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

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

DEATH PENALTY CASE

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No. _____

IN THE

Supreme Court of the United States

MARGARET A. ALLEN,

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v.

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

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Appendix A

United States Court of Appeals for the Eleventh Circuit Order Denying Application for a Certificate of Appealability, dated April 12, 2023.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 23-10447-P

MARGARET A ALLEN,

Petitioner - Appellant,

versus

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

Respondents - Appellees.

Appeal from the United States District Court
for the Middle District of Florida

ORDER:

Margaret Allen, a Florida inmate sentenced to death for murder, applies for a certificate of appealability to appeal the denial of her petition for a writ of habeas corpus. 28 U.S.C. §§ 2253, 2254. Because she failed to make a substantial showing of the denial of a constitutional right, Allen's application for a certificate of appealability is **DENIED**.

I. BACKGROUND

Allen was convicted for the kidnapping and first-degree murder of Wenda Wright. *See Allen v. State (Allen I)*, 137 So. 3d 946, 951–55 (Fla. 2013) (summarizing the crimes, trial, and sentencing). Allen believed that Wright had stolen her purse and persuaded Wright to come to her home. *Id.* at 951. Although Wright begged to be allowed to leave, Allen and an accomplice, Quintin Allen, refused to release her. *Id.* Allen struck Wright in the head, knocking her to the ground. *Id.* Quintin held Wright down on the floor while Allen poured chemicals onto Wright's face. *Id.* Then Allen beat Wright with belts while Quintin tied Wright's feet. *Id.* When Allen pulled a belt around Wright's neck, Wright begged her to stop. *Id.* Wright started shaking and then fell still after about three minutes. *Id.* at 951–52.

The next day, Allen, Quintin, and James Martin, who had spent the previous night at Allen's house but did not witness the murder, moved Wright's body into a borrowed truck and drove to an area off the highway to dispose of it. *Id.* at 952–53. They buried Wright, covered the hole, and threw the carpet in which Wright's body had been wrapped in a dumpster outside a truck stop. *Id.* at 952. Quintin turned himself in to the police and took the police to the burial location. *Id.*

Dr. Sajid Qaiser, the county's chief medical examiner, testified at Allen's trial based on his review of the autopsy report because the doctor who performed

the autopsy was unavailable. *Id.* at 953 & n.1. Dr. Qaiser testified that Wright's body showed extensive bruising and that a dead body cannot bruise. *Id.* at 953. He could not tell whether Wright lost consciousness during the beating. *Id.* The marks on her body indicated that her hands had been tied and that something had been tied tightly around her neck or she had been hanged. *Id.* He concluded that Wright's death was a homicide and that strangulation was an important cause of death, although other factors also contributed. *Id.*

The trial court denied the defense's motion for acquittal. *Id.* The defense rested without calling any witnesses. *Id.* The jury found Allen guilty of kidnapping and first-degree murder. *Id.*

During the penalty phase, Dr. Qaiser again testified on behalf of the State. He explained that someone would feel a sense of panic during strangulation. *Id.* He did not know whether Wright was conscious during the majority of the attack. *Id.* Someone would lose consciousness after about ten to twenty seconds of strangulation. *Id.* He testified that unconscious people may perceive pain, although he could not say whether Wright experienced pain while unconscious. *Allen v. State (Allen II)*, 261 So. 3d 1255, 1276 (Fla. 2019).

The defense called two expert witnesses during the penalty phase. First, a neurological physician testified that Allen had suffered from numerous head injuries, was at the lower end of intellectual capacity, and had organic brain

damage that would destroy her impulse control and make it difficult for her to conform her conduct to the requirements of the law and might affect her ability to appreciate the criminality of her conduct. *Allen I*, 137 So. 3d at 953–54. Although he could not determine whether Allen was substantially mentally impaired because she was not cooperative, he thought that Allen would not be able to create a complex plan. *Id.* at 954. But when he learned the facts of the case on cross-examination, he stated that learning that Allen had created and followed through on the plan to discard Wright's body would change the severity of his diagnosis of Allen. *Id.* Second, a specialist in neuropsychiatry and brain imaging testified that he had reviewed Allen's brain scan and identified at least ten traumatic brain injuries. *Id.* He thought that these injuries would make it hard for Allen to conform her conduct to the requirements of the law but would not impair her planning abilities. *Id.*

The defense also called Allen's aunt, Myrtle Hudson. *Id.* Hudson testified that Allen grew up in a violent and drug-infested neighborhood. *Id.* Hudson knew that Allen was beaten to the point of unconsciousness in at least two abusive relationships. *Id.* She thought Allen was sexually abused as a child. *Id.*

Finally, the trial court held a hearing outside the presence of the jury to allow both sides to present additional evidence. *Id.*; *see Spencer v. State*, 615 So. 2d 688, 690–91 (Fla. 1993). Several witnesses testified for the defense regarding

Allen's character and background. *Allen I*, 137 So. 3d at 954. Allen testified that she had been abused and that she sold drugs. *Id.* She denied killing Wright but admitted that her daughter had told the police that Allen had committed the crimes. *Id.*

The jury unanimously recommended a sentence of death. *Id.* at 955. The trial court found and afforded great weight to two statutory aggravators: the murder was committed in connection with a kidnapping and the murder was especially heinous, atrocious, or cruel. *Id.* The trial court found no statutory mitigation. *Id.* The trial court afforded some weight to three nonstatutory mitigating factors: Allen was a victim of physical and possibly sexual abuse; she had brain damage that resulted in episodes of lack of impulse control; and she grew up around violence and illegal drugs. *Id.* It afforded little weight to the finding that Allen helped other people by providing food, money, or shelter. *Id.* Because the trial court concluded that the aggravating factors outweighed the mitigating factors, it imposed the death sentence for the murder. *Id.* It imposed a sentence of life imprisonment for the kidnapping. *Id.* at 969.

The Supreme Court of Florida affirmed Allen's convictions and sentences on direct appeal. *Id.* Allen moved for postconviction relief under Florida Rule of Criminal Procedure 3.851. The trial court held an evidentiary hearing on every

claim but for one subclaim and denied the motion. *See Allen II*, 261 So. 3d at 1267. The Supreme Court of Florida affirmed. *Id.* at 1289.

Allen filed a timely federal petition for a writ of habeas corpus. *See* 28 U.S.C. § 2254. She alleged fourteen grounds for relief based on both her direct appeal and her motion for postconviction relief. The district court denied the petition and denied a certificate of appealability.

II. STANDARD FOR GRANTING A CERTIFICATE OF APPEALABILITY

This Court may issue a certificate of appealability "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). That standard requires the applicant to "demonstrat[e] 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). Whether the applicant has satisfied that burden is a "threshold inquiry that does not require full consideration of the factual or legal bases adduced in support of the claims." *Id.* at 336.

When the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, governs an applicant's claims, we examine the district court's application of the Act to the petition for a writ of habeas corpus and ask whether its resolution was debatable among reasonable jurists. *Miller-El*, 537

U.S. at 336. Under the Act, when a state court has adjudicated a claim on the merits, federal habeas relief is unavailable on that claim unless its adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or "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)(1)–(2). State-court determinations of fact are presumed to be correct, and a petitioner can rebut that presumption only "by clear and convincing evidence." *Id.* § 2254(e)(1). When a state court has ruled that a petitioner failed to comply with a state procedure in the process of exhausting her claim, if that state procedure was an independent and adequate ground to deny relief, then the petitioner has procedurally defaulted that claim in federal court and ordinarily cannot receive relief on that claim. *Mason v. Allen*, 605 F.3d 1114, 1119–20 (11th Cir. 2010).

III. DISCUSSION

Allen seeks a certificate of appealability on fourteen grounds, which fall into five groups of claims. First, she argues that her death sentence is unconstitutional because the jury did not explicitly find the facts necessary to impose the death penalty and was informed that its recommendation of the death sentence was advisory. Second, she argues that her trial counsel was constitutionally ineffective.

Third, she argues that the prosecution knowingly introduced and failed to correct false evidence. Fourth, she argues that the trial court's exclusion of evidence that Quintin confessed to the crime violated her right to due process. Fifth, she argues that her death sentence is unconstitutional because the sentencing judge erred in finding and weighing the evidence in aggravation and mitigation.

Allen also argues the district court failed to address her allegation that the state court unreasonably determined the facts. *See* 28 U.S.C. § 2254(d)(2). We disagree. The district court's decision clearly encompassed factual review. Moreover, that a state court's decision was based on an unreasonable determination of the facts would not, by itself, merit habeas relief; Allen would still have to prove that her custody violated federal law, *id.* § 2254(a). *See Wilson v. Corcoran*, 562 U.S. 1, 5–6 (2010).

A. Allen's Claims Regarding the Jury's Advisory Sentence Do Not Merit a Certificate of Appealability.

Allen contends that her death sentence violates the rules established in *Hurst v. Florida*, 577 U.S. 92 (2016), and *Caldwell v. Mississippi*, 472 U.S. 320 (1985), but she has abandoned her *Hurst* claim and failed to satisfy her burden regarding her *Caldwell* claim. In *Hurst*, the Supreme Court explained that the Sixth Amendment requires a jury to find each fact that is necessary to the imposition of the death penalty. 577 U.S. at 97–98. It held Florida's capital-sentencing scheme unconstitutional because the sentencing judge under that system found the factual

predicates for death-penalty eligibility. *Id.* at 99–100, 103. In *Caldwell*, the Court held that it is a violation of the Eighth Amendment "to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." 472 U.S. at 328–29.

Allen's application for a certificate of appealability purports to "incorporate[] all previously advanced claims and arguments," but "[w]e have rejected the practice of incorporating by reference arguments made to the district courts," *Anderson v. Sec'y for Dep't of Corr.*, 462 F.3d 1319, 1331 (11th Cir. 2006). Allen's application asserts that "her death sentence is unconstitutional in light of *Hurst*" without further explanation. Because Allen failed to challenge the Supreme Court of Florida's determination that the *Hurst* error was harmless beyond a reasonable doubt, *Allen II*, 261 So. 3d at 1287–89, she has not satisfied her burden on this issue.

As for Allen's argument that the jury was misled about its responsibility, she acknowledges that "to establish a *Caldwell* violation, a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law." *Romano v. Oklahoma*, 512 U.S. 1, 9 (1994) (alteration adopted) (citation omitted). The Supreme Court of Florida held that the jury instructions at Allen's trial correctly described the jury's role under Florida law at the time. *Allen*

II, 261 So. 3d at 1289. Although Allen argues that the trial court made an "incorrect statement of the law" in remarks to the jury, federal habeas relief "does not lie for errors of state law," *Corcoran*, 562 U.S. at 5. Because Allen does not explain why reasonable jurists may debate any issue of federal law regarding her *Caldwell* claim, she has not satisfied her burden.

B. Allen's Claims of Ineffective Assistance of Counsel Do Not Merit a Certificate of Appealability.

Allen also fails to satisfy her burden regarding her claims of ineffective assistance of counsel. To prevail on such a claim, a defendant must prove both that her counsel's performance was objectively deficient and that the defective performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The Supreme Court of Florida held that each of Allen's claims failed one or both of those elements. *See Allen II*, 261 So. 3d at 1269–86. The district court determined that Allen was not entitled to habeas relief under the deference afforded to state-court merits decisions. No reasonable jurist would debate that resolution.

1. Penalty-Phase Mitigating Evidence

Allen devotes most of her application to her claim that her counsel was ineffective for failing to adequately investigate and present mitigating evidence during the penalty phase. The Supreme Court of Florida held that Allen failed to

prove prejudice under *Strickland*. *Allen II*, 261 So. 3d at 1272–75. The district court determined that Allen was not entitled to relief on this claim.

In her application, Allen urges that a member of the Supreme Court of Florida would have granted her relief on this claim. *See id.* at 1289–90 (Pariente, J., dissenting). But the standard to obtain a certificate of appealability is whether reasonable jurists applying the deference owed to state-court merits decisions would disagree with the *district court's* resolution of Allen's claims, not whether the underlying state-court decision was debatable. *Miller-El*, 537 U.S. at 336.

Allen also contends that under *Strickland*, the court must "speculate" as to the effect of additional mitigation evidence developed in postconviction proceedings. *Cf. Sears v.* Upton, 561 U.S. 945, 956 (2010). The Supreme Court of Florida did so: it determined that the postconviction evidence was cumulative or otherwise entitled to little weight, and it explained its conclusion that because 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. *Allen II*, 261 So. 3d at 1272–75. The district court did the same.

Allen also asserts that the Supreme Court of Florida's denial of relief on this subclaim violated her equal-protection rights and that the district court "appears to have ignored" this argument. *See* U.S. CONST. amend. XIV, § 1. She compares herself to another capital defendant whose case originated in the same county and

who was granted relief by the Supreme Court of the United States on his claim that counsel prejudiced him by unreasonably failing to present mitigating evidence. Allen argues that "the only difference between her and similarly situated individuals [who] were granted relief . . . [is] that [she] is a female."

The decision Allen cites, *Porter v. McCollum*, 558 U.S. 30 (2009), is inapposite. In *Porter*, the Supreme Court of the United States granted relief because the jury heard "almost nothing" about the defendant's troubled background, the Supreme Court of Florida had rejected one of the aggravating circumstances the sentencing judge had found, and the Florida courts failed to give any consideration to postconviction evidence of Porter's cognitive defects. 558 U.S. at 41–43. In Allen's case, by contrast, the jury heard evidence of Allen's traumatic upbringing; the Supreme Court of Florida upheld the statutory-aggravator findings; and the state courts treated Allen's brain damage as a nonstatutory mitigating factor. *Allen II*, 261 So. 3d at 1273–75; *Allen I*, 137 So. 3d at 962–64, 967. No reasonable jurist would think that Allen's sex was "the only difference between her and" Porter.

2. Prosecutor's Guilt-Phase Closing Argument

Allen argues that her counsel was ineffective for failing to object to portions of the prosecutor's guilt-phase closing argument. Her application mentions only one portion of that argument: the prosecutor's misstatements of some of Dr.

Qaiser's testimony. The Supreme Court of Florida held that Allen failed to prove prejudice, in part because in the light of the evidence "that Wright was tortured, bound, and strangled by Allen," there was no reasonable probability that the prosecutor's partial misstatements about details of that torture and strangulation—how many minutes it takes to die of strangulation and whether blood vessels in Wright's eyes had burst because of the tight strangulation—affected the outcome. *Allen II*, 261 So. 3d at 1270–71. The district court agreed that Allen could not prove prejudice and found that she was not entitled to habeas relief on this claim.

Allen now criticizes the district court because although part of its reasoning was that the trial court instructed the jury that attorneys' statements were not evidence, the jury did not receive that instruction during the penalty phase. But the prosecutor's misstatements were during the guilt phase, where Allen does not dispute that the instruction was given, so the jury instruction was close in time to the allegedly prejudicial comments. Jurors are presumed to follow the court's instructions. *See Brown v. Jones*, 255 F.3d 1273, 1280 (11th Cir. 2001). Moreover, the district court's determination also relied on the "extensive evidence" of Allen's attack on Wright. In the light of that evidence, coupled with the accurate jury instruction in the same trial phase as the prosecutor's misstatements, no reasonable jurist would debate whether Allen met the high bar for habeas relief.

3. Penalty-Phase Prosecutorial Misconduct

Next, Allen faults her trial counsel for not objecting to or moving for a mistrial based on prosecutorial misconduct during the penalty phase. First, the prosecutor stated that Allen had multiple drug-offense convictions when, in fact, she had only one drug conviction and that conviction should not have been disclosed to the jury. Second, the prosecutor improperly questioned one of Allen's mental-health experts about Allen's future dangerousness. Third, the prosecutor described Allen's actions as "waterboarding torture" during closing arguments. The Supreme Court of Florida held that Allen failed to prove that she was prejudiced by any of these comments. *Allen II*, 261 So. 3d at 1277–78, 1280. The district court agreed.

Regarding the comments on drug convictions, Allen's sole argument about the district court's prejudice analysis is that the prosecutor's comments were repeated, "not isolated like the [Supreme Court of Florida] claimed." But the state court *did* consider that the topic of Allen's involvement with drugs arose multiple times. *See Allen II*, 261 So. 3d at 1277.

Although future dangerousness is not a legitimate sentencing consideration under Florida law, the Supreme Court of Florida reasonably rejected Allen's challenge based on that line of questioning. On direct appeal, it found that the improper questions did not amount to reversible error for several reasons,

including that the jury was properly instructed on what aggravating circumstances it could consider. *Allen I*, 137 So. 3d at 962. In postconviction proceedings, it determined that because Allen did not prove on direct review that the prosecutor's comments amounted to reversible error, she had failed to prove prejudice under *Strickland*. *Allen II*, 261 So. 3d at 1278. Allen's sole argument in her application is that the jury was encouraged to consider an illegitimate sentencing factor, but we must assume that the jury obeyed its instructions. *See Brown*, 255. F.3d at 1280.

Regarding the prosecutor's use of the term "waterboarding torture," Allen points out that the district court misstated the *Strickland* prejudice standard when it denied relief on this subclaim. But the district court recited the correct standard elsewhere in its decision, and the Supreme Court of Florida stated and applied the correct standard, *Allen II*, 261 So. 3d at 1280. In the light of the evidence that Allen tortured Wright by pouring chemicals on her face, reasonable jurists would not debate whether Allen was entitled to habeas relief on this claim.

4. Expert Testimony Regarding Wright's Cause of Death

Allen argues that counsel was ineffective for failing to call an expert witness to testify based on the autopsy report. The Supreme Court of Florida held that Allen's claim failed under both elements of *Strickland*: counsel's cross-examination of Dr. Qaiser successfully elicited the weaknesses in his testimony and drew the jury's attention to the differences between his opinions and the

autopsy report, so additional expert testimony to the same effect—such as the testimony of the forensic expert at Allen's postconviction hearing—would not have undermined the prosecution's case. *Id.* at 1283–84. The district court agreed. Allen does not identify any particular evidence to which the postconviction expert testified that was not brought out on cross-examination at her trial. And although the district court misstated the *Strickland* prejudice standard in its analysis of this claim, the state court did not, and in any event, jurists of reason would not debate that the state court reasonably concluded that Allen's claims failed under *both* elements of *Strickland*.

5. Quintin's Testimony

Next, Allen argues that her counsel was ineffective for eliciting testimony from Quintin on cross-examination about Allen pouring chemicals on Wright that went further than Quintin's testimony on direct examination. She also argues that counsel was ineffective for failing to impeach Quintin with an allegedly inconsistent statement he made to the police. Allen contends that Quintin's testimony contributed to both statutory aggravators and that a different trial strategy would have led the jury to "discredit[] all of Quintin's testimony." The Supreme Court of Florida ruled that these claims failed both elements of *Strickland*. *Allen II*, 261 So. 3d at 1275–76, 1284–85. The district court agreed.

No reasonable jurist would debate this resolution. As the Supreme Court of Florida found, counsel cross-examined Quintin extensively, and Quintin admitted that he had lied on direct examination regarding the manner in which Wright was restrained while the substances were poured on her. *Id.* at 1285. Because the jury was already aware that Quintin's testimony was inconsistent and that he had lied on the stand, jurists would not debate the reasonableness of the decision of the Supreme Court of Florida that cumulative evidence—the additional cross-examination and impeachment for which Allen now advocates—would not have made a difference.

6. Dr. Qaiser's Testimony

Allen argues that her counsel was ineffective for failing to object to Dr. Qaiser's testimony, relevant to the "especially heinous, atrocious, or cruel" aggravator, that unconscious people can feel pain. The Supreme Court of Florida held that counsel was not deficient because on cross-examination, Dr. Qaiser admitted that he could not say whether *Wright* experienced pain while unconscious. *Id.* at 1276. The court also held that in the light of the evidence about Allen's torture of Wright, including while Wright was conscious and begged to be released, there was no reasonable probability that an objection to Dr. Qaiser's testimony could have affected the outcome. *Id.* at 1276–77. The district court agreed that Allen's claim failed both elements of *Strickland*.

Allen now argues that Dr. Qaiser's statement was "completely at odds with mainstream medicine." But that contention, even if true, does not establish either element of *Strickland*, much less that reasonable jurists would debate the resolution of Allen's claim in the light of the deference owed to the state court. Even if it were impossible for Wright to experience pain while unconscious, the Supreme Court of Florida correctly found that Wright was also tortured while conscious and that there was "a large amount of evidence" supporting the aggravating factor that was "unrelated to Dr. Qaiser's testimony." *Id.*

Allen also contends that the testimony violated her rights under the Confrontation Clause because Dr. Qaiser's testimony about studies on this subject "made him a conduit for other individuals who were unable to be cross-examined." *See* U.S. CONST. amend. VI. She complains that the district court "failed to consider" this argument. But Allen never made a freestanding Confrontation-Clause claim; instead, she argued that her counsel was ineffective for failing to object on Confrontation-Clause grounds. So, the ruling that Allen was not prejudiced by the lack of an objection resolved this argument too.

7. Hudson's Testimony

Allen argues that counsel was ineffective for questioning her aunt, Myrtle Hudson, during the penalty phase about Allen's childhood exposure to a culture of drugs and violence. The Supreme Court of Florida determined that counsel's

questioning was strategic and that in the light of the evidence, there was no reasonable probability that this line of questioning affected the outcome. *Allen II*, 261 So. 3d at 1283. The district court agreed that Allen's claim failed both elements of *Strickland*, in part because the trial court treated the evidence of Allen's childhood as a nonstatutory *mitigating* factor.

Allen argues that although the trial court treated this evidence as mitigating, the jury may have considered it "inflammatory." But as previously discussed, the jury was properly instructed on what it could consider an aggravating factor, and we presume that the jury obeyed that instruction. *See Brown*, 255 F.3d at 1280. Moreover, Allen's unsupported speculation about how the jury might have viewed the evidence does not come close to "affirmatively prov[ing] prejudice" under *Strickland*, 466 U.S. at 693, much less prove that reasonable jurists would debate the resolution of this claim under the deference owed to the state court's holding.

8. Juror Carll

Allen's final *Strickland* claim is that her counsel should have used a peremptory strike against one juror, Carll, or should have stricken her for cause. Allen alleges that Carll, who stated during voir dire regarding her views on the death penalty that she was "pro death," was biased against Allen. Allen agrees that to prevail on her *Strickland* claim, she must prove that Carll was actually biased. The Supreme Court of Florida affirmed the trial court's determination that Carll

was not biased against Allen and held that Allen failed to prove prejudice. *Allen II*, 261 So. 3d at 1286. It found that Carll's statements "show[ed] that she would abide by the law and consider the evidence presented." *Id.* The district court agreed that Allen failed to prove that Carll was biased and thereby failed to prove prejudice.

Because actual juror bias is a question of fact, a federal habeas court must presume that a state court's determination of that issue is correct. *Patton v. Yount*, 467 U.S. 1025, 1036 (1984); 28 U.S.C. § 2254(e)(1). In her application, Allen does not even attempt to rebut this presumption by clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1). Allen does not even state what type of bias she alleges. Allen's arguments regarding deficient performance are irrelevant because the state court denied her claim for failure to prove prejudice. *Allen II*, 261 So. 3d at 1286.

C. Allen's Giglio *Claim Does Not Merit a Certificate of Appealability.*

Allen argues that the prosecution violated the rule of *Giglio v. United States*, 405 U.S. 150 (1972), by eliciting and failing to correct what it knew to be false testimony that Allen had multiple drug-offense convictions when in fact she had only one. The Supreme Court of Florida held that the *Giglio* claim was procedurally barred because it should have been raised on direct appeal. *Allen II*, 261 So. 3d at 1286. It also explained that even if the claim were not procedurally barred, it would fail on the merits because the *Giglio* violation was harmless. *Id.* at 1286–87. The district court addressed only the merits decision and determined that

Allen was not entitled to habeas relief. In her application for a certificate of appealability, Allen likewise discusses the merits rulings without acknowledging the state court's finding of a procedural bar.

The procedural bar was an adequate and independent state ground on which to deny relief. *See Dugger v. Adams*, 489 U.S. 401, 410 n.6 (1989) (explaining that the Supreme Court of Florida has "faithfully applied" the governing procedural rule in "the vast majority of cases"). Because the state court denied Allen's claim on an adequate and independent state ground and reached the merits only as an alternative holding, the federal courts are without power to review the underlying claim. *Sochor v. Florida*, 504 U.S. 527, 533 (1992).

D. Allen's Chambers *Claim Does Not Merit a Certificate of Appealability.*

Allen argues that the trial court erred and violated her due-process rights by excluding Martin's testimony that Quintin had admitted to choking Wright to death. She cites *Chambers v. Mississippi*, 410 U.S. 284 (1973), for this claim. In *Chambers*, the Supreme Court held that a defendant's due-process rights were violated when the trial court both refused to allow the defendant to cross-examine an individual who had confessed to the crime and also refused to allow three witnesses who had heard the confessions to testify about them. *Id.* at 291–93, 302. When Allen raised this claim on direct appeal, the Supreme Court of Florida denied it because *Chambers* was inapposite and was expressly limited to its facts.

Allen I, 137 So. 3d at 957; *see Chambers*, 410 U.S. at 302–03. It also rejected Allen's arguments that the testimony was admissible under various state-law hearsay exceptions and held, in the alternative, that any error was harmless. *Allen I*, 137 So. 3d at 955–58. The district court agreed that *Chambers* was inapplicable.

Allen now argues that the hearsay evidence was reliable and important to her defense but fails to address the Supreme Court of Florida's reasoning for distinguishing *Chambers*: Allen was not prevented from calling or cross-examining Quintin. *Id.* at 957. So, Allen has not made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2).

E. Allen's Claims Regarding the Trial Judge's Sentence Do Not Merit a Certificate of Appealability.

Finally, Allen claims that the trial court's imposition of the death sentence was unconstitutional. She contends that the evidence did not support the aggravating factors, supported statutory mitigating factors, and supported giving greater weight to nonstatutory mitigating factors. The Supreme Court of Florida rejected all these state-law claims on direct appeal. *Allen I*, 137 So. 3d at 962–68. The district court agreed that the evidence supported each of the trial court's findings. Because federal habeas relief "does not lie for errors of state law," Allen is entitled to relief only if she proves that the Supreme Court of Florida failed to comply with *federal* law. *Corcoran*, 562 U.S. at 5 (citation omitted); 28 U.S.C. § 2254(a).

Allen disputes an issue of state law regarding one of the aggravating factors but does not even attempt to argue that the Supreme Court of Florida's holding violated her federal constitutional rights. Although she maintains that the Supreme Court of Florida made an unreasonable determination of the facts, her sole contention in support of this argument is that the *trial court* allegedly applied the wrong standard when it weighed the aggravating and mitigating circumstances. That too is an issue of state law.

IV. CONCLUSION

Allen's application for a certificate of appealability is **DENIED**.

/s/ William H. Pryor Jr.
CHIEF JUDGE

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

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

DEATH PENALTY CASE

Appendix B

United States Court of Appeals for the Eleventh Circuit Order denying Ms. Allen's Motion for Reconsideration, dated May 19, 2023.

In the

United States Court of Appeals

For the Eleventh Circuit

No. 23-10447

MARGARET A ALLEN,

Petitioner-Appellant,

versus

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

Respondents-Appellees.

Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket No. 6:19-cv-00296-PGB-DCI

Before WILLIAM PRYOR, Chief Judge, and BRANCH and BRASHER, Circuit Judges.

BY THE COURT:

Allen's motion for reconsideration of the April 12, 2023, order denying her application for a certificate of appealability is **DENIED**.

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

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

DEATH PENALTY CASE

Appendix C

Ms. Allen's Application for a Certificate of Appealability, dated February 28, 2023.

Appeal No. 23-10447-P

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MARGARET A. ALLEN,
Petitioner/Appellant,

v.

SECRETARY, DEPARTMENT
OF CORRECTIONS, et al.,
Respondents/Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
District Court No.: 6:19-cv-00296-PGB-DCI

APPLICATION FOR A CERTIFICATE OF APPEALABILITY

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Margaret A. Allen v. Secretary, Department of Corrections, et al.
Appeal No. 23-10447-P

In compliance with Fed. R. App. P. 26.1 and 11th Cir. R. 26.1, counsel for Petitioner/Appellant hereby certifies that the following trial judges, attorneys, persons, associations of persons, firms, partnerships, or corporations may have an interest in the outcome of this case or appeal:

Ahmed, Raheela (Former Attorney for Petitioner/Appellant)

Allen, Margaret A. (Petitioner/Appellant)

Bankowitz III, Frank J. (Attorney for Petitioner/Appellant at Trial)

Bausch, Russell K. (Former Assistant State Attorney)

Beatty, Gary D. (Former Assistant State Attorney)

Bondi, Pamela Jo (Former Attorney General State of Florida)

Byron, Honorable Paul G. (United States District Court Judge, Middle District of Florida)

Canady, Honorable Charles T. (Florida Supreme Court Justice)

DeLiberato, Maria (Former Acting Capital Collateral Regional Counsel – Middle Region)

Dixon, Ricky D. (Secretary, Florida Department of Corrections)

Driscoll, Jr., James (Attorney for Petitioner/Appellant)

Margaret A. Allen v. Secretary, Department of Corrections, et al.
Appeal No. 23-10447-P

Dugan, Honorable David W. (Former Circuit Court Judge, Eighteenth Judicial Circuit, in and for Brevard County)

Fusaro, Lisa M. f/k/a Bort, Lisa M. (Attorney for Petitioner/Appellant)

Inch, Mark S. (Former Secretary, Florida Department of Corrections)

Labarga, Honorable Jorge (Florida Supreme Court Justice)

Laurienzo, Morgan P. (Attorney for Petitioner/Appellant)

Lawson, Honorable Alan (Former Florida Supreme Court Justice)

Lewis, Honorable R. Fred (Former Florida Supreme Court Justice)

Maxwell III, Honorable George W. (Circuit Court Judge, Eighteenth Judicial Circuit, in and for Brevard County)

Meacham, Doris (Assistant Attorney General, Counsel for Respondents/Appellees)

Milosevic, Tamara (Former Assistant Attorney General)

Moody, Ashley (Attorney General State of Florida)

Neff, Reuben A. (Former Attorney for Petitioner/Appellant)

Pariente, Honorable Barbara J. (Former Florida Supreme Court Justice)

Perinetti, Maria C. (Former Attorney for Petitioner/Appellant)

Perry, Honorable James E.C. (Former Florida Supreme Court Justice)

Pinkard, Eric C. (Capital Collateral Regional Counsel - Middle Region)

Polston, Honorable Ricky (Florida Supreme Court Justice)

Popoola, Tayo (Former Assistant Attorney General)

Margaret A. Allen v. Secretary, Department of Corrections, et al.
Appeal No. 23-10447-P

Quince, Honorable Peggy (Former Florida Supreme Court Justice)

Riecks, James D. (Former Assistant Attorney General)

Singleton, Vivian (Former Assistant Attorney General)

Viggiano, Jr., James Vincent (Former Capital Collateral Regional Counsel - Middle Region)

Whittle, Nicholas A. (Former Attorney for Petitioner/Appellant)

Wright, Wenda (Deceased Victim)

Wulchak, James R. (Attorney for Petitioner/Appellant on Direct Appeal)

There are no corporations involved in this case.

APPLICATION FOR A CERTIFICATE OF APPEALABILITY

Petitioner/Appellant, Margaret A. Allen ("Allen"), by and through undersigned counsel, moves this Court to issue a certificate of appealability pursuant to 28 U.S.C. § 2253 and 11th Cir. R. 22-1, and states as follows:

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.

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

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). Two justices dissented from the majority opinion and would have vacated 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, Allen timely filed her petition for writ of habeas corpus under 28 U.S.C. § 2254 on February 14, 2019. (Doc. 1). She filed a memorandum of law in support of her petition. (Doc. 13). Respondents filed a corrected response to the petition (Doc. 20) and Allen filed a reply. (Doc. 21).

