No. _____

IN THE

Supreme Court of the United States

MARGARET A. ALLEN,

Petitioner,

v.

SECRETARY, DEPARTMENT OF CORRECTIONS, ATTORNEY GENERAL, STATE OF FLORIDA,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

DEATH PENALTY CASE

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CAPITAL CASE

QUESTIONS PRESENTED

Ms. Allen's case is one of the most mitigated and least aggravated capital cases. However, her jury was completely unaware of that fact due to her trial counsel rendering ineffective assistance of counsel in violation of *Strickland v. Washington*, 466 U.S. 668 (1984) and the Sixth Amendment. Worse yet, although Ms. Allen has always maintained her innocence, her trial counsel failed to challenge the only evidence which the lower courts have found to support her convictions. Accordingly, Ms. Allen raises the following issues:

1. Whether the Eleventh Circuit flouted this Court's relevant decisions and precedent by declining to even grant a certificate of appealability regarding trial counsel's ineffectiveness in failing to investigate and present compelling available mitigation and in failing to challenge the evidence used to support Ms. Allen's convictions?

2. Whether Ms. Allen's convictions and death sentence are unconstitutional due to receiving ineffective assistance of counsel at her trial in violation of her rights under the Sixth Amendment?

3. Whether the conflicting evidence in Ms. Allen's case undermines and refutes her convictions to the extent that her convictions and death sentence should be vacated?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page. Petitioner, Margaret A. Allen, a death-sentenced Florida prisoner, was the appellant in the United States Court of Appeals for the Eleventh Circuit. Respondents, Secretary, Department of Corrections, and Attorney General, State of Florida, were the appellees in the United States Court of Appeals for the Eleventh Circuit.

LIST OF RELATED CASES

Trial
Circuit Court of the Eighteenth Judicial Circuit, in and for Brevard County, Florida
State of Florida v. Margaret Ann Allen; Case number: 2005-CF-048260
Judgement entered: Guilty as charged, on one count of first-degree felony murder and one count of kidnapping. Death recommendation, September 23, 2010. Death sentence imposed by court on May 19, 2011.

Direct Appeal
Supreme Court of Florida
Allen v. State, 137 So. 3d 946 (Fla. 2013); Case Number: SC11-1206
Judgment entered: July 11, 2013; Rehearing denied: April 17, 2014.

Certiorari
Supreme Court of the United States
Allen v. Florida, 135 S. Ct. 362 (2014); Case Number: 14-5570
Judgment entered: October 14, 2014; *cert denied*.

Postconviction Motion
Circuit Court of the Eighteenth Judicial Circuit, in and for Brevard County, Florida
Margaret A. Allen v. State of Florida; Case Number: 052005CF048260AXXXXX
Judgment entered: August 2, 2017; order denying postconviction relief (unpublished).

Appeal of denial of postconviction
Supreme Court of Florida
Allen v. State, 261 So. 2d 1255 (Fla. 2019); Case Number: SC17-1623
Judgment entered: January 7, 2019

Federal habeas petition
United States District Court, Middle District. Florida, Orlando Division.
Allen v. Sec'y, Fl. Dep't of Corr., *et al.*: Case Number: 6:19-cv-296-PGB-DCI
Judgment signed: March 30, 2022; Judgment entered: March 31, 2022.

Appeal from the denial of federal habeas petition
United States Court of Appeals, Eleventh Circuit.
Allen v. Sec'y, Fl. Dep't of Corr., *et al.*: Case Number: 23–10447-P
Judgment entered: April 12, 2023; Motion for Reconsideration denied: May 19, 2023.

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IN THE SUPREME COURT OF THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI

Margaret A. Allen respectfully petitions for a writ of certiorari to review the errors in the order of the United States Court of Appeals for the Eleventh Circuit ("Eleventh Circuit").

OPINIONS BELOW

This is a petition regarding the errors of the Eleventh Circuit in denying a certificate of appealability to appeal the denial of Ms. Allen's petition for a writ of habeas corpus. The unpublished order at issue is reproduced at Appendix A. The United States District Court for the Middle District of Florida's unpublished Order Denying Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus is reproduced at Appendix E.

JURISDICTION

The order of the Eleventh Circuit was entered on April 12, 2023. Ms. Allen timely filed a Motion to Reconsider, Vacate, or Modify Order, which was denied on May 19, 2023. On July 10, 2023, Ms. Allen timely filed an Application for Sixty Day Extension of Time to File Petition for a Writ of Certiorari. On July 14, 2023, Justice Thomas extended the time to and including September 18, 2023. The Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein

> the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. amend. VI

The Eighth Amendment provides: Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. U.S. Const. amend. VIII.

The Fourteenth Amendment provides, in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV.

STATEMENT OF THE CASE

I. Procedural History

Ms. Allen is sentenced to death for capital murder in the State of Florida. She was found guilty of first-degree murder and kidnapping. After a unanimous ***recommendation*** from her penalty phase ***advisory*** jury panel, the trial court sentenced her to death. As a result, she was denied a new penalty phase under *Hurst v. Florida*, 577 U.S. 92 (2016) and its progeny.

Ms. Allen appealed her convictions and sentences to the Florida Supreme Court ("FSC"), which affirmed. *Allen v. State*, 137 So. 3d 946 (Fla. 2013). This Court denied certiorari. *Allen v. Florida*, 574 U.S. 938 (2014).

Ms. Allen then sought postconviction relief in the Florida courts. She filed a motion for postconviction relief under Florida Rule of Criminal Procedure 3.851. The motion was denied and appealed to the FSC. The FSC revised the opinion upon rehearing but affirmed the denial of postconviction relief. *Allen v. State*, 261 So. 3d 1255 (Fla. 2019). Notably, two justices dissented from the majority opinion and would have vacated Ms. Allen's sentence of death and remanded for a new penalty phase trial. *Id*. at 1289-92.

After the majority of the FSC denied her relief, Ms. Allen timely filed her petition for writ of habeas corpus under 28 U.S.C. § 2254 on February 14, 2019. She filed a memorandum of law in support of her petition. App. G. Respondents filed a corrected response to the petition (App. H) and Allen filed a reply. App. I.

Ms. Allen's petition for writ of habeas corpus was denied by the district court on March 30, 2022. App. E. Judgment was entered on March 31, 2022. Ms. Allen filed a Motion to Alter or Amend Judgment (App. J), which was denied on January 10, 2023. App. F. A notice of appeal from the final order entered by the district court denying habeas relief was timely filed.

The district court declined to issue a certificate of appealability ("COA"). Accordingly, Ms. Allen filed an Application for a Certificate of Appealability (App. C) in the Eleventh Circuit on February 28, 2023. *See* 28 U.S.C. § 2253. On April 12, 2023, the Eleventh Circuit issued an order denying a COA. App. A. Ms. Allen timely filed a Motion to Reconsider, Vacate, or Modify Order (App. D), which the Eleventh Circuit denied on May 19, 2023. App. B.

II. Summary of Relevant Facts

Two justices dissented from the FSC's majority opinion in Ms. Allen's case: Justice Peggy A. Quince and Justice Barbara J. Pariente. Justice Pariente's dissenting opinion aides in detailing the facts related to the infirmities with the mitigation presentation that Ms. Allen's jury and trial court received due to trial counsel's ineffectiveness and provides an excellent summary:

> [W]ithout a full picture of Allen's upbringing and background, the jury could never have understood the full extent of the mitigation in her case, which could have caused at least one juror to recommend life. Because Allen's attorney's failure to properly investigate and present mitigation evidence—specifically the testimony of Allen's aunt, Barbara Capers, who could have given first-hand accounts of the abuse Allen suffered—constitutes deficient performance and the absence of important mitigation undermines confidence in the jury's unanimous recommendation for death, I dissent.
>
> Capers, who was available and willing to testify, would have presented a considerably more complete and detailed picture of Allen's horrific childhood and early adult life, including first-hand accounts and graphic details of the physical and sexual abuse Allen suffered at the hands of her family members and former boyfriends. The testimony would not have been cumulative to the testimony presented at trial. Rather, it would have been compelling based on Caper's first-hand knowledge of the events of Allen's life. However, Allen's attorney never so much as even contacted Capers, even though Capers was at all times available to testify. Thus, because ***Allen has established ineffective assistance of counsel***, I conclude that Allen's sentence of death should be vacated, and this case should be remanded for a new penalty phase.
>
> **BACKGROUND**
>
> Approximately two and a half years before trial, Allen's case was reassigned from the public defender's office to defense counsel. Upon taking Allen's case, counsel failed to conduct an independent investigation into mitigation. Trial counsel only spoke with two mitigation witnesses before the trial—(1) Allen's aunt, Myrtle Hudson, and (2) Allen's sister, whose name he did not remember. He did not enlist the help of an investigator or mitigation specialist. At the postconviction evidentiary hearing, counsel testified that he thought the "witnesses were all lined up" before he took the case and it was just a

matter of "putting [the mitigation] on."

