepting this case for plenary review or remanding it to the Eleventh Circuit for the consideration it deserves.

I. CONCLUSION

The Petitioner requests the Court to grant his petition for writ of certiorari.

Respectfully Submitted,

/s/ Michael Ufferman

MICHAEL UFFERMAN
Michael Ufferman Law Firm, P.A.
2022-1 Raymond Diehl Road
Tallahassee, Florida 32308
(850) 386-2345/fax (850) 224-2340
FL Bar No. 114227
Email: ufferman@uffermanlaw.com

COUNSEL FOR THE PETITIONER