Allen's petition for writ of habeas corpus was denied by the district court on March 30, 2022. (Doc. 22). Judgment was entered on March 31, 2022. (Doc. 23). Allen filed a Motion to Alter or Amend Judgment (Doc. 24), which was denied on January 10, 2023. (Doc. 25). A notice of appeal from the final order entered by the district court denying habeas relief was timely filed. (Doc. 26).

The district court declined to issue a certificate of appealability ("COA"). (Doc. 22 at 87; Doc. 25 at 3). A COA is a prerequisite to an appeal in this cause. *See* 28 U.S.C. § 2253. Accordingly, Allen hereby files this application for a COA.

THE STANDARD FOR GRANTING A COA

In order to appeal to the Circuit Court of Appeals, a COA is required under 28 U.S.C. §2253 and FRAP 22(b)(1). 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). This threshold question should be decided without "full consideration of the factual or legal bases adduced in support of the claims." *Buck v. Davis*, 580 U.S. 100, 115 (2017) (quoting *id*. at 336). As the Supreme 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.

It is also appropriate for this Court to take into account the severity of the sentence when deciding whether to issue a COA in a capital case. *See Barefoot v. Estelle*, 463 U.S. 880, 893 (1983) ("In a capital case, the nature of the penalty is a proper consideration . . ."). "Any doubt regarding whether to grant a COA is resolved in favor of the petitioner, and the severity of the penalty may be considered in making this determination." *Graves v. Cockrell*, 351 F. 3d 143, 150 (5th Cir. 2003). Appellate review is especially warranted when a petitioner, like Allen, has been sentenced to death.

Allen incorporates all previously advanced claims and arguments made in these proceedings; none are waived or abandoned because they are not repeated here.

Allen seeks a COA on all grounds of her petition for writ of habeas corpus. Each ground is debatable among jurists of reason and will be discussed in turn below.

PRELIMINARY CONSIDERATIONS FOR GRANTING A COA

As the majority of Allen's grounds involve ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984), Allen respectfully submits that jurists of reason could disagree with the district court affording such high deference to Allen's trial counsel, Frank Bankowitz ("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." (Doc. 22 at 66). The amount of time counsel has practiced is irrelevant. A reasonable jurist's only consideration should be 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 testing process." *Strickland*, 466 U.S. at 688. Despite taking over Allen's case ***two and a half years prior to trial***, counsel failed to satisfy this bare minimum requirement and denied Allen's jury critical information in what was literally a life-or-death situation. Ex. M p. 2791, 2880; Ex. A-4 p. 649-54.

Further, it is clear that even seasoned attorneys can make errors, as evidenced by 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 Bankowitz 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 counsel were less egregious; a woman was not convicted and sent to death row as a result of those deficiencies.

In addition, Allen pleaded in each ground of her petition for a writ of habeas corpus that the FSC's adjudication also "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, in each ground, 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. (Doc. 22 at 16, 36, 42, 57, 62, 67, 69, 71, 73, 76, 79, 86). Allen respectfully submits that jurists of reason would find it debatable that an unreasonable determination of the facts occurred on each ground, which the district court improperly failed to consider. Reasonable jurists could also conclude that ascertaining whether the FSC's decision on these grounds was based on an unreasonable determination of the facts is an issue that is adequate to deserve encouragement to proceed further.

GROUND ONE

ALLEN'S DEATH SENTENCE VIOLATES *HURST V. FLORIDA*, 577 U.S. 92 (2016) AND *CALDWELL V. MISSISSIPPI*, 472 U.S. 320 (1985), AS WELL AS THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS

Allen alleged in Ground One of her habeas petition and memorandum of law that her death sentence is unconstitutional in light of *Hurst*, *Caldwell*, and the Sixth, Eighth, and Fourteenth Amendments. (Doc. 1 at 6-11; Doc. 13 at 4-13; Doc. 21 at 2-6). This ground was addressed at pages 13-16 of the district court's order. (Doc. 22). Most notably, Allen's sentencing decision "does not meet the standard of reliability that the Eighth Amendment requires" because her jury's sense of responsibility for determining the appropriateness of a death sentence was impermissibly minimized. *Caldwell v. Mississippi*, 472 U.S. 320, 341 (1985). The Supreme Court has held that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Id*. at 328–29.

Notwithstanding, the district court found: "There is no indication that the trial judge implied that the jury recommendation was superfluous or that the jury's decision was lessened because they gave an advisory recommendation." (Doc. 22 at

16). However, that finding ignores the reality that Allen's case is different than most because the trial court also made extrajudicial statements that repeatedly minimized the jury's role in violation of *Caldwell*. In addition to almost one hundred references to the jury's role being advisory, in Allen's case the trial court went on to erroneously instruct the venire: "You do understand that ***nobody*** will impose the sentence but ***me***. Although I'm going to give great weight to your recommendation, it is ***not*** controlling. ***I can fly in the face of your recommendation or I can follow your recommendation, with some qualifications***." Ex. A-10 p. 157. The trial court's instructions improperly express that the judge was the only decision maker considering Allen's sentence and that he did not have to follow the jury's recommendation without some further qualifications being present. This is an incorrect statement of the law. *Romano v. Oklahoma*, 512 U.S. 1, 9 (1994) ("to establish a *Caldwell* violation, a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law"). Allen's death sentence "does not meet the standard of reliability that the Eighth Amendment requires," because her jury did not feel the gravity or weight of their decision. *Caldwell*, 472 U.S. at 341.

Worse yet, the prosecutor also minimized the jury's role by telling the venire: "In Florida, okay, it is the judge who makes the ultimate sentencing decision in this

type of case." Ex. A-10 p. 143. This inappropriate statement should have been given weightier consideration in Allen's case because Allen's jury was never instructed in the penalty phase that "what the attorneys say is not evidence or your instruction on the law." FL ST CR JURY INST 2.7.

The totality of these statements by the trial judge and the prosecutor "urged the jurors to view themselves as taking only a preliminary step toward the actual determination of the appropriateness of death—a determination which would eventually be made by others and for which the jury was not responsible." *Caldwell*, 472 U.S. at 336. Allen has made a substantial showing that she was sentenced to death in violation of *Hurst*, *Caldwell*, and the Sixth, Eighth, and Fourteenth Amendments. Reasonable jurists could disagree with the district court's resolution of Allen's claim. *Miller-El*, 537 U.S. at 327. Reasonable jurists could also conclude the issue presented in this claim is adequate to deserve encouragement to proceed further. *Id*. This Court should grant a COA.

GROUND TWO

ALLEN RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE OF HER TRIAL WHEN TRIAL COUNSEL FAILED TO ADEQUATELY INVESTIGATE, PREPARE, AND PRESENT AVAILABLE MITIGATION

Allen alleged in Ground Two of her habeas petition and memorandum of law that she received ineffective assistance of counsel regarding the mitigation presented during the penalty phase of her trial. (Doc. 1 at 12-31; Doc. 13 at 13-38; Doc. 21 at 6-18). This ground was addressed at pages 16-36 of the district court's order. (Doc. 22). Some of the main areas where counsel was ineffective include: 1) failure to investigate, interview, and present mitigation witnesses; 2) failure to present evidence of Allen's sexual abuse or childhood physical abuse; 3) failure to present evidence of Allen's Posttraumatic Stress Disorder ("PTSD"); and 4) failure to acquire records such as police reports. 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 (rev. ed. 2003). Allen did not receive the level of representation guaranteed to her under *Strickland* and the Sixth Amendment because counsel failed to adequately

investigate, prepare, and present the abundant amount of mitigation that was available at the time of trial. The mitigation that counsel attempted to present at trial was abhorrently incomplete. Allen was prejudiced by these deficiencies and sentenced to death as a result.

Counsel, a solo practitioner, tried both phases of Allen's trial himself, with no co-counsel, which is not the customary practice in Florida. Counsel also failed to seek assistance from a mitigation specialist or investigator. Ex. M p. 2790, 2835. Although counsel took over the case from the Public Defender's Office two and a half years prior to trial and had ample time to perform an investigation into 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, counsel admitted he ***did not even interview all the witnesses*** provided to him by the Public Defender's Office. Ex. M p. 2795. It is clear that counsel did not exercise reasonable professional judgment. *Strickland*, 466 U.S. at 690-91.

As a result of counsel's deficiencies, he only suggested ***two*** nonstatutory mitigators and no statutory mitigation in his sentencing memorandum. Ex. A-6 p. 923. His whole argument and analysis of the mitigation encompassed ***less than one page***. Ex. A-6 p. 923-24. Notably, the State's memorandum actually suggested more

mitigators than defense counsel did. Ex. M p. 891. Due to counsel's ineffectiveness, 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).

First and foremost, Allen submits that this ground deserves encouragement to proceed further because jurists of reason on the FSC have already disagreed with the district court. Two justices dissented from the FSC's majority opinion in Allen's case: Justice Peggy A. Quince and Justice Barbara J. Pariente. Justice Pariente's dissenting opinion aides in showing the infirmities with the mitigation presentation that Allen's jury and trial court received due to counsel's ineffectiveness:

> [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.

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." (Doc. 22 at 29). However, as this is an incorrect interpretation of the law and the state court was not required to find that the mitigation outweighs the aggravation, jurists of reason would disagree with the district court's resolution of this claim.

> 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.

Strickland, 466 U.S. at 695 (emphasis added). Allen was never required to show in any postconviction court that mitigation 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, the Supreme Court 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 v. Upton*, 561 U.S. 945, 955 (2010). *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. Therefore, 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.

The district court also claims that the mitigation presented in postconviction was cumulative (Doc. 22 at 32-33, 35), however it is paramount to consider that the weightiest and most impactful eyewitness mitigation uncovered in postconviction was ***never*** presented to Allen's jury or trial judge. ***None*** of the physical abuse that Allen suffered as a child at the hands of her mother and grandfather was heard at trial. Barbara Ann Capers ("Capers") witnessed young Allen being beaten by her mother almost every single day. Allen's mother beat Allen with her hands, fists, and with belts, and would also whip her with sticks and slap her in the face. Ex. M p. 2639-40, 2663, 2678-79. The torture became so severe that when Allen was about twelve years old, her mother beat Allen so badly that Capers had to call the police. Ex. M p. 2640. Myrtle Hudson ("Hudson") also witnessed this violence. When Allen was about seven, Hudson witnessed Allen's mother grab her by her hair, push her head under the water in the bathtub, and hold her head underwater. Ex. M p. 2729-30. On multiple occasions, Hudson also witnessed Allen's mother beat Allen with a belt until she left swollen marks on Allen. Ex. M p. 2730.

Allen's mother was not the only family member to inflict violence upon her as a child. Allen's grandfather also perpetually abused Allen and the other children in the family. He would line up all of the boys and girls naked, including Capers and Allen, and go down the row beating all of the children with three oak switches until

they bled. Ex. M p. 2649. He also whipped Allen with sticks. Ex. M p. 2679. The district court's decision would be debatable among jurists of reason because ***none*** of this horrific childhood abuse was mentioned at Allen's trial.

The district court stated that "Dr. Gebel noted that Petitioner also had a history of sexual assault," but jurists of reason could disagree, because in all actuality, nothing definitive was presented to Allen's jury. (Doc. 22 at 29). During Michael Gebel, M.D.'s ("Dr. Gebel") testimony, he listed various medical records and merely said: "A possible sexual assault in September of 1996." Ex. A-21 p. 1745. However, contrary to Allen's trial where this possible sexual assault was mentioned in passing, in postconviction, extensive testimony was presented that not only was Allen sexually abused by multiple men (including her brother, her grandfather, her grandfather's brother ("Uncle Roy"), and at least one other man), but Capers even personally witnessed Uncle Roy touching Allen in private places, grabbing Allen's breasts, and kissing Allen on the mouth. Ex. M p. 2642-48. When Allen was young, her mother went to jail and Allen stayed with her grandfather, but Allen told Capers that she wanted to stay with her instead because Allen's grandfather was sexually molesting her. Ex. M p. 2642-43, 2665. Uncle Roy was also sexually molesting Allen every other weekend while he visited Allen's grandfather. Ex. M p. 2645. The very men that should have been making 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 counsel's ineffectiveness, Allen's jury never heard about this family history, including the brutality 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. (Doc. 22 at 33). The testimony at Allen's trial only scratched the surface of the available mitigation regarding all the domestic violence Allen suffered. At the postconviction evidentiary hearing, multiple eyewitnesses testified to the horrifying domestic violence Allen suffered at the hands of at least three men. Ex. M p. 2652-55, 2684-85, 2770-73. Further, 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 Allen over the years, including beating her while she was pregnant, and on another occasion hitting Allen in the head with a hammer multiple times inside Winn-Dixie. Ex. M p. 2602-12. Accordingly, jurists of reason could disagree with the district court's characterization of this poignant evidence as cumulative.

Further, Allen's jury and trial judge were never made privy to the fact that Allen suffered from PTSD. Worse yet, the factfinders were never informed how the effects of Allen's 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." The extreme emotional disturbance was related to Allen's PTSD and factors such as her environment leaving her vulnerable to emotional dysregulation when faced with the loss of her money. Ex. M p. 2995-96. The longer she 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. Ex. M p. 3027-28. Allen was unable to think logically and rationally. Ex. M p. 2972.

Notwithstanding, the district court gave unjustified consideration to the fact that counsel presented the testimony of two experts during Allen's penalty phase. (Doc. 22 at 32). Notably, counsel was so ineffective that at trial, neither expert was ever asked if he had an opinion on statutory mitigating circumstances. *See Allen*, 137 So. 3d at 965-66. Counsel was also remarkably deficient because he never had Dr. Gebel properly evaluate Allen for statutory mitigation. Counsel was aware that Allen was leery of participating in the only evaluation Dr. Gebel performed because a

guard was in the room, but counsel never sent Dr. Gebel back for another interview or evaluation. Ex. A-21 p. 1745; Ex. M p. 2861-62. If counsel had not been ineffective, it is likely that Dr. Gebel would have been able to find statutory mitigation, as well as the presence of Allen's PTSD.

The district court also places undue emphasis on Michael Gamache, Ph.D.'s ("Dr. Gamache") testimony and claims that he refuted the PTSD diagnosis and did not think any significant mitigation was left out of the penalty phase. (Doc. 22 at 25, 32-33). However, the district court fails to consider that ***Dr. Gamache did not evaluate Allen and has never even spoken with her***. Ex. M p. 3247, 3273. Dr. Gamache did not speak with Allen's family or any other witnesses either and improperly relied solely on self-reports within records. Ex. M p. 3174. Moreover, Dr. Gamache failed to follow his own approach. He testified that his "approach is to obtain a self-report from the person and look for any evidence of corroboration." Ex. M p. 3235. He did neither. Ex. M pp. 3211, 3235-36, 3242-43. Affording Dr. Gamache's testimony more weight than the doctors who actually met with Allen and evaluated her, is an unreasonable determination of the facts and debatable among jurists of reason.

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. (Doc. 22 at 32); *Simmons v. State,* 105 So. 3d 475, 506 (Fla. 2012) (quoting *Rose v. State,* 675 So. 2d 567, 573 (Fla. 1996)) (the Florida Supreme Court 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 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. (Doc. 22 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. ("Dr. Russell") 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 Allen was not prejudiced. (Doc. 22 at 32). There is a reasonable probability, that but for 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. Reasonable jurists would find the district court's assessment debatable.

Allen submits that reasonable jurists could conclude there is a reasonable probability that, upon hearing the plethora of available mitigation, a juror would find the totality of her 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, 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 counsel had not been deficient, very great weight would have been given to this mitigating circumstance due to the eyewitnesses' confirmation that Allen was sexually assaulted on numerous occasions, primarily by the men in her family, as well as Allen being abused during the formative years of her childhood.

The additional mitigation presented in postconviction that the district court dismissed as cumulative, painted a more complete picture of Allen's background from family members who actually witnessed and experienced the abuse alongside 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 Allen's trial. As in *Porter*, the FSC's opinion that 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. 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 nonstatutory mitigating circumstances that outweighed the aggravators." (Doc. 22 at 34). The only reason this indication is not present is due to counsel's ineffectiveness, or else Allen would have had the ability to prove the existence of these mitigating circumstances at trial.

In addition, the district court mischaracterizes Allen's case and claims that there was substantial evidence of aggravating circumstances and goes on to cite *Suggs v. McNeil*, 609 F.3d 1218, 1232 (11th Cir. 2010) as support. (Doc. 22 at 34). However, only ***two*** aggravators were found by the trial court in Allen's case. In contrast, *Suggs* was a highly aggravated case with ***seven*** aggravators found by the trial court. 609 F.3d 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*, Allen's case only contained two aggravators, which she contends are unsupported based on her claims contained in the other grounds of her petition. *See id*. The district court also cites to *Sochor v. Sec'y Dept. of Corr.*, 685 F.3d 1016, 1030 (11th Cir. 2012) as a similar case. (Doc. 22 at 35). However, *Sochor* involved twice as many aggravators as in Allen's case. *Sochor*, 685 F.3d at 1022. As 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 Allen maintains is particularly unsupported, or at the very least, undermined), it is apparent that her case is clearly not the most aggravated and least mitigated. Therefore, a reasonable jurist would find the district court's determination debatable.

Moreover, in its citation of *Sochor*, the district court appears to inappropriately adopt a per se rule. *Id*. at 1030. The district court seems to state a rule that in any case "where the murder involves sexual battery, torture or rape, aggravating circumstances outweigh any prejudice caused by a lawyer's failure to present mitigating evidence." (Doc. 22 at 35). This is troubling for multiple reasons. This statement adds an automatic death sentence as the only appropriate sentence in such cases, no matter how ineffectively the trial counsel performed in their mitigation presentation. *See Woodson v. North Carolina*, 428 U.S. 280, 301 (1976)

(unconstitutional to "inexorably impos[e] a death sentence upon every person convicted of a specified offense"). In that category of cases, it would give trial counsel immunity to be ineffective in presenting mitigation because they would be unable to be found ineffective regardless of their deficiencies. It is also problematic that if this was going to become an element of the crime that automatically resulted in a death sentence, Allen was not given any prior notice.

Most importantly, the district court's implied per se rule is a violation of the Eighth Amendment because it does not properly narrow the class of individuals who are eligible for the death penalty. No one with these allegations in their case would ever be able to overcome that single aggravator and would therefore always receive a death sentence. This per se rule that the district court appears to adopt is also unconstitutional because it does not consider the individualized characteristics of the accused. "[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*, 428 U.S. at 304 (internal citation omitted).

However, unlike the district court's overreaching characterization of *Sochor* in its order, nothing in *Sochor* creates a per se rule that death is always appropriate in those cases. 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 her compelling mitigation. The district court needed look no further than the *Dobbs v. Turpin*, 142 F.3d 1383, 1390 (11th Cir. 1998) opinion that was also cited in its order. In *Dobbs*, this Court stated:

> This court has found capital defendants to have been prejudiced in past cases where their lawyer's failure to investigate resulted in omissions of mitigating evidence. *See, e.g., Jackson,* 42 F.3d at 1368-69 (concluding that prejudice arose where defendant's lawyer failed to discover and introduce mitigating evidence showing that the defendant suffered a "brutal and abusive childhood"); *Harris,* 874 F.2d at 763 (finding that defendant suffered prejudice when his lawyer's failure to investigate led to the omission of potentially mitigating evidence concerning his family, scholastic, military and employment background); *Blake v. Kemp,* 758 F.2d 523, 533-34 (11th Cir.) (holding that defendant demonstrated a reasonable probability that he would have received a lower sentence but for his lawyer's failure to search out mitigating character evidence), *cert. denied,* 474 U.S. 998, 106 S. Ct. 374, 88 L. Ed. 2d 367 (1985).

Id. at 1390. Allen, like Dobbs, was entitled to an individual decision. The Supreme Court has explained:

> To be sure, *Furman* held that 'in order to minimize the risk that the death penalty would be imposed on a capriciously selected group of offenders, the decision to impose it had to be guided by standards so that the sentencing authority would focus on the particularized circumstances of the crime and the defendant.' *Gregg v. Georgia*, 428 U.S. 153, 199, 96 S. Ct. 2909, 2937, 49 L. Ed. 2d 859 (1976) (joint opinion of STEWART, POWELL, and STEVENS, JJ.). But as we made clear in *Gregg,* so long as the class of murderers subject to capital punishment is narrowed, there is no constitutional infirmity in a procedure that allows a jury to recommend mercy based on the

> mitigating evidence introduced by a defendant. *Id.,* at 197–199, 203, 96 S. Ct., at 2936–2937, 2939.

Penry v. Lynaugh, 492 U.S. 302, 326-27 (1989), *abrogated by Atkins v. Virginia*, 536 U.S. 304 (2002), *holding modified by Boyde v. California*, 494 U.S. 370 (1990).

It is clearly unconstitutional if every defendant whose case was alleged to involve sexual battery, torture, or rape was unable to ever succeed on an ineffective assistance of counsel claim when trial counsel deficiently fails to present mitigating evidence, no matter if any prejudice was suffered. Such an exclusion was not carved out in *Strickland*, and therefore should not have been present in the district court's order either. The Supreme 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 v. Taylor*, 529 U.S. 362, 397–98 (2000)). Instead, the district court claims that if this aggravation is present, no amount of mitigation could outweigh it. As this is patently unreasonable and unconstitutional, reasonable jurists would disagree. Although the district court goes on to say that "[u]pon weighing all the relevant evidence, the Court concludes that the aggravating circumstances outweigh the cumulative mitigation evidence counsel failed to present," based upon the district court's immediately preceding

interpretation of *Sochor* and wording claiming that her case was similar, it is evident that Allen's claim never stood a fair chance. (Doc. 22 at 35). This Court should conclude this issue deserves encouragement to proceed further to consider the individualized characteristics of Allen and her case and decide this claim on a constitutional basis, free from this improper per se rule.

Although Allen made a substantial showing of the denial of her constitutional rights, the district court appears to have ignored Allen's arguments regarding the violation of her rights under the Eighth and Fourteenth Amendments. (Doc. 13 at 35-38). Allen's right to equal protection of laws under the Fourteenth Amendment was violated because the law was not applied consistently to all capital defendants. *See Gregg v. Georgia*, 428 U.S. 153, 188 (1976). As detailed in her memorandum of law, the Supreme Court and this Court have granted relief to similarly situated capital defendants. (Doc. 13 at 31-33). One such example is Porter, whose case originated in the same county as Allen's case, Brevard County, Florida, and also involved a unanimous advisory jury recommendation. *Porter*, 558 U.S. 30. Similar to *Porter*, Allen's counsel "did not even take the first step of interviewing witnesses or requesting records." *Id*. at 40. Like Allen, Porter also presented evidence in postconviction of his abusive childhood and witnessing family violence. *Id*. at 33. Porter joined the Army to escape his horrible family life; similarly, Allen suffered

such severe physical, emotional, and sexual abuse during childhood that Capers forged Allen's mother's name to send Allen to Job Corps in an attempt to help Allen escape her abusive family. Ex. M p. 2641, 2667-69; *Porter*, 558 U.S. at 34. Sadly, upon Allen's return she fell into a string of abusive relationships and domestic violence. Ex. M p. 2652. Like Allen, 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 Porter's counsel was ineffective, and the Supreme Court agreed. *Id*. at 38; *see also Porter v. Crosby*, 6:03CV1465ORL31KRS, 2007 WL 1747316, at *32 (M.D. Fla. June 18, 2007). However, in the instant case, the district court failed to reach the same result. Thus, the state court's decision was contrary to the principle that "selective application of [ ] rules violates the principle of treating similarly situated defendants the same." *See Griffith v. Kentucky,* 479 U.S. 314, 323 (1987). There is clearly an equal protection issue in Allen's case because the only difference between her and similarly situated individuals that were granted relief by the Supreme Court, this Court, and the FSC was that Allen is a female. Reasonable jurists would find the district court's ruling debatable.

Allen was arbitrarily and discriminatorily denied relief although other similarly situated capital defendants were granted relief under similar or worse facts; therefore, Allen's right to be free from arbitrary and capricious sentencing under the Eighth Amendment was also denied. *See Spaziano v. Florida*, 468 U.S. 447, 465-66 (1984), *overruled on other grounds by Hurst v. Florida*, 577 U.S. 92 (2016). The FSC's opinion implicates 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). Allen respectfully requests this Court find that this claim deserves encouragement to proceed further to decide her claims under the Eighth and Fourteenth Amendments.

Finally, as briefly mentioned above, although the district court held that "[t]he state court's denial of this claim was not contrary to or an unreasonable application of clearly established federal law" (Doc. 22 at 36), it 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. In her pleadings relating to this ground, Allen asserted numerous explicit examples of how the FSC's determination of the facts were unreasonable. (Doc. 13 at 14, 19, 20-21, 24, 29, 33); (Doc. 21 at 6, 17-18). For

example, the FSC misstated in its opinion that 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 Allen suffered as a child during her trial. The FSC's finding on that subject was indisputably an unreasonable determination of the facts. Further, Allen's jury only heard a brief fleeting reference that Allen may have been sexually abused. Ex. A-21 p. 1745; A-22 p. 1883-84.

In addition, the FSC claimed the jury heard testimony outlining Allen's mental health issues. *Allen*, 261 So. 3d at 1273. However, the jury never heard any evidence that 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. Ex. M p. 3247. Notably, Dr. Gamache never even spoke with Allen or her family. Ex. M p. 3211, 3242-43. Without question, Dr. Russell's actual evaluation of Allen and interviews with her family to obtain

corroborating evidence made his opinion more reliable than Dr. Gamache's. 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.

The FSC's decision was contrary to, or involved an unreasonable application of, clearly established Federal law, and also resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented. 28 U.S.C. § 2254(d). Thus, Allen has made a substantial showing that she has been sentenced to death in violation of *Strickland* and the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. 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. This Court should grant a COA.

GROUND THREE

ALLEN RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN TRIAL COUNSEL FAILED TO OBJECT TO MULTIPLE IMPROPER COMMENTS AND MISREPRESENTATIONS IN THE STATE'S GUILT PHASE CLOSING ARGUMENTS AT TRIAL

Allen alleged in Ground Three of her habeas petition and memorandum of law that counsel provided ineffective assistance under *Strickland* during the guilt phase by failing to object to numerous improper comments and misrepresentations in the State's guilt phase closing arguments. (Doc. 1 at 31-36; Doc. 13 at 38-45; Doc. 21 at 18-21). This ground was addressed at pages 36-42 of the district court's order. (Doc. 22). The first issue is that the district court did not even address Allen's allegations that the FSC made an unreasonable determination of the facts in light of the state court record. 28 U.S.C. § 2254(d)(2). Consequently, 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.

For another example, the district court also detailed that the prosecutor's comments which misstated Sajid Qaiser, M.D.'s ("Dr. Qaiser") testimony did not result in prejudice because "[t]he trial court instructed the jury that the statements were not evidence." (Doc. 22 at 40). Allen submits that the district court's failure to consider that the prosecutor's improper comments and misstatements in the guilt

phase not only prejudiced her in the guilt phase, but also prejudiced her in the penalty phase because the comments and misrepresentations related to the aggravating circumstance of "the capital felony was especially heinous, atrocious, or cruel" ("HAC"). Ex. A-20 p. 1578-79, 1581, 1629-30. Contrary to the district court's assertions, Allen's jury was never instructed during the penalty phase of her trial that "what the attorneys say is not evidence or your instruction on the law." FL ST CR JURY INST 2.7. Therefore, reasonable jurists could find the district court's ruling debatable.

Allen has made a substantial showing that she has been sentenced to death in violation of *Strickland* and the Sixth Amendment to the United States Constitution. Reasonable jurists could disagree with the district court's resolution of this constitutional claim, and reasonable jurists could conclude the issue presented in this claim is adequate to deserve encouragement to proceed further. This Court should grant a COA.

GROUNDS FOUR AND THIRTEEN

ALLEN RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL FAILED TO OBJECT TO AND MOVE FOR A MISTRIAL BASED ON MULTIPLE INSTANCES OF PROSECUTORIAL MISCONDUCT IN THE PENALTY PHASE OF HER TRIAL

Allen alleged in Grounds Four and Thirteen of her habeas petition and memorandum of law that she received ineffective assistance of counsel due to counsel's failure to object to multiple instances of prosecutorial misconduct in her penalty phase. (Doc. 1 at 36-46, 77-79; Doc. 13 at 45-61; Doc. 21 at 21-32). Ground Thirteen is related to the portion of Ground Four regarding the prosecutor's impermissible introduction of the future dangerousness nonstatutory aggravator, therefore it was argued together in the memorandum of law and addressed together in the district court's order. (Doc. 22 at 42-57). Allen submits that all portions of this ground warrant a COA based on the denial of her rights under *Strickland* and the Sixth Amendment, but she will only address some of the most apparent debatable examples herein.

1. Petitioner's Prior Drug Convictions

The district court failed to give proper consideration to the fact that counsel ineffectively failed to object or move for a mistrial when the prosecutor knowingly elicited false testimony that Allen had been convicted several times for selling drugs,

and again failed to object or move for a mistrial when the prosecutor argued to the jury that they had "heard about the Defendant's time in prison for previous drug sale convictions." Ex. A-22 p. 1891-92, 1930. Allen only had ***one*** prior conviction for the sale of drugs almost fourteen years prior to trial, and it should not have even been disclosed to the jury. Ex. A-5 p. 881-82; *see also Poole v. State*, 997 So. 2d 382, 392 (Fla. 2008). These incidents were not isolated like the FSC claimed, which the district court reproduced in its order. (Doc. 22 at 42-43).

In addition, the district court noted that counsel testified that "he strategically presented evidence regarding drug use and the culture of the neighborhood and how it affected her negatively." (Doc. 22 at 43, citing Ex. M p. 2828-29). This is an improper *post hoc* rationalization because, at the time of trial, counsel clearly did not intend to present such information to the jury as a mitigator because that was not one of the only ***two*** mitigators counsel requested in his sentencing memorandum. *Harrington v. Richter*, 562 U.S. 86, 109 (2011) (citing *Wiggins*, 539 U.S. at 526-27) ("courts may not indulge '*post hoc* rationalization' for counsel's decisionmaking that contradicts the available evidence of counsel's actions"); Ex. A-6 p. 906-24. Further, it cannot be a reasonable strategy for counsel to allow the prosecutor to present false testimony that painted Allen in a worse light. Allen submits that reasonable jurists would find that counsel did not have any reasonable strategy for allowing the

prosecutor to present false testimony that placed a nonstatutory aggravator before the jury and find that Allen was prejudiced under *Strickland*.

2. Petitioner's Future Dangerousness

Although the district court conceded that Allen's jury heard two mentions of future dangerousness, which is improper under Florida law, the district court held that counsel was not ineffective. (Doc. 22 at 46-47). The district court's statement that "[n]either the prosecutor nor the state court relied on or used the testimony regarding her alleged future dangerousness as an aggravating factor" is misplaced. *Id*. Regardless of whether that was their intention, Allen's jury heard the inflammatory exchange regarding future dangerousness, counsel failed to object, and no curative instruction was given. The jury was encouraged to take into account a matter that was not a legitimate sentencing consideration. *Johnson v. Wainwright*, 778 F.2d 623, 630 (11th Cir. 1985). Consequently, Allen was prejudiced by her jury improperly being led to believe she would be a danger to society including prison guards, which resulted in a death sentence. The district court's ruling is debatable among jurists of reason.

7. Use of the Term Waterboarding Torture

The district court found that Allen did not show prejudice because "The Court cannot say that but for the prosecutor's use of the term 'waterboarding torture' the

result of the penalty phase would have been different." (Doc. 22 at 53). The standard that the district court used is erroneous. Under clearly established Federal law, Allen must only establish 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. Accordingly, Allen submits that under the proper standard, reasonable jurists would find, if counsel had objected to the prosecutor's improper comments, there is a reasonable probability that she would not have received a death sentence.