Had she been asked to testify, Allen's aunt, Barbara Capers, could have added the following testimony: that she personally witnessed Allen's mother physically abusing Allen by beating her with her hands and fists almost every day; Allen's mother would also beat Allen with belts, whip her with sticks, and slap her in the face; when Allen was twelve, her mother beat her so badly that Capers called the police; Allen's grandfather also physically abused Allen, he would line up the boys and girls naked, including Allen, and go down the row beating them with oak switches; Allen also witnessed her grandfather being abusive to her mother; in her twenties, Allen was beat up by her boyfriend, Bill Skane, and was unrecognizable when Capers visited her in the hospital; Capers witnessed Allen's paramour abuse her many times while she was pregnant, including one time he and another boy kicked and punched Allen in the stomach; when Allen was a young girl, her mother went to jail and Allen stayed with her grandfather, and Allen told Capers that she wanted to stay with her instead because he was sexually molesting her; Allen's uncle Roy also sexually molested her when he visited the grandfather every other weekend; Capers saw Roy touch and grab Allen in private places like her breasts and kiss her on the mouth; Allen told Capers that her brother and another man sexually molested her; Allen had a stroke as a teenager that affected her speech and her memory; and Allen demonstrated signs of severe anxiety.

ANALYSIS

…

1. Deficiency

Although Capers' testimony would have involved the same subject as evidence presented at trial, it is not merely cumulative—as the majority and postconviction court suggest. It is impossible to conclude that Capers' testimony would have been similar in breadth and detail to Hudson's. Rather, Capers' testimony was more detailed and included many personal, eyewitness accounts to the abuse Allen suffered. Certainly, hearing first-hand accounts of the abuse suffered by Allen would be far more impactful on the jury than Hudson's vague recollection of Allen's childhood.

Further, Allen's childhood and history of abuse were the most significant mitigation the defense presented during the penalty phase. *See* per curiam op. at 5-6, note 2. While Hudson's testimony was a critical component of the mitigation presented because it could help the jury understand why Allen committed this heinous crime, Capers' testimony would have undoubtedly painted an even clearer picture for the jury of

this mitigation, as explained above.

Thus, trial counsel's investigation was wholly insufficient and "fell short of the standards for capital defense work articulated by the American Bar Association (ABA)—standards to which [the United States Supreme Court] long have referred as 'guides to determining what is reasonable,'" which provide that efforts must be made to discover all reasonably available mitigation and evidence to rebut aggravators. *Wiggins v. Smith*, 539 U.S. 510, 524, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003); *see* Am. Bar Ass'n, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases 10.11* (rev. ed. 2003). Accordingly, I would conclude that Allen has satisfied the first prong of the *Strickland* analysis.

2. Prejudice

…

Hudson testified at the postconviction evidentiary hearing that she told counsel about Capers and her willingness to testify in Allen's case. Further, Capers testified at the postconviction evidentiary hearing that she was contacted by an attorney—not Allen's trial counsel—before trial, was available to speak with an expert, and wanted to testify, but was not asked to do so. Rather than looking into Capers' testimony, trial counsel relied solely on Hudson's testimony for information regarding Allen's childhood and adult life. In fact, Capers wanted to help Allen but was never told that her testimony could help; she was even present in the courtroom for the duration of the trial.

Clearly, as explained above, Capers' testimony would have better illustrated for the jury the trauma in Allen's childhood, development, and surroundings as an adult. Indeed, counsel conceded that it would have been beneficial to find witnesses to substantiate Allen's violent family life. *See Walker v. State*, 88 So. 3d 128, 140 (Fla. 2012). Further, the additional "insight into [Allen's] childhood and young adulthood" that Capers could have provided would have "serv[ed] to humanize [her] to the jury" and could have persuaded jurors to be more sympathetic and merciful. *Id.* at 140-41. Thus, I conclude that prejudice has been established because our confidence in the unanimous jury verdict should be undermined.

CONCLUSION

It is clear that Capers' testimony would have provided the jury with a more complete and accurate picture of the powerful mitigation in Allen's case. However, because of the failure of Allen's attorney to investigate and present this mitigation evidence, the jury only received a partial

> understanding of the abuse Allen suffered as a child and into her adult life. ***This half-truth undoubtedly undermines our confidence in Allen's sentence of death. Thus, I would vacate Allen's sentence of death and remand for a new penalty phase.***
>
> Accordingly, I dissent.

Allen, 261 So. 3d at 1289-92 (emphasis added). Justice Pariente illustrates the unjust denial of Allen's Sixth Amendment rights as related to the barebones mitigation presentation at her trial.

In addition, the State's only evidence supporting the murder and kidnapping convictions was the testimony of Quintin Allen ("Quintin") and Sajid Qaiser, M.D. ("Dr. Qaiser"). Quintin is a co-defendant who pinned the crimes on Ms. Allen and became a State witness to avoid the death penalty. Dr. Qaiser is a successor medical examiner whose opinions were in complete conflict with the report of the original medical examiner who conducted the autopsy. Unlike Dr. Qaiser, Robert Whitmore, M.D. ("Dr. Whitmore") actually saw the victim's body and did not find any evidence of ligature marks. However, as detailed further below, if trial counsel had been effective and hired an independent forensic pathologist such as Daniel J. Spitz, M.D. ("Dr. Spitz") to testify at Ms. Allen's trial, the State's evidence supporting her convictions and the aggravating circumstances would have been undermined and rebutted. Dr. Spitz's postconviction testimony was in agreement with Dr. Whitmore's findings and disproved the testimony of both Quintin and Dr. Qaiser.

Any additional relevant facts are incorporated below.

REASONS FOR GRANTING THE PETITION

I. THE SIXTH AMENDMENT GUARANTEES THE RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL

Ms. Allen's trial counsel was so constitutionally deficient that she did not receive the trial she was entitled to under *Strickland* and the Sixth Amendment. Trial counsel, Frank Bankowitz ("trial counsel"), was ineffective in an abundance of ways. However, this petition will only address the two most egregious instances, both of which undermine confidence in the result of her capital trial.

Cases like Ms. Allen's, where counsel was this grossly ineffective, are precisely what the Sixth Amendment seeks to protect. However, Ms. Allen's case was decided in such a way that conflicts with relevant decisions of this Court. In fact, the way that the lower courts have marginalized Ms. Allen's compelling ineffective assistance of counsel claims also implicates the violation of her rights under the Eighth and Fourteenth Amendments.

A. Trial counsel rendered ineffective assistance of counsel by failing to adequately investigate, prepare, and present available mitigation at the penalty phase of Ms. Allen's trial.

Ms. Allen did not receive the level of representation guaranteed to her under *Strickland* and the Sixth Amendment because trial counsel failed to adequately investigate, prepare, and present the abundant amount of mitigation that was available at the time of trial. Some of the main areas where trial counsel was ineffective include: 1) failure to conduct a sufficient investigation into Ms. Allen's background, including failure to interview and present mitigation witnesses; 2) failure to present evidence of Ms. Allen's sexual abuse and childhood physical abuse;

3) failure to conduct a reasonable mental health investigation and present evidence that Ms. Allen suffers from Posttraumatic Stress Disorder ("PTSD"); and 4) failure to acquire records such as police reports. Trial counsel's deficient mitigation presentation fell below prevailing norms and disregarded the American Bar Association Guidelines. *See Wiggins v. Smith*, 539 U.S. 510, 524 (2003); *Rompilla v. Beard*, 545 U.S. 374, 382-83, 387 (2005); *see also* AM. BAR ASS'N, GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES, 31 HOFSTRA L. REV. 913 (rev. ed. 2003) ("ABA Guidelines"). The mitigation that trial counsel attempted to present at trial was abhorrently incomplete. Ms. Allen was prejudiced by these deficiencies and sentenced to death as a result.

Accordingly, Ms. Allen asserts the lower courts erred in affording such high deference to Ms. Allen's trial counsel. The district court noted: "Even if in hindsight this tactic proved unsuccessful, the Court will not second-guess Bankowitz, an experienced criminal attorney with forty-three years of practice." App. E at 66. The amount of time counsel has practiced is irrelevant.[1] A reasonable jurist's only consideration should be trial counsel's performance in the instant case, which was grossly deficient. Regardless of how many years counsel had practiced, he had "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial

[1] It is clear that even seasoned attorneys can make errors, as evidenced by trial counsel receiving multiple public reprimands by the Florida Supreme Court, *The Florida Bar v. Bankowitz*, 177 So. 3d 1272 (Fla. 2015), and in one instance he was also "directed to attend The Florida Bar's Ethics School." *The Florida Bar v. Bankowitz*, SC18-1268, 2018 WL 4049133, at *1 (Fla. Aug. 23, 2018). The difference is that those errors committed by trial counsel were less egregious; a woman was not convicted and sent to death row as a result of those deficiencies.

testing process." *Strickland*, 466 U.S. at 688. Despite taking over Ms. Allen's case ***two and a half years prior to trial***, trial counsel failed to satisfy this bare minimum requirement and denied Ms. Allen's jury critical information in what was literally a life-or-death situation.

In addition, trial counsel, a solo practitioner, tried both phases of Ms. Allen's trial himself, with no co-counsel. Trial counsel also failed to seek assistance from a mitigation specialist or investigator. A capital defense team comprised solely of one attorney is not the customary practice in Florida and is also a violation of Guideline 4.1 of the ABA Guidelines. *See* ABA Guidelines at 952. Although trial counsel took over the case two and a half years prior to trial and had ample time to perform an investigation into Ms. Allen's mitigation, he ignored all the "red flags" of potential avenues for mitigation and failed to investigate further. *See Wiggins*, 539 U.S. at 527; *Porter v. McCollum*, 558 U.S. 30, 40 (2009). At the postconviction evidentiary hearing, trial counsel admitted he ***did not even interview all the witnesses*** provided to him by the Public Defender's Office. It is clear that trial counsel did not exercise reasonable professional judgment. *Strickland*, 466 U.S. at 690-91.

As a result of trial counsel's deficiencies, he was only able to suggest ***two*** non-statutory mitigators and no statutory mitigation in his sentencing memorandum. His whole argument and analysis of the mitigation encompassed ***less than one page***. Notably, the State's memorandum actually suggested more mitigators than defense counsel did. Due to counsel's ineffectiveness, Ms. Allen's jury was not privy to critical mitigating information regarding Allen's individual characteristics or past life. *See*

Gregg v. Georgia, 428 U.S. 153, 206 (1976); *Roberts v. Louisiana*, 428 U.S. 325, 333-34 (1976). "Although counsel nominally put on a case in mitigation in that counsel in fact called witnesses to the stand after the prosecution rested, the record leaves no doubt that counsel's investigation to support that case was an empty exercise." *Andrus v. Texas*, 140 S. Ct. 1875, 1882 (2020).

a. Trial counsel failed to present evidence of Ms. Allen's sexual abuse or childhood physical abuse.

The lower courts incorrectly claim that the mitigation presented in postconviction was cumulative, however it is paramount to consider that the weightiest and most impactful eyewitness mitigation uncovered in postconviction was ***never*** presented to Ms. Allen's jury or trial judge. ***None*** of the abuse Ms. Allen suffered as a child at the hands of her mother and grandfather during her formative years was heard at trial. Barbara Ann Capers witnessed young Ms. Allen being beaten by her mother almost every single day. Ms. Allen's mother beat Ms. Allen with her hands, fists, and with belts, and would also whip her with sticks and slap her in the face. The torture became so severe that when Ms. Allen was about twelve years old, her mother beat Ms. Allen so badly that Ms. Capers had to call the police. Myrtle Hudson also witnessed this violence. When Ms. Allen was about seven, Ms. Hudson witnessed Ms. Allen's mother grab Ms. Allen by her hair, push her head under the bathwater, and hold her head underwater. On multiple occasions, Ms. Hudson witnessed Ms. Allen's mother beat Ms. Allen with a belt and leaving swollen marks.

Sadly, Ms. Allen's mother was not the only family member to inflict violence upon her as a child. Ms. Allen's grandfather also perpetually abused Ms. Allen and

the other children in the family. He would line up all of the boys and girls naked, including Ms. Capers and Ms. Allen, and go down the row beating all of the children with three oak switches until they bled. He also whipped Ms. Allen with sticks. The district court's decision is debatable among jurists of reason because ***none*** of this horrific childhood abuse was mentioned at Ms. Allen's trial. Nonetheless, the Eleventh Circuit failed to issue a COA.

The district court stated that "Dr. Gebel noted that Petitioner also had a history of sexual assault," but jurists of reason could disagree, because nothing definitive was actually presented to Ms. Allen's jury. App. E at 29. During Michael Gebel, M.D.'s testimony, he listed various medical records and merely said: "A possible sexual assault in September of 1996." Contrary to Ms. Allen's trial where this possible sexual assault was mentioned in passing, in postconviction, extensive testimony was presented that not only was Ms. Allen sexually abused by multiple men (including her brother, her grandfather, her grandfather's brother ("Uncle Roy"), and at least one other man), but Ms. Capers even personally witnessed Uncle Roy touching Ms. Allen in private places, grabbing Ms. Allen's breasts, and kissing Ms. Allen on the mouth. When Ms. Allen was young, her mother went to jail and Ms. Allen stayed with her grandfather, but Ms. Allen told Ms. Capers that she wanted to stay with her instead because Ms. Allen's grandfather was sexually molesting her. Uncle Roy was also sexually molesting Ms. Allen every other weekend while he visited Ms. Allen's grandfather. The very men that should have been making Ms. Allen feel safe and protected and that she was supposed to be able to trust, were the very men

perpetrating the majority of this sexual assault upon her.

As a result of trial counsel's ineffectiveness, Ms. Allen's jury never heard this family history, including the brutality Ms. Allen suffered as a child and the torturous sexual abuse she repeatedly faced. Therefore, the FSC's findings are without a doubt an unreasonable determination of the facts. The district court's finding that the additional evidence is cumulative because counsel presented history of sexual and physical abuse at the penalty phase is equally erroneous. App. E at 33. The testimony at Ms. Allen's trial only scratched the surface of the available mitigation regarding all the domestic violence Ms. Allen suffered, with only a couple of short references.

At the postconviction evidentiary hearing, multiple eyewitnesses testified to the horrifying domestic violence Ms. Allen suffered at the hands of at least three men. Further, Ms. Allen's ex-boyfriend, Brian Watkins, also testified in detail to the voluminous amount of traumatic physical violence and mental abuse he personally perpetrated on Ms. Allen over the years, including beating her while she was pregnant, and on another occasion hitting Ms. Allen in the head with a hammer multiple times inside Winn-Dixie. This incident was documented, but trial counsel deficiently failed to obtain any police reports. *See Rompilla*, 545 U.S. at 383-93. The jury never heard this compelling testimony. Accordingly, jurists of reason could disagree with the district court's characterization of this evidence as cumulative.

The FSC's findings are unquestionably an unreasonable determination of the facts. Therefore, reasonable jurists could disagree with the district court and find Ms. Allen's constitutional rights under the Sixth Amendment were violated. The Eleventh

Circuit erred in failing to grant a COA and this Court should grant the petition.

b. Trial counsel failed to conduct a sufficient mental health investigation or present evidence regarding Ms. Allen's PTSD.