At the very least, reasonable jurists could conclude the prosecutorial misconduct issues presented in this ground "are adequate to deserve encouragement to proceed further." *Miller-El*, 537 U.S. at 327. Allen has made a substantial showing of the denial of her Sixth Amendment rights and a COA should issue.

GROUND FIVE

ALLEN RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT HER TRIAL WHEN COUNSEL FAILED TO PRESENT AVAILABLE EXPERT TESTIMONY THAT CORROBORATED THE ORIGINAL MEDICAL EXAMINER'S FINDINGS AND REFUTED DR. QAISER'S TESTIMONY

Allen alleged in Ground Five of her habeas petition and memorandum of law that she received ineffective assistance when counsel failed to present expert testimony to corroborate the findings of Robert Whitmore, M.D. ("Dr. Whitmore"),

the original medical examiner who actually performed the autopsy, and which also refuted Dr. Qaiser's testimony. (Doc. 1 at 46-55; Doc. 13 at 61-71; Doc. 21 at 32-37). This ground was addressed at pages 57-62 of the district court's order. (Doc. 22).

Once counsel became aware that Dr. Qaiser's opinion was converse to both Dr. Whitmore and the autopsy report, it was egregiously ineffective to fail to present the testimony of an independent forensic pathologist such as Daniel J. Spitz, M.D. ("Dr. Spitz"). Counsel testified at the postconviction evidentiary hearing that Dr. Qaiser's testimony was a major portion of the State's case, and he was shocked at Dr. Qaiser's "report since it was diametrically opposed to Dr. Whitmore's." Ex. M p. 2801-02. Counsel stated that Dr. Qaiser changed the autopsy findings and found ligature marks, which corroborated co-defendant-turned-State-witness Quintin Allen's ("Quintin") testimony. Ex. M p. 2803. Worse yet, counsel conceded that it would have been important to establish that no evidence of ligature marks existed, and counsel was aware that he would not be able to effectively challenge Dr. Qaiser's testimony himself. Ex. M p. 2804, 2807-08.

Notably, just like Dr. Whitmore, Dr. Spitz did not find ligature marks and he testified that ***Wenda Wright's "body does not show indicators or findings that would support a conclusion of ligature strangulation."*** Ex. M p. 2882, 3289-90,

3302. Dr. Spitz also refuted the other areas where Dr. Qaiser's testimony overreached, which undermined Quintin's testimony regarding the events surrounding Wright's death. If the jury heard Wright's injuries, or lack thereof, did not support Quintin's testimony of the events surrounding her death, ***all*** of his testimony would be called into question and discounted. The fact that Dr. Spitz's testimony undermines Quintin's credibility is incredibly important because, in both of its opinions, the FSC heavily relied on Quintin's testimony of the events surrounding Wright's death. *Allen*, 137 So. 3d 946; *Allen*, 261 So. 3d 1255. Accordingly, Allen was prejudiced in both phases of her trial because Wright's cause of death and the HAC aggravator were tied to Dr. Qaiser's and Quintin's brutal strangulation testimony, which Dr. Spitz's testimony refuted.

The district court found that counsel made a strategic decision to solely cross-examine Dr. Qaiser regarding the autopsy. (Doc. 22 at 61). However, Allen submits that counsel's strategy was not reasonable. The jury never saw the actual autopsy report from Dr. Whitmore or received any proper explanation regarding the fact that Wright may not have even been strangled. Allen was prejudiced by counsel's unreasonable decisions because there is a reasonable probability that the jury would have found her not guilty or guilty of a lesser charged offense, especially when taken together with the improper testimony and arguments detailed in Grounds Three and

Eight. At the very least, there is a reasonable probability that the jury would not have sentenced her to death.

Further, the district court found that there was no prejudice because "Petitioner has not shown that Dr. Spitz's testimony would have resulted in a different outcome at trial." (Doc. 22 at 62). Not only is the standard reflected here erroneous, but the district court is holding Allen to a higher standard and placing a greater burden upon her than that of the clearly established Federal law. 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. Allen submits that if counsel had called a forensic expert such as Dr. Spitz to testify at trial and challenge Dr. Qaiser's testimony, there was a reasonable probability that the outcome of Allen's guilt phase trial would have been different, but at the very least, there is a reasonable probability that Allen would not have received a death sentence. As the district court's interpretation of the law was incorrect, reasonable jurists could disagree and find that under the correct standard, Allen's claims should be granted. Reasonable jurists could also debate whether the FSC made an unreasonable determination of the facts in light of the state court record, and that this issue is adequate to deserve encouragement to proceed further. Allen has made a

substantial showing of the denial of a constitutional right, and this Court should grant a COA.

GROUNDS SIX AND SEVEN

ALLEN RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT HER TRIAL WHEN COUNSEL ELICITED DAMAGING FALSE TESTIMONY FROM QUINTIN ALLEN AND ALSO FAILED TO IMPEACH HIM WITH HIS PRIOR INCONSISTENT STATEMENTS

As Grounds Six and Seven were addressed together in the district court's order, they are addressed together here. (Doc. 22 at 62-67). Allen alleged in Ground Six of her habeas petition and memorandum of law that counsel was ineffective under *Strickland* by eliciting detrimental false testimony from co-defendant-turned-State-witness Quintin claiming that Allen poured chemicals ***in*** Wright's eyes and mouth when Quintin previously only said Allen poured substances ***on*** Wright. (Doc. 1 at 55-58; Doc. 13 at 71-75). Allen's counsel also deficiently elicited testimony on recross-examination that the substances were bleach, ammonia, nail polish remover, and hairspray when Quintin had already conceded that he could only identify rubbing alcohol (a less caustic and more mild liquid). Allen was prejudiced because the false testimony elicited made the alleged acts appear more HAC.

Similarly, in Ground Seven, Allen alleged that counsel was ineffective in failing to impeach Quintin with his prior inconsistent statements to Detective Gary

Boyer indicating that Allen ***did not*** pour bleach on Wright. (Doc. 1 at 58-61; Doc. 13 at 75-80; Doc. 21 at 37-39). If counsel had shown the jury that Quintin's story was inconsistent and if counsel did not elicit damaging false testimony, the jury would have discredited all of Quintin's testimony. Quintin's testimony provided the main support for the only two aggravators found in Allen's case. *See Allen*, 137 So. 3d at 963-64. Therefore, if the jury had been shown that Quintin was not a credible witness, insufficient aggravation would be present for Allen to even be ***eligible*** for the death penalty. Allen has been denied her Sixth Amendment rights and the resolution of these *Strickland* claims are debatable among jurists of reason.

Further, the district court found that "even taking Petitioner's allegation that counsel acted deficiently as true, Petitioner had not shown prejudice." (Doc. 22 at 66). The district court goes on to say that "Petitioner has not shown that but for counsel's actions, the result of the proceeding would have been different." *Id*. at 67. However, the district court is again holding Allen to a higher standard and placing a greater burden upon her than that of the clearly established Federal law. 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, reasonable jurists would apply the appropriate standard and could disagree with the district court's resolution of these

claims. *Miller-El*, 537 U.S. at 327. Allen has made a substantial showing of the denial of a constitutional right, and this Court should grant a COA.

GROUND EIGHT

ALLEN RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT HER TRIAL WHEN COUNSEL FAILED TO OBJECT TO DR. QAISER'S TESTIMONY THAT UNCONSCIOUS PEOPLE CAN FEEL PAIN

Allen alleged in Ground Eight of her habeas petition and memorandum of law that counsel provided ineffective assistance of counsel under *Strickland* by failing to object to or meaningfully refute Dr. Qaiser's testimony that unconscious people can feel the sensation of pain. (Doc. 1 at 62-64; Doc. 13 at 80-83; Doc. 21 at 39-40). This ground was addressed at pages 67-69 of the district court's order. (Doc. 22). At the postconviction evidentiary hearing, Dr. Spitz confirmed that Dr. Qaiser's assertion of feeling pain during unconsciousness is "completely at odds with mainstream medicine" and "[t]here is no more pain once an individual is unconscious." Ex. M p. 3311-12. The district court found that the "state court's denial of this claim was not contrary to or an unreasonable application of clearly established federal law." (Doc. 22 at 69). Allen submits that reasonable jurists could disagree and find that the FSC unreasonably applied *Strickland*.

The district court also failed to consider Allen's arguments under the Confrontation Clause of the Sixth Amendment which "guarantees a defendant the right to be confronted with the witnesses ***against him***." *Melendez-Diaz v. Massachusetts*, 557 U.S. 81 305, 313 (2009) (emphasis in original); *see also Crawford v. Washington*, 541 U.S. 36, 42 (2004). Dr. Qaiser testified that studies had been done to support unconscious people perceiving pain which made him a conduit for other individuals who were unable to be cross-examined regarding this false information. Ex. A-21 p. 1709-12; Ex. A-20 p. 1728. Consequently, Allen has made a substantial showing of the denial of a constitutional right. The district court's resolution of this claim is debatable among jurists of reason and the issue presented is adequate to deserve encouragement to proceed further. This Court should grant a COA.

GROUND NINE

ALLEN WAS DENIED DUE PROCESS AT HER TRIAL WHEN THE STATE KNOWINGLY ELICITED AND FAILED TO CORRECT FALSE TESTIMONY THAT ALLEN WAS CONVICTED SEVERAL TIMES FOR SELLING DRUGS

Allen alleged in Ground Nine of her habeas petition and memorandum of law that the State violated *Giglio v. United States*, 405 U.S. 150 (1972), *Napue v. Illinois,* 360 U.S. 264 (1959), and the Fourteenth Amendment by eliciting false testimony

during Hudson's cross-examination that Allen was convicted ***several*** times for selling drugs and the State allowed the false testimony to go uncorrected. (Doc. 1 at 65-66; Doc. 13 at 83-85; Doc. 21 at 40-42). *See also* Ex. A-22 p. 1891-92. This ground was addressed at pages 70-71 of the district court's order. (Doc. 22). Notably, Allen only had ***one*** conviction. Ex. A-5 p. 881. The prosecutorial misconduct was exacerbated by the State also arguing to the jury in closing argument, "You heard about the Defendant's time in prison for previous drug sale ***convictions***." Ex. A-22 p. 1930.

The district court held that the false evidence was not material and agreed with the FSC that the false evidence was harmless. (Doc. 22 at 71). Allen submits that this false testimony was material and had a substantial and injurious effect because the jury would consider Allen a career criminal drug dealer whose life did not deserve saving. *See Brecht v. Abrahamson*, 507 U.S. 619, 638 (1993). When in all actuality, Allen only had ***one*** conviction for selling drugs almost nine years prior to these charges and fourteen years prior to trial (and that conviction should not have even been disclosed). Allen contends that jurists of reason could debate that there is a reasonable likelihood that the false evidence could have affected the judgment. *Giglio*, 405 U.S. at 154. Under the "could have" standard, a new trial is required "unless the prosecution persuades the court that the false testimony was harmless

beyond a reasonable doubt." *Guzman v. Sec'y, Dept. of Corr.*, 663 F.3d 1336, 1348 (11th Cir. 2011) (quoting *Smith v. Sec'y, Dept. of Corr.*, 572 F.3d 1327, 1333 (11th Cir. 2009). Therefore, Allen has made a substantial showing of the denial of a constitutional right and the issues presented in this claim are also adequate to deserve encouragement to proceed further. A COA should issue.

GROUND TEN

ALLEN RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT HER PENALTY PHASE WHEN COUNSEL QUESTIONED MYRTLE HUDSON ABOUT ALLEN GROWING UP AROUND "DRUGS, THUGS, AND VIOLENCE" AND REINFORCING IT AS A THEME, EVEN THOUGH COUNSEL NEVER INTENDED TO PRESENT IT AS A MITIGATOR

Allen alleged in Ground Ten of her habeas petition and memorandum of law that counsel provided ineffective assistance of counsel under *Strickland* during the penalty phase of her trial by questioning Hudson about Allen growing up around "drugs, thugs, and violence" and reinforcing it as a theme, even though he did not intend to use it as a mitigating circumstance. (Doc. 1 at 67-68; Doc. 13 at 85-89; Doc. 21 at 42-43). The district court erroneously found that counsel was not deficient and claimed he made a strategic decision to question Hudson regarding the violent drug culture in the neighborhood. (Doc. 22 at 72-73, citing Ex. M p. 2828-30). This is an improper *post hoc* rationalization because it is clear that, at the time of trial,

counsel did not intend to present such information to the jury as a mitigator because that was not one of the two mitigators that counsel requested in his sentencing memorandum. *See Richter*, 562 U.S. at 109 (citing *Wiggins*, 539 U.S. at 526-27); Ex. A-6 p. 906-24.

Further, the trial court found the similar mitigating circumstance almost solely from evidence presented at the *Spencer*[1] hearing, which is a proceeding held outside the presence of the jury. Ex. A-6 p. 960-61. Not only was Allen's jury never privy to this evidence, but it is evident that whatever evidence counsel did inadvertently present during the *Spencer* hearing was so deficient that the trial court was only able to accord it "some weight".

Moreover, just because the trial court, with the added advantage of the *Spencer* hearing testimony, was able to find the mitigator, does not mean that the jury considered the inflammatory information they received to be mitigation. Allen's jury did not have the benefit of any testimony explaining how living in such an atmosphere affected her. Thus, there is a reasonable probability that the jurors instead found the derogatory theme to be a nonstatutory aggravator that inappropriately encouraged a vote for the death penalty.

[1] *Spencer v. State*, 615 So. 2d 688 (Fla. 1993).

Jurists of reason could disagree with the district court's resolution of this claim and find that counsel was ineffective under *Strickland* because he did not have any reasonable strategy at the time of trial and as a result, Allen was prejudiced. Reasonable jurists could also conclude this issue is adequate to deserve encouragement to proceed further. Allen has made a substantial showing of the denial of her Sixth Amendment rights, and this Court should grant a COA.

GROUND ELEVEN

ALLEN RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL FAILED TO CHALLENGE JUROR CARLL FOR CAUSE OR STRIKE HER PEREMPTORILY

Allen alleged in Ground Eleven of her habeas petition and memorandum of law that counsel was ineffective when failing to challenge Juror Carll for cause, and if not granted, strike her peremptorily. (Doc. 1 at 69-73; Doc. 13 at 89-93; Doc. 21 at 44-46). The district court denied the claim and stated that Allen did not show Juror Carll was actually biased against her. (Doc. 22 at 75-76). However, the district court again incorrectly accepted counsel's *post hoc* rationalization by pointing out that counsel claimed he was considering who was next in line and thought he had to keep Juror Carll in light of the remaining potential jurors. (Doc. 22 at 74); *see also Richter*, 562 U.S. at 109 (citing *Wiggins*, 539 U.S. at 526-27). Counsel could not have been

looking down the line, because the trial court had to bring in another panel of prospective jurors in order to select alternates, making it impossible for counsel to look down the line to a panel that would be arriving the next day. Ex. A-12 p. 473.

Further, the district court claims that Juror Carll was willing to follow the law, but she was never specifically asked if she could render her verdict solely upon the evidence presented and the instructions on the law given to her by the court. (Doc. 22 at 75); *see Barnhill v. State*, 834 So. 2d 836, 845 (Fla. 2002). An actually biased juror sat on Allen's jury. Accordingly, reasonable jurists could disagree with the district court and find that as a result of counsel's deficiencies, Allen was prejudiced because there is a reasonable probability that, but for counsel's errors, the result of her proceeding would be different. *Owen v. Florida Dept. of Corr.*, 686 F.3d 1181, 1195 (11th Cir. 2012). Allen submits that the likelihood of a different result is substantial. *See id*. Allen has made a substantial showing of the denial of her Sixth Amendment rights and a COA should issue.

GROUND TWELVE

THE TRIAL COURT VIOLATED *CHAMBERS V. MISSISSIPPI*, 410 U.S. 284 (1973) BY EXCLUDING JAMES MARTIN'S TESTIMONY THAT QUINTIN ALLEN ADMITTED TO CHOKING WENDA WRIGHT

Allen alleged in Ground Twelve of her habeas petition and memorandum of law that the trial court erred in excluding co-defendant James Martin's ("Martin") testimony that the other co-defendant turned State witness, Quintin, had admitted he choked Wright to death. (Doc. 1 at 73-76; Doc. 13 at 93-97). This ground was addressed at pages 76-78 of the district court's order. (Doc. 22).

The district court held that Allen has not shown that *Chambers* was applicable and that it was unclear whether Quintin's hearsay was reliable. (Doc. 22 at 78). Allen disagrees and submits that "the statement was sufficiently against the declarant's penal interest that a reasonable person in the declarant's position would not have made the statement unless believing it to be true." *Williamson v. United States*, 512 U.S. 594, 603-04 (1994). Martin's testimony regarding Quintin's statement was critical to Allen's defense and "bore persuasive assurances of trustworthiness." *Chambers*, 410 U.S. at 302; Ex. A-17 p. 1263-65. Quintin received a deal for his testimony and in turn blamed Wright's death on Allen. Quintin's confession to Martin supported Allen's defense that Quintin killed Wright when Allen left the

house to search for her purse. It is clear that a person in Quintin's position would not have made these inculpatory statements to Martin unless he believed it to be true. Notably, before the prosecutor cut Martin off during his proffer, Martin tried to bring attention to the fact that it was inconceivable for a woman of Allen's stature to inflict these injuries upon the 311-pound victim, which is further support that it was Quintin who killed Wright, not Allen.

The FSC's denial of this claim was an unreasonable application of clearly established federal law and the FSC also made an unreasonable determination of the facts in light of the state court record. Allen has made a substantial showing of the denial of her rights under *Chambers* and the Fourteenth Amendment and reasonable jurists could disagree with the district court's resolution of Allen's claim. A COA should issue.

GROUND FOURTEEN

ALLEN'S DEATH SENTENCE WAS IMPOSED UNCONSTITUTIONALLY BECAUSE THE TRIAL COURT FOUND IMPROPER AGGRAVATORS AND ALSO FAILED TO CONSIDER AND MINIMIZED MITIGATORS

Allen alleged in Ground Fourteen of her habeas petition and memorandum of law that the only two aggravators the trial court found were each impermissibly imposed: "during the course of a kidnapping" and "especially heinous, atrocious, or

cruel." (Doc. 1 at 79-88; Doc. 13 at 97-100; Doc. 21 at 46-47). Further, the trial court erred in minimizing Allen's unrebutted mitigation, including evidence of Allen's organic brain damage, and the trial court also improperly rejected two statutory mitigators. This ground was addressed at pages 79-86 of the district court's order. (Doc. 22).

The district court held that the aggravators were proper and that Allen did not demonstrate any error regarding the mitigators. (Doc. 22 at 81-86). Reasonable jurists could disagree with the district court's resolution of this claim, or conclude the issue is adequate to deserve encouragement to proceed further. For one example, Allen submits that the "during the course of a kidnapping" aggravator was an improper element to the aggravation scale because even if Quintin was credible, his testimony showed Wright's only confinement was merely incidental to the killing. *Brown v. Sanders*, 546 U.S. 212, 220 (2006); *Faison v. State*, 426 So. 2d 963, 966 (Fla. 1983).

In addition, reasonable jurists could debate that the FSC made an unreasonable determination of the facts, which the district court did not even address. For example, the trial court applied the wrong standard in weighing the aggravating and mitigating circumstances when sentencing Allen to death. Its reasoning was that "[t]here is no excuse or justification for the Defendant's conduct."

Ex. A-6 p. 962. If an "excuse" or "justification" for the killing existed, then that fact would totally ***prevent*** a conviction for first-degree murder. Instead, mitigation should have been treated in its proper manner "as a basis for a sentence less than death." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). Allen has made a substantial showing that her death sentence is constitutionally unsound under the Eighth and Fourteenth Amendments, and this Court should grant a COA.

CONCLUSION

Allen has made a substantial showing of the denial of a constitutional right, as required by 28 U.S.C. § 2253(c)(2). Allen has also specified the issues for which the required showing has been made. *Id*. Therefore, a COA should issue on each ground.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

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Dated: February 28, 2023

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of February, 2023, a true copy of the foregoing has been filed electronically with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to Doris Meacham, Assistant Attorney General, Office of the Attorney General, 444 Seabreeze Blvd, 5th Floor, Daytona Beach, Florida 32118, at Doris.Meacham@myfloridalegal.com and at CapApp@myfloridalegal.com.

I HEREBY FURTHER CERTIFY that a true copy of the foregoing was mailed to Margaret A. Allen, DOC# 699575, Lowell Correctional Institution, 11120 Northwest Gainesville Road, Ocala, Florida 34482-1479, a non-CM/ECF participant, on this 28th day of February, 2023.

/s/ Lisa M. Fusaro
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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

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

DEATH PENALTY CASE

Appendix D

Ms. Allen's Motion to Reconsider, Vacate, or Modify Order, dated May 2, 2023.

Appeal No. 23-10447-P

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MARGARET A. ALLEN,
Petitioner/Appellant,

v.

SECRETARY, DEPARTMENT
OF CORRECTIONS, et al.,
Respondents/Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
District Court No.: 6:19-cv-00296-PGB-DCI

MOTION TO RECONSIDER, VACATE, OR MODIFY ORDER

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Margaret A. Allen v. Secretary, Department of Corrections, et al.
Appeal No. 23-10447-P

In compliance with Fed. R. App. P. 26.1 and 11th Cir. R. 26.1, counsel for Petitioner/Appellant hereby certifies that the following trial judges, attorneys, persons, associations of persons, firms, partnerships, or corporations may have an interest in the outcome of this case or appeal:

Ahmed, Raheela (Former Attorney for Petitioner/Appellant)

Allen, Margaret A. (Petitioner/Appellant)

Bankowitz III, Frank J. (Attorney for Petitioner/Appellant at Trial)

Bausch, Russell K. (Former Assistant State Attorney)

Beatty, Gary D. (Former Assistant State Attorney)

Bondi, Pamela Jo (Former Attorney General State of Florida)

Byron, Honorable Paul G. (United States District Court Judge, Middle District of Florida)

Canady, Honorable Charles T. (Florida Supreme Court Justice)

DeLiberato, Maria (Former Acting Capital Collateral Regional Counsel – Middle Region)

Dixon, Ricky D. (Secretary, Florida Department of Corrections)

Driscoll, Jr., James (Former Attorney for Petitioner/Appellant)

Margaret A. Allen v. Secretary, Department of Corrections, et al.
Appeal No. 23-10447-P

Dugan, Honorable David W. (Former Circuit Court Judge, Eighteenth Judicial Circuit, in and for Brevard County)

Fusaro, Lisa M. f/k/a Bort, Lisa M. (Attorney for Petitioner/Appellant)

Inch, Mark S. (Former Secretary, Florida Department of Corrections)

Labarga, Honorable Jorge (Florida Supreme Court Justice)

Laurienzo, Morgan P. (Attorney for Petitioner/Appellant)

Lawson, Honorable Alan (Former Florida Supreme Court Justice)

Lewis, Honorable R. Fred (Former Florida Supreme Court Justice)

Maxwell III, Honorable George W. (Circuit Court Judge, Eighteenth Judicial Circuit, in and for Brevard County)

Meacham, Doris (Assistant Attorney General, Counsel for Respondents/Appellees)

Milosevic, Tamara (Former Assistant Attorney General)

Moody, Ashley (Attorney General State of Florida)

Neff, Reuben A. (Former Attorney for Petitioner/Appellant)

Pariente, Honorable Barbara J. (Former Florida Supreme Court Justice)

Perinetti, Maria C. (Former Attorney for Petitioner/Appellant)

Perry, Honorable James E.C. (Former Florida Supreme Court Justice)

Pinkard, Eric C. (Capital Collateral Regional Counsel - Middle Region)

Polston, Honorable Ricky (Florida Supreme Court Justice)

Popoola, Tayo (Former Assistant Attorney General)

Margaret A. Allen v. Secretary, Department of Corrections, et al.
Appeal No. 23-10447-P

Quince, Honorable Peggy (Former Florida Supreme Court Justice)

Riecks, James D. (Former Assistant Attorney General)

Singleton, Vivian (Former Assistant Attorney General)

Viggiano, Jr., James Vincent (Former Capital Collateral Regional Counsel - Middle Region)

Whittle, Nicholas A. (Former Attorney for Petitioner/Appellant)

Wright, Wenda (Deceased Victim)

Wulchak, James R. (Attorney for Petitioner/Appellant on Direct Appeal)

There are no corporations involved in this case.

MOTION TO RECONSIDER, VACATE, OR MODIFY ORDER DENYING APPLICATION FOR A CERTIFICATE OF APPEALABILITY

Petitioner/Appellant, Margaret A. Allen, by and through undersigned counsel, moves this Court to reconsider, vacate, or modify its April 12, 2023 Order (Doc. 10-1) and issue a certificate of appealability ("COA") pursuant to 28 U.S.C. § 2253 and 11th Cir. R. 22-1, and states as follows:

PROCEDURAL HISTORY

Allen is sentenced to death for capital murder in the State of Florida. Due to word constraints, the earlier procedural history can be found in her Application for a COA filed with this Court on February 28, 2023. (Doc. 8). A copy of which is attached as *Appendix A*. On April 12, 2023, this Court issued an Order denying Allen's application for a COA ("Order"). (Doc. 10-1). This motion follows.

INTRODUCTION

Allen submits that she has satisfied the requirements under 28 U.S.C. § 2253 and Fed. R. App. P. 22(b)(1) and this Court should reconsider its denial of a COA. A COA should issue if the petitioner makes "a substantial showing of the denial of a constitutional right." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). 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.

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 v. Davis*, 580 U.S. 100, 115 (2017) (quoting *id*. at 336). "In fact, the statute forbids it." *Miller-El*, 537 U.S. at 336. Similar to *Buck*, Allen submits that although this Court "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 the Supreme 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.

Allen respectfully requests that this Court reconsider its denial of a COA without deciding her case on the merits and grant her a COA.

Further, the gravity of this matter is of utmost importance and Allen's pleading needs to be considered with the appropriate lens. Determination of whether to grant Allen a COA is a life-or-death question. Appellate review is especially warranted when a petitioner, like Allen, has been sentenced to death. In denying a COA, this Court has failed to properly consider and take into account the severity of 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 . . ."). "[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," this Court must reconsider its denial of a COA under the lower burden afforded to individuals sentenced to death. *Nelson v. Davis*, 952 F.3d 651, 658 (5th Cir. 2020). Accordingly, Allen respectfully requests that this Court properly

consider the nature of her sentence and resolve any doubt as to whether to grant a COA in her favor. A COA should issue.

Allen continues to seek a COA on all grounds of her petition for writ of habeas corpus and requests that this Court reconsider. Although Allen submits that she has made a substantial showing of the denial of a constitutional right in each ground and that each ground is debatable among jurists of reason, she will only discuss some of the most compelling points for reconsideration due to the motion word limit. As Allen is unable to reiterate all of the facts and arguments of each ground herein, she respectfully requests that this Court reconsider granting her a COA based on this motion as well as her initial Application for a COA which is attached as *Appendix A*. Allen does not abandon any of the grounds from her initial application solely due their nonmention here. Allen will also provide further detail regarding several statements this Court enumerated in its Order.

GROUND ONE

Allen alleged in Ground One that her death sentence is unconstitutional in light of *Hurst v. Florida*, 577 U.S. 92 (2016), *Caldwell v. Mississippi*, 472 U.S. 320, 341 (1985), and the Sixth, Eighth, and Fourteenth Amendments. (Doc. 1 p.6-11; Doc. 13 p.4-13; Doc. 21 p.2-6; Doc. 22 p.13-16).

This Court states that "Allen does not explain why reasonable jurists may debate any issue of federal law regarding her *Caldwell* claim." Order p.10. However, Allen has explained that reasonable jurists may debate her rights were violated under federal law and the Constitution. Allen has made a substantial showing of the denial of a constitutional right. As support, she explicitly detailed that her sentencing decision "does not meet the standard of reliability that the Eighth Amendment requires" because her jury's sense of responsibility for determining the appropriateness of a death sentence was impermissibly minimized. *Caldwell*, 472 U.S. at 341. The Supreme Court has held that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Id*. at 328-29.

The district court fails to consider Allen's case is different than most because the trial court also made extrajudicial statements that minimized the jury's role in violation of *Caldwell*. (Doc. 22 p.16). The trial court erroneously instructed the venire: "You do understand that ***nobody*** will impose the sentence but ***me***. Although I'm going to give great weight to your recommendation, it is ***not*** controlling. ***I can fly in the face of your recommendation or I can follow your recommendation, with some qualifications***." Ex. A-10 p.157. The trial court's instructions incorrectly

express that the judge was the only decisionmaker considering Allen's sentence and did not have to follow the jury's recommendation. Allen's death sentence "does not meet the standard of reliability that the Eighth Amendment requires," because her jury did not feel the gravity or weight of their decision. *Caldwell*, 472 U.S. at 341. Allen has made a substantial showing that she was sentenced to death in violation of *Hurst*, *Caldwell*, and the Sixth, Eighth, and Fourteenth Amendments. This Court should reconsider and grant a COA.

GROUND TWO

Allen alleged in Ground Two that she received ineffective assistance of counsel regarding the mitigation presented during her penalty phase. (Doc. 1 p.12-31; Doc. 13 p.13-38; Doc. 21 p.6-18; Doc. 22 p.16-36). The main areas where counsel was ineffective include: 1) failure to conduct a sufficient investigation into Allen's background, including failure to interview and present mitigation witnesses; 2) failure to present evidence of Allen's sexual abuse and childhood physical abuse; 3) failure to conduct a reasonable mental health investigation and failure to present evidence that Allen suffers from Posttraumatic Stress Disorder ("PTSD"); and 4) failure to acquire records such as police reports.

This Court rightly noticed that "Allen devotes most of her application to her claim that her counsel was ineffective for failing to adequately investigate and

present mitigating evidence during the penalty phase." Order p.10. Allen was obligated to spend the majority of her application (and prior briefing in the lower courts) on this claim because counsel missed an abundance of significant mitigation. Worse yet, most of this mitigation would have been easily found if trial counsel had completed even a cursory investigation, let alone the investigation that Allen was entitled to under *Strickland* and the Sixth Amendment. *See Porter v. McCollum*, 558 U.S. 30, 42 (2009). Reasonable jurists could disagree with the district court's resolution and conclude that her rights were violated under federal law and the Constitution. Allen has made a substantial showing of the denial of a constitutional right, and out of all the claims detailed, this claim merits granting a COA most.

Counsel's egregiously 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); AM. BAR ASS'N, GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES (rev. ed. 2003). Counsel, a solo practitioner, tried both phases of Allen's trial himself and failed to seek assistance from a mitigation specialist or investigator. Ex. M p.2790, 2835. Counsel had ample time to investigate mitigation but ignored all the "red flags" and failed to investigate further. *See Wiggins*, 539 U.S. at 527; *Porter*, 558 U.S. at 40. Allen did not receive

the level of representation guaranteed under *Strickland* and the Sixth Amendment because the jury was not privy to critical mitigation regarding her life and individual characteristics. The mitigation counsel presented was abhorrently incomplete. *See Andrus v. Texas*, 140 S. Ct. 1875, 1882 (2020).