Trial counsel was also ineffective in failing to ensure the completion of a reasonably competent mental health evaluation. As a result of trial counsel's ineffectiveness, Ms. Allen's jury and trial judge were completely unaware that Ms. Allen suffers from PTSD. Worse yet, the factfinders were never informed how the effects of Ms. Allen's lifetime of traumatic abuse interacted with her brain injuries in order to establish the weighty statutory mitigating circumstance of "the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance." The extreme emotional disturbance was directly related to Ms. Allen's PTSD and factors such as her environment leaving her vulnerable to emotional dysregulation when faced with the loss of her purse containing her money. The longer Ms. Allen could not find her money, the more frustrated she became, and as her emotional dysregulation escalated, she did not have the ability to handle the stressor without overreacting. Ms. Allen was unable to think logically and rationally.

Notwithstanding, the district court gave unjustified consideration to the fact that trial counsel presented the testimony of two experts during Ms. Allen's penalty phase. App. E at 32. Notably, counsel was so ineffective that at trial, neither expert was even asked his opinion on the existence of statutory mitigating circumstances. *See Allen*, 137 So. 3d at 965-66. Trial counsel was also remarkably deficient because he never had Dr. Gebel properly evaluate Ms. Allen for statutory mitigation. Trial counsel was aware that Ms. Allen was leery of participating in the only evaluation

performed by Dr. Gebel because a guard was in the room, but counsel never sent Dr. Gebel back for another interview or evaluation. If trial counsel had not been ineffective, Dr. Gebel would have found weighty statutory mitigation, including the presence of Ms. Allen's PTSD diagnosis.

The district court also places undue emphasis on Michael Gamache, Ph.D.'s testimony and claims that he refuted the PTSD diagnosis. App. E at 25, 32-33. However, the district court fails to consider that ***Dr. Gamache did not evaluate Ms. Allen and has never even spoken with her***. Dr. Gamache did not speak with Ms. Allen's family or any other witnesses. He improperly relied solely on self-reports within records. Moreover, Dr. Gamache failed to follow his own approach and best practices. He testified that his "approach is to obtain a self-report from the person and look for any evidence of corroboration." He did neither. Affording Dr. Gamache's testimony more weight than the doctors who actually met with Ms. Allen and evaluated her, is a patently unreasonable determination of the facts.

Although the district court admits that the trial court was unable to find any statutory mitigation, it fails to consider that the statutory mitigation presented in postconviction was of the weightiest order. App. E at 32; *Simmons v. State,* 105 So. 3d 475, 506 (Fla. 2012) (quoting *Rose v. State,* 675 So. 2d 567, 573 (Fla. 1996)) (the FSC has "consistently recognized that severe mental disturbance is a mitigating factor of the most weighty order, and the failure to present it in the penalty phase may constitute prejudicial ineffectiveness"). The district court points out that Dr. Gebel opined at trial that Ms. Allen's organic brain damage might make it difficult to

appreciate the criminality of her conduct or understand the consequences of her actions, and she could also have difficulty conforming her conduct to the requirements of the law. App. E at 30. However, those opinions relate to section 921.141(7)(f) of the Florida Statutes, which is not the same statutory mitigator found by William Russell, Ph.D. in postconviction. Dr. Russell found the existence of an entirely different statutory mitigator: "The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance." § 921.141(7)(b), Fla. Stat. Therefore, the district court is incorrect in its findings that Dr. Russell's testimony would have been cumulative, and that Ms. Allen was not prejudiced. App. E at 32. There is a reasonable probability, that but for trial counsel's failure to provide the trial experts with the proper tools to find statutory mitigation, and counsel's failure to even ask whether any statutory mitigators existed, the trial court would have been able to find the presence of ***both*** of these weighty statutory mitigators. Thus, reasonable jurists would find the district court's assessment debatable. Trial counsel was ineffective and a COA should have been granted.

c. Ms. Allen's rights under the Eighth and Fourteenth Amendments were also violated.

Ms. Allen submits that she has also made a substantial showing of the denial of her constitutional rights under the Eighth and Fourteenth Amendments. "The Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed." *Gregg*, 428 U.S. at 188.

Ms. Allen's Eighth Amendment rights were violated when she was arbitrarily

and discriminatorily denied relief although other similarly situated capital defendants were granted relief under similar or worse facts. Therefore, Ms. Allen's right to be free from arbitrary and capricious sentencing under the Eighth Amendment was denied. *See Spaziano v. Florida*, 468 U.S. 447, 465-66 (1984), *overruled on other grounds by Hurst*, 577 U.S. 92. "[T]he Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (internal citation omitted). The lower courts' decisions implicate the Eighth Amendment's concern against capriciousness in capital cases "[w]hen the law lays an unequal hand on those who have committed intrinsically the same quality of offense and . . . [subjects] one and not the other" to a uniquely harsh form of punishment. *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942); *see also Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

Ms. Allen's constitutional rights under the Fourteenth Amendment were also violated because the law was not applied consistently to similarly situated capital defendants who were granted relief. *See Gregg*, 428 U.S. at 188. The Eleventh Circuit completely discounted Ms. Allen's equal protection arguments and the district court appeared to ignore the argument altogether.

This Court and the lower courts have granted relief to similarly situated capital defendants. One such compelling example is Mr. Porter, whose case originated in the same county as Ms. Allen's case, Brevard County, Florida, and also involved a

unanimous advisory jury recommendation. *Porter*, 558 U.S. 30. Similar to *Porter*, Ms. Allen's counsel "did not even take the first step of interviewing witnesses or requesting records." *Id*. at 40. Like Ms. Allen, Mr. Porter also presented evidence in postconviction of his abusive childhood and witnessing family violence. *Id*. at 33. Mr. Porter joined the Army to escape his horrible family life; similarly, Ms. Allen suffered such severe physical, emotional, and sexual abuse during childhood that Ms. Capers forged Ms. Allen's mother's name to send Ms. Allen to Job Corps in an attempt to help her escape her abusive family. *Id*. at 34. Sadly, upon Ms. Allen's return, she fell into a string of abusive relationships and domestic violence. Like Ms. Allen, Mr. Porter also presented evidence of statutory mitigation in postconviction, but the trial court and the majority of the FSC (two justices dissented in both *Allen* and *Porter*) found no statutory mitigating circumstances or prejudice in either case. *Id*. at 36-37. The district court in *Porter* found that Mr. Porter's counsel was ineffective, and this Court agreed. *Id*. at 38; *see also Porter v. Crosby*, 6:03CV1465ORL31KRS, 2007 WL 1747316, at *32 (M.D. Fla. June 18, 2007). Ms. Allen submits that like this Court held in *Porter*, the FSC's opinion that Ms. Allen was not prejudiced by "counsel's failure to conduct a thorough—or even cursory—investigation is unreasonable. The Florida Supreme Court either did not consider or unreasonably discounted the mitigation evidence adduced in the postconviction hearing." 558 U.S. at 42. However, even with all the similarities, in Ms. Allen's case, the lower courts failed to reach the same result. *See Griffith v. Kentucky,* 479 U.S. 314, 323 (1987) ("[S]elective application of [ ] rules violates the principle of treating similarly situated defendants the same.")