The district court incorrectly claims the mitigation presented in postconviction was cumulative. (Doc. 22 p.32-33, 35). The most compelling eyewitness mitigation uncovered in postconviction was ***never*** presented to Allen's jury or trial judge. ***None*** of the abuse Allen suffered as a child at the hands of her mother and grandfather during her formative years was heard at trial. Barbara Ann Capers ("Capers") witnessed Allen being beaten by her mother almost daily with her hands, fists, belts, and sticks. Ex. M p.2639-40, 2663, 2678-79. Allen's mother beat her so badly that Capers called the police. Ex. M p.2640. Myrtle Hudson witnessed Allen's mother beat Allen with a belt and grab Allen and push her head under the bathwater and hold her head underwater. Ex. M p.2729-30. Allen's grandfather also perpetually abused Allen and the other children. He lined up the boys and girls naked, including Capers and Allen, and went down the row beating the children with oak switches until they bled. Ex. M p.2649, 2679. The district court's decision is debatable among jurists of reason because ***none*** of this horrific childhood abuse was mentioned at Allen's trial.

The district court also stated: "Dr. Gebel noted that Petitioner also had a history of sexual assault", but nothing definitive was presented to Allen's jury. (Doc. 22 p.29). Michael Gebel, M.D. ("Dr. Gebel") listed various medical records and merely said: "A possible sexual assault in September of 1996." Ex. A-21 p.1745. Postconviction testimony was presented that Allen was sexually abused by multiple men (including her brother, grandfather, grandfather's brother ("Uncle Roy"), and at least one other man) and Capers personally witnessed Uncle Roy touching Allen in private places, grabbing Allen's breasts, and kissing Allen on the mouth. Ex. M p.2642-48. When young Allen's mother went to jail, Allen stayed with her grandfather, and Allen told Capers he was sexually molesting her. Ex. M p.2642-43, 2665. Uncle Roy also sexually assaulted Allen on weekends while visiting Allen's grandfather. Ex. M p.2645. The men who should have made Allen feel safe, were the very men perpetrating this sexual assault upon her.

Allen's jury never heard the childhood brutality Allen suffered or the torturous sexual abuse she repeatedly faced. Therefore, the Florida Supreme Court's ("FSC") findings are unquestionably an unreasonable determination of the facts and reasonable jurists could debate that Allen's rights under *Strickland* and the Sixth Amendment were violated.

Further, Allen's jury only heard short references to the domestic violence Allen suffered. Multiple postconviction eyewitnesses testified to the horrifying domestic violence Allen suffered from at least three men. Ex. M p.2652-55, 2684-85, 2770-73. Allen's ex-boyfriend, Brian Watkins, testified to the voluminous amount of physical violence and mental abuse he perpetrated on Allen, including beating her while pregnant and hitting her in the head with a hammer inside Winn-Dixie. Ex. M p.2602-12. Jurists of reason could disagree with the district court's characterization of this evidence as cumulative.

Counsel was also ineffective in failing to ensure a reasonably competent mental health evaluation. Consequently, no one at trial was aware Allen suffered from PTSD. Worse yet, the factfinders were never informed how the effects of Allen's lifetime of traumatic abuse interacted with her brain injuries 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." Allen's PTSD and factors such as her environment left her vulnerable to emotional dysregulation when faced with losing her purse. Ex. M p.2995-96. The longer she could not find her purse, the more frustrated she became, and as her emotional dysregulation escalated, she was unable to handle the stressor without overreacting. Ex. M p.3027-28. Allen was unable to think logically and rationally. Ex. M p.2972.

Instead, the district court focused on counsel presenting two experts during Allen's penalty phase. (Doc. 22 p.32). However, counsel was so ineffective that neither expert was asked for an opinion on statutory mitigating circumstances. *See Allen v. State*, 137 So. 3d 946, 965-66 (Fla. 2013). Allen was leery of participating in Dr. Gebel's evaluation because a guard was in the room, but counsel never sent Dr. Gebel back for another interview or an evaluation for statutory mitigation. Ex. A-21 p.1745; Ex. M p.2861-62. If counsel was effective, Dr. Gebel would have found weighty statutory mitigation including Allen's PTSD diagnosis.

The district court also places undue emphasis on Michael Gamache, Ph.D.'s ("Dr. Gamache") testimony and claims that he refuted the PTSD diagnosis. (Doc. 22 p.25, 32-33). However, ***Dr. Gamache did not evaluate Allen and has never even spoken with her, her family, or any other witnesses***. Ex. M p.3174, 3247, 3273. Dr. Gamache also failed to follow his own best practices. Ex. M p.3211, 3235-36, 3242-43. Affording Dr. Gamache's testimony more weight than doctors who actually met with Allen and evaluated her is patently unreasonable.

Allen submits that she has also made a substantial showing of the denial of her constitutional rights under the Eighth and Fourteenth Amendments. (Doc. 13 p.35-38). Allen's right to equal protection of laws under the Fourteenth Amendment was violated because the law was not applied consistently to similarly situated

capital defendants who were granted relief. (Doc. 13 p.31-33). Allen's Eighth Amendment rights were violated when she was arbitrarily and discriminatorily denied relief and other capital defendants were granted relief under similar or worse facts. This issue deserves encouragement to proceed further to consider the individualized characteristics of Allen and her case. *See Woodson v. North Carolina*, 428 U.S. 280, 304 (1976).

This Court states the FSC and district court held: "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." Order p.11 (citing *Allen v. State*, 261 So. 3d 1255, 1272-75 (Fla. 2019)); Doc. 22 p.34. That is a mischaracterization of Allen's case because there is not substantial evidence of aggravators. Only ***two*** aggravators were found in Allen's case. As Allen needed one aggravator to be eligible for the death penalty, it is apparent that her case is not the most aggravated and least mitigated. Consequently, if Allen's weighty mitigation is considered in conjunction with her other claims that undermined the aggravators, then the balance is much different. For example, both aggravators are undermined due to Quintin Allen's ("Quintin") biased testimony lacking credibility. This Court has agreed that Quintin's testimony was inconsistent and that he lied on the stand. Order p.17. Also, "the capital felony was especially heinous, atrocious, or cruel"

("HAC") aggravator is unsupported due to Daniel J. Spitz, M.D.'s ("Dr. Spitz") postconviction testimony and Sajid Qaiser, M.D.'s ("Dr. Qaiser") lack of credibility. Notably, Quintin and Dr. Qaiser's testimony was the sole evidence against Allen. Allen has made a substantial showing of the violation of her rights under *Strickland* and the Sixth, Eighth, and Fourteenth Amendments and a reasonable jurist would find the district court's determination debatable.

Allen respectfully requests that this Court grant her a COA on this claim. This Court 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 have as bad, or worse, facts as Allen's case and either as much, or less, mitigation uncovered in postconviction. Therefore, it is likely that reasonable jurists would find the district court's ruling debatable and conclude that Allen's claim under *Strickland* and the Sixth Amendment deserves encouragement to proceed further. Allen respectfully submits that if a panel of this Court had considered her Application for COA, that she would have at least been granted a

COA on this claim. *See infra* p21-23. Allen moves for reconsideration and requests this Court to issue a COA.

GROUND THREE

Allen alleged in Ground Three that counsel provided ineffective assistance under *Strickland* during the guilt phase by failing to object to numerous improper comments and misrepresentations in the State's guilt phase closing arguments. (Doc. 1 p.31-36; Doc. 13 p.38-45; Doc. 21 p.18-21; Doc. 22 p.36-42).

The most prejudicial example is the improper comments related to Wenda Wright's ("Wright") cause of death and the HAC aggravator. The district court claimed the prosecutor's comments misstating Dr. Qaiser's testimony were not prejudicial because "[t]he trial court instructed the jury that the statements were not evidence." (Doc. 22 p.40). The district court failed to consider the prosecutor's guilt phase misconduct also prejudiced her in the penalty phase because the comments and misrepresentations related to the HAC aggravator. Ex. A-20 p.1578-79, 1581, 1629-30. Allen's jury was never instructed during the penalty phase that "what the attorneys say is not evidence or your instruction on the law."

This Court points out that the prosecutor's misstatements were in the guilt phase and an instruction was given during that phase. Order p.13. However, this Court goes on to state that "[j]urors are presumed to follow the court's instructions."

Order p.13 (citing *Brown v. Jones*, 255 F.3d 1273, 1280 (11th Cir. 2001)). Consequently, Allen submits for reconsideration the fact that the jury was instructed prior to penalty phase deliberations: "[Y]ou can take into consideration what you have learned in the guilt phase and the penalty phase." Ex. A-22 p.1976. The trial court deviated from standard penalty phase jury instructions and led the jury to believe anything they learned during guilt phase, including closing arguments, could be considered. Ex. A-5 p.842.

Allen was prejudiced in both phases of her trial. The outcome of Allen's guilt phase is undermined because strangulation may not have occurred. *See* Ex. M p.1575-1604. No expert testified to explain Dr. Qaiser's inconsistencies with the original medical examiner, Robert Whitmore, M.D.'s ("Dr. Whitmore") report, or to show strangulation was unlikely. Allen was also prejudiced in the penalty phase because the misleading remarks that Wright was brutally strangled causing internal injury and burst eye blood vessels is inflammatory and supports HAC. Allen has made a substantial showing that she has been denied her rights under *Strickland* and the Sixth Amendment. This Court should reconsider and grant a COA.

GROUND FIVE

Allen alleged in Ground Five that she received ineffective assistance when counsel failed to present expert testimony to corroborate the findings of Dr.

Whitmore, the original medical examiner who performed the autopsy, and which also refuted Dr. Qaiser's testimony. (Doc. 1 p.46-55; Doc. 13 p.61-71; Doc. 21 p.32-37; Doc. 22 p.57-62).

This Court and the district court focuses on whether evidence was brought out on cross-examination, however counsel conceded the importance of establishing no evidence of ligature marks exist, and counsel testified he was aware he was unable to effectively challenge Dr. Qaiser's testimony himself. Order p.16; Doc. 22 p.61; Ex. M p.2804, 2807-08. Counsel knew Dr. Qaiser's testimony was vital to the State's case because he found ligature marks that Dr. Whitmore had not. Ex. M p.2801-03. Therefore, counsel was ineffective in failing to present testimony of an independent forensic pathologist such as Dr. Spitz.

The jury never saw the autopsy report or received any explanation that Wright may not have been strangled. If the jury heard Wright's injuries, or lack thereof, did not support Quintin's testimony of the events surrounding her death, ***all*** of his testimony would be called into question and discounted. The fact that Dr. Spitz's testimony undermines Quintin's credibility is critical because all courts have heavily relied on Quintin's testimony of the events surrounding Wright's death. *Allen*, 137 So. 3d 946; *Allen*, 261 So. 3d 1255.

Especially when considered with the misconduct detailed in Grounds Three and Eight, Allen was prejudiced in both phases of her trial. Wright's cause of death and the HAC aggravator were solely proven by Dr. Qaiser's and Quintin's brutal strangulation testimony, which Dr. Spitz's testimony refuted. Allen has made a substantial showing of the denial of her rights under *Strickland* and the Sixth Amendment, and this Court should reconsider and grant a COA.

GROUND NINE

Allen alleged in Ground Nine that the State violated *Giglio v. United States*, 405 U.S. 150 (1972), *Napue v. Illinois,* 360 U.S. 264 (1959), and the Fourteenth Amendment by eliciting false testimony that Allen was convicted ***several*** times for selling drugs (when she only had ***one*** conviction) and the State allowed the false testimony to go uncorrected. (Doc. 1 p.65-66; Doc. 13 p.83-85; Doc. 21 p.40-42; Doc. 22 p.70-71; Ex. A-22 p.1891-92).

This Court stated that federal courts are without power to review Allen's claim because it was denied on an adequate and independent state ground. Order p.21. However, like in Allen's case, in *Rogers v. McMullen*, 673 F.2d 1185, 1188 (11th Cir. 1982), the FSC also reached the merits of the constitutional issue and the *Rogers* court held: where "the state courts have not relied exclusively upon (the appellant's) procedural default, *Wainwright v. Sykes* [433 U.S. 72 (1977)] does not prevent

federal habeas review." (quoting *Thompson v. Estelle*, 642 F.2d 996 (5th Cir. 1981)). "Because the Florida Supreme Court reached the constitutional issue, we are not foreclosed from addressing the merits by *Wainwright v. Sykes*." *Id*. Allen requests that this Court reconsider and grant her a COA.

GROUND ELEVEN

Allen alleged in Ground Eleven that counsel was ineffective when failing to challenge Juror Carll ("Carll") for cause, and if not granted, strike her peremptorily. (Doc. 1 p.69-73; Doc. 13 p.89-93; Doc. 21 p.44-46). The district court denied the claim and stated that Allen did not show Carll was actually biased against her. (Doc. 22 p.75-76).

This Court asserted Allen did not detail what type of bias she alleges. Order p.20. For clarification, Carll stated she was "pro death" and if the defendant committed a crime and a person died during it, they should be recommended for the death penalty to give their life for the life that was taken. Ex. A-11 p.220, 249-50; Doc. 13 p.89-92. When trying to qualify her answer, she still admitted she would recommend the death penalty for anyone who "had a hand in the death." Ex. A-11 p.221. Her statements to recommend death in identical circumstances to what the State was alleging in Allen's case shows Carll was actually biased and counsel was deficient in failing to strike her for cause. At the very least, counsel should have

struck her peremptorily. An actually biased juror sat on Allen's jury which substantially shows the denial of her Sixth Amendment rights. This Court should reconsider and grant a COA.

GROUND TWELVE

Allen alleged in Ground Twelve that the trial court erred in excluding co-defendant James Martin's ("Martin") testimony that the other co-defendant-turned-State-witness, Quintin, had admitted choking Wright to death. (Doc. 1 p.73-76; Doc. 13 p.93-97; Doc. 22 p.76-78).

The district court held Allen has not shown *Chambers* was applicable and it was unclear whether Quintin's hearsay was reliable. (Doc. 22 p.78). Allen disagrees and submits that "the statement was sufficiently against the declarant's penal interest that a reasonable person in the declarant's position would not have made the statement unless believing it to be true." *Williamson v. United States*, 512 U.S. 594, 603-04 (1994). Martin's testimony regarding Quintin's statement was critical to Allen's defense and "bore persuasive assurances of trustworthiness." *Chambers*, 410 U.S. at 302; Ex. A-17 p.1263-65. Quintin received a plea deal for his testimony and in turn blamed Wright's death on Allen. Notably, Quintin was the sole unsubstantiated evidence claiming Allen was responsible for Wright's death. Quintin's confession to Martin instead supported Allen's defense that Quintin killed

Wright when Allen left the house to search for her purse. It is clear that a person in Quintin's position would not have made these inculpatory statements to Martin unless he believed it to be true. Further, before the prosecutor cut Martin off during his proffer, Martin tried to bring attention to the fact that it was inconceivable for a woman of Allen's stature to inflict these injuries upon the 311-pound victim, which is further support that it was Quintin who killed Wright, not Allen.

This Court stated that Allen was not prevented from calling Quintin to testify. Order p.22. Allen submits additional clarification. Although Quintin had testified at trial, he was unavailable in terms of this statement because the statement was clearly against his penal interest and Quintin has a Fifth Amendment right against self-incrimination. Therefore, it is reasonably likely that Quintin would have invoked his right if confronted with this statement, which renders him unavailable based on Fla. Stat. § 90.804 and Fed. R. Evid. 804. *See United States v. Salerno*, 505 U.S. 317, 321 (1992). Therefore, Allen has made a substantial showing of the denial of her rights under *Chambers* and the Fourteenth Amendment. This Court should reconsider and grant a COA.

MOTION FOR APPLICATION FOR COA TO BE CONSIDERED BY A PANEL OF THIS COURT OR EN BANC

Although Allen is aware of this Court's rule that the denial of a COA may not be the subject of a petition for panel rehearing or a petition for rehearing en banc (11th Cir. R. 22-1(c)), she respectfully requests that this Court reconsider that Eleventh Circuit Rule and allow her Application for a COA (*Appendix A*) to be heard by a panel of this Court or allow her to petition for rehearing en banc.

Allen submits that the first Internal Operating Procedure under Fed. R. App. P. 22 contemplates that it is possible for this Court to allow a panel to consider her Application for a COA or allow it to be heard en banc, because it states "[c]onsistent with FRAP 2, the court may suspend the provisions of 11th Cir. R. 22-1(c) and order proceedings in accordance with the court's direction." Fed. R. App. P. 2 states: "On its own or a party's motion, a court of appeals may—to expedite its decision or for other good cause—suspend any provision of these rules in a particular case and order proceedings as it directs, except as otherwise provided in Rule 26(b)." 11th Cir. R. 2-1 also confirms that "[i]n lieu of the procedures described in the Eleventh Circuit Rules and Internal Operating Procedures, the court may take such other or different action as it deems appropriate."

As further persuasive authority, in this posture, Courts of Appeals in other circuits do entertain petitions for panel rehearing and petitions for rehearing en banc. *See Harper v. Lumpkin*, 64 F.4th 684 (5th Cir. 2023) ("The petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (Fed. R. App. P. 35 and 5th Cir. R. 35), the petition for rehearing en banc is DENIED."); *see also Buck v. Stephens*, 630 Fed. Appx. 251, 251 (5th Cir. 2015); *Roper v. Weaver*, 550 U.S. 598, 601, 604 (2007) (footnote and dissent show availability of rehearing en banc in the Court of Appeals for the Eighth Circuit).

As "the denial of a certificate concludes the appeal; it has the same *effect* as an adverse decision on the merits. A request for reconsideration therefore should be treated the same as a petition for rehearing, no matter what caption it bears." *Thomas v. United States*, 328 F.3d 305, 308 (7th Cir. 2003) (emphasis in original). An order such as Allen's, "that terminates the appeal, and may be reviewed by the Supreme Court, also should be eligible for review by the full court of appeals. Occasionally the denial of a request for a certificate of appealability will present the sort of legal question that justifies rehearing en banc; that option should be available." *Id*. Accordingly, in the Court of Appeals for the Seventh Circuit, Thomas's petition was distributed to all active judges. *Id*.

Similar to what Allen is requesting, in the Court of Appeals for the Sixth Circuit, the petitioner was allowed to "petition [] the court to rehear en banc an order denying him a certificate of appealability." *Bell v. Jones*, 561 F.3d 655, 656 (6th Cir. 2009). The matter was referred to a "panel of three judges, two of whom are senior judges, on which the original deciding judge does not sit." *Id.* Lastly, the matter was referred "to all of the active eligible members of the court for further proceedings on the suggestion for en banc rehearing." *Id.*

Accordingly, pursuant to Fed. R. App. P. 2 and 11th Cir. R. 2-1, Allen moves for this Court to allow a panel of three judges to consider her Application for a COA. (*Appendix A*). In the alternative, she moves to allow her to petition for rehearing en banc. Allen submits that good cause is shown due to her case being a literal matter of life or death and for this Court not to consider her poignant claims denying her constitutional rights would constitute an injustice.

CONCLUSION

Allen submits that she has made a substantial showing of the denial of a constitutional right, as required by 28 U.S.C. § 2253(c)(2). Therefore, Allen respectfully requests that this Court reconsider, vacate, or modify its Order denying her application for COA and grant her a COA.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

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Dated: May 2, 2023

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of May, 2023, a true copy of the foregoing has been filed electronically with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to Doris Meacham, Assistant Attorney General, Office of the Attorney General, 444 Seabreeze Blvd, 5th Floor, Daytona Beach, Florida 32118, at Doris.Meacham@myfloridalegal.com and at CapApp@myfloridalegal.com.

I HEREBY FURTHER CERTIFY that a true copy of the foregoing was mailed to Margaret A. Allen, DOC# 699575, Lowell Correctional Institution, 11120 Northwest Gainesville Road, Ocala, Florida 34482-1479, a non-CM/ECF participant, on this 2nd day of May, 2023.

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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

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

DEATH PENALTY CASE

Appendix E

United States District Court for the Middle District of Florida Order Denying Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus, dated March 30, 2022.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

MARGARET A. ALLEN,

Petitioner,

v. Case No. 6:19-cv-296-PGB-DCI

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

Respondents.
_____/

ORDER

This cause is before the Court on a Petition for Writ of Habeas Corpus ("Petition," Doc. 1) filed pursuant to 28 U.S.C. § 2254. Thereafter, Respondents filed a Response to the Petition ("Response," Doc. 20) in accordance with this Court's instructions. Petitioner filed a Reply to the Response ("Reply," Doc. 21) Petitioner alleges fourteen claims for relief. For the following reasons, the Petition is denied.

I. STATEMENT OF THE FACTS

The facts adduced at trial, as set forth by the Supreme Court of Florida, are as follows:

> On March 8, 2005, Margaret A. Allen was indicted for the first-degree murder and kidnapping of Wenda Wright. Wright's domestic

partner, Johnny Dublin, last saw Wright leaving his home with Allen. Wright never returned home. A few days after Wright went missing, Quintin Allen, Margaret Allen's co-defendant and the State's main witness turned himself in to the police and told the police about the events that led up to Wright's death. Quintin also took the police to the location in which he, Allen, and James Martin buried Wright's body.

Guilt Phase

A jury trial commenced on September 13, 2010. Johnny Dublin testified for the State. Dublin testified that on the day Wright went missing, Allen came to Dublin and Wright's house and whispered something into Wright's ear. In response, Wright and Allen left the house together. A little while later, Allen returned to Dublin's house and told Dublin that Wright stole about $2000 of Allen's money and Allen asked Dublin if she could search his house. Dublin obliged and Allen searched Dublin' house. Dublin testified that he noticed that Allen had scratches on her when she came back to his house. Dublin asked Allen where Wright was, and Allen responded that she was still at Allen's house. Dublin testified that the next day, Allen came back to his house and asked him where Wright was. Dublin testified that Quintin was with Allen.

Quintin Allen testified for the State. He acknowledged that he was serving a fifteen-year sentence of incarceration followed by five years' probation for his guilty plea for second-degree murder based on his involvement in Wright's murder. Quintin testified that he was at Allen's house on the day of the murder when Allen noticed that her purse was missing. Allen left her house and told Quintin to stay with her children. Allen returned to her house with Wright and asked Quintin to come inside. Allen told Quintin that Wright must have stolen Allen's purse because Wright was the only person at Allen's house before the purse went missing. Allen and Quintin searched for the purse. Allen left the house again and told Quintin not to let Wright leave if she tried. At one point while Allen was gone, Wright tried to leave; Quintin told Wright that Allen wanted her to stay, and Wright obliged.

Upon Allen's return, Quintin plaited Allen's hair. Quintin testified that at one point Wright started crying and begged Allen to let her go home. Wright attempted to leave Allen's house and Allen hit Wright on the head; Wright fell to the ground. Quintin testified that Allen had a gun and told him that if he did not help her with Wright, she would shoot him, so Quintin held Wright down on the floor. While he held Wright down, Allen found chemicals including bleach, fingernail polish remover, rubbing alcohol and hair spritz and poured them all onto Wright's face. At one point, one of Allen's children walked into the room in which this was taking place, and Allen told the child to rip off a piece of duct tape for Allen. Allen attempted to put the duct tape over Wright's mouth, but because Wright's face was wet from the chemicals that were poured on her face, the duct tape would not stick to her skin. Allen retrieved belts from her closet and beat Wright with them. Quintin then tied Wright's feet together with one of the belts. Quintin testified that at that point Wright was not struggling. Allen then put one of the belts around Wright's neck and pulled. At one point, Wright said, "Please, stop. Please stop. I am going to piss myself." Wright's body started shaking and after about three minutes, Wright did not move. Allen then told Quintin to get some sheets to tie Wright's hands together in case Wright woke up.

Quintin left soon after the incident. Allen called Quintin throughout the night, but he did not answer her calls. The next day, Allen found Quintin at the barbershop. Quintin testified that Allen still had the gun. Quintin got into the truck that Allen was driving; James Martin was also in the truck. Allen told Quintin that Wright was dead. Allen then told Quintin that he had to help her get rid of the body.

Allen, Quintin, and Martin drove to Lowe's to buy plywood to help move Wright's body from inside the house into the truck. They also borrowed a dolly hand truck from a local shop to help move the body. Quintin testified that upon returning to Allen's house, Wright's body had been moved from where he had last seen her and had been wrapped in Allen's carpet. They were eventually able to get Wright's body into the truck. Then, all three took shovels from Allen' mother's tool shed and drove to an area off of the highway to dump Wright's

body. Quintin and Martin dug a hole while Allen stood as a lookout. They placed Wright's body in the hole, covered the hole with debris, and took the carpet with them. They threw the carpet into a dumpster outside of a truck stop and picked up Allen's daughter from school. Quintin went to the police and turned himself in. Quintin also took the police to the place where Wright's body had been buried.

James Martin testified that he was sentenced to sixty months' incarceration for his participation in hiding Wright's body. Martin testified that on the day of the murder, he was at Allen's house helping her repair a car. Allen asked Martin to help her search for her purse, and Martin did. He testified that he left Allen's house around 10 p.m. to get a starter belt for the car. Martin finished repairing the car and asked Allen if she had any cocaine. She did not, so Martin left Allen's house, found cocaine, came back to Allen's house, and smoked it. Martin testified that when he got back from finding the cocaine, Wright was the only one at Allen's house. Martin testified that the timing of the events of the day was unclear because he had been high. Martin testified that he slept at Allen's house until the morning and got a ride from Allen when she took her children to school. At that point, Allen told Martin that she needed help. Allen and Martin went back to Allen's house, and Martin saw Wright's body. Martin testified that Allen told him, "He must have hit her too hard." Martin testified that he noticed a bandana tied around Wright's hands.

Allen told Martin that they had to bury Wright's body. Allen sent Martin to Allen's brother's house to borrow a truck. Martin testified that the truck was never found by police. Martin testified that the entire plan, including getting the plywood at Lowe's was Allen's idea. Martin testified that he was the only smoker of the group, and he dumped all of the ashtrays out of the car after they buried the body. When they got back to Allen's house, Quintin left, and Martin cleaned the nylon strap that had been used to secure the carpet around Wright's body. Martin also washed the truck but testified that he did not know what became of the vehicle. Martin was at Allen's house when the police came to Allen's house with a search warrant.

On cross-examination, Martin testified that it was Quintin who first told Wright that she could not leave. Martin also testified that Quintin gave directions to bury the body. The defense elicited that Martin told Allen's sister that Quintin "did this." On redirect, the State elicited from Martin that he was asleep and did not see who killed Wright.

Denise Fitzgerald, a crime scene technician, testified that she exhumed Wright's body and located a cigarette butt in the vicinity. The State and defense stipulated that the DNA found on the cigarette butt was consistent with Martin's DNA.

Dr. Sajid Qaiser, a forensic pathologist and chief medical examiner for Brevard County, testified that while he did not perform the autopsy on Wright, he had reviewed the autopsy report. He testified that Dr. Robert Whitmore, the medical examiner who had performed the autopsy on Wright was no longer the chief medical examiner. Dr. Qaiser testified that a body cannot bruise once dead and that Wright had bruising in the following places: upper and lower eye lid, front and back of her ear, left torso, all over the left side, trunk, right hand, thigh, knee, left eyebrow, forehead, upper arm and shoulder area. Additionally, Wright's chest, hands, torso, face, and lower lip had contusions. Wright's wrist showed signs of ligation, meaning her hands were tied. Wright's neck showed signs of ligation, meaning that she was either hung or something was tied tightly around her neck. Dr. Qaiser testified that his medical conclusion was that Wright's death was the result of homicidal violence, and strangulation and ligature were an important cause of death. Dr. Qaiser testified that Wright was morbidly obese, with an enlarged heart, which contributed to her death. He testified that it would take from four to six minutes of strangulation to die. He could not tell whether she was rendered unconscious during the beating.

The State rested, and the defense filed a motion for judgment of acquittal asserting that the State had not proven the underlying charge of kidnapping for felony murder. The trial court denied the motion, and the defense rested without calling any witnesses. The jury found Allen guilty of first-degree murder and kidnapping.

Penalty Phase

The penalty phase commenced on September 22, 2010. Dr. Qaiser testified on behalf of the State. He acknowledged that he could not determine what kind of pain Wright felt before she died. Dr. Qaiser reiterated that Wright had about eight to ten bruises on her face. He also testified that someone would feel a sense of panic and pressure during strangulation.

On cross-examination by the defense, Dr. Qaiser acknowledged that he did not know whether Wright was conscious during the majority of the attack. Dr. Qaiser also testified that someone would lose consciousness after about ten to twenty seconds of strangulation and would die after about four to six minutes. After Dr. Qaiser's testimony, the State rested.

Dr. Michael Gebel, a neurological physician, testified for the defense. He testified that he had reviewed Allen's records and spoken with Allen. He determined that Allen suffered from numerous head injuries, including at least four incidents in which Allen lost consciousness. He testified that Allen's records included emergency room visits in 1995 and 1996 during which she was treated for facial and head trauma and bite wounds. He also testified that she was treated in 1989 for a drug overdose. Dr. Gebel testified that Allen had significant intracranial injuries and was at the lower end of intellectual capacity. He testified that Allen had organic brain damage, which would destroy impulse control. He opined that this brain damage might affect her ability to appreciate the criminality of her conduct and that she would have difficulty conforming her conduct to the requirements of the law. He also testified that Allen would not be able to create a complex plan. He acknowledged that Allen was not cooperative enough for him to determine whether Allen was substantially mentally impaired, but that she had lost the ability to control her mood.

On cross-examination, the State elicited Dr. Gebel's opinion that a person with Allen's brain injuries would not be able to create and follow through with a plan such as the one Allen executed to discard

Wright's body. Upon the doctor finding out the facts of this case, he stated that while that would change the severity of his diagnosis of Allen, it would not change her brain injuries.

Dr. Joseph Wu, a neuropsychiatry and brain imaging specialist, testified on behalf of the defense that he reviewed Allen's PET scan. He testified that Allen had at least ten traumatic brain injuries, mostly to the right side of her brain, resulting in asymmetrical changes, specifically in the frontal lobe. Dr. Wu testified that damage to the frontal lobe affects impulse control, judgment, and mood regulation. He also testified that her brain injuries would make it hard for Allen to conform her conduct to the requirements of society. He testified that she would have an overreaction to slight provocation, but that Allen's injuries should not impair her planning abilities. Dr. Wu testified that Allen's ability to understand and regulate proportionate responses in a consistent manner was significantly impaired. He also testified that it would be difficult for her to consistently conform her conduct to the requirements of society.

Myrtle Hudson, Allen's aunt, testified that Allen had an unstable childhood in a violent and drug-infested neighborhood. Hudson testified that she never knew Allen to abuse drugs, but Allen drank alcohol. Hudson knew of at least two abusive relationships in which Allen was beaten to the point of unconsciousness. She also thought Allen had been sexually abused as a child.

Spencer Hearing

Myrtle Hudson testified that Allen became part of the neighborhood culture, drinking alcohol and selling drugs. Bessie Noble, an advocate for prisoners, testified that Allen had an abusive and bad life. Tara Posey, Allen's cousin, testified that Allen was a good person and friend, but she had a tough and violent life, and had a problem with alcohol. She also testified that Allen sold drugs so that she could provide for her children. April Smith, Allen's sister-in-law, testified that Allen was a good person with a hard life. Irene Posey, Allen's grandmother, testified that Allen had a good childhood, living with

her intermittently. She testified that Allen had been a good child and that she did not commit this crime.

Margaret Allen testified on her own behalf regarding her harsh upbringing, including selling drugs and being abused. She recounted that she suffered head injuries as a result of being beaten. She acknowledged that she had been previously charged with drug and gun possession charges. She testified that she did not kill Wright. On cross-examination, Allen admitted that she had been arrested for assault and battery and that her daughter told the police that Allen committed the instant crime.

The State elicited victim impact testimony from Dublin that Wright was a good person and that she and Allen had been good friends. Diane Baxter, Wright's sister-in-law, Maria Jackson, Wright's sister, and Ralph Baxter gave victim impact statements regarding the impact Wright's murder had on the family.