Ms. Allen's case is similar to many other ineffective assistance of counsel cases where relief was granted. The mitigation that Ms. Allen's jury did not hear is also very similar to the mitigation in *Cooper v. Sec'y, Dept. of Corr.*, 646 F.3d 1328, 1355-56 (11th Cir. 2011). Just as Mr. Cooper's "jury heard a small sliver of his volatile upbringing," his jury did not hear about his "life of horrific abuse rendered by both his father and brother" and his depression. *Id.* at 1355. Similarly, Ms. Allen's jury only heard minor mentions that former boyfriends abused her, and her jury did not hear anything about her life of horrific abuse inflicted upon her by her mother, grandfather, uncle, brother, and other men or the PTSD that resulted from it. Just as in *Rompilla*, Ms. Allen's counsel did not unearth the "useful information" to be found in school, medical, and police records. 545 U.S. at 379. These records contained "red flags" that would have prompted a reasonable attorney to investigate further. *See id.* at 392. Like Ms. Allen, Mr. Rompilla also lived in terror because he was abused and beat up by a parent. *Id.* Numerous other defendants were also granted relief under *Strickland* when, like Ms. Allen, their juries were not privy to the details of their nightmarish abusive childhoods. *See Williams v. Taylor*, 529 U.S. 362 (2000); *Johnson v. Sec'y, DOC*, 643 F.3d 907 (11th Cir. 2011); *Ferrell v. Hall*, 640 F.3d 1199 (11th Cir. 2011); *Debruce v. Comm'r, Alabama Dept. of Corr.*, 758 F.3d 1263, 1276 (11th Cir. 2014). Multiple similarly situated defendants with similar or worse facts were granted relief by the FSC too. *Bevel v. State*, 221 So. 3d 1168 (Fla. 2017); *Ellerbee v. State*, 232 So. 3d 909 (Fla. 2017). Based on the relief granted in the aforementioned similar cases, it is clear that Ms. Allen is also deserving of relief.

Notably, instead of granting a COA on Ms. Allen's Eighth Amendment arguments, the lower courts failed to even address it. The Eleventh Circuit erred when it failed to grant a COA because this claim deserves encouragement to proceed further to decide Ms. Allen's claims under the Eighth Amendment and consider the individualized characteristics of Ms. Allen and her case. *See Woodson*, 428 U.S. at 304. Further, there is clearly also an equal protection issue in Ms. Allen's case because the only difference between her and similarly situated individuals that were granted relief by this Court and the lower courts was that Ms. Allen is a female. Contrary to the Eleventh Circuit's assertions, Ms. Allen respectfully submits that reasonable jurists would find the district court's ruling debatable, and a COA should have been granted.

d. The requirements for issuance of a COA are satisfied.

The lower courts arbitrarily denied Ms. Allen a COA. To appeal to the Circuit Court of Appeals, a COA is required under 28 U.S.C. §2253 and Fed. R. App. P. 22(b)(1) and Ms. Allen submits that she has satisfied the requirements of both. Thus, the Eleventh Circuit erred in denying a COA. However, "[w]ith respect to this Court's review, § 2253 does not limit the scope of [ ] consideration of the underlying merits." *Buck v. Davis*, 580 U.S. 100, 118 (2017). Ms. Allen respectfully requests that this Court consider the underlying merits of her ineffective assistance of counsel claims.

The Eleventh Circuit erred in denying a COA, because a COA should be issued if the petitioner makes "a substantial showing of the denial of a constitutional right." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003); *see also* 28 U.S.C. § 2253. The standard

for issuing a COA is more lenient than the standard for granting a writ of habeas corpus. "A petitioner satisfies this standard by demonstrating 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*, 537 U.S. at 327 (internal citation omitted).

The "threshold question" of whether to grant a COA should be decided without "full consideration of the factual or legal bases adduced in support of the claims." *Buck*, 580 U.S. at 115 (quoting *id*. at 336). "In fact, the statute forbids it." *Miller-El*, 537 U.S. at 336. Similar to *Buck*, Ms. Allen submits that although the Eleventh Circuit "phrased its determination in proper terms," "it reached that conclusion only after essentially deciding the case on the merits." *Buck*, 580 U.S. at 115-16. As this Court has emphasized, the COA inquiry "is not coextensive with a merits analysis." *Id*. at 115. Thus, "[t]he COA inquiry asks only if the District Court's decision [is] debatable." *Miller-El*, 537 U.S. at 348. A petitioner need not prove that the appeal will succeed. *Id*. at 337. "[A] court of appeals should not decline the application for a COA merely because it believes the applicant will not demonstrate an entitlement to relief" because "a COA will issue in some instances where there is no certainty of ultimate relief." *Id*. "Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Id*. at 338. Ms. Allen submits that the Eleventh Circuit ignored this Court's precedent and essentially prematurely decided her case on the merits when the court should have instead granted her a COA.

The gravity of this matter is of utmost importance and Ms. Allen's case needs to be considered with the appropriate lens. Determination of whether to grant Ms. Allen a COA is a life-or-death question. Appellate review is especially warranted when a petitioner, like Ms. Allen, has been sentenced to death. In denying a COA, the Eleventh Circuit has failed to properly consider and appreciate the severity of Ms. Allen's death sentence when deciding whether to issue a COA. *See Barefoot v. Estelle*, 463 U.S. 880, 893 (1983), *superseded on other grounds by statute*, 28 U.S.C. § 2253(c)(2) ("In a capital case, the nature of the penalty is a proper consideration . . .").

Accordingly, the Eleventh Circuit's standard conflicts with the United States Court of Appeals for the Fifth, Seventh, and Ninth Circuits. The Fifth Circuit has stated that "[a]ny doubt as to whether a COA should issue in a death-penalty case must be resolved in favor of the petitioner." *Medellin v. Dretke*, 371 F.3d 270, 275 (5th Cir. 2004) (citing *Pippin v. Dretke*, 434 F.3d 782, 787 (5th Cir. 2005)); *see also Porter v. Gramley*, 112 F.3d 1308, 1312 (7th Cir. 1997); *Williams v. Woodford*, 384 F.3d 567, 583 (9th Cir. 2004). As "[t]he COA standard is less burdensome in capital cases," the Eleventh Circuit erred in not considering whether to grant a COA under the lower burden afforded to individuals sentenced to death. *Nelson v. Davis*, 952 F.3d 651, 658 (5th Cir. 2020). Accordingly, Ms. Allen respectfully submits that if the Eleventh Circuit was not in conflict with other court of appeals and properly considered the nature of her sentence and resolved any doubt as to whether to grant a COA in her favor, a COA would have been granted.

Further, Ms. Allen asserts that she was also unconstitutionally discriminated

against when the Eleventh Circuit denied her a COA on this claim. The Eleventh Circuit has granted COAs to other similarly situated capital defendants on their Sixth Amendment ineffective assistance of counsel claims related to mitigation in the past. *See Andrew R. Allred v. Sec'y, Florida Dep't of Corr., et al.*, Appeal No. 22-12331-P; *Johnny Hoskins v. Sec'y, Florida Dep't of Corr., et al.*, Appeal No. 15-10763-P; and *Michael L. King v. Sec'y, Florida Dep't of Corr., et al.*, Appeal No. 18-11421-P. Each of these cases is comprised of worse facts than Ms. Allen's case and as much, or less, mitigation uncovered in postconviction. Notably, each of the appellants in those cases were male. Therefore, as other Eleventh Circuit jurists have previously deemed similar claims worthy of a COA when raised by male appellants, it is likely that reasonable jurists would find the district court's ruling debatable and conclude that Ms. Allen's claim deserves encouragement to proceed further under *Strickland* and the Sixth Amendment.

i. The decisions of the lower courts conflict with this Court's precedent, thus reasonable jurists could debate that the adjudication of Ms. Allen's claims resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by this Court.

The lower courts' decisions explicitly conflict with this Court's precedent in *Strickland*. However, Ms. Allen submits that the decisions also conflict with this Court's relevant decisions and precedent in numerous other cases including *Porter*, 558 U.S. 30; *Sears v. Upton*, 561 U.S. 945 (2010); *Rompilla*, 545 U.S. 374; and *Williams*, 529 U.S. 362. *See also supra* pp. 17-19.

First and foremost, the district court improperly stated and applied the

Strickland standard for prejudice. The district court improperly concluded that the mitigating evidence produced at both trial and the postconviction evidentiary hearing "does not outweigh the evidence in aggravation. Thus, the state court properly found that counsel's actions did not result in prejudice." App. E at 29. However, this is an incorrect interpretation of the law because the state court was not required to find that the mitigation outweighs the aggravation. Therefore, jurists of reason would be obligated to disagree with the district court's resolution of this claim. This Court details the proper standard in *Strickland*:

> When a defendant challenges a death sentence such as the one at issue in Allen's case, the question is whether there is a ***reasonable probability*** that, absent the errors, the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.