The jury recommended a sentence of death by a unanimous vote. The trial court found two aggravators: (1) the capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit a kidnapping (great weight); and (2) the capital felony was especially heinous, atrocious, or cruel (great weight). The trial court found no statutory mitigation and found the following nonstatutory mitigation: (1) defendant has been the victim of physical abuse and possible sexual abuse in the past (some weight); (2) defendant has brain damage as a result of prior acts of physical abuse and the brain damage results in episodes of lack of impulse control (some weight); (3) defendant grew up in a neighborhood where there were acts of violence and illegal drugs (some weight); and (4) defendant would help other people by providing shelter, food or money (little weight). The trial court concluded that the aggravating circumstances outweighed the mitigation. Thus, the trial court imposed the sentence of death.

Allen v. State, 137 So. 3d 946, 951–55 (Fla. 2013) ("*Allen I*").

II. PROCEDURAL HISTORY

Petitioner was charged by indictment with first degree murder and kidnapping. (Ex. A-3 at 333-34). After a jury trial, Petitioner was convicted as charged. (Ex. A-5 at 794-95). A penalty proceeding was conducted, and the jury recommended a sentence of death by unanimous vote. (Ex. A-5 at 858). Thereafter, the trial judge conducted a hearing pursuant to *Spencer v. State*, 615 So. 2d 688 (Fla. 1993), after which it found two aggravating factors and several non-statutory mitigating factors. (Ex. A-6 at 941-65). The trial court concluded that the aggravating circumstances outweighed the mitigating circumstances and imposed a sentence of death. (*Id.* at 941-65 and 971). The trial court also sentenced Petitioner to a term of life imprisonment for the kidnapping conviction. (*Id.* at 974).

Petitioner appealed, raising four claims, and the Supreme Court of Florida affirmed Petitioner's convictions of kidnapping and first-degree murder and her respective sentences of life imprisonment and death. *Allen I*, 137 So. 3d at 956-69.

Petitioner subsequently filed a motion for post-conviction relief pursuant to Rule 3.851 of the Florida Rules of Criminal Procedure alleging fourteen grounds for relief (Ex. M at 403-75). Petitioner filed an amended motion, and trial court held an evidentiary hearing on the majority of Petitioner's claims, after which it denied

relief. (Ex. M at 1939-2019 and 2571-3363). Petitioner appealed, and the Supreme Court of Florida affirmed. *Allen v. State*, 261 So. 3d 1255 (Fla. 2019) ("*Allen II*").

III. GOVERNING LEGAL PRINCIPLES

A. Standard Of Review Under The Antiterrorism Effective Death Penalty Act ("AEDPA")

Under the AEDPA, federal habeas relief may not be granted with respect to a claim adjudicated on the merits in state court unless the adjudication of the claim:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) 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). The phrase "clearly established Federal law," encompasses only the holdings of the Supreme Court of the United States "as of the time of the relevant state-court decision." *Williams v. Taylor*, 529 U.S. 362, 412 (2000).

A federal habeas court must identify the last state court decision, if any, that adjudicated the claim on the merits. *See Marshall v. Sec'y, Fla. Dep't of Corr.*, 828 F.3d 1277, 1285 (11th Cir. 2016). Where the state court's adjudication on the merits is unaccompanied by an explanation, the habeas court should "look through" any unexplained decision "to the last related state-court decision that does provide a

relevant rationale. It should then presume that the unexplained decision adopted the same reasoning." *Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018). The presumption may be rebutted by showing that the higher state court's adjudication most likely relied on different grounds than the lower state court's reasoned decision, such as persuasive alternative grounds briefed or argued to the higher court or obvious in the record it reviewed. Id. at 1192–93, 1195–96.

For claims adjudicated on the merits, "section 2254(d)(1) provides two separate bases for reviewing state court decisions; the 'contrary to' and 'unreasonable application' clauses articulate independent considerations a federal court must consider." *Maharaj v. Sec'y for Dep't of Corr.*, 432 F.3d 1292, 1308 (11th Cir. 2005). Under the "contrary to" clause, a federal court may grant the writ if the

> state court arrives at a conclusion opposite to that reached by [the United States Supreme Court] on a question of law or if the state court decides a case differently than [the United States Supreme Court] has on a set of materially indistinguishable facts. Under the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the United States Supreme Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case.

Parker v. Head, 244 F.3d 831, 835 (11th Cir. 2001). "For a state-court decision to be an 'unreasonable application' of Supreme Court precedent, it must be more than

incorrect—it must be 'objectively unreasonable.'" *Thomas v. Sec'y, Dep't of Corr.*, 770 F. App'x 533, 536 (11th Cir. 2019) (quoting *Lockyer v. Andrade*, 538 U.S. 63, 75, (2003)).

Under § 2254(d)(2), a federal court may grant a writ of habeas corpus if the state court's decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." A determination of a factual issue made by a state court is presumed correct, and the habeas petitioner must rebut the presumption of correctness by clear and convincing evidence. *See Parker*, 244 F.3d at 835-36; 28 U.S.C. § 2254(e)(1).

Where the state court applied the correct Supreme Court precedent, the federal court must consider whether the state court unreasonably applied that precedent or made an unreasonable determination of the facts. *Whatley v. Warden*, 927 F.3d 1150, 1181 (11th Cir. 2019). "'[A] state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision.'" Id. at 1175 (quoting *Harrington v. Richter*, 562 U.S. 86, 103 (2011)). Federal courts may review a claim de novo only if the state court's decision was based on an unreasonable application of Supreme Court precedent or an unreasonable determination of the facts. *Id.*

B. Standard For Ineffective Assistance Of Counsel

In *Strickland v. Washington*, the Supreme Court established a two-part test for determining whether a convicted person is entitled to relief because his counsel provided ineffective assistance. 466 U.S. 668, 687-88 (1984). To prevail under Strickland, a petitioner must demonstrate "(1) that his trial 'counsel's performance was deficient' and (2) that it 'prejudiced [his] defense.'" *Whatley*, 927 F.3d at 1175 (quoting *Strickland*, 466 U.S. at 687).

Prejudice "requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687. That is, "[t]he [petitioner] must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. at 694. A reasonable probability is "a probability sufficient to undermine confidence in the outcome." *Id*.

IV. DISCUSSION

A. Claim One

Petitioner alleges that her death sentence violates *Hurst v. Florida*, 577 U.S. 92 (2016) and *Caldwell v. Mississippi*, 472 U.S. 320 (1985). (Doc. 1 at 6). Petitioner raised this claim in her Rule 3.851 proceedings, and the trial court summarily denied the claim. (Ex. M at 2016).The Supreme Court of Florida affirmed. *Allen II*, 261 So. 3d at 1287-88.

In *Hurst*, the Supreme Court of the United States held that "[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death" and that a "jury's mere recommendation is not enough." 577 U.S. at 97. The Supreme Court of Florida later held:

> before the trial judge may consider imposing a sentence of death, the jury in a capital case must unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt, unanimously find that the aggravating factors are sufficient to impose death, unanimously find that the aggravating factors outweigh the mitigating factors, and unanimously recommend a sentence of death.

Hurst v. State, 202 So. 3d 40, 57-58 (Fla. 2016). In *Mosely v. State*, 209 So. 3d 1248, 1283 (Fla. 2016), the Supreme Court of Florida extended *Hurst* to those whose sentences became final after the issuance of *Ring v. Arizona*, 536 U.S. 584 (2002).

The jury unanimously recommended a sentence of death in 2010; however, Petitioner contends that because there were no special findings with regard to the aggravators, it cannot be determined that the jury unanimously found that they were proved beyond a reasonable doubt. (Doc. 1 at 8). The Supreme Court of Florida has addressed this issue and found that when a jury unanimously recommends a death sentence, their unanimous recommendations allows a court "to conclude beyond a reasonable doubt that a rational jury would have unanimously found that there were sufficient aggravators to outweigh the

mitigating factors." *Davis v. State*, 207 So.3d 142, 174 (Fla. 2016). Therefore, the Court concludes that by unanimously recommending a death sentence, the jury necessarily found the aggravating factors beyond a reasonable doubt.

Additionally, the Court notes that in *State v. Poole*, 297 So. 3d 487, 503–04 (Fla. 2020), *cert. denied sub nom., Poole v. Fla.*, 141 S. Ct. 1051 (2021), the Supreme Court of Florida receded from *Hurst*, 202 So. 3d at 57-58, concluding a unanimous jury recommendation of death is not required pursuant to *Spaziano v. Florida*, 468 U.S. 447, 465 (1984) and *Harris v. Alabama*, 513 U.S. 504, 515 (1995). Therefore, Petitioner is not entitled to relief on this claim.

To the extent Petitioner contends that her sentence violates *Caldwell v. Mississippi*, 472 U.S. 320, 328-29 (1985), her claim also fails. In *Caldwell*, the Supreme Court held "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Id.* To show that a trial court violated *Caldwell*, a defendant must show that the remarks to the jury "'improperly described the role assigned to the jury by local law.'" *Carr v. Schofield*, 364 F.3d 1246, 1258 (11th Cir. 2004) (quoting *Dugger v. Adams*, 489 U.S. 401, 407 (1989)). No *Caldwell* violation exists when a jury was not "affirmatively misled regarding its role in the sentencing process." *Id.* (citing

Romano v. Oklahoma, 512 U.S. 1, 9 (1994)). A reference to or description of the jury's verdict as an advisory one or a recommendation does not constitute a *Caldwell* violation. *Davis v. Singletary*, 119 F.3d 1471, 1482 (11th Cir. 1997).

During the penalty phase, the trial court told the jurors although their recommendation was advisory in nature, it would be given great weight and deference by the court in determining what sentence to impose. (Ex. A-22 at 1969). Furthermore, the jury was given the standard penalty phase jury instructions which accurately explained the jury's role under Florida law. *See* Fla. Std. Jury Inst. (Crim.) § 7.11; *Archer v. State*, 673 So. 2d 17, 21 (Fla. 1996) (holding the Florida Standard Jury Instructions fully advise the jury of the importance of its role).

There is no indication that the trial judge implied that the jury recommendation was superfluous or that the jury's decision was lessened because they gave an advisory recommendation. The state court's rejection of this claim is not contrary to or an unreasonable application of federal law. Accordingly, Claim One is denied.

B. Claim Two

Petitioner alleges that trial counsel was ineffective for failing to adequately investigate, prepare, and present available mitigation evidence during the penalty

phase. (Doc. 1 at 12). Petitioner raised this claim in her Rule 3.851 motion, and the trial court held an evidentiary hearing on the claim. (Ex. M at 649-53).

Petitioner presented the testimony from eight witnesses, Brian Watkins ("Watkins"), her former boyfriend, her aunts, Barbara Capers ("Capers) and Myrtle Hudson ("Hudson"), her children Alvinia Ragoo ("Alvinia") and Carlos Ragoo ("Carlos"), former defense counsel Frank Bankowitz ("Bankowitz"), and Dr. William Russell ("Dr. Russell"), a psychologist. The parties stipulated that Watkins, Capers, Hudson, Alvinia, and Carlos were prior convicted felons. (Ex. M at 2571-72).

Watkins testified that he dated Petitioner for a number of years and they had a child together. (*Id.* at 2598). Watkins was aware that Petitioner had suffered a stroke, and as a result she had anxiety, sweating, emotional fits, and migraines. (*Id.* at 2599-2601). Watkins admitted he physically abused Petitioner and stated that he would hit her or choke her. (*Id.* at 2602-04). Watkins testified to an incident wherein he choked Petitioner while she was pregnant. (*Id.* at 2604). On occasion, if Petitioner attempted to hit him, Watkins would grab her and hold her mouth and nose until she stopped or calmed down. (*Id.* at 2604-05).

Watkins described an incident that occurred between himself and Petitioner at Winn Dixie, wherein Watkins hit her several times and she threatened him with

a box cutter. (*Id.* at 2608-09). Both Watkins and Petitioner went to the hospital for stitches. (*Id.* at 2610). Additionally, Watkins testified that Petitioner abused alcohol and would get "wild" when she drank but noted she did not do drugs. (*Id.* at 2606-08). Watkins was in prison from 2005 to 2010 and stated that no investigators came to talk to him regarding Petitioner's case. (*Id.* at 2614-16).

Watkins clarified that during Petitioner's trial he was in a halfway house. (*Id.* at 2625-26). On cross-examination he stated that he made no efforts to testify at Petitioner's penalty phase because he was reluctant to speak to the defense and did not want to get "caught up in the system." (*Id.* at 2618-19). However, on redirect examination, Watkins testified that he would have spoken to the defense. (*Id.* at 2626).

Capers, Petitioner's aunt, testified that she spoke to Bankowitz and the defense expert, Dr. Russell, prior to trial. (*Id.* at 2633-64). Capers stated that she was never asked to testify at the penalty phase. (*Id.* at 2634-35). Capers testified that she is ten years older than Petitioner, and Petitioner lived with her for a period of time while she was growing up. (*Id.* at 2636). Capers noted that Petitioner had a rough childhood; Petitioner's mother was abusive and she suffered a stroke when she was a teenager, which led to speech and memory issues. (*Id.* at 2639-42). Capers also testified that Petitioner was sexually abused by her uncle and possibly

her brother. (*Id.* at 2645-48). Petitioner's grandfather, Curtis, was also physically abusive to his children and Petitioner and would beath them with oak switches. (*Id.* at 2648-49).

Capers stated that when Petitioner was a teenager or in her early twenties, she exhibited signs of anxiety, had trouble with her memory, and would sleep more than was normal. (*Id.* at 2656-57). Capers testified regarding Petitioner's abusive relationship with a man named Bill Skanes, who also beat her so badly she needed hospitalization. (*Id.* at 2652-54).

Alvinia testified that she lived with Petitioner, her grandmother, Alvainia, her stepfather Watkins, and her siblings when she was growing up. (*Id.* at 2681-84). Alvinia recalled the abuse that Petitioner was subjected to at Watkins' hands. (*Id.* at 2685). Alvina admitted that she was in prison at the time of her mother's trial. (*Id.* at 2687-90). Alvinia remembered giving a deposition in this case and speaking to Dr. Russell but did not recall talking to Bankowitz . (*Id.* at 2691-92).

Alvina testified on cross-examination that she spoke to law enforcement at the time the crime was committed and told them that she did not see anything. (*Id.* at 2963). Alvina admitted that at the time of the crime she did not want to give a deposition and was uncooperative. (*Id.* at 2695-2701). Alvinia stated that despite her actions at the deposition, she might have been cooperative at trial. (*Id.* at 2702).

Hudson, Petitioner's aunt, testified at Petitioner's penalty phase and the *Spencer* hearing. (*Id.* at 2721). Hudson spoke to Petitioner's attorneys regularly, and she told Bankowitz about Petitioner's history and assisted him in contacting their family. (*Id.* at 2722-23). Hudson was unsure if Capers spoke to Bankowitz about Petitioner's background. (*Id.* at 2723).

Hudson testified that Petitioner's mother, Alvainia, prioritized men over her children; therefore, sometimes Petitioner would live with Hudson or her grandparents. (*Id.* at 2725-26). Hudson testified regarding Alvainia's quick temper and how she abused Petitioner. (*Id.* at 2726). Alvainia pushed Petitioner's head under water during a hair washing incident and would scream and beat Petitioner with a belt. (*Id.* at 2729-30). Hudson testified that Petitioner had a stroke when she was a teenager, but she also helped her mother pay bills and fix up her home. (*Id.* at 2732-34).

Hudson recalled that Watkins physically abused Petitioner and described an incident where Petitioner had to be hospitalized as a result of injuries sustained by Watkins. (*Id.* at 2734-37). Hudson stated that Petitioner had problems with her memory and would sleep all day. (*Id.* at 2739). Petitioner did not abuse drugs but did drink too much alcohol. (*Id.* at 2740). Hudson testified that it was as if Petitioner had split personalities, and she would use two different voices. (*Id.*)

Hudson admitted on cross that she testified to some of this information at the penalty phase. (*Id.* at 2742). Hudson noted that she brought Alvainia and another family member to speak with Bankowitz. (*Id.* at 2752). Hudson also gave Bankowitz a list of people to speak with. (*Id.* at 2753-54).

Carlos, Petitioner's son, testified that he was incarcerated when the crime was committed, was released from prison in 2009, but returned to prison a few months later. (*Id.* at 2764). Carlos testified that his mother would have "blackouts" where she would lock herself in her bedroom for days. (*Id.* at 2765-66). Petitioner suffered from extreme mood swings and she would throw temper tantrums. (*Id.* at 2766-67). Carlos stated Petitioner would also sleep for two to three days at a time. (*Id.* at 2768).

Carlos testified that he witnessed Watkins' abuse of Petitioner. (*Id.* at 2770). Carlos also told the court about another man that lived with them and abused Petitioner. (*Id.* at 2772). This man hit Petitioner with closed fists, resulting in Petitioner going to the hospital and having a miscarriage. (*Id.* at 2772-73). Carlos testified that he was incarcerated at the time of the penalty phase and the jury would have heard about his incarceration history. (*Id.* at 2775-76).

Bankowitz testified that he took over this case from the Office of the Public Defender, and they had completed the bulk of the investigation in this matter. (*Id.*

at 2790-91). Bankowitz was qualified to try death penalty cases at the time of trial, and he has practiced criminal law for forty-three years. (*Id.* at 2791 and 2809). Bankowitz testified that the key trial strategy was to challenge co-defendant and key witness Quintin Allen's ("Quintin") testimony. (*Id.* at 2798-2800). Bankowitz explained that he attempted to challenge Quintin's multiple inconsistent stories. (*Id.* at 2801).

Bankowitz recalled that Hudson told him about Petitioner suffering from physical and sexual abuse by family members (*Id.* at 2811). Bankowitz testified that he made many attempts to speak or meet with Petitioner's family members. (*Id.* at 2812). Bankowitz noted that two of Petitioner's children were in prison, and he was told that her daughters would not cooperate or have anything to do with Petitioner. (*Id.* at 2813). Additionally, Bankowitz noted that one of Petitioner's sisters did not want to testify due to health issues. (*Id.*). Bankowitz testified that he called Dr. Joseph Wu ("Dr. Wu") and Dr. Michael Gebel ("Dr. Gebel") as mitigation witnesses; however, he did not recall if they spoke to family members other than Hudson. (*Id.* at 2814-15). Bankowitz reiterated that Petitioner's family members and children did not want to be involved. (*Id.* at 2815 and 2837).

Bankowitz stated that there was documentation that Petitioner suffered from a brain injury, and the jury saw proof of Petitioner's hospital admissions. (*Id.*

at 2817). Bankowitz stated Petitioner did not remember many things, so he relied upon Hudson to get Petitioner's family history and background. (*Id.* at 2817). Bankowitz tried to show the jury that Petitioner grew up in an atmosphere of violence and drugs and presented this through Hudson's testimony. (*Id.* at 2828-29). Bankowitz testified that he was never given Petitioner's boyfriends' names, therefore, he could not question them or ask them to testify. (*Id.* at 2830). On cross-examination, Bankowitz testified that the jury was presented evidence about the physical abuse Petitioner suffered, her hospitalizations, and sexual abuse. (*Id.* at 2857-60).

Dr. Russell, a psychologist, testified that he specializes in working with people in the criminal justice system who had trauma and post-traumatic stress disorder ("PTSD"). (*Id.* at 2913-24). Dr. Russell stated that he could not do a full analysis of Petitioner without interviewing family members and gathering third-party information and records, therefore he obtained Petitioner's school, medical, and jail records and spoke with her family. (*Id.* at 2929-31).

Dr. Russell testified that Petitioner had a chaotic background that included growing up in drug and violence-infested neighborhood and physical and sexual abuse. (*Id.* at 2932-33). Dr. Russell noted Petitioner had no "protective" factors in her life, such as family or friends to protect her from trauma, teach her right from

wrong, and support her school development. (*Id.* at 2933-36). Dr. Russell testified that Petitioner was raised in multiple unstable households with people who had behavioral problems, abused drugs, sold drugs, or otherwise had social difficulties. (*Id.* at 2937-39).

Dr. Russell diagnosed Petitioner with complex PTSD, which is an inability to cope with stress, trauma, or negative feelings. (*Id.* at 2946 and 2966). Dr. Russell stated that he came to this conclusion because he observed emotional dysregulation, a history of sleep issues, irritability, reckless and aggressive behavior, a history of outbursts, and difficulty concentrating. (*Id.* at 2953-54 and 2975-79). Dr. Russell noted that Petitioner experienced several traumatic stressors in her youth that resulted in this diagnosis, including physical and sexual abuse, multiple head injuries, living in a violent neighborhood, health issues, and alcohol abuse. (*Id.* at 2947-51 and 2966-67). Dr. Russell opined that Petitioner was under an extreme emotional disturbance at the time the crime was committed. (*Id.* at 2969).

Dr. Russell admitted on cross that during the penalty phase, a witness testified about Petitioner's history of poverty and abuse, but he felt that it did not tie into Petitioner's mental health issues. (*Id.* at 2998-99). Dr. Russell testified that

in order to develop his opinion regarding Petitioner's mental health, he spoke to several family members, including Capers, Hudson, and two others. (*Id.* at 3010).

Dr. Russell acknowledged that Dr. Gebel testified Petitioner had frontal lobe damage, decreased cognitive ability, and low intellectual ability that would affect her impulse control and ability to perform executive planning. (*Id.* at 3000). Dr. Russell also admitted that Dr. Gebel told the jury Petitioner could not appreciate the criminality of her conduct nor could she conform her conduct to the law. (*Id.* at 3000-04). Finally, Dr. Russell agreed that Dr. Wu testified during the penalty phase that Petitioner's frontal lobe damage would impair someone's judgment, impulse control, and ability to control their mood, thus, someone could react disproportionately to a perceived wrong. (*Id.* at 3006). Dr. Russell disagreed with the State's assertion that his testimony "presented nothing new." (*Id*. at 3008). On redirect, Dr. Russell stated the expert testimony did not integrate the mental health issues with Petitioner's history and behavior. (*Id.* at 3062-63 and 3075).

The State presented a rebuttal witness, Dr. Michael Gamache ("Dr. Gamache") who primarily practices forensic psychology. (*Id.* at 3152-54). Dr. Gamache reviewed the reports of Drs. Gebel, Wu, and Russell. (*Id.* at 3161). Dr. Gamache opined that he did not find any significant mitigation information that was left out of the penalty phase. (*Id.* at 3161-63).

Dr. Gamache also stated that the original trier of fact was given evidence that Petitioner was exposed to multiple traumatic events during her lifetime, both as a child and an adult. (*Id.* at 3172). Dr. Gamache stated that in order to diagnose Petitioner with PTSD, one would also have to find evidence of intrusive recollections, flashbacks, or dreams; however, he did not find evidence of such with regard to Petitioner. (*Id.* at 3173-74). Dr. Gamache noted that Petitioner was not diagnosed with PTSD prior to the crime, after the crime was committed, and has not been diagnosed with PTSD since being housed at the Department of Corrections. (*Id.* at 3177). Dr. Gamache stated that Petitioner's classification in prison is "S-1" which indicates an inmate that has no mental disorder diagnosis. (*Id.* at 3179).

Dr. Gamache concluded that there was no evidence Petitioner was experiencing PTSD symptoms when the crime was committed, or that the situation with the victim triggered an intrusive recollection regarding a traumatic event she had experienced that affected her mental state. (*Id.* at 3181-82, 3188-89, and 3200). Dr. Gamache also did not notice that Petitioner had memory problems; she was able to recollect the events that took place the night the crime was committed and could recall childhood events. (*Id.* at 3202-04). Dr. Gamache opined that at the time of the offense, no evidence supported the conclusion that Petitioner

was suffering from an extreme mental or emotional disturbance or that she was unable to conform her behavior to the law. (*Id.* at 3207-08).

The trial court denied this claim, concluding that Petitioner failed to show that defense counsel acted deficiently or that his conduct was unreasonable under prevailing professional norms. (Ex. M at 2006). The trial court found that the testimony presented at the evidentiary hearing was cumulative to the evidence presented at the penalty phase. (*Id.* at 2010-11). The court noted that counsel performed sufficient investigation to find mitigation witnesses, including Petitioner's family members, and none of the witnesses who testified at the hearing were forthcoming at the time of trial. (*Id.*). Furthermore, the court stated that the failure to present additional mental health testimony did not amount to deficient performance nor did prejudice result given the significant evidence in aggravation. (*Id.* at 2013-14)

The Supreme Court of Florida affirmed on appeal, concluding Petitioner had not shown prejudice. *Allen II*, 261 So. 3d at 1272. The court stated that Petitioner was overemphasizing the "value of the evidentiary hearing testimony," finding that the evidence was cumulative to the mitigation evidence presented at trial. *Id.* at 1274. The court stated that the absence of more specific mitigation evidence did not "render the penalty phase unreliable" because the jury

recommendation of death was unanimous, and the trial court found the existence of "two significant aggravators . . . ." *Id.* The court concluded that the additional mitigation evidence would not have impacted the balance of aggravating and mitigating factors. *Id.*

The court also noted that Dr. Gamache's testimony rebutted Dr. Russell's findings, therefore, the additional mitigation evidence would not have outweighed the established aggravating factors. *Id.* The court stated that because the trial court had already found several nonstatutory factors, such as Petitioner's physical abuse, possible sexual abuse, and brain damage, the additional testimony "would have, at most, only added weight to these mitigating circumstances." *Id.*

To determine prejudice from an unreasonable failure to investigate and present favorable or mitigating evidence, the test is whether there is a reasonable probability that but for counsel's errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694. To assess that probability, the Court considers the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding" and reweighs it against the evidence in aggravation. *See Rose v. McNeil*, 634 F.3d 1224, 1242 (11th Cir. 2011) (citing *Porter v. McCollum*, 558 U.S. 30, 41 (2009)); *Sear v. Upton*, 130 S. Ct 3259, 3267 (2010) ("A proper analysis of prejudice under *Strickland* would have taken into

account the newly uncovered evidence . . . , along with the mitigation evidence introduced during Sears' penalty phase trial, to assess whether there is a reasonable probability that Sears would have received a different sentence after a constitutionally sufficient mitigation investigation."); *Reed v. Sec'y, Fla. Dep't of Corr.*, 593 F.3d 1217, 1240–41 (11th Cir. 2010) ("In that process, what matters is not merely the number of aggravating or mitigating factors, but their weight.").

The Court has reviewed the record, including the mitigating evidence produced at both trial and the post-conviction evidentiary hearing, and concludes that it does not outweigh the evidence in aggravation. Thus, the state court properly found that counsel's actions did not result in prejudice.

Defense counsel investigated and presented mitigation evidence regarding Petitioner's background, family history, and mental health issues during the penalty phase. Bankowitz called Dr. Gebel, a neurologist, who testified that in order to assess Petitioner, he reviewed her mental health, school, medical, and jail records. (Ex. A-21 at 1744). Dr. Gebel also interviewed Petitioner. (*Id.*). Dr. Gebel stated that Petitioner suffered from numerous head traumas during her life. (*Id.* at 1744-45). Dr. Gebel noted that Petitioner also had a history of sexual assault and potential drug use. (*Id.* at 1745).

Dr. Gebel testified that Petitioner suffered from significant intracranial injuries, which would decrease her cognitive ability and make her unable to understand the consequences of her behavior. (*Id.* at 1750). Dr. Gebel opined that Petitioner was in the lower end of intellectual capacity and had frontal and temporal lobe damage. (*Id.* at 1750-51). Dr. Gebel stated that this type of brain damage would destroy one's ability to control the impulses, think things through in a clear and normal pattern, and plan day-to-day activities. (*Id.* at 1751).

Dr. Gebel opined that Petitioner's organic brain damage might make it difficult for Petitioner to appreciate the criminality of her conduct or understand the consequences of her actions. (*Id.* at 1752-53). According to Dr. Gebel, Petitioner could also have difficulty conforming her conduct to the requirements of the law. (*Id.* at 1753). Dr. Gebel stated that Petitioner would have difficult controlling her mood and the ability to look one step ahead and recognize consequences of actions. (*Id.* at 1753-54).

Dr. Wu, a neuropsychiatrist, also testified on behalf of the defense. (*Id.* at 1798-99). Dr. Wu reviewed Petitioner's PET scan, or a positron emission topography scan of her brain. (*Id.* at 1800). A PET scan is a way to look at brain function or activity and can be used to diagnose traumatic brain injuries, Alzheimer's disease, strokes, and tumors. (*Id.* at 1800 and 1810). Dr. Wu reviewed

Petitioner's medical records, which indicated she had sustained numerous head traumas during her life. (*Id.* at 1816). Dr. Wu testified that Petitioner's PET scans indicated that her brain had an asymmetrical change on the right side. (*Id.*). Dr. Wu noted that the right side of Petitioner's frontal lobe was less active than the left side. (*Id.* at 1819).

Dr. Wu testified that the frontal lobe helps regulate a person's judgment, impulse control, and moods. (*Id.* at 1822). Dr. Wu stated that people with frontal lobe injuries lack the ability to appreciate the consequences of their actions because they react to situations in a disproportionate manner. (*Id.* at 1829-30). Dr. Wu stated that to a reasonable degree of medical certainty, Petitioner suffers from traumatic brain injury and would find it difficult to conform her actions when experiencing some type of provocation or slight. (*Id.* at 1830-31).

Hudson also testified about Petitioner's background and childhood, stating that Petitioner would live with various relatives when growing up and did not have a father figure aside from her uncle. (Ex. A-22 at 1878). Hudson testified that Petitioner grew up in a "drug neighborhood" that had a lot of violence. (*Id.* at 1878-79). Hudson noted that Petitioner did not abuse drugs but did abuse alcohol. (*Id.* at 1879 and 1887-88). Hudson also testified regarding Petitioner's abusive romantic

relationships, including one wherein she was beaten and sent to the hospital and another wherein she was threatened and hit with a gun. (*Id.* at 1879-83 and 1886). Hudson noted that Petitioner had three children who each had learning or behavioral issues. (*Id.* at 1889).

The record reflects that Bankowitz presented extensive testimony on Petitioner's mental health, brain damage, and her ability appreciate the criminality of her conduct or conform her conduct to the requirements of the law. Although the trial court did not find the existence of any statutory mitigators, the court found the existence of a nonstatutory mitigator, that Petitioner had brain damage as a result of prior acts of physical abuse, and her brain damage results in a lack of impulse control. Aside from Dr. Russell's testimony regarding the diagnosis of PTSD, which was refuted by Dr. Gamache, the jury and judge heard the similar testimony as to what was presented during the evidentiary hearing.

Because counsel consulted with and presented the testimony of two experts during the penalty phase, there is no indication that the failure to consult with additional experts amounts to deficient performance or prejudice. The presentation of Dr. Russell's testimony would have been cumulative to the evidence that Petitioner had suffered multiple head injuries, had frontal lobe brain damage, and suffered from an impulse control order, and Dr. Russell's testimony

could have opened the door to a rebuttal witness similar to Dr. Gamache. *See Dallas v. Warden*, 964 F.3d 1285, 1308 (11th Cir. 2020) (holding that mitigation evidence is cumulative "when it tells a more detailed version of the same story told at trial or provides more or better examples or amplifies the themes presented to the jury.") (quotation omitted), *cert denied sub nom. Dallas v. Raybon*, 142 S. Ct. 124 (2021); *Morrow v. Warden*, 886 F.3d 1138, 1150 (11th Cir. 2018) (noting that simply pointing to new evidence that is weak or cumulative does not demonstrate prejudice) (citation omitted).

With regard to witnesses testifying about Petitioner's childhood and family background, the record is clear that Bankowitz attempted to speak with additional family members and they either were reluctant to speak with him and testify or they were incarcerated. Therefore, defense counsel did not act deficiently for failing to call Watkins, Capers, Alvinia, and Carlos as witnesses. Moreover, counsel presented evidence of Petitioner's childhood, family background, the neighborhood in which she grew up, and her history of sexual and physical abuse, hospitalizations, and alcohol abuse during the penalty phase. The additional evidence presented at the post-conviction evidentiary hearing was cumulative because it only added a more detailed version of the same story presented at trial,

with perhaps additional or better examples of the abuse Petitioner suffered as a child and adult. *See Dallas*, 964 F.3d at 1308.