466 U.S. at 695 (emphasis added). Ms. Allen was never required to show in any postconviction court that mitigation definitively outweighs aggravation, just that there was a ***reasonable probability*** that the factfinder would conclude that the balance of aggravating and mitigating circumstances did not warrant a sentence of death. From this perspective, Allen surely meets this burden when the significant and compelling mitigation that counsel failed to present is considered.

Further, this Court has made abundantly clear that: "We certainly have never held that counsel's effort to present ***some*** mitigation evidence should foreclose an inquiry into whether a facially deficient mitigation investigation might have prejudiced the defendant." *Sears*, 561 U.S. at 955. *Sears* goes on to note that the proper *Strickland* prejudice standard "require[s] a court to 'speculate' as to the effect

of the new evidence—regardless of how much or how little mitigation evidence was presented during the initial penalty phase." *Id*. at 956. As in *Sears*,

> A proper analysis of prejudice under *Strickland* would have taken into account the newly uncovered evidence of [] 'significant' mental and psychological impairments, along with the mitigation evidence introduced during [the] penalty phase trial, to assess whether there is a reasonable probability that [the defendant] would have received a different sentence after a constitutionally sufficient mitigation investigation.

Id. This Court requires "consider[ation of] 'the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding' —and 'reweig[hing] it against the evidence in aggravation.'" *Porter*, 558 U.S. at 41 (quoting *Williams*, 529 U.S. at 397-98). Ms. Allen was entitled to an individual consideration of whether there is a reasonable probability that the factfinders would have found that the balance of the aggravating factors did not outweigh the totality of her compelling mitigation.

Ms. Allen submits that her trial counsel rendered ineffective assistance of counsel by failing to adequately investigate and present mitigation. Reasonable jurists could conclude there is a reasonable probability that, upon hearing the plethora of available mitigation, a juror would find the totality of Ms. Allen's mitigating circumstances outweigh any aggravating circumstances. Not only was the weighty statutory mitigating circumstance of "the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance" not found at her trial, no evidence of PTSD or this mitigating factor was presented at all. Further, Ms. Allen only received "some weight" attributed to being a "victim of

physical abuse and possible sexual abuse in the past." *Allen*, 137 So. 3d at 955. There is a reasonable probability that if trial counsel had not been deficient, very great weight would have been given to this mitigating circumstance due to the eyewitnesses' confirmation that Ms. Allen was sexually assaulted on numerous occasions, primarily by the men in her family, as well as Ms. Allen being abused during the formative years of her childhood.

The additional mitigation presented in postconviction that the lower courts unreasonably discounted and dismissed as cumulative, painted a more complete picture of Ms. Allen's background from family members who actually witnessed and experienced the abuse alongside Ms. Allen, which would have served to humanize her in front of the jury. Therefore, it is wholly improper to dismiss the importance and impact that this allegedly cumulative mitigating evidence would have had on the factfinders at Ms. Allen's trial. Consequently, reasonable jurists could debate the district court's finding that "there is no indication that the jury would have given more weight to, or found the existence of, statutory and non-statutory mitigating circumstances that outweighed the aggravators." The only reason this indication is not present is due to trial counsel's ineffectiveness, or else Ms. Allen would have had the ability to prove the existence of these mitigating circumstances at trial.

The Eleventh Circuit claims no reasonable jurist would debate the district court's resolution. The Eleventh Circuit appears to agree with the FSC's erroneous opinion that aggravating evidence was so great that there was no reasonable probability the additional mitigation would have altered the outcome of Ms. Allen's

trial. The district court also mischaracterizes Allen's case and claims that "the aggravating evidence was so great, there was no reasonable probability that this additional mitigating evidence would have altered the outcome of Allen's trial." App. A at 11 (citing *Allen*, 261 So. 3d at 1272-75). The district court goes on to cite *Suggs v. McNeil*, 609 F.3d 1218, 1232 (11th Cir. 2010) as support. App. E at 34. However, only ***two*** aggravators were found by the trial court in Ms. Allen's case. In contrast, *Suggs* was a highly aggravated case with ***seven*** aggravators found by the trial court. *Id*. at 1232. The *Suggs* opinion details that "this brutal, carefully planned murder was committed for pecuniary gain by an individual on parole for a prior murder. These aggravating facts are even more difficult to overcome." *Id*. Unlike *Suggs*, Ms. Allen's case only contained two aggravators, which she contends are unsupported based on her other ineffective assistance of counsel claims. *See infra* pp. 30-40. The district court also cites *Sochor v. Sec'y Dept. of Corr.*, 685 F.3d 1016, 1030 (11th Cir. 2012) as a similar case. App. E at 35. However, *Sochor* involved twice as many aggravators as in Ms. Allen's case. *Sochor*, 685 F.3d at 1022.

As Ms. Allen needed one aggravator in order to even be ***eligible*** for the death penalty, by the trial court only finding two aggravators (one of which was automatic and the other Ms. Allen maintains is unsupported, or at the very least, undermined), it is apparent that her case is clearly not the most aggravated and least mitigated. *See infra* pp. 30-40. Further, if Ms. Allen's weighty mitigation is considered in conjunction with all of the postconviction evidence undermining the aggravators, then it is clear that mitigation far outweighs any aggravation. For example, both

aggravators are undermined due to Quintin's biased testimony lacking credibility and "the capital felony was especially heinous, atrocious, or cruel" ("HAC") aggravator is unsupported due to Dr. Spitz's postconviction testimony and Dr. Qaiser's lack of credibility. Accordingly, Ms. Allen has made a substantial showing of the violation of her rights under *Strickland* and the Sixth, Eighth, and Fourteenth Amendments.

As the state courts' decisions were contrary to, or involved an unreasonable application of, clearly established Federal law under 28 U.S.C. § 2254(d)(1), jurists of reason could conclude that this issue deserves encouragement to proceed further. Accordingly, no reasonable court could have concluded that counsel's failures were sound strategy and entitled to deference under *Strickland*. Therefore, reasonable jurists could disagree with the district court's resolution of Allen's ineffective assistance of counsel claim. *Miller-El*, 537 U.S. at 327. At the very least, reasonable jurists could conclude the issue presented in this claim is adequate to deserve encouragement to proceed further. As a result, this Court should find that the Eleventh Circuit erred in denying Ms. Allen the COA required to pursue her claims on appeal. This Court should grant the petition.

ii. Reasonable jurists could debate because the adjudication of Ms. Allen's claims resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Ms. Allen also pleaded that the FSC's adjudication of her claims "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). However, the district court only addressed whether it found that the FSC's rejection of these

claims was contrary to or an unreasonable application of federal law and did not address 28 U.S.C. § 2254(d)(2), whether the FSC made an unreasonable determination of the facts in light of the state court record. Ms. Allen respectfully submits that jurists of reason would find it debatable that an unreasonable determination of the facts occurred, which the district court improperly failed to consider. The Eleventh Circuit claimed that the district court's decision encompassed factual review. Ms. Allen respectfully disagrees.

Ms. Allen detailed numerous explicit examples where the FSC's determination of the facts was unreasonable. For example, the FSC misstated in its opinion that Ms. Allen's jury heard about her traumatic childhood, as well as "the physical and sexual abuse she suffered while growing up and as an adult." *Allen*, 261 So. 3d at 1273. Contrary to the FSC's assertions, there was ***no mention*** of the abuse Ms. Allen suffered as a child during her trial. The FSC's finding on that subject was indisputably an unreasonable determination of the facts. Further, Ms. Allen's jury only heard a brief fleeting reference that Allen may have been sexually abused.

In addition, the FSC claimed the jury heard testimony outlining Ms. Allen's mental health issues. *Allen*, 261 So. 3d at 1273. However, the jury never heard any evidence that Ms. Allen had PTSD or how the effects of her lifetime of traumatic abuse interacted with her brain injuries in order to establish the statutory mitigating circumstance of "the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance."