The Constitution requires the sentencer in capital cases to be permitted to consider any relevant mitigating factor. *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982). The evidence presented at the post-conviction evidentiary hearing was relevant; however, even after consideration the witnesses who testified about Petitioner's background and childhood and Dr. Russell's opinion that Petitioner had PTSD, frontal lobe damage, and decreased cognitive ability, there is no indication that the jury would have given more weight to, or found the existence of, statutory and nonstatutory mitigating circumstances that outweighed the aggravators.

The record reflects that there was substantial evidence of the aggravating circumstances. This is not a case "where the weight of the aggravating circumstances or the evidence supporting them was weak." *Suggs v. McNeil*, 609 F. 3d 1218, 1232 (11th Cir. 2010) (internal quotations omitted). Based on evidence that Petitioner restrained the victim, tied her up, hit her at least eight to ten times with fists and a belt, pour various liquids over her face, and strangled her, the state court concluded that the murder was especially heinous, atrocious, or cruel. The Supreme Court of Florida has stated that the heinous, atrocious, or cruel aggravator

is "among the weightiest . . . in the statutory scheme." *Rigterink v. State*, 66 So. 3d 866, 900 (Fla. 2011).

Moreover, Petitioner committed the murder during the commission of a kidnapping. The Eleventh Circuit has noted that many death penalty cases involve murders that are accompanied by torture, rape, or kidnapping. *Sochor v. Sec'y, Dep't of Corr.*, 685 F.3d 1016, 1030 (11th Cir. 2012) (noting in cases where the murder involves sexual battery, torture or rape, aggravating circumstances outweigh any prejudice caused by a lawyer's failure to present mitigating evidence) (citing *Jackson v. Herring*, 42 F.3d 1350, 1369 (11th Cir. 1995); *Dobbs v. Turpin*, 142 F.3d 1383, 1390 (11th Cir. 1998)); *see also Brooks v. Comm'r, Ala. Dep't of Corr.*, 719 F.3d 1292, 1302 (11th Cir. 2013) (holding that mitigating evidence of the petitioner's character and background would not have outweighed the aggravating circumstances, which included evidence that the victim, who was alive for a portion of the attack, was struck five to eight times with a heavy object, had a skull fracture and neck injuries from trauma or strangulation). Similar to these cases, the facts reflect that this case involved torture, injuries sustained from trauma and strangulation, and kidnapping. Upon weighing all the relevant evidence, the Court concludes that the aggravating circumstances outweigh the cumulative mitigation evidence counsel failed to present. Consequently, a reasonable probability does not exist that but for

counsel's failure to present additional mitigation evidence, that the trial court would have rendered a sentence other than death.

The state court's denial of this claim was not contrary to or an unreasonable application of clearly established federal law. Accordingly, Claim Two is denied.

C. Claim Three

Petitioner asserts that trial counsel was ineffective for failing to object to numerous improper comments made during the guilt phase closing argument. (Doc. 1 at 31). The Court will address each comment in turn below.

Petitioner first states that the prosecutor misstated the elements of first-degree felony murder when he stated "All we have to prove is that during the course of the kidnapping she died. And it doesn't matter how." (Ex. A-20 at 1632-33). Petitioner raised this claim in her Rule 3.851 motion, and the trial court summarily denied relief, finding that the prosecutor properly instructed the jury that the victim had to die as a consequence of and during the course of the kidnapping. (Ex. M at 1968-69). The Supreme Court of Florida affirmed, concluding that the State's closing argument accurately described each element of first-degree kidnapping and the trial court gave the jury correct elements of the crime in the written jury instructions. *Allen II*, 261 So. 3d at 1269-70.

The Court agrees with the state court's assessment of this claim. To convict Petitioner of first-degree felony murder, the State had to prove that the victim is dead and the victim was killed as a consequence of or while Petitioner was engaged in the commission of a kidnapping. *See* § 782.04(1)(a)(2), Fla. Stat.; Fla. Std. Jury Inst. (Crim.) § 7.3. The prosecutor first described the three elements of kidnapping, arguing that Petitioner held the victim against her will at Petitioner's home. (Ex. A-20 at 1568-73 and 1576-77). The prosecutor then explained the elements of first-degree felony murder, tracking the language from the statute and Florida's standard jury instruction. (*Id*. at 1579-84).

Petitioner has not shown that trial counsel's failure to object resulted in deficient performance or that but for counsel's actions, the result of the proceeding would have been different. Even if the prosecutor's statement was improper, the jury heard the correct elements of first-degree felony murder. There is no indication that the jury was led to believe that they could convict Petitioner of murder if the victim died in some other manner not related to the strangulation and beating. Furthermore, the trial court gave the jury the correct instructions on first-degree felony murder. (*Id.* at 1639-41). The Eleventh Circuit has held that jurors are presumed to follow the court's instructions. *See Brown v. Jones*, 255 F.3d

1273, 1280 (11th Cir. 2001). Therefore, Petitioner is not entitled to relief on this claim.

Petitioner next asserts that trial counsel should have objected when the prosecutor discussed the plea bargain the State made with Quintin. (Doc. 1 at 23). Petitioner contends that the prosecutor called the plea bargain "distasteful" and improperly bolstered Quintin's testimony. (*Id.*) Petitioner states that the prosecutor also presented misleading argument about whether the State had also discussed a plea bargain with Petitioner. (*Id.* at 33).

Petitioner raised this claim in his Rule 3.851 motion, and the trial court denied relief, noting that the State properly discussed the plea bargain, did not make any misleading statements. (Ex. M at 1961-62). The Supreme Court of Florida affirmed, holding that Petitioner did not establish prejudice. *Allen II*, 261 So. 3d at 1270.

The prosecutor referenced Quintin's plea bargain during closing arguments, and in doing so stated that while he might find taking a plea distasteful, it was Quintin who came forward to police regarding the crime. (Ex. A-20 at 1562-63). The prosecutor noted that the crime may not have been solved if Quintin had not come forward. (*Id.* at 1563). Although "attempts to bolster a witness by vouching for his credibility are normally improper and constitute error," *United States v.*

Newton, 44 F.3d 913, 921 (11th Cir. 1995) (citations omitted), the Court concludes that the comments made by the prosecutor were proper and not made to vouch for Quintin. Moreover, there is no indication in the record that the prosecutor made misleading statements about whether the State made a plea offer to Petitioner that was later withdrawn. Petitioner has not shown that counsel acted deficiently or that prejudice resulted from these statements. Florida courts allow attorneys wide latitude during closing arguments, and the trial court instructed the jury that the statements were not evidence or to be considered an instruction on the law. (Ex. A-20 at 1557); *Thomas v. State*, 748 So. 2d 970, 984 (Fla. 1999). Consequently, Petitioner is not entitled to relief on this matter.

In his third subclaim, Petitioner contends that the prosecutor made multiple improper comments related to the victim's cause of death and whether the death was heinous, atrocious, or cruel. (Doc. 1 at 33-34). Petitioner contends that the prosecutor mispresented Dr. Qaiser's testimony and the autopsy report and made statements that the victim suffered from petechia or burst pinpoint blood vessels in the eyes, that the strangulation took three or four minutes, and the victim suffered from internal neck injuries. (*Id.*). Petitioner raised this claim in his Rule 3.851 motion, and the trial court denied relief, finding that the State did not misrepresent the evidence presented at trial (Ex. M at 1963-67).

The Supreme Court of Florida affirmed, finding first with regard to the issue of petechia that Petitioner was not prejudiced. *Allen II*, 261 So. 3d at 1270-71. The court noted that the evidence at trial showed that the victim was tortured, bound, and strangled, therefore, whether petechia had occurred did not weaken the evidence nor would that comment change the outcome of the trial. *Id.* at 1271. With respect to the issue of how long the strangulation occurred, the court concluded that "[t]he prosecutor's statement that it takes 'three to four minutes to die of strangulation was not wholly inconsistent with the evidence . . . that it takes 'four to six minutes" to die of strangulation. *Id.* The court found that no prejudice resulted from this statement. Finally, the court concluded that the prosecutor's minor misstatement that the victim's neck injuries were internal instead of external did not result in prejudice "[b]ased on the totality of the record . . . ." *Id.*

The Court has reviewed the prosecutor's comments regarding the victim's manner of death, including whether petechia occurred, the amount of time the victim was strangled, and whether she sustained neck injuries as a result. (Ex. A-20 at 1579-81 and 1629-30). There is no indication that these comments, which may have misstated Dr. Qaiser's testimony, resulted in prejudice. The trial court instructed the jury that the statements were not evidence. Moreover, the jury heard extensive evidence regarding the treatment of the victim, including that Petitioner

punched or struck the victim multiple times, poured bleach, hair spritz, nail polish remover, and rubbing alcohol on the victim's face, held her down, tied her up, beat her with a belt, and strangled her while the victim pleaded with Petitioner to stop. (Ex. A-15 at 902-15). Petitioner cannot show a reasonability probability exists that but for counsel's failure to object to these minor misstatements, the result of the proceeding would have been different. Petitioner is not entitled to relief on these claims.

To the extent Petitioner also argues that the cumulative impact of these errors deprived her on a fair trial, the claim also fails. Petitioner has not shown an error of constitutional dimension with respect to any of the above claims. Therefore, she cannot show that the cumulative effect of the alleged errors deprived her of fundamental fairness in the state criminal proceedings. *See Morris v. Sec'y, Dep't of Corr.*, 677 F.3d 1117, 1132 (11th Cir. 2012) (refusing to decide whether post-AEDPA claims of cumulative error may ever succeed in showing that the state court's decision on the merits was contrary to or an unreasonable application of clearly established law but holding that petitioner's claim of cumulative error was without merit because none of his individual claims of error or prejudice had any merit).

The state court's denial of this claim was not contrary to or an unreasonable application of clearly established federal law. Accordingly, Claim Three is denied.

D. Claims Four and Thirteen

Petitioner contends in Claim Four that trial counsel was ineffective for failing to object and move for a mistrial due to the prosecutor's improper comments made during the penalty phase closing argument. (Doc. 1 at 36). Petitioner lists approximately eleven instances of prosecutorial misconduct, and the Court will address each below. (*Id.* at 36-46). In Claim Thirteen, Petitioner alleges that the trial court erred when it allowed the State to repeatedly ask Dr. Wu about her future dangerousness. (Doc. 1 at 77-78). This claim is related to the second subclaim of Claim Four, and therefore, the Court will address these claims together.

1. Petitioner's Prior Drug Convictions

Petitioner first contends that the State improperly insinuated that she had more than one prior drug conviction and had been in jail or prison prior to the crime. (Doc. 1 at 36-37). Petitioner raised this claim in her Rule 3.851 motion, and the trial court denied relief, concluding Petitioner could not show prejudice. (Ex. M at 1976). The Supreme Court of Florida affirmed, finding that the prosecutor's statements about Petitioner's prior drug convictions and time in prison were

isolated occurrences. *Allen II*, 261 So. 3d at 1277. The court concluded that no prejudice occurred because the evidence reflected that Petitioner was involved in a lifestyle of drugs and violence, and the trial court found this lifestyle was a nonstatutory mitigating circumstance. *Id.*

During the penalty phase, the State cross-examined defense witness Dr. Gebel, asking whether he had reviewed Petitioner's jail or prison records. (Ex. A-21 at 1757-58). The prosecutor also asked Dr. Gebel if he was aware of Petitioner's history of drug use or prior drug convictions. (*Id.* at 1758-59). Dr. Gebel stated that Petitioner denied a history of drug use. (*Id.* at 1758). Even assuming this line of questioning was improper because Petitioner only had one prior drug conviction, Petitioner has not demonstrated prejudice. The penalty phase jury heard evidence that Petitioner lived in a neighborhood that had a culture of violence and drug use.

Furthermore, defense counsel Bankowitz noted at the evidentiary hearing that he strategically presented evidence regarding drug use and the culture of the neighborhood and how it affected her negatively. (Ex. M at 2828-29). Based on this evidence, the trial court found the existence of the nonstatutory mitigator that she grew up in a neighborhood where there were acts of violence and illegal drug use and gave the mitigator some weight. *Allen I*, 137 So. 3d at 955. Petitioner cannot

show a reasonable probability exists that but for counsel's actions, the result of the proceeding would have been different.

2. Petitioner's Future Dangerousness

Petitioner next contends that trial counsel was ineffective for failing to object to Dr. Wu's testimony regarding Petitioner's future dangerousness. (Doc. 1 at 38-39). Petitioner also states that the trial court erred in allowing this testimony (Doc. 1 at 77-78).

Petitioner raised these claims in the state court, in a Rule 3.851 motion and on direct appeal, respectively. The Supreme Court of Florida affirmed, noting on direct appeal that even if the testimony was improper, any error was harmless because the testimony was isolated, the prosecutor did not use the argument of future dangerousness in closing arguments, and the trial court did not rely upon it when sentencing Petitioner. *Allen I*, 137 So. 3d at 961-62. The court concluded that Petitioner's penalty phase was not rendered fundamentally unfair. *Id.* at 962. On appeal from the denial of Petitioner's Rule 3.851 motion, the court relied upon its prior ruling and concluded that Petitioner could not show prejudice. *Allen II*, 261 So. 3d at 1278.

During the penalty phase, the prosecutor asked Dr. Wu whether people with a frontal lobe brain injury such as Petitioner have impulse control order such

that she might be at risk of acting out to a prison guard in the future. (Ex. A-21 at 1855). First Dr. Wu testified that he could not say, noting that Petitioner is at a higher risk but prison is a more structured setting than the outside world. (*Id.*). When the prosecutor restated the question, asking if Dr. Wu was testifying that to a reasonable degree of medical certainty, Petitioner is a future risk, defense counsel objected to the question. (*Id.* at 1855-56). The trial court sustained the objection. (*Id.* at 1856).

Petitioner cites to *Zant v. Stephens*, 462 U.S. 862 (1983), to support his claim that the improper comments about future dangerousness warrant a new penalty phase. In *Stephens*, the Supreme Court of the United States considered whether habeas relief was warranted where the jury was instructed on an invalid statutory aggravator, a substantial history of assaultive criminal convictions. *Id.* at 885. The Court noted that while the statutory aggravating factor had been struck down by the Georgia Supreme Court, the evidence of whether the petitioner had a history of assaultive criminal convictions was fully amissible during the penalty phase. *Id.* at 886. The Court stated that even if not considered a statutory aggravator, the number of convictions was properly admitted and "fully subject to explanation by the defendant." *Id.* at 887. The Court concluded that although the jury may have given the history of convictions some weight because they were labeled as a

statutory aggravator, any possible impact was not a "constitutional defect" because the jury was not instructed to weigh that evidence more heavily than the other evidence introduced during the penalty phase. *Id.* at 889-90.

The Court concludes that Petitioner is not entitled to relief in light of *Stephens*. In the instant case, although the jury heard two potential mentions of Petitioner's future dangerousness, which is improper under Florida law, *see Teffeteller v. State*, 439 So. 2d 840, 844 (Fla. 1983) (arguments related to future dangerousness are improper), the State did not argue that this was a factor the jury should consider, nor was future dangerousness labeled as an aggravating factor like in *Stephens*. (Ex. A-22 at 1911-33) Moreover, the jury was not instructed on considering future dangerousness as an aggravating circumstance in this case or that this factor weighed more heavily than other factors; the state court properly instructed the jury on what they could consider as aggravating circumstances. (*Id.* at 1969-78. Juries are presumed to follow the court's instructions, and a reasonable probability does not exist that this error contributed to the jury's recommendation. *See Brown v. Jones*, 255 F.3d 1273, 1280 (11th Cir. 2001) ("We have stated in numerous cases . . . that jurors are presumed to follow the court's instructions.").

Additionally, federal courts have held that isolated or unintentional remarks are viewed with lenity and habeas relief is not warranted unless a

prosecutor encourages a jury to take into account matters that are not legitimate sentencing considerations. *See Geralds v. Inch*, No. 5:13-cv-167-MW, 2019 WL 2092977, at *39 (N.D. Fla. May 13, 2019), *aff'd sub. nom. Geralds v. Att'y Gen., Fla.*, 855 F. App'x 576 (11th Cir. 2021) (citing *Johnson v. Wainwright*, 778 F.2d 623, 630 (11th Cir. 1985) and *Reese v. Sec'y, Fla. Dep't of Corr.*, 675 F.3d 1277, 1287 (11th Cir. 2012)); *Walker v. State*, 707 So. 2d 300, 314 (Fla. 1997) (finding one isolated mention of future dangerousness was harmless where the trial court properly instructed the jurors as to the aggravating factors they could consider).

Petitioner has not shown that counsel acted deficiently, that she was deprived of a constitutionally fair penalty phase, or that prejudice resulted. Neither the prosecutor nor the state court relied on or used the testimony regarding her alleged future dangerousness as an aggravating factor.

3. Whether Petitioner Exhibited of Signs of Remorse

Petitioner contends that trial counsel was ineffective for failing to object to Dr. Wu's testimony or insinuation that Petitioner lacked remorse for the crime. (Doc. 1 at 39). Petitioner raised this claim in her Rule 3.851 motion, and the trial court denied relief, finding the comments were proper. (Ex. M at 1977). On appeal, the Supreme Court of Florida affirmed, concluding that Petitioner did not demonstrate prejudice. *Allen II*, 261 So. 3d at 1278.

The prosecuted cross-examined Dr. Wu regarding Petitioner's impulse control disorder. (Ex. A-21 at 1851). The prosecutor asked whether a person with impulse control disorder would show remorse after they have an outburst. (*Id.*). Dr. Wu stated that it would depend on the case. (*Id.*). The prosecutor asked whether Petitioner exhibited any signs of remorse after the murder, and Dr. Wu stated that he did not have the specific details or circumstances regarding her actions at that time. (*Id.*).

Even assuming that this line of cross-examination was improper, Petitioner cannot demonstrate prejudice. There was an overwhelming amount of evidence demonstrating that the victim was prevented from leaving Petitioner's home, and that she bound, beaten, and strangled. In light of the evidence of aggravating factors, a reasonable probability does not exist that the outcome of the penalty phase would have been different. Petitioner is not entitled to relief on this claim.

4. Improper Golden Rule Argument

Petitioner alleges that trial counsel was ineffective for failing to object to the State's improper golden rule arguments (Doc. 1 at 40). During the penalty phase closing arguments, the State was discussing how the victim was strangled using a strap and stated, "You cannot get your breath. Okay? Use your common sense. I mean, all of us have, you know, run somewhere, maybe we have a medical

condition. . . it is scary when you can't get your breath." (Ex. A-22 at 1920). The prosecutor later discussed the basic human instinct to survive, noting, "You know, I want to live. I don't want to die. I want to see my children again." (*Id.* 1921).

Petitioner raised this claim in his Rule 3.851 motion, and the trial court denied relief, finding the comment was appropriate. (Ex. M at 1982-83). On appeal, the Supreme Court of Florida affirmed, finding Petitioner could not demonstrate prejudice because there was a significant amount of evidence supporting the heinous, atrocious, or cruel aggravator in this case. *Allen II*, 261 So. 3d at 1279.

Florida courts have held that "golden rule" arguments, or arguments that persuade jurors "to place themselves in the victim's position during the crime and imagine the victim's suffering" are impermissible. *Mosley v. State*, 46 So. 3d 510, 520 (Fla. 2009). Although the comments above did not explicitly ask the jurors to put themselves in the victim's shoes and imagine her suffering, even assuming that the comments were impermissible, Petitioner cannot demonstrate prejudice.

The jury heard an overwhelming amount of evidence that the victim was restrained, bound, beaten, strangled, and that she begged to be let go. The prosecutor was commenting on the heinous, atrocious, or cruel manner in which the victim died. When considering this evidence supporting the heinous, atrocious, or cruel aggravator, a reasonable probability does not exist that but for

counsel's actions, the result of the penalty phase would have been different. *See Grossman v. McDonough*, 466 F.3d 1325, 1348 (11th Cir. 2006) (noting that a victim's fear, pain, and emotional strain are relevant to the heinous nature of a murder); *Flectcher v. State*, 168 So. 4d 186, 217-18 (Fla. 2015) (affirming the finding of the HAC aggravator where the victim was restrained, hit, threatened with a firearm, screamed several times, and was strangled). Petitioner is not entitled to relief on this claim.

5. Misstatement of Death Penalty Law

Petitioner contends that trial counsel was ineffective for failing to object to the prosecutor's mischaracterization of death penalty law. (Doc. 1 at 41-42). During closing argument, the prosecutor stated, "there are cases where the recommendation for the death penalty is warranted. This is that case . . . . But in certain cases it is what the law calls for." (Ex. A-22 at 1932).

Petitioner raised this claim in her Rule 3.851 motion, and the trial court denied relief, noting that the comment was not improper, did not attempt to gain sympathy for the State, nor did it deprive Petitioner of a fair penalty phase. (Ex. M at 1989-90). The Supreme Court of Florida affirmed, finding Petitioner failed to show prejudice because the jury instructions correctly informed the jury on the

law regarding weighing the aggravating and mitigating factors. *Allen II*, 261 So. 3d at 1279.

The Court agrees with the state court's findings. Even assuming that the prosecutor misstated Florida death penalty law, the trial court correctly instructed the jury on how to find and weigh the aggravating and mitigating circumstances. (Ex. A-22 at 1969-76). As the Court noted above, jurors are presumed to follow the court's instructions. *Brown*, 25 F.3d at 1280. Consequently, Petitioner is not entitled to relief on this claim.

6. Misrepresentation of Dr. Gebel's testimony

Petitioner asserts that trial counsel should have objected to the prosecutor's misrepresentation of Dr. Gebel's testimony. (Doc. 1 at 42). During closing argument, the prosecutor stated that Dr. Gebel got paid for her testimony and stated that Dr. Gebel would not have changed her opinion regarding Petitioner's cognitive disorders even if he knew additional facts about the case. (Ex. A-22 at 1926).

Petitioner raised this claim in her Rule 3.851 motion, and the trial court denied relief, finding first that the prosecutor's statement was not a complete misstatement. (Ex. M at 1985). The court also stated that even if the comment was not a complete reflection of Dr. Gebel's testimony, prejudice did not result. The

Supreme Court of Florida affirmed, concluding that no prejudice resulted from the comment. *Allen II*, 261 So. 3d at 1280.

The Court agrees that the prosecutor's comments did not result in prejudice. The jury heard Dr. Gebel's testimony, including the doctor's statement that if he knew additional facts about the case, he might change his opinion with regard to the degree of Petitioner's brain injury. (Ex. A 21- at 1761). Dr. Gebel ultimately opined that Petitioner had frontal and temporal lobe damage, an impulse control disorder, and therefore, she could not appreciate the criminality of her conduct nor could she conform her behavior to the law. (*Id.* at 1751-53). The jury was instructed on how to weigh the aggravating and mitigating circumstances, and there is no indication that the prosecutor's comment about Dr. Gebel's testimony would have influenced the jury or resulted in a different outcome in light of the evidence presented.

7. Use of the Term Waterboarding Torture

Petitioner alleges that trial counsel was ineffective for failing to object to the prosecutor's characterization of pouring liquids on the victim's face as waterboarding torture. (Doc. 1 at 43). Petitioner raised this claim in his Rule 3.851 motion, and the trial court concluded that the statemen was not improper in light of Quintin's testimony that various liquids were poured on the victim's face and

she was tortured. (Ex. M at 1982). The Supreme Court of Florida affirmed, agreeing with the trial court and concluding no prejudice resulted from counsel's actions. *Allen II*, 261 So. 3d at 1280.

Petitioner has not shown prejudice with regard to this claim. The jury heard Quintin's testimony that Petitioner punched or struck the victim multiple times, poured bleach, hair spritz, nail polish remover, and rubbing alcohol on the victim's face, held her down, tied her up, beat her with a belt, and strangled her while the victim pleaded to be let go. (Ex. A-15 at 902-15). The Court cannot say that but for the prosecutor's use of the term "waterboarding torture" the result of the penalty phase would have been different.

8. Misstatement of Dr. Wu's Testimony

Petitioner alleges that trial counsel was ineffective for failing to object and request a curative instruction on the prosecutor's misstatement that a PET scan is not a standalone test and that Dr. Wu uses MRIs and CAT scans to diagnose brain trauma. (Doc. 1 at 43). Petitioner raised this claim in his Rule 3.851 motion, and the trial court denied relief, noting that Dr. Wu did testify that the PET scan is not a standalone diagnostic test. (Ex. M at 1987). The Supreme Court of Florida affirmed, concluding Petitioner had not shown prejudice. *Allen II*, 261 So. 3d at 1281.

Dr. Wu testified on cross-examination that often a PET scan is done in conjunction with an MRI. (Ex. A-21at 1856). However, Dr. Wu also stated that while this is preferable, it is not always done or essential. (*Id.* at 1856-57). The Court concludes while not entirely correct, the prosecutor's comment was not a complete mischaracterization of Dr. Wu's testimony. Moreover, the jury heard that Dr. Wu had diagnosed Petitioner with brain damage after reviewing a PET scan and psychological records. (*Id.* at 1816). The jury also heard a large amount of evidence in aggravation, as the Court noted above. Therefore, a reasonable probability does not exist that but for counsel's actions, the result of the penalty phase would have been different.

9. Evidence of Petitioner's Bad Character

Petitioner argues that trial counsel was ineffective for failing to object and move for a mistrial when the prosecutor introduced evidence of Petitioner's bad character during closing argument. (Doc. 1 at 44). During closing argument, the prosecutor mentioned that two of Petitioner's children were in prison. (Ex. A-22 at 1930). Petitioner contends that this statement inferred that she is a bad mother.

Petitioner raised that claim in her Rule 3.851, and the trial court denied relief, concluding that the comment was a fair response to evidence presented by defense counsel. (Ex. M at 1989). The Supreme Court of Florida affirmed, noting

that the Hudson testified that two of Petitioner's children are in prison and one lives with her grandmother. *Allen II*, 261 So. 3d at 1281. The Court also found that no prejudice resulted from this comment. *Id.*

Hudson testified during the penalty phase that two of Petitioner's children were serving prison sentences and one was living with her grandmother. (Ex. A-22 at 1889). Federal courts have held that "a prosecutor may argue both facts in evidence and reasonable inferences from those facts." *Tucker v. Kemp*, 762 F.2d 1496, 1506 (11th Cir. 1985). Therefore, counsel's failure to object did not amount to deficient performance because the prosecutor's statement was a fair comment on the evidence. However, even if the comment was improper, Petitioner cannot show prejudice, because a reasonable probability does not exist that but for counsel's actions, the result of the penalty phase proceeding would have been difference in light of the aggravating circumstances presented.

10. Misstatement of Mental Health Mitigation Testimony

Petitioner contends that trial counsel should have objected and moved for a mistrial when the prosecutor told the jury that he wrote down Dr. Gebel's testimony. (Doc. 1 at 45). Petitioner also claims that the prosecutor misstated Dr. Gebel's testimony by arguing that the doctor said Petitioner had no major brain injury. (*Id.*). Petitioner raised this claim in her Rule 3.851 motion, and the trial court

summarily denied relief, finding Petitioner had not shown deficient performance or prejudice. (Ex. M at 1984-86). The Supreme Court of Florida affirmed, stating that the Petitioner had not shown prejudice. *Allen II*, 261 So. 3d at 1281-82.

Dr. Gebel testified that, within a reasonable degree of medical certainty, Petitioner had brain damage. (Ex. A-21 at 1750). Dr. Gebel stated that Petitioner had suffered from intracranial injuries. (*Id.*). However, Dr. Gebel also noted that Petitioner did not have a major brain injury "in terms of weakness in an arm or a leg. . . But the mental status itself was questionable." (*Id.* at 1745).

The prosecutor's statement was a fair comment on Dr. Gebel's testimony. *See Tucker*, 762 F.2d at 1506. Additionally, a reasonable probability does not exist that but for this testimony, the outcome of the penalty phase would have been different in light of the evidence presented to support the aggravating circumstances. This claim does not warrant habeas relief.

11. Cumulative Error

Petitioner asserts that the cumulative effect of these errors warrants a new penalty phase. (Doc. 1 at 45). Petitioner has not shown an error of constitutional dimension with respect to any of the above claims. Therefore, she cannot show that the cumulative effect of the alleged errors deprived her of fundamental fairness in the state criminal proceedings. *See Morris,* 677 F.3d at 1132.

The state court's denial of these claims was not contrary to or an unreasonable application of clearly established federal law. Accordingly, Claims Four and Thirteen are denied.

E. Claim Five

Petitioner alleges that trial counsel was ineffective for failing to present available expert testimony that would have corroborated Dr. Whitmore's autopsy report. (Doc. 1 at 46-47). Petitioner raised this claim in his Rule 3.851 motion, and the trial court held an evidentiary hearing on this claim. (Ex. M at 2809).

Bankowitz testified that Dr. Qaiser was not initially a witness in this action but became one when he took over the Brevard County Medical Examiner's Office from Dr. Whitmore. (*Id.* at 2802). Bankowitz testified that Dr. Qaiser's opinion was that the victim's death was due in part to ligature marks, which was substantially different from the initial report, which did not report any ligature marks. (*Id.* at 2803-04). Bankowitz testified that in order to challenge Dr. Qaiser's opinion, he sought to introduce Dr. Whitmore's report, which he was able to do during the cross-examination of Dr. Qaiser. (*Id.* at 2804 and 2810).

Bankowitz did not call a defense expert regarding the ligature marks and could not recall why he made that choice. (*Id.* at 2810-11). On cross-examination, Bankowitz testified that he was able to extensively cross-examine Dr. Qaiser

regarding the matter, and the trial judge and jury were aware of the difference in opinions between Dr. Qaiser and Dr. Whitmore, including the fact that Dr. Qaiser never saw the victim's body nor did he perform the autopsy. (*Id.* at 2854-55). Bankowitz was able to use those distinctions to infer that Dr. Whitmore's findings were more reliable than Dr. Qaiser. (*Id.*). Bankowitz did not feel that he needed another expert to testify about Dr. Whitmore's findings. (*Id.* at 2874-75).

Petitioner called Dr. Spitz, the chief medical examiner in Macomb and St. Clair Counties, Michigan, to testify regarding the autopsy findings. (*Id.* at 3274). Dr. Spitz reviewed the autopsy report, photographs, toxicology, and trial testimony (*Id.* at 3281-82). Dr. Spitz opined that the victim's body did not show indicators that would support a conclusion of ligature strangulation. (*Id.* at 3289). Dr. Spitz testified that the victim had bruises on either side of her neck but no ligature contusions or marks were present. (*Id.* at 3290). Dr. Spitz stated that while the victim's neck had lines on it, they were curved lines indicative of skin folds and not strangulation. (*Id.*). Dr. Spitz did not notice any other neck injuries, such as petechiae hemorrhages, strap musculature, or damage to the hyoid bone. (*Id.*).

Dr. Spitz reviewed several of the autopsy photographs and opined that the skin on the victim's neck was unremarkable and did not show injuries to her neck. (*Id.* at 3299-3302). Dr. Spitz also opined that because the victim's body had begun

to degrade prior to the autopsy, it made evaluation of whether there were bruises on the victim's body more difficult. (*Id.* at 3303-04). Dr. Spitz noted that Dr. Whitmore's report found two areas of non-specific bruising on the victim's neck and others on her face and body. (*Id.* at 3304-05). Dr. Spitz stated that Dr. Whitmore, as the doctor performing the autopsy, was in the best position to make a determination regarding whether the victim's neck showed ligature marks. (*Id.* at 3305).

On cross-examination, Dr. Spitz agreed that the death of the victim was as a result of a homicide. (*Id.* at 3317). Dr. Spitz agreed that one eyewitness told police that the victim was strangled by using a belt. (*Id.* at 3318). Dr. Spitz admitted that he could not exclude ligature strangulation as the cause of death in this case. (*Id.* at 3323-24 and 3331-32). On redirect-examination, Dr. Spitz stated that if he had testified at the penalty phase, he would have included asphyxia as a possible cause of death but would note that there was no evidence of ligature. (*Id.* at 3343-45). Dr. Spitz later clarified that while ligature was unlikely, he could not completely exclude that possibility. (*Id.* at 3346)

The trial court denied relief, finding that Dr. Spitz's testimony does not undermine the result in this case, because "Dr. Spitz agreed that a ligature was possible . . ." and that the victim's death was the result of a homicide. (Doc. 1-1 at

66). The trial court noted that while Dr. Spitz agreed that the victim's bruising could have resulted from being restrained or as a result of a ligature. (*Id.* at 66-7). The trial court also found that "[e]verthing Dr. Spitz testified to was brought out on cross-examination of Dr. Qaiser." (*Id.* at 67). The trial court concluded that Bankowitz made a strategic decision not to hire a forensic expert and instead challenged Dr. Qaiser's findings on cross-examination, therefore no prejudice resulted. (*Id.*).

The Supreme Court of Florida affirmed, holding that Petitioner could not show deficient performance or prejudice. *Allen II*, 261 So. 3d at 1284. The court noted that counsel brought out the fact that Dr. Qaiser did not perform the autopsy and that Dr. Whitmore did not find evidence of ligature on cross-examination. *Id.* The court agreed that Dr. Spitz's testimony was tantamount to or the same as what was brought out on Dr. Qaiser's cross-examination. *Id.* The court also found that Bankowitz's decision not to call an expert because he could elicit the same information on cross-examination was a sound strategic decision. *Id*. Finally, the court held that even if Dr. Spitz had been called to testify, a reasonable probability does not exist that the outcome of trial would have been different because Dr. Spitz also could not rule out the possibility of ligature strangulation. *Id.*

An attorney's decision regarding the retention of an expert witness is a matter of trial strategy. *See Adams v. Wainright*, 709 F.2d 1443, 1445 (11th Cir. 1983) (noting that attorneys are not constitutionally ineffective because of tactical decisions, and even if in retrospect the strategy appears wrong, the decision is only ineffective if it "was so patently unreasonable that no competent attorney would have chosen it."); *see also Strickland*, 466 U.S. at 690 ("strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable.").

This Court agrees with the state court's finding that Bankowitz made a strategic decision not to call an expert witness regarding the autopsy. Instead, defense counsel challenged Dr. Qaiser's testimony on cross-examination by using Dr. Whitmore's report, thus presenting evidence to the judge and jury that Dr. Whitmore, the doctor who performed the autopsy, did not opine that the victim's cause of death was due to ligature strangulation. Through his cross-examination, Bankowitz was able to question Dr. Qaiser's findings regarding the ligature strangulation and whether the victim felt pain. Therefore, trial counsel was not deficient for failing to challenge Dr. Qaiser's testimony. *See Harrington v. Richter*, 562 U.S. 86 (2011) (stating that *Strickland* does not require that a defense attorney hire an expert to rebut a State's expert, and it was entirely reasonable for the court

to find no prejudice when the defendant failed to offer any evidence challenging the prosecution's expert's conclusions); *See Connor v. Sec'y, Fla. Dep't of Corr.*, 713 F.3d 1320, 1341 (11th Cir. 2013) (noting that *Strickland* does not require counsel to present cumulative evidence).

Additionally, the Court agrees that there is no prejudice in this case. Through Bankowitz's cross-examination, he was able to suggest or infer to the jury that Dr. Whitmore's report was more reliable because he had performed the autopsy. (Ex. A-18 at 1407-08; Ex. A-19 at 1468-71). Although Dr. Spitz stated that he did not agree with Dr. Qaiser's ultimate finding of ligature strangulation, Dr. Spitz testified that he could not rule such out. Moreover, the bulk of, if not all, of Dr. Spitz's testimony was brought out during the cross-examination of Dr. Qaiser. (Ex. A-18 at 1469-77 and 1487-92). Therefore, Petitioner has not shown that Dr. Spitz's testimony would have resulted in a different outcome at trial.

The state court's denial of this claim was not contrary or an unreasonable application of clearly established federal law. Accordingly, Claim Five is denied pursuant to § 2254(d).

F. Claims Six and Seven

Petitioner asserts in Claim Six that trial counsel was ineffective for eliciting testimony from Quintin that Petitioner poured multiple chemicals in the victim's

eyes and mouth when he had already conceded on redirect examination that she used rubbing alcohol. (Doc. 1 at 55). In Claim Seven Petitioner contends trial counsel was ineffective for failing to impeach Quintin with his statements to Detective Boyer indicating that Petitioner did not pour chemicals on the victim. (*Id.* at 58).

Quintin testified that Petitioner poured bleach, rubbing alcohol, hair spritz, and fingernail polish remover on the victim's face (Ex. A-15 at 903-06, 914). Petitioner contends that this testimony was in contrast to his statement to Detective Boyer, wherein he stated Petitioner poured alcohol on the victim but could not remember what else was used; however, he told police bleach was not used. (Doc. 1 at 59). Quintin was extensively cross-examined about the use of bleach and other chemicals and whether any chemicals were poured into the victim's mouth. (Ex. A-16 at 1037-44).

Petitioner raised these claims in his Rule 3.851 motion, and the trial court held an evidentiary hearing. Bankowitz testified that he extensively impeached Quintin regarding the use of chemicals, including whether they were poured on the victim's face or in her mouth, to show that he made multiple inconsistent statements. (Ex. M at 2868-69). Bankowitz also stated that because the medical

findings did not show any evidence of caustic chemicals such as bleach, he questioned Quintin extensively to point out that his statement was untrue. (*Id.*).

The trial court denied relief, noting that Petitioner could not demonstrated prejudice. (Ex. M at 1952). The court found that Quintin told police Petitioner used several products and never *clearly* eliminated the use of bleach. (*Id.*) (emphasis added). The court also noted that Quintin's testimony regarding the substances used "wavered" or changed during the course of his statements to police and trial testimony. (*Id.*) *See also* Ex. A-15 at 905-06, Ex. A-16 at 1036-1044.

Moreover, the court noted that the issue of whether bleach was used was refuted by the autopsy report and Dr. Qaiser's testimony that no evidence of bleach was found. (Ex. M at 1953-54). The court concluded that the impeachment of Quintin was not unreasonable under the prevailing norms, and no prejudice had resulted. (*Id.* at 1954-55). The court also found that defense counsel properly impeached Quintin regarding whether he poured chemicals into the victim's eyes and mouth and that it was clear Quintin stated that the chemicals were poured on the victim's face and not in her mouth. (*Id.* at 1955-56).

The Supreme Court of Florida affirmed, finding Petitioner had not shown deficient performance or prejudice. *Allen II*, 261 So. 3d at 1275-76, and 1285. The court found that defense counsel's questioning of Quintin and impeachment

methods amounted to sound trial strategy. *Id.* at 1275 and 185. Moreover, the court found that Petitioner could not demonstrate prejudice because the jury was aware Quintin had given multiple inconsistent statements, and the finding that the murder was heinous, atrocious, or cruel was not based solely on the use of chemicals but instead relied on the fact that the victim was bound, beaten, and strangled. *Id.* at 1276.

The Sixth Amendment guarantees "reasonable competence, not perfect advocacy with the benefit of hindsight." *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003). Furthermore, "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Strickland*, 466 U.S. at 690.

The Court agrees that defense counsel's actions were reasonable trial strategy. Defense counsel thoroughly cross-examined Quintin and in doing so, demonstrated to the jury that he had made multiple inconsistent statements, including differing statements as to what alleged chemicals were used and whether the chemicals were poured over the victim or in her mouth. (Ex. A-16 at 1039-43; 1054-55). Although Petitioner argues that Bankowitz improperly elicited evidence regarding multiple chemicals, the state court noted that this strategy was reasonable to illustrate to the jury the numerous different statements Quintin

made. 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.

Furthermore, even taking Petitioner's allegation that counsel acted deficiently as true, Petitioner had not shown prejudice. Petitioner states that had counsel properly questioned Quintin, the jury would not have found the heinous, atrocious, or cruel aggravator. However, the state court found that there was sufficient evidence, without the testimony regarding the chemicals, to find that HAC aggravator.

Federal and Florida courts have held that a victim's fear, pain, and emotional strain before her death are all relevant to the heinous nature of a murder. *See Grossman v. McDonough*, 466 F.3d 1325, 1348 (11th Cir. 2006). The focus is on the means and manner by which a death is inflicted, and courts can consider the victim's perception, fear, or terror. *Colley v. State*, 310 So. 4d 14-15 (Fla. 2020), *cert. denied sub nom.*, *Colley v. Fla.*, 142 S. Ct. 144 (2021). Courts have consistently upheld the finding of the heinous, atrocious, or cruel aggravator where a conscious victim was beaten or strangled. *See Flectcher v. State*, 168 So. 4d 186, 217-18 (Fla. 2015) (affirming the finding of the aggravator where the victim was, over a prolonged period of time, threatened with a firearm and struck, screamed several

times, and was strangled); *Conde v. State*, 860 So. 2d 930, 955 (Fla. 2003) (stating it is permissible to "infer that strangulation perpetrated upon a conscious victim involves foreknowledge of death, causes extreme anxiety and fear, and is a method of killing to which heinousness is applicable.").

The evidence presented at trial indicates that the victim was held down, tied up, threatened with a gun or death, hit multiple times, and the victim begged to be let go. At some point the victim was strangled by hand or with a belt, and she eventually lost consciousness and died. Even without considering the evidence of chemicals, there was sufficient evidence to convict Petitioner and find that the murder was heinous, atrocious, or cruel. Petitioner has not shown that but for counsel's actions, the result of the proceeding would have been different.

The state court's denial of these claims was not contrary to nor did it result in an unreasonable application of clearly established federal law. Accordingly, Claims Six and Seven are denied pursuant to § 2254(d).

G. Claim Eight

Petitioner contends that trial counsel was ineffective for failing to object to Dr. Qaiser's testimony that unconscious people can feel pain (Doc. 1 at 62). Petitioner raised this claim in his Rule 3.851 motion, and the trial court denied relief, noting that because Dr. Qaiser testified that he could not testify within a

reasonable degree medical probability that the victim felt pain while unconscious, this testimony was discredited. (Ex. M at 1971).

On appeal, the Supreme Court of Florida affirmed, stating first that defense counsel made a strategic decision not to object to the testimony and instead determined he would challenge the testimony on cross-examination. *Allen II*, 261 So. 3d at 1276. The court noted that counsel succeeded in getting Dr. Qaiser to admit that he could not definitely say whether the victim felt pain within a reasonable degree of medical probability. *Id.* The court also found that Petitioner had not demonstrated prejudice because there was a large amount of evidence to support the heinous, atrocious, or cruel aggravator that was unrelated to this testimony, such as being bound, beaten, and strangled. *Id.* at 1276-77.

Bankowitz testified at the evidentiary hearing that he did not call an independent expert to attack Dr. Qaiser's claim the victim might feel pain even when unconscious because his plan was to attack Dr. Qaiser on cross-examination. (Ex. M at 2805 and 2810). Bankowitz stated that he felt he was able to extensively cross-examine Dr. Qaiser about the matter, and the jury was aware that Dr. Qaiser's opinion differed from Dr. Whitmore's report. (*Id.* at 2854-56).

The trial record reflects that Bankowitz did indeed thoroughly cross-examine Dr. Qaiser about this issue, and the doctor admitted that he could not

definitively say whether the victim felt pain while unconscious. (Ex. A-21 at 1725-28). Bankowitz made a strategic decision to challenge Dr. Qaiser's testimony on cross-examination, and Petitioner has not shown that this strategy was unreasonable. *See Strickland*, 466 U.S. at 690 ("strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable.").

Additionally, Petitioner has not shown prejudice. While Petitioner contends that this evidence was used to prove the heinous, atrocious, or cruel aggravator, there was sufficient evidence that aggravator even without consideration of this evidence. As the Court noted above, the evidence presented at trial showed that the victim was prohibited from leaving Petitioner's home, initially held down and then tied down, threatened with a gun or death, struck multiple times, and eventually strangled while she pled to be released before losing consciousness and dying. *See Fletcher*, 168 So. 4d at 217-18; *Conde*, 860 So. 2d at 955. Petitioner cannot show that but for counsel's actions, a reasonable probability exists that the outcome of the trial would have been different.

The state court's denial of this claim was not contrary to or an unreasonable application of clearly established federal law. Accordingly, Claim Eight is denied.

H. Claim Nine

Petitioner alleges that her due process rights were violated when the State knowingly elicited and failed to correct false testimony that Petitioner was convicted several times for selling drugs in violation of *Giglio v. United States*, 405 U.S. 150 (1972). (Doc. 1 at 65). Petitioner takes issues with Hudson's testimony during the penalty phase, wherein Hudson testified that Petitioner was convicted "several times for selling drugs." (Ex. A-22 at 1892). Petitioner contends that she only had one conviction for selling drugs. (Doc. 1 at 65).

Petitioner raised this claim in her Rule 3.851 motion, and the trial court summarily denied relief, concluding that the evidence of prior drug convictions was not material. (Ex. M at 1995). The Supreme Court of Florida affirmed, agreeing that the false evidence presented by the State was immaterial "because there is no reasonable possibility that the number of prior drugs convictions that Allen had contributed to the jury's sentencing recommendation" or that the fact that Allen had one drug conviction versus many would have had an impact on the vote in light of the evidence presented. *Allen II*, 261 So. 3d at 1287.

To demonstrate a *Giglio* violation, a defendant must establish that (1) the prosecutor presented or failed to correct false testimony; (2) the prosecutor knew the testimony was false; and (3) the false evidence was material, or that there is a

reasonable likelihood that the false testimony could have affected the judgment. 405 U.S. 150, at 154; *Guzman v. Sec'y, Dep't of Corr.*, 663 F.3d 1336, 1348 (11th Cir. 2011).

It is clear that the State failed to correct Hudson's testimony when the prosecutor was aware Petitioner had only one prior drug sale conviction. However, Petitioner has not demonstrated that the false evidence was material. The jury heard evidence that Petitioner grew up in a neighborhood where the sale or abuse of drugs was common. The jury also heard evidence that the victim was restrained from leaving, had chemicals or liquids poured on her face, was beaten with fists and a belt, was tied up, and strangled by a belt. A reasonable probability does not exist that if the jurors had heard Petitioner had one drug conviction as opposed to several drug convictions that they would not have unanimously agreed to sentence her to death. The Court agrees with the Supreme Court of Florida's conclusion that the use of this evidence was harmless.

The state court's denial of this claim was not contrary to or an unreasonable application of clearly established federal law. Accordingly, Claim Nine is denied.

I. Claim Ten

Petitioner contends trial counsel was ineffective for asking Hudson about Petitioner growing up around drugs and violence when he did not intend to use

it in mitigation. (Doc. 1 at 67). Petitioner raised this claim in her Rule 3.851 motion, and the trial court held an evidentiary hearing on the claim.

Bankowitz testified that he specifically asked Hudson about the neighborhood in which Petitioner grew up in order to show the atmosphere and that being near drugs and violence had a negative effect on her. (Ex. M at 2828-30). The trial court denied relief, noting that the trial court listed growing up in a neighborhood of drugs and violence as a nonstatutory mitigator. (*Id.* at 1991-94).

The Supreme Court of Florida affirmed, finding that counsel's questioning of Hudson regarding the neighborhood in which Petitioner grew up was strategic and purposeful and therefore, Petitioner had not shown deficient performance. *Allen II*, 261 So. 3d at 1283. The court noted that this evidence was used by the trial court to find a nonstatutory mitigating circumstance. *Id.* The court also held that Petitioner failed to demonstrate prejudice because there is "no reasonable probability that the jury hearing that Allen grew up surrounds by 'drugs, thugs, and violence' impacted their balancing of the aggravating and mitigating circumstances in light of the evidence. . . ." *Id.* (citations omitted).

Petitioner has not demonstrated deficient performance. Bankowitz made a strategic decision to question Hudson about the neighborhood in which Petitioner

grew up in order to demonstrate how the culture of violence and drugs affected her negatively. Petitioner has not shown that this strategy was unreasonable.

Furthermore, the Court agrees that a reasonable probability does not exist that but for counsel's actions, the result of the proceeding would have been different. This evidence was favorable to Petitioner, and the trial court used the evidence to find a nonstatuory mitigating circumstance. Moreover, Petitioner fails to demonstrate this evidence influenced the jury's unanimous vote for a death sentence in light of the evidence presented in aggravation.

The state court's denial of this claim was not contrary to nor was it an unreasonable application of clearly established federal law. Claim Ten is therefore denied pursuant to § 2254(d).

J. Claim Eleven

Petitioner alleges that counsel was ineffective for failing to strike Juror Carll for cause or use a peremptory challenge. (Doc. 1 at 70-71). Petitioner raised this claim in his Rule 3.851 motion, and the trial court held an evidentiary hearing on the claim, after which it denied relief. (Ex. M at 1950).

During voir dire, Juror Carll was asked by counsel what would cause her to vote for a life sentence rather than a death sentence, and the juror stated, "But if the person actually committed the death with a bunch of other people and

participated in the physical death, they should be recommended for the death penalty." (Ex. A-11 at 221). Juror Carll also stated that everyone who had a hand in the death should be recommended for the death penalty. (*Id.*). Later, Carll stated that she would listening to the aggravating and mitigating circumstances objectively. (*Id.* at 249-50, 372). Carll noted that she is flexible and would take into account the events that led up to the death and how the defendant was involved. (*Id.* at 249-50).

Bankowitz testified that he thought he had sufficiently rehabilitated Carll. (Ex. M at 2866). Bankowitz also stated that it was his practice to consider "who is next in line" if a particular juror is stricken from the panel. (*Id.*). Bankowitz testified that he considers a number of factors when selecting a jury, including a juror's reactions and body language. (*Id.* at 2866-67). Bankowitz stated that because he thought Carll was rehabilitated, and in light of the remaining potential jurors, he made the decision to keep her as a juror. (*Id.*)

The trial court denied relief, finding that Bankowitz's decision not to strike Carll was a mater of trial strategy, and thus did not constitute ineffective assistance of counsel. (Doc. 1-1 at 12). The Supreme Court of Florida affirmed, finding that Petitioner had not shown that juror Carll was actually biased against her and thus, she had not demonstrated prejudice. *Allen II*, 261 So. 3d at 1285-86.

The constitutional standard of fairness requires that the criminally accused have a panel of impartial, indifferent jurors." *Murphy v. Florida*, 421 U.S. 794, 799 (1975). "The purpose of a voir dire is to ascertain whether a potential juror can render a verdict solely on the basis of the evidence presented and the charge of the trial court." *Wilcox v. Ford*, 813 F.2d 1140, 1150 (11th Cir. 1987). In Florida, "[t]he test for determining juror competency is whether the juror can lay aside any bias or prejudice and render a verdict solely on the evidence presented and the instructions on the law given by the court." *Smith v. Florida*, 28 So.3d 838, 859 (Fla. 2009) (citing *Lusk v. Florida*, 446 So.2d 1038, 1041 (Fla. 1984)). To establish that Petitioner was prejudiced by Carll's presence on the jury, Petitioner must demonstrate that the juror was actually biased against her. *Smith v. Phillips*, 455 U.S. 209, 215 (1981).

Petitioner has not shown that juror Carll was actually biased against her. Carll assured the trial court that she was willing to listen to the evidence presented at trial, be fair, and follow the law. Carll's statements that she would be flexible and consider both the aggravating and mitigating circumstances refute Petitioner's claim that Carll was biased. Therefore, Petitioner has not established prejudice.

The state court's denial of this claim was not contrary to or an unreasonable application of clearly established federal law. Accordingly, Claim Eleven is denied pursuant to § 2254(d).

K. Claim Twelve

Petitioner contends that the trial court erred in excluding James Martin's ("Martin") testimony that Quintin admitted to choking the victim, thereby violating *Chambers v. Mississippi*, 410 U.S. 284 (1973). (Doc. 1 at 73).

Petitioner raised this claim on direct appeal, and the Supreme Court of Florida affirmed, finding that Martin's testimony was inadmissible hearsay, did not qualify as a statement against interest pursuant to § 90.804(2)(c), Fla. Stat., was unreliable, and to the extent the evidence was admissible, the error in excluding it was harmless. *Allen I*, at 956-57. The court noted that Martin denied ever saying Quintin confessed to choking the victim, therefore, a reasonable probability does not exist that the error affected the verdict. *Id.* at 957. The Court also addressed Petitioner's argument that the statement was admissible under *Chambers v. Mississippi*, 410 U.S. 284 (1973), finding that *Chambers* was inapplicable because the trial court did not prevent Petitioner from calling or cross-examining Quintin as a witness. *Allen I*, 137 So. 3d at 957. Additionally, the court held that Martin's

testimony was not admissible as a statement by a co-conspirator pursuant to § 90.803(18)(e), Fla. Stat. *Id.* at 958.

Martin testified that at some point he and Quintin were in adjoining cells at the jail. (Ex. A-17 at 1257). Quintin told Martin that the State had come to him regarding this case "with a deal." (*Id.* at 1258). The State then asked to proffer testimony that Quintin told Martin that he had choked the victim. (*Id.* at 1258-62). However, Martin testified that Quintin never stated that he choked the victim. (*Id.* at 1262-63). Martin was impeached with his deposition statement that Quintin admitted to choking the victim, but Martin disputed the deposition statement. (*Id.* at 1263-65). After hearing a lengthy argument from the parties, the trial court ruled that the statement was inadmissible. (*Id.* at 1266-90).

In *Chambers*, the defendant was prevented, as a consequence of "the combination of the Mississippi's 'party witness' or 'voucher' rule and its hearsay rule" to cross-examine witness McDonald, who initially admitted to committing the crime and then later recanted, or present witnesses who would have discredited McDonald. 410 U.S at 294. The Supreme Court found that the trial court erred when it refused to admit hearsay statements made by McDonald, which were made close in time after the murder was committed and corroborated by other evidence in the case. *Id.* at 300. The Court noted that even if there was any

question about the truthfulness of the statements, the witness was present in the courtroom and could be cross-examined and his demeanor and responses weighed by the jury. *Id.* at 301.

Petitioner has not shown that *Chambers* is applicable in this matter.[1] Unlike the facts of *Chambers*, Petitioner was not prevented from calling Quintin as a witness or cross-examining about his hearsay statement that he had choked the victim. Therefore, Petitioner has not shown that due process was violated.

Furthermore, Petitioner has not shown that Quintin's hearsay statement was admissible during Martin's testimony under Florida law. Section 90.804(2)(c), Florida Statutes, provides that a statement against interest or a statement tending to expose the declarant to criminal liability and offered to exculpate the accused is generally inadmissible unless corroborating circumstances can show the trustworthiness of the statement. This exception can be used only when the declarant is unavailable. Quintin was clearly available and did testify at trial, therefore, his hearsay statement was not admissible under this section.

---

[1] Furthermore, when considering the same factors as the Supreme Court in *Chambers*, it is unclear that Quintin's hearsay was reliable as it was not made close in time to when the murder was committed, nor was there any other evidence to corroborate his statement.

To the extent Petitioner contends that Quintin's hearsay statement was admissible as a co-conspirator statement, the Court disagrees. Section 90.803(18)(e), Florida Statutes, provides that a statement made by a co-conspirator is admissible if the statement was made during the course of, and in furtherance of the conspiracy. Even assuming Martin was a co-conspirator in this matter because he assisted Quintin and Petitioner in moving and burying the victim's body (Ex. A-17 at 1170-1220), there is no record evidence that Quintin's statement was made during the course of or in furtherance to the conspiracy. The hearsay statement was made well after Martin and Quintin had been arrested and the conspiracy had terminated. *See Brooks v. State*, 787 So. 2d 765, 772 (Fla. 2001) (finding a hearsay statement made by a co-conspirator was inadmissible under § 90.803(18)(e), Fla. Stat., because there was no evidence in the record to suggest that the statement was made while the conspiracy existed).

The state court's denial of this claim was not contrary to or an unreasonable application of clearly established federal law. Accordingly, Claim Twelve is denied.

L. Claim Fourteen

Petitioner asserts that her death sentence was impermissibly imposed because the trial court found two improper aggravating circumstance—that

murder was committed during a kidnapping and the murder was heinous, atrocious, or cruel—and failed to consider or minimized the weight of several mitigating circumstances. (Doc. 1 at 79-84). Petitioner specifically maintains that trial court erred when it failed to find that she was under the influence of an extreme mental or emotional disturbance and that she could not appreciate the criminality of her conduct or conform her conduct to the law. (*Id.* at 82-84). Petitioner also states that the trial court minimized a plethora of nonstatutory mitigation factors. (*Id* at 86).

Petitioner raised this claim on direct appeal, and the Supreme Court of Florida affirmed, first concluding that there was sufficient evidence to support a kidnapping conviction, therefore, the finding of the aggravator that the murder was committed during the court of a kidnapping was supported by competent, substantial evidence. *Allen I*, 137 So. 3d at 962. The court also affirmed the finding of the heinous, atrocious, or cruel aggravator based on the testimony presented that the victim was terrorized, held down, had chemicals poured onto her face, was tied up, beaten, and strangled. *Id.* at 963-64. The court further affirmed the trial court's rejection of the statutory mitigators, noting first that Petitioner's experts did not testify that she was under an extreme mental or emotional disturbance at the time of the murder. *Id.* at 965.

With regard to the statutory mitigator that Petitioner was unable to appreciate the criminality of her conduct or conform her conduct to the law, the court noted that Petitioner's experts did not testify that her mental health condition "*substantially* impaired" her ability to conform her conduct to the law. *Id.* at 966. Finally, the court found that the trial court's assessment of the nonstatutory mitigating circumstances was supported by the record. *Id.* at 967.

The Court discussed the finding of the heinous, atrocious, and cruel aggravator above, and therefore, will not rediscuss the substantial amount of evidence presented to support the aggravator. The Court thus turns to the aggravator that the murder was committed during the course of a kidnapping.

To prove the crime of kidnapping, the State must show that the defendant imprisoned another person against her will by using force or threats, and in doing so had the intent to inflict bodily harm or terrorize the victim. § 787.01, Fla. Stat. The record reflects that the victim was confined by force against her will when Petitioner hit her, knocked her to the ground, and restrained her. The victim asked to go home, and Petitioner hit the victim additional times, and over a period of time, the victim was beaten, had liquids poured over her, and was strangled. The evidence was sufficient to demonstrate that the victim was confined with intent to inflict bodily harm or terrorize her. As such, the finding of that the murder was

committed while Petitioner was engaged in the commission of a kidnapping was proper. *See* § 921.141, Fla. Stat.

Petitioner next argues that the trial court erred when it did not find the existence of two statutory mitigating circumstances. A trial court must find a proposed mitigating circumstance when a defendant has established the mitigator through competent, substantial evidence. *See Reynolds v. State*, 934 So. 2d 1128 (Fla. 2006). However, a court can reject a mitigator if the defendant fails to prove such or there is competent, substantial evidence supporting the rejection. *Ault v. State*, 53 So. 2d 175, 186 (Fla. 2010) (permitting the rejection of expert evidence if that evidence cannot be reconciled with the other evidence in the case).

The Court concludes that the rejection of the first statutory mitigator, that Petitioner was under an extreme mental or emotional disturbance, was proper because neither Dr. Gebel nor Dr. Wu were questioned about this mitigator. Neither mental health expert testified about her mental state as she committed the crime, and they did not present any opinions about this mitigator.

With regard to the second statutory mitigator, whether Petitioner could not appreciate the criminality of her conduct or conform her conduct to the law, her claim also fails. Dr. Gebel testified that Petitioner's brain damage *might* affect her ability to appreciate the criminality of her conduct or conform her actions to the

law. (Ex. A-21 at 1752) (emphasis added). Dr. Gebel also noted that Petitioner was not cooperative enough with him to determine if she was substantially impaired. (*Id.* at 1753).

Dr. Gebel noted on cross-examination that someone with Petitioner's type of injuries should not be able to exhibit the level of executive planning to took place when removing and burying the victim's body. (*Id.* at 1759-61). Essentially, Dr. Gebel noted that the underling facts of the crime would not change the fact that Petitioner has brain damage but it would change his opinion on the degree of damage. (*Id.* at 1761). Dr. Wu testified that Petitioner suffered from frontal lobe damage and it would impair her ability or make it difficult to appreciate the criminality of her conduct but would not impair her planning ability. (*Id.* at 1830-31).

Section 921.141(7)(f), Florida Statutes provides that one mitigating circumstance is that "the capacity of the defendant to appreciate the criminality of . . . her conduct or to conform . . . her conduct to the requirements of the law was *substantially* impaired." (emphasis added). The Court agrees with the state court findings that the rejection of this statutory mitigator was support by the evidence because neither mental health expert testified that Petitioner's brain injury was such that it *substantially* impaired her ability to conform her conduct to the law.

Furthermore, Florida courts have upheld the rejection of the statutory mitigator where a defendant's "purposeful actions after the crime indicate that the defendant was aware of the criminality of his conduct." *Bright v. State*, 299 So. 3d 985, 1006-07 (Fla. 2020), *cert denied sub nom., Bright v. Fla.*, 141 S. Ct. 1697 (2021). Here, Petitioner, with the help of Quintin and Martin, bought plywood and a dolly to assist in moving the victim's body, drove to a remote location, where Petitioner directed Quintin and Martin to bury the body while she stood by as a lookout. Petitioner also later disposed of the rug she had used to wrap up the victim's body. These are purposeful actions of someone who knew that their actions were wrong. *See Davidson v. State*, 323 So. 3d 1241, 1248-49 (Fla. 2021), *cert. denied sub nom., Davidson v. Fla.*, 2022 WL 516180 (U.S. Feb. 22, 2022) (upholding the rejection of the statutory mitigator where evidence that the defendant concealed his crimes and fled demonstrated that his capacity to understand and conform his conduct to the law was not substantially impaired); *Nelson v. State*, 850 So. 2d 514, 531 (Fla. 2003). Consequently, the trial court did not err in rejecting this statutory mitigator.

Finally, the Court will consider the trial court's findings regarding the nonstatutory mitigators. The *Lockett* Court held that a sentencer should "not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant

proffers as a basis for a sentence less than death." *Lockett*, 438 U.S. at 604 (emphasis in original, footnote omitted). The Eleventh Circuit has further held that

> while sentencing courts may not refuse to consider evidence offered in mitigation, they need not decide that the facts established by that evidence have mitigating force in the context of the case. The Constitution requires that the sentencer be allowed to consider and give effect to evidence offered in mitigation, but it does not dictate the effect that must be given once the evidence is considered; it does not require the sentencer to conclude that a particular fact is mitigating or to give it any particular weight.

Schwab v. Crosby, 451 F.3d 1308, 1329-30 (11th Cir. 2006) (citing *Harich v. Wainwright*, 813 F.2d 1082, 1101 (11th Cir. 1987), for the proposition that "*Skipper [v. South Carolina*, 476 U.S. 1 (1986)], *Eddings* [*v. Oklahoma*, 455 U.S. 104 (1982)], and *Lockett* require that the defendant be allowed to present all relevant mitigating evidence to the sentencing jury or court . . . . These cases do not require that the sentencing body accept the conclusion that the evidence constitutes a mitigating circumstance or that the mitigating circumstances outweigh the aggravating circumstances.").