For another example, the FSC also unreasonably determined that Dr. Russell's

opinion was weakened, and his findings were rebutted by State expert Dr. Gamache. *See Allen*, 261 So. 3d at 1274. This determination of the facts was unreasonable because unlike Dr. Russell, Dr. Gamache ***did not*** evaluate Allen. Notably, Dr. Gamache never even spoke with Allen or her family. Without question, Dr. Russell's actual evaluation of Ms. Allen and interviews with her family to obtain corroborating evidence made his opinion more reliable than Dr. Gamache's.

Ms. Allen has made a substantial showing that she has been sentenced to death in violation of the Sixth, Eighth, and Fourteenth Amendments. Accordingly, jurists of reason could debate and find that 28 U.S.C. § 2254(d)(2) was satisfied due to the FSC's unreasonable determination of the facts in multiple instances. Ascertaining whether the FSC's decision on these grounds was based on an unreasonable determination of the facts is an issue that should have been explicitly considered by the district court and is adequate to deserve encouragement to proceed further. Issuance of a COA was warranted, and this Court should grant the petition.

B. Ms. Allen's trial counsel rendered ineffective assistance of counsel by failing to challenge the State's only evidence used to support her convictions and aggravating circumstances.

Ms. Allen did not receive the level of representation guaranteed to her under *Strickland* and the Sixth Amendment because trial counsel failed to challenge the only evidence that the State used to support her convictions and aggravation: testimony from Quintin and Dr. Qaiser. Some of the instances where trial counsel was ineffective in challenging the State's evidence include: 1) failing to challenge Dr. Qaiser's testimony regarding the presence of ligature marks on the victim's body, 2)

failing to challenge Dr. Qaiser's inaccurate testimony that unconscious people can feel pain, and 3) failing to impeach Quintin with his prior inconsistent statements.

As a result of trial counsel's deficiencies, the jury heard unchallenged erroneous testimony claiming that the victim was strangled, that ligature marks were present on the victim's body, and unconfronted equivocal testimony by co-defendant-turned-State witness, Quintin, who implicated Ms. Allen as the result of a plea deal so he would not be facing a death sentence himself. Trial counsel's failures were so unreasonable and prejudiced Ms. Allen so greatly that she was not only convicted, but also sentenced to death.

a. Ms. Allen's trial counsel rendered ineffective assistance of counsel by failing to challenge Dr. Qaiser's purported evidence of ligature marks.

Ms. Allen was provided ineffective assistance of counsel because trial counsel failed to effectively challenge evidence presented by the State regarding the purported presence of ligature marks on the victim's body. Trial counsel had reason to question the validity of Dr. Qaiser's findings because his opinion conflicted with the original medical examiner, Dr. Whitmore. Dr. Qaiser was not present at the autopsy and did not physically see the victim's body. Instead, he merely reviewed photographs. Notably, Dr. Whitmore, who actually saw the victim's body and conducted the autopsy, did not make any findings that ligature marks existed or that strangulation was a possible cause of death. Instead, Dr. Whitmore found these contributing factors to the victim's cause of death: cocaine intoxication with obesity cardiomegaly with narrow right cardio RCA – carotid artery and cirrhosis of the liver.

The lack of ligature marks conflicts with the State's theory and Quintin's testimony claiming that the victim was strangled to death. Despite never physically seeing the body, Dr. Qaiser testified at trial that ligature marks did exist on the victim's body. As a result of trial counsel's ineffectiveness, Dr. Qaiser's inaccurate testimony regarding the existence of ligature marks corroborated Quintin's narrative where he claimed that Ms. Allen strangled the victim to death with a belt. The testimony is prejudicial because there is no physical evidence tying Ms. Allen to the crimes. Dr. Qaiser's erroneous testimony is the only evidence that corroborates Quintin's story, and their testimony was the sole evidence against her.

Dr. Qaiser's testimony conflicts with the original autopsy report conducted by Dr. Whitmore (which the jury never saw) and the postconviction testimony of forensic pathologist Dr. Spitz. Dr. Spitz reviewed the same materials as Dr. Qaiser and testified in alignment with Dr. Whitmore's autopsy report regarding the lack of ligature marks on the victim's body. Dr. Spitz specifically found that the victim's "body does not show indicators or findings that would support a conclusion of ligature strangulation." Although trial counsel minimally cross-examined Dr. Qaiser regarding the manner of death, it was wholly unreasonable to only rely solely on cross-examination in this instance. Trial counsel lacked the specialized knowledge and ability to effectively challenge Dr. Qaiser's testimony on his own and should have hired an independent forensic pathologist to rebut Dr. Qaiser's testimony. Notably, at the postconviction evidentiary hearing, trial counsel conceded the importance of establishing the lack of ligature marks and admitted that he was unable to challenge

Dr. Qaiser's testimony on his own. Trial counsel was aware of Dr. Qaiser's anticipated testimony prior to trial because Dr. Qaiser stated in his deposition that he disagreed with Dr. Whitmore's findings that ligature marks were not present. Considering that trial counsel was aware of how damaging Dr. Qaiser's conflicting opinion was, competent counsel would have properly investigated and challenged Dr. Qaiser's alleged evidence of ligature marks with the assistance of an independent expert.

Due to failure to seek independent consultation, trial counsel was left cross-examining Dr. Qaiser as the sole means to challenge his testimony. The district court found that trial counsel made a strategic decision to solely cross-examine Dr. Qaiser regarding the autopsy, but Ms. Allen submits that no reasonable lawyer would rely on this unfounded strategy in a capital case. App. E at 61. Further, trial counsel himself was aware it was not plausible. This "strategy" is the result of lack of preparedness and overall ineffectiveness, not by trial counsel's grand design, and only potentially could have been an acceptable decision if Dr. Qaiser was in complete agreement with Dr. Whitmore's autopsy report. The district court also found that Dr. Spitz's testimony was equivalent to what trial counsel brought out during cross-examination. App. E at 62. However, the district court failed to consider that an independent expert such as Dr. Spitz could have shown the images to the jury and explained why there were no ligature marks. The jury would have also found Dr. Spitz's testimony to be not only informative and credible, but also unbiased, considering he mainly testifies for the State and testifies for both sides in civil matters. Additionally, the district court failed to consider that trial counsel was

aware of Dr. Qaiser's opinion prior to trial, because during Dr. Qaiser's deposition he explained the existence of ligature marks and showed images of where he believed them to be. In postconviction, trial counsel stated that he was shocked at Dr. Qaiser's "report since it was diametrically opposed to Dr. Whitmore's," which did not include any finding of ligature marks. Thus, trial counsel was aware of the conflict in the evidence prior to trial and conceded that he could not challenge this evidence by himself, yet still acted ineffectively by failing to seek an independent expert.

The district court also focused on whether Dr. Spitz could exclude ligature asphyxia as a possible cause of death and erred in finding that Dr. Spitz's testimony did not undermine the result in this case because he agreed that a ligature was a possibility. App. E at 62. Although Dr. Spitz stated that a ligature "falls within the broad realm of possible," he also stated he "obviously disagreed with what Dr. Qaiser points at in his opinion is a ligature mark." Dr. Spitz found that the body did not show the indicia of ligature strangulation and reiterated that he does not think this death occurred by ligature strangulation. The district court placed undue emphasis on Dr. Spitz's testimony of a remote possibility that ligature strangulation occurred, without considering how the ligature mark evidence related to the credibility of Quintin's testimony, which was the only other evidence against Ms. Allen.

Notably, the district court applied the wrong standard and agreed with the FSC's finding of no prejudice because Ms. Allen "has not shown that Dr. Spitz's testimony would have resulted in a different outcome at trial." App. E at 62. Not only is the standard reflected here erroneous, but the district court held Ms. Allen to a

higher standard and placed a greater burden upon her than that of the clearly established Federal law. Ms. Allen does not have to show that Dr. Spitz's testimony would result in a different outcome, only that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. Ms. Allen submits that if trial counsel had called an independent forensic expert such as Dr. Spitz to testify at trial and challenge Dr. Qaiser's testimony, that there was a reasonable probability that the outcome of both phases of Ms. Allen's trial would be different.

But for Dr. Qaiser corroborating Quintin's strangulation narrative by claiming to see ligature marks on the victim, there is a reasonable probability that the outcome of the guilt phase would have been different because had the jury heard evidence that the victim ***did not*** have any ligature marks, the State's strangulation theory as told by Quintin would not have been corroborated. Trial counsel was ineffective by failing to present to the jury that the victim's body showed no indication of strangulation. Had this been presented by trial counsel, Quintin's narrative of the murder would not have been found credible since the evidence shows no ligature marks to support the theory of strangulation. As a result, there is a reasonable probability that the jury would not have convicted Ms. Allen based on the lack of any other evidence connecting her to the crimes. Additionally, since Quintin and Dr. Qaiser's unchallenged testimony is tied to the HAC aggravator, exposing the lack of ligature mark evidence to the jury would have undermined the finding of the existence of the HAC aggravator. The prejudicial, unchallenged testimony of the presence of ligature

marks was inflammatory and had the jury heard evidence to the contrary, there is a reasonable probability that Ms. Allen would not have received a death sentence. Reasonable jurists would debate the district court's decision and whether Ms. Allen's rights were violated by trial counsel's ineffectiveness. Thus, the Eleventh Circuit erred by failing to issue a COA, and this Court should grant the petition.

b. Ms. Allen's trial counsel rendered ineffective assistance of counsel by failing to challenge Dr. Qaiser's testimony that individuals can feel pain while unconscious.

Ms. Allen was also prejudiced by trial counsel's deficient failure to challenge Dr. Qaiser's scientifically inaccurate testimony that unconscious people could feel pain. This testimony erroneously led the jury to believe that the victim, while unconscious, was able to feel pain from the acts alleged to be performed on her. Had trial counsel called an independent expert such as Dr. Spitz as a witness, the jury would have learned Dr. Qaiser's theory is not supported by the scientific community.

In addition, while Dr. Qaiser was falsely testifying that unconscious people feel pain, he went on to provide extensive testimony regarding studies he claimed were going on worldwide. Trial counsel was also ineffective by failing to object to this testimony on the grounds of hearsay, improper bolstering, and a violation of the Confrontation Clause of the Sixth Amendment because trial counsel was unable to cross-examine those who conducted the studies. *See Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 313 (2009); *see also Crawford v. Washington*, 541 U.S. 36, 42 (2004).

Not only did trial counsel fail to object to the presentation of this testimony from Dr. Qaiser, but he failed to seek an independent expert to review this theory put

forth by Dr. Qaiser. Notably, at the postconviction evidentiary hearing, Dr. Spitz testified that Dr. Qaiser's claim of feeling pain while unconscious, is "completely at odds with mainstream medicine" and that "there is no more pain once an individual is unconscious." Accordingly, Ms. Allen was prejudiced by Dr. Qaiser testifying that while unconscious, the victim could have been experiencing pain without outwardly manifesting it. Dr. Qaiser also stated that he could not rule out that the victim felt pain once unconscious. As a result of trial counsel's deficiencies in failing to object to and challenge Dr. Qaiser's misrepresentations by presenting an expert, the jury heard unreliable, unrebutted testimony that is in contradiction with the consensus of the medical field. Jurors were left with the false impression that unconscious people can feel pain, which led to the finding of the HAC aggravator.

The district court found that trial counsel made a strategic decision to challenge Dr. Qaiser's testimony on cross-examination and that Ms. Allen has not shown that this strategy was unreasonable. App. E at 68-69. The district court also found that trial counsel thoroughly cross-examined Dr. Qaiser and erroneously placed emphasis on his admission that he could not definitively say for sure whether the victim felt pain while unconscious. App. E at 68-69. However, the district court fails to consider that challenging this unfounded testimony would have further exposed Dr. Qaiser's lack of credibility to the jury. If the jury knew Dr. Qaiser's testimony was not credible in multiple facets, including his misleading testimony regarding the presence of ligature marks that went unchallenged, they also in turn would have found Quintin's testimony unreliable since his narrative is directly tied to Dr.

Qaiser's opinions. The credibility of Dr. Qaiser directly impacts Quintin's credibility, which is what each of Ms. Allen's convictions and aggravating circumstances depend on. Therefore, reasonable jurists could debate that the district court's resolution was incorrect and conclude her constitutional rights were violated.

The Eleventh Circuit did not issue a COA and instead wrongly prejudged Ms. Allen's case on the merits, improperly using Quintin's biased testimony as support. App. A at 17-18. However, there is a reasonable probability that but for counsel's deficiencies in failing to rebut Dr. Qaiser's scientifically inaccurate testimony, the HAC aggravator, one of only two aggravators found, would have been undermined. Due to trial counsel's ineffectiveness, Ms. Allen has made a substantial showing of the denial of a constitutional right. Thus, the Eleventh Circuit erred in failing to grant a COA.

c. Ms. Allen's trial counsel rendered ineffective assistance of counsel by failing to impeach Quintin's testimony with his own prior inconsistent statements.

Ms. Allen submits that she was also prejudiced as a result of trial counsel's deficiencies in failing to impeach Quintin's testimony. Although Quintin's testimony is the key evidence against Ms. Allen, he has made numerous conflicting statements regarding Ms. Allen allegedly pouring different chemicals on the victim's body. Notably, the Eleventh Circuit even agreed that Quintin's testimony was inconsistent and that he lied on the stand. App. A at 17.

Prior to trial, Quintin made statements to detectives indicating that Ms. Allen did not pour bleach on the victim or any substance in her eyes or mouth. At trial,

Quintin testified that Ms. Allen poured chemicals on the victim. Then, in violation of *Strickland*, trial counsel went on to ineffectively elicit detrimental false testimony from Quintin that Ms. Allen poured substances ***in*** the victim's eyes and mouth, as opposed to his initial story of only ***on*** the victim. Then on re-cross examination, trial counsel deficiently elicited testimony that the substances were bleach, ammonia, nail polish remover, and hairspray after Quintin originally conceded he could only identify rubbing alcohol, a less caustic substance. Still, trial counsel did not impeach Quintin with his prior statement that Ms. Allen did not pour bleach on the victim. As Quintin's allegations were the main evidence against Ms. Allen, impeaching him would have shown the jury a pattern of him lying and lacking credibility.

The district court agreed with the FSC that there was sufficient evidence of the HAC aggravator regardless of whether trial counsel impeached Quintin based on the victim being bound, beaten, and strangled. App. E at 67. However, the aforementioned evidence came from Quintin and was bolstered by Dr. Qaiser's erroneous unrebutted testimony. Hence, there is a reasonable probability that had counsel effectively impeached Quintin and did not elicit inflammatory false testimony, the results of both phases of her trial would be different.

Worse yet, the district court again applied the wrong standard and found that Ms. Allen "has not shown that but for counsel's actions, the result of the proceeding would have been different." App. E at 67. However, the district court is once again holding Ms. Allen to a higher standard and placing a greater burden upon her than that of the clearly established Federal law. Ms. Allen submits that under the proper

standard she has shown that but for counsel's deficiencies, there is a reasonable probability that the outcome of both phases of her trial would have been different. Accordingly, the Eleventh Circuit erred by failing to issue a COA in this case.

d. Conclusion

Trial counsel's deficient performance violated *Strickland* and the Sixth Amendment by failing to challenge the sole evidence found to support Ms. Allen's convictions, Quintin and Dr. Qaiser's testimony. Ms. Allen was prejudiced because had an independent expert such as Dr. Spitz challenged Dr. Qaiser's testimony, both Dr. Qaiser and Quintin's credibility would have been diminished. In turn, impeaching Quintin's testimony would have undermined Dr. Qaiser's credibility since his testimony was reliant on Quintin's narrative of the crimes. Had trial counsel effectively challenged this testimony, there is a reasonable probability that the jury would not have convicted Ms. Allen, and at the very least she would have received a life sentence. Thus, the Eleventh Circuit erred by failing to grant Ms. Allen a COA because she met the requirements and showed that reasonable jurists would disagree with the district court's findings that trial counsel did not render ineffective assistance of counsel. *See supra* pp. 20-22. This Court should grant the petition.

CONCLUSION

For all of these reasons, the Court should grant the petition for a writ of certiorari; order further briefing; and/or vacate and remand this case to the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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September 18, 2023
Date