The trial court considered all of Petitioner's mitigating evidence. The trial court then found the existence of four nonstatutory mitigators: (1) defendant has been the victim of physical abuse and possible sexual abuse in the past (some weight); (2) defendant has brain damage as a result of prior acts of physical abuse

and the brain damage results in episodes of lack of impulse control (some weight); (3) defendant grew up in a neighborhood where there were acts of violence and illegal drugs (some weight); and (4) defendant would help other people by providing shelter, food or money (little weight). (Ex. A-5 at 806-13). The trial court was not required to accept Petitioner's mitigating factors, *Atkins v. Singletary*, 965 F.2d 952, 962 (11th Cir. 1992), and was not required to give any mitigating factor great weight. *Schwab*, 451 F.3d at 1329-30. Consequently, Petitioner has not demonstrated any error with respect to the nonstatutory mitigators.

The state court's denial of this claim was not contrary to or an unreasonable application of clearly established federal law. Accordingly, Claim Fourteen is denied.

Any of Petitioner's allegations not specifically addressed herein have been found to be without merit.

IV. CERTIFICATE OF APPEALABILITY

This Court should grant an application for certificate of appealability only if the Petitioner "makes a substantial showing of the denial of a constitutional right." 28 U.S.C. §2253(c)(2). To make such a showing "the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484

(2000); *see also Lamarca v. Sec'y Dep't of Corr.*, 568 F.3d 929, 934 (11th Cir. 2009). However, a prisoner need not show that the appeal will succeed. *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003).

The Court concludes that Petitioner has not made the requisite showing in these circumstances. Petitioner is not entitled to a certificate of appealability.

Accordingly, it is **ORDERED AND ADJUDGED** as follows:

1. The Petition for Writ of Habeas Corpus (Doc. 1) is **DENIED**, and this case is **DISMISSED WITH PREJUDICE**.

2. Petitioner is **DENIED** a certificate of appealability.

3. The Clerk of the Court is directed to enter judgment and close the case.

DONE AND ORDERED in Orlando, Florida, on March 30, 2022.

PAUL G. BYRON
UNITED STATES DISTRICT JUDGE

Copies to:

Counsel of Record

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

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

DEATH PENALTY CASE

Appendix F

United States District Court for the Middle District of Florida Order Denying Petitioner's Motion to Alter or Amend Judgment, dated January 10, 2023.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

MARGARET A. ALLEN,

Petitioner,

v. Case No: 6:19-cv-296-PGB-DCI

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

Respondents.
_____/

ORDER

This cause is before the Court on Petitioner's Motion to Alter or Amend Judgment ("Motion," Doc. 24). Petitioner seeks to alter or amend the Court's Order (Doc. 22) denying his Petition for Writ of Habeas Corpus ("Petition," Doc. 1) and the corresponding Judgment (Doc. 23) because "an unreasonable determination of the facts occurred on each ground . . . ." (Doc. 24 at 3). Petitioner raised fourteen claims in the Petition for Writ of Habeas Corpus ("Petition," Doc. 1), and the Motion specifically addresses Claims One, Two, Four, Five, Six, Seven, Ten, Eleven, and Thirteen. As to each Claim, Petitioner argues that the Court's denial was "based upon manifest errors of law and fact." (Doc. 24 at 4).

Petitioner has filed the Motion under Federal Rule of Civil Procedure 59(e). The decision to alter or amend a judgment under Rule 59(e) is committed to the sound discretion of the trial court. *Am. Home Assur. Co. v. Glenn Estess & Assocs., Inc.*, 763 F.2d 1237, 1238 (11th Cir. 1985). A Rule 59(e) motion may not be used to relitigate old matters or to raise arguments or present evidence available before the entry of judgment. *Michael Linet, Inc. v. Vill. of Wellington, Fla.*, 408 F.3d 757, 759 (11th Cir. 2005). Generally, there are four reasons for granting a Rule 59(e) motion: (1) to correct manifest errors of law or fact upon which the judgment is based; (2) to enable a party to present newly discovered or previously unavailable evidence; (3) to prevent manifest injustice; or (4) because of an intervening change in controlling law. *Moton v. Walker,* No. 8:09–cv–1986–T–33TBM, 2012 WL 919980, at *1 (M.D. Fla. March 19, 2012).

Here, Petitioner has presented no grounds warranting relief under Rule 59(e). The Court, in its Order denying the Petition, set forth its analysis for why each claim lacked merit. Here, Petitioner does not allege that a change in the controlling law has intervened, nor does she claim that new evidence has become available. Petitioner has not shown that the Court's Order constituted clear error or manifest injustice that the Court must correct. Instead, Petitioner has merely taken this opportunity to raise arguments or present evidence that could have

been raised previously or to relitigate issues already decided and adjudicated by the Court, either expressly or by reasonable implication, which will not support a motion to alter or amend. *See Jacobs v. Tempur-Pedic Intern., Inc.*, 626 F.3d 1327, 1344 (11th Cir. 2010) ("'[A] Rule 59(e) motion [cannot be used] to relitigate old matters, raise argument or present evidence that could have been raise prior to the entry of judgment.'"). The Court has carefully reviewed Petitioner's arguments and finds she has failed to demonstrate a basis for relief under Rule 59(e) or for altering or amending the Court's Order dismissing the Petition.

Accordingly, it is **ORDERED** that Petitioner's Motion to Alter or Amend Judgment (Doc. 24) is **DENIED**. Further, because Petitioner has not made a substantial showing of the denial of a constitutional right, a certificate of appealability is denied with regard to the denial of this motion.

DONE and **ORDERED** in Orlando, Florida on January 10, 2023.

PAUL G. BYRON
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel of Record
Unrepresented Party

No. _____

IN THE

Supreme Court of the United States

MARGARET A. ALLEN,

Petitioner,

v.

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

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

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

DEATH PENALTY CASE

Appendix G

Petitioner's Memorandum of Law in Support of her Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus, filed August 20, 2019.

UNITED STATES DISTRICT COURT
Middle District of Florida
Orlando Division

MARGARET A. ALLEN,
Petitioner,

v.

DEATH PENALTY CASE
CASE NO.: 6:19-cv-296-ORL-40-DCI

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

Respondents.
_____/

PETITIONER'S MEMORANDUM OF LAW IN SUPPORT OF HER PETITION UNDER 28 U.S.C. § 2254 FOR WRIT OF HABEAS CORPUS

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ATTORNEY FOR PETITIONER, MARGARET A. ALLEN

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INTRODUCTION

The Petitioner, Margaret A. Allen ("Allen"), by and through her undersigned counsel, respectfully submits the following memorandum of law in support of her Petition Under 28 U.S.C. § 2254 For Writ of Habeas Corpus By A Person In State Custody (Doc. 1) ("Petition"), which was timely filed on February 14, 2019. *See* 28 U.S.C. § 2244(d)(1996). Allen is currently incarcerated at Lowell Correctional Institution in the State of Florida under a sentence of death. The relevant facts were presented in Allen's Petition under each Ground and are hereby incorporated into the following memorandum in support of a grant of relief. Furthermore, interrelated Grounds will be argued below in concert. This case heavily relies on the correct facts found in the record below to meet its clear and convincing burden. The citations to the record will be in accordance with the Supreme Court of Florida's ("FSC") record on appeal.[1]

PROCEDURAL PREREQUISITES

Allen's Petition was filed after the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Section 2254(d) of the AEDPA provides that this Court can grant a writ of habeas corpus to a state prisoner on a claim that was "adjudicated on the merits in State court." Specifically, relief shall be granted if this Court concludes that the adjudication of the claim by the state court "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court

[1] References to the record on appeal will be referred to as R[volume number]/[page number(s)].The postconviction record on appeal will be referred to as P[page number(s)]. The supplemental postconviction record on appeal will be referred to as PS[page number].

proceeding." 28 U.S.C. § 2254(d).

Under the "contrary to" clause, this Court may grant the writ if the state court arrived at a conclusion opposite to that reached by the Supreme Court of the United States ("SCOTUS") on a question of law, or if the state court decided a case differently than SCOTUS has on a set of materially indistinguishable facts. *Williams v. Taylor*, 529 U.S. 362, 412-413 (2000). Under the "unreasonable application" clause, this Court may grant the writ if the state court identified the correct governing legal principle established by SCOTUS, but it unreasonably applied that principle to the facts of the prisoner's case." *Id*. at 413. In addition, "rules of law may be sufficiently clear for habeas purposes even when they are expressed in terms of a generalized standard rather than as a bright-line rule." *Id.* at 382.

This Court may also grant the writ if the state court's decision was based upon an unreasonable determination of the facts in light of the evidence presented. The determination of factual issues made by a state court "shall be presumed to be correct," and Allen "shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1). Allen submits to this Court that the factual findings by the lower state courts are not only unreasonable but also incorrect in light of the evidence presented at trial and in postconviction. *See* 28 U.S.C. § 2254(d). This Court must look at the record below in determining whether the Petitioner has met the clear and convincing standard.

All of the habeas grounds in Allen's Petition and discussed herein meet the procedural prerequisites and can be considered by this Court. *See* 28 U.S.C. § 2254(c). The state courts had full and fair opportunities to address and resolve these claims, thus Allen has met the exhaustion requirement. *See* 28 U.S.C. § 2254(b); *see also O'Sullivan v. Boerckel*, 526 U.S.

838, 845 (1999). Furthermore, the factual and theoretical bases of Allen's habeas claims were presented in state court and are the same before this Court. *See Vazquez v. Hillery*, 474 U.S. 254, 257-260 (1986) (Supplementation and clarification of a factual record in federal habeas court is permitted and does not defeat the exhaustion rule of 28 U.S.C. § 2254).

This Court may presume the absence of an independent and adequate state ground for a state court decision when the decision "fairly appears to rest primarily on federal law, or to be interwoven with federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion." *Michigan v. Long,* 463 U.S. 1032, 1040-41 (1983); *see also Judd v. Haley*, 250 F. 3d 1308, 1313 (11th Cir. 2001) (citing *Card v. Dugger*, 911 F.2d 1494 (11th Cir. 1990) ("[T]he last state court rendering a judgment in the case must clearly and expressly state that it is relying on state procedural rules to resolve the federal claim without reaching the merits of that claim," . . . "the state court's decision must rest solidly on state law grounds, and may not be 'intertwined with an interpretation of federal law,'" . . . and "the state procedural rule must be adequate; *i.e.,* it must not be applied in an arbitrary or unprecedented fashion")).

A petitioner seeking to raise a claim as a federal issue in state court does so by "citing in conjunction with the claim the federal source of law on which he relies or a case deciding such a claim on federal grounds, or by simply labeling the claim 'federal.'" *Baldwin v. Reese*, 541 U.S. 27, 32 (2004). Petitioners are required to fairly present their federal claims to the state courts. *Duncan v. Henry*, 513 U.S. 364, 365-66 (1995). In terms of fair presentment, the petitioner must identify the specific constitutional right violated. *See Gray v. Netherland*, 518 U.S. 152, 162–63 (1996). "[I]t is not enough to make a general appeal to a constitutional

guarantee as broad as due process to present the 'substance' of such a claim to a state court." *Id.* at 163. The claim raised in federal court must then be the "substantial equivalent" of the claim presented in state court. *Picard v. Connor*, 404 U.S. 270, 278 (1971). Allen's habeas grounds have been appropriately federalized and are suitable for this Court's review.

Allen will demonstrate below, as to each habeas ground, that her convictions and sentence of death are based on state court decisions that are contrary to, or involved an unreasonable application of, clearly established federal law, and/or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented. *See* 28 U.S.C. § 2254(d); *see also Williams*, 529 U.S. 362. Allen will also demonstrate the actual prejudice she suffered as to each ground. *See Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993).

The facts set out in Allen's Petition are hereby incorporated into this memorandum.

GROUND ONE

Allen alleged in her amendment to her motion for postconviction relief that in light of *Hurst v. Florida*, 136 S. Ct. 616 (2016), her death sentence is unconstitutional. The lower court summarily denied this claim without granting a postconviction evidentiary hearing ("EH"), and found "that even if the jury were properly instructed, that it would have still found that the aggravators greatly outweighed the mitigators" and "any *Hurst* error regarding [Allen's] sentence, which was based upon a unanimous recommendation of death, is harmless beyond a reasonable doubt." P2019. The FSC affirmed the lower court's denial of relief because "the State proved beyond a reasonable doubt that the *Hurst* error was harmless and because Allen's *Hurst*-induced *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), claim fails to show that the standard jury instructions violate the Eighth Amendment."

Allen v. State, 261 So. 3d 1255, 1287 (Fla. 2019). The FSC also concluded that, "beyond a reasonable doubt, a rational jury would have unanimously found that sufficient aggravating factors outweighed the mitigation."[2] *Id*. at 1289. The FSC's resolution of this claim was an unreasonable application of clearly established federal law, specifically *Hurst v. Florida*, 136 S. Ct. 616 (2016), *Caldwell*, 472 U.S. 320, and the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. Further, the FSC's opinion was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

I. Allen's Death Sentence Violates the Sixth and Fourteenth Amendments.

On January 12, 2016, *Hurst v. Florida* issued and declared Florida's capital sentencing scheme unconstitutional. 136 S. Ct. at 619. SCOTUS held, "The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. ***A jury's mere recommendation is not enough***."[3] *Id*. An advisory recommendation by the jury cannot be treated as the factual finding required. *See id*. at 622. Therefore, Allen's death sentence rests upon findings made by the trial court as a result of the procedure now held unconstitutional. She was deprived of her Sixth Amendment right to have the jury determine every fact necessary for her capital sentence.

The FSC correctly found that "Allen's sentence was final in 2014" and "the *Hurst* requirements are retroactive to her sentence." *Allen,* 261 So. 3d at 1288. However, the FSC found that the *Hurst* error was subject to harmless error review and that the error was harmless in Allen's case. *Id*. at 1287-88. Conversely, Allen asserts that *Hurst* errors must be

[2] Notably, the FSC's determination fails to consider that a juror could still vote for a life sentence out of mercy, even if the juror finds that aggravating circumstances outweigh mitigating circumstances.

[3] All emphasis is supplied unless otherwise noted.

deemed "structural" and not subject to harmless error analysis. *See Arizona v. Fulminante*, 499 U.S. 279, 307-09 (1991). The Sixth Amendment error identified in *Hurst*—stripping the capital jury of its constitutional fact-finding role—represents a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Id.* at 310. *Hurst* errors "infect the entire trial process," and "deprive defendants of basic protections without which a [capital] trial cannot reliably serve its function as a vehicle for determination" of whether the elements necessary for a death sentence exist. *Brecht v. Abrahamson*, 507 U.S. 619, 630 (1993); *Neder v. United States*, 527 U.S. 1, 8-9 (1999). The effect of failing to require a jury finding as to whether sufficient aggravation exists, and if so, whether it is not outweighed by the mitigation, cannot be quantified. There are no means of quantifying ***any*** of Allen's jury's findings in the penalty phase absent the number of votes for a non-binding death recommendation, which was not subject to a reasonable doubt standard. *See* § 921.141, Fla. Stat. (2010). Although the jury findings required by *Ring*[4] and *Hurst* function as an additional element of the crime of death-eligible first-degree murder, harmless error cannot be assessed as set forth in *Neder* because, in a capital trial, the jury makes the findings as to the possible punishment (the "death-eligibility" element under *Ring*) separately from its guilt phase findings (the remaining elements constituting only first-degree murder). There are no findings by which a reviewing court could determine that Allen's jury actually found that there was sufficient aggravation that outweighed the mitigation, beyond a reasonable doubt. Instead, the reviewing court has to substitute its ***own*** findings for that of the jury in order to determine error, and in doing so, fails to protect the Sixth Amendment jury right for capital cases as set

[4] *Ring v. Arizona*, 536 U.S. 584 (2002).

forth in *Ring*. Accordingly, as the constitutional error in Allen's case is structural, harmless error analysis is not possible.

Although the FSC recognizes that "a unanimous recommendation alone is insufficient to determine harmless error," the FSC still improperly emphasized Allen's unanimous advisory recommendation and held that the jury instructions "support the conclusion that the jury unanimously made the requisite factual findings to impose death." *Allen*, 261 So. 3d at 1288. However, this reliance on the jury's recommendation in denying *Hurst* relief on harmless error grounds contravenes the Sixth Amendment in light of *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993) (emphasizing that valid harmless-error review looks "to the basis on which the jury ***actually rested*** its verdict."). In Allen's case, there was no constitutionally valid jury verdict containing the findings of fact required to impose a death sentence. *Sullivan* requires that, before a reviewing court may apply harmless error analysis, there must be a valid jury verdict, grounded in the proof beyond-a-reasonable-doubt standard. The logic of *Sullivan* applies here:

> The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error. That must be so, because to hypothesize a guilty verdict that was never in fact rendered—no matter how inescapable the findings to support that verdict might be—would violate the jury-trial guarantee.

Id. at 279-80. Accordingly, any reliance on Allen's advisory jury's recommendation would constitute a violation of the Sixth Amendment.

As no interrogatory-style verdict form was used in Allen's penalty phase, the jury did not ***expressly*** make any findings, let alone unanimously. R5/858. Allen's jury was only asked if the jury "advise[d] and recommend[ed] to the court that it impose the death penalty" and the number of votes, on a document titled "Advisory Sentence." R5/858. Also, because there was

no interrogatory verdict, it cannot be determined what aggravators, if any, the jury unanimously found proven beyond a reasonable doubt. It is pure speculation whether the jury unanimously found both aggravating factors proven beyond a reasonable doubt. Moreover, the jury was instructed consistently that their role was merely advisory or a recommendation. Further, ***Allen's jury was never instructed that any of the aggravating circumstances must be found unanimously***. R22/1969-83. The jury was only instructed, "In order to consider the death penalty as a possible penalty, you must determine that at least one aggravating circumstance has been proven." R22/1975. It is impossible to know if ***any*** aggravator was found ***unanimously*** by the jurors. If no aggravators are found unanimously, the jury should not go on to weighing mitigation because it is unclear what the mitigation is being weighed against. As such, both the FSC and the lower court erred in finding that based on the jury instructions given, the jury unanimously made the requisite factual findings to impose death. P2018; *Allen*, 261 So. 3d at 1288. Further, although SCOTUS has explained in *Satterwhite v. Texas*, 486 U.S. 249, 258-59 (1988) that the State does not meet its burden of establishing that an error in capital sentencing is harmless merely by showing that the evidence in the record is sufficient to support a death sentence, the FSC also improperly found that the facts of Allen's case support the conclusion that the Hurst error was harmless. *Allen*, 261 So. 3d at 1288.

Even if this Court found that the *Hurst* error was subject to harmless error analysis, the FSC has not granted *Hurst* relief to any individuals with a unanimous death recommendation, and a blanket finding that the error is harmless where the jury recommendation was unanimous is arbitrary and capricious. As the findings of Allen's jury are unknown, to deny Allen the effect of *Hurst* by considering the error harmless, while granting relief to similarly situated

defendants sentenced in the same timeframe, deprives her of the due process and equal protection she is entitled to under the Fourteenth Amendment to the United States Constitution and the corresponding provisions of the Florida Constitution. Allen's situation is unique and an individualized harmless error review shows that the *Hurst* error in her case was not harmless. In addition, if trial counsel, Frank J. Bankowitz, ("counsel") provided Allen with effective assistance such as effectively investigating mitigation, and the State did not commit a *Giglio* violation, Allen would not have received a unanimous jury recommendation and would have been in the class of defendants whose *Hurst* errors were not found harmless and were entitled to a new penalty phase. Allen's case also pales in comparison to the other 12-0 death recommendation cases in Florida. Only two aggravators were independently found by the trial court, one of which, "the capital felony was especially heinous, atrocious, or cruel," would have been undermined if counsel had been effective. *See infra* pp. 61-71. Further, if counsel had properly investigated Allen's background and presented her full history of sexual and physical abuse and statutory mental health mitigation, her mitigation would have outweighed both aggravators. *See infra* pp. 13-38. When considering harmless error, the court must look at the totality of the evidence, both at trial and in postconviction. The cumulative effect of all of counsel's deficiencies, combined with the *Hurst* error, *Caldwell* error, and *Giglio* error present in Allen's case, made a critical difference and deprived her of a fair penalty phase. Further, Allen's penalty phase, "as a whole, was fundamentally unfair and outside of the bounds of the Constitution." *Conklin v. Schofield*, 366 F.3d 1191, 1210 (11th Cir. 2004). Without the presence of the multitude of deficiencies and errors, Allen maintains that at least one juror would vote for a life sentence, which at the time of trial would have entitled her to a

new penalty phase now, and at present time would mandate a binding life sentence.

In addition, the Due Process Clause of the Fourteenth Amendment requires that the State must prove each element beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970). This requirement attaches to any factual finding necessitated by the Sixth Amendment. "It would not satisfy the Sixth Amendment to have a jury determine that the defendant is probably guilty, and then leave it up to the judge to determine (as *Winship* requires) whether he is guilty beyond a reasonable doubt . . . . In other words, the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt." *Id.* "Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." *United States v. Booker*, 543 U.S. 220, 244 (2005). This requirement is incorporated into the *Hurst* line of cases beginning with *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000). Therefore, any reliance upon the jury recommendation requires the underpinnings of the recommendation to be made beyond a reasonable doubt. Florida's pre-*Hurst* jury determinations, including the advisory recommendation in Allen's case, did not incorporate the beyond-a-reasonable doubt standard.

II. Allen's Death Sentence Violates the Eighth Amendment.

This uncertainty as to what findings Allen's jury would have made if properly instructed under a constitutional sentencing scheme is even more significant in light of *Caldwell v. Mississippi*, 472 U.S. 320 (1985). When the jury's sense of responsibility for determining the appropriateness of death is impermissibly minimized, as it was in Allen's case, it cannot be said to have no effect on the sentencing decision because "that decision does not

meet the standard of reliability that the Eighth Amendment requires." *Id.* at 341. SCOTUS has held that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Id.* at 328–29. However, the FSC held that there was no *Caldwell* error because at the time of trial, "Allen's jury was properly instructed based on the existing law." *Allen*, 261 So. 3d at 1289 (citing *Romano v. Oklahoma*, 512 U.S. 1, 9 (1994)).

As counsel confirmed at the EH, the jury was informed numerous times that they were only recommending an advisory sentence and the judge would impose the final sentence. P2889-90. During voir dire, the fact that the sentencing decision was advisory or a recommendation was referenced over seventy times to the potential jurors. P1869-74. During penalty phase closing arguments, jurors were told another eighteen times that they were merely issuing a recommendation as to the sentence. R22/1911-44. From voir dire all the way through the jury instructions, the role of Allen's jury was minimized throughout her trial by repeatedly emphasizing that they were merely providing an advisory recommendation because the final decision rests solely with the judge. R10/157, R13/591, 605, R21/1706. The judge specifically told the venire, "You do understand that ***nobody*** will impose the sentence but ***me***. Although I'm going to give great weight to your recommendation, it is ***not*** controlling. ***I can fly in the face of your recommendation or I can follow your recommendation***, with some qualifications." R10/157. The State also told the venire that, "In Florida, okay, it is the judge who makes the ultimate sentencing decision in this type of case." R10/143. Further, the following exchange regarding jury sequestration highlights how advisory majority votes

undermined Allen's jury deliberation:

> State: Okay. Well, even if we do (unintelligible) the cure for that is you don't instruct them until tomorrow morning, you don't have to worry about sequestering them tonight. They're not going to be out overnight. If we do the charge tomorrow, if we do jury instructions tomorrow morning and the penalty phase, it doesn't need to be, ***it needs to be majority vote. So the odds of them staying over tomorrow night is zip***.
>
> Trial Court: I understand that. And ***it seems like only needs one vote rather than a lot of deliberation.***
>
> State: Right.
>
> Trial Court: I did talk to one of the court staff lawyers who was actually on a jury - - and not that this is maybe relevant to this case - - but she said that one of the things that happened is ***they just basically vote***. Your - - it is not a consensus vote, your vote speaks for your mind and your conscious.

R21/1693. If the jury was given constitutional instructions, each juror would be mandated to feel the weight of their sentencing responsibility because each juror would possess the power to save Allen's life by voting in favor of a life sentence. As post-*Hurst* cases in Florida have shown, properly instructed jurors have appreciated the gravity of the proceeding and many have exercised their individual right to preclude the death sentence.

Further, the FSC's decision was contrary to, or involved an unreasonable application of *Romano v. Oklahoma*. The FSC is correct in that *Romano* states, "[t]o establish a *Caldwell* violation, a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law." 512 U.S. at 9. However, the jury instructions in place at the time of Allen's trial create a constitutional error because section 921.141, Florida Statutes was deemed unconstitutional in *Hurst v. Florida*, 136 S. Ct. 616 (2016). Surely, the general rule stated in *Romano* presumes that the role assigned to the jury by local law is otherwise consistent with the United States Constitution. It is illogical to

conclude that *Romano* meant no error occurs if the remarks to the jury properly described the jury's role according to local law, even if that local law violated the federal constitution. Accurately instructing the jury on an unconstitutional law is still unconstitutional. Allen maintains that the FSC's repeated treatment of these accurately instructed, yet unconstitutional, ***advisory jury recommendations*** as "binding" and as "the necessary factual finding that *Ring* requires" is unconstitutional. *Hurst*, 136 S. Ct. at 622.

The FSC's adjudication of the *Hurst* and *Caldwell* issues in this case was contrary to, or involved an unreasonable application of, clearly established federal law. Additionally, the FSC's conclusion that the *Hurst* and *Caldwell* errors could be excused was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. Neither the facts of this case nor the jury's unanimous advisory death recommendation support the FSC's holding that the extensive constitutional error in Allen's penalty phase could not reasonably have affected the outcome. The FSC cannot treat the jury's advisory recommendation as a fact-finding, nor can it assume or speculate that the jury, if properly instructed, would have reached the same conclusion. Therefore, Allen's death sentence must be found to be unconstitutional and vacated, and Allen must be granted a new penalty phase.

GROUND TWO

Allen alleged in Claim 13 of the motion for postconviction relief that counsel provided prejudicial ineffective assistance of counsel during the penalty phase by failing to adequately investigate, prepare, and present available mitigation, primarily in the following areas: 1) failure to investigate, interview, and present mitigation witnesses; 2) failure to present evidence of Allen's sexual abuse or childhood physical abuse; 3) failure to present evidence of Allen's

Posttraumatic Stress Disorder ("PTSD"); and 4) failure to acquire records such as police reports. The lower court held an EH on this claim, and found that Allen failed to establish either deficient performance or prejudice. P2006-15. The FSC affirmed the lower court's denial of relief and found no prejudice, emphasizing that Allen's advisory jury recommendation was unanimous. *Allen*, 261 So. 3d at 1273-75. The FSC did not address the deficient performance prong; therefore, this Court must examine this element of the *Strickland* claim *de novo. Id*.; *see Rompilla v. Beard*, 545 U.S. 374, 390 (2005). The FSC's resolution of this claim was an unreasonable application of clearly established federal law, specifically *Strickland v. Washington*, 466 U.S. 668 (1984), *Williams v. Taylor*, 529 U.S. 362 (2000), and the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. Further, in many respects, the state court made an unreasonable determination of the facts in light of the state court record.

SCOTUS has held that counsel "has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Strickland*, 466 U.S. at 688. Specifically, counsel has a duty to investigate in order "to make the adversarial testing process work in the particular case." *Id.* at 690. Accordingly, there are two prongs to an ineffective assistance of counsel claim.

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id. at 687. To establish deficient performance, a petitioner must demonstrate that counsel's representation "fell below an objective standard of reasonableness." *Id.* at 688. In order to show

prejudice, a defendant is not required to show "that counsel's deficient conduct more likely than not altered the outcome" of the proceeding." *Id*. at 693. Instead, "[t]he defendant must show that 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 a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

In *Wiggins v. Smith*, 539 U.S. 510, 527 (2003), SCOTUS held that "[i]n assessing the reasonableness of an attorney's investigation, however, a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." A cursory investigation does not automatically justify a tactical decision with respect to strategy, "[r]ather a reviewing court must consider the reasonableness of the investigation said to support that strategy." *Id.*

> [S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness . . .

Strickland, 466 U.S. at 690-91.

Counsel's duty to investigate and prepare applies to the penalty phase, as well as the guilt phase, of a capital trial. *See, e.g., Williams*, 529 U.S. 362; *Porter v. McCollum*, 558 U.S. 30 (2009); *Sears v. Upton*, 561 U.S. 945 (2010). "An attorney has a duty to conduct a reasonable investigation, including an investigation of the defendant's background, for possible mitigating evidence." *Porter v. Singletary*, 14 F.3d 554, 557 (11th Cir. 1994) (citing *Thompson v. Wainwright,* 787 F.2d 1447, 1451 (11th Cir. 1986)). In *Rompilla v. Beard*, SCOTUS held that counsel rendered deficient performance which fell below prevailing norms as set out in

the American Bar Association ("ABA") Guidelines, citing counsel's failure to obtain school records, failure to obtain records of Rompilla's prior conviction and incarceration, and failure to gather evidence of a history of substance abuse. 545 U.S. at 382-83, 387. Therefore, it is indisputable that under the prevailing norms at the time of Allen's trial in 2010 that counsel had an "obligation to conduct a thorough investigation of the defendant's background." *Williams*, 529 U.S. at 396. Instead, Allen's counsel unreasonably ignored the prevailing norms, which prejudiced Allen. Accordingly, the FSC's resolution of Allen's *Strickland* claim resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by SCOTUS.

I. Deficient Performance of Trial Counsel

Counsel provided deficient performance under *Strickland* when he failed to thoroughly investigate and interview family members and past boyfriends in order to present evidence related to statutory and nonstatutory mitigating circumstances. Counsel deficiently failed to present evidence of Allen's history of physical and sexual abuse inflicted upon her since childhood. He was also deficient in failing to present expert mental health testimony regarding Allen's cognitive deficits and the PTSD she suffered as a result of her early childhood trauma and perpetual violence and abuse thereafter. As a result of counsel's deficient performance, Allen's jury also did not hear that these factors interacted with her multiple traumatic brain injuries and rendered her under the influence of extreme mental or emotional disturbance at the time of the crime. If counsel had only been deficient in that area, and at least obtained police reports and school records, he would have at least seen some of the "red flags" to investigate further. However, counsel did not obtain those records, which would have

corroborated the information provided by Allen's family and past boyfriends. *See Porter*, 558 U.S. at 40 (holding that counsel provided deficient performance when "he ignored pertinent avenues for investigation of which he should have been aware"). SCOTUS has repeatedly emphasized the importance of focusing the sentencer's attention to the ***particularized characteristics and past life*** of the individual defendant. *See Gregg v. Georgia*, 428 U.S. 153, 206 (1976); *see also Roberts v. Louisiana*, 428 U.S. 325, 333-34 (1976). However, due to counsel's ineffectiveness, Allen's jury was not privy to the critical information regarding Allen's individual characteristics or past life.

Notably, Allen's brother retained and paid private counsel to take over Allen's defense. R1/110, 120. Counsel wrongly assumed that the mitigation investigation was complete when he took over Allen's case from the Public Defender's Office. P2790-91, 2795. This assumption was detrimental to Allen's case. Counsel thought the "witnesses were all lined up" and it was just a matter of "putting that on." P2790-91, 2795. As such, counsel, who was trying the case alone, failed to enlist the help of an investigator or mitigation specialist. P2790, 2835. Competent counsel would have realized the mitigation provided was relatively weak and did not address statutory mitigation and accordingly would have investigated further. At the EH, counsel said he had the case for a year or a year and half prior to trial, however his Notice of Appearance was actually filed in March 2008, two and a half years prior to trial. P2791, R4/649. Therefore, counsel had ample time to investigate mitigation, but unreasonably failed to do so. He even admitted that in all that time he ***did not even interview all the witnesses*** provided to him by previous counsel, who was the Public Defender's Office. P2795.

As such, counsel's conduct "fell short of the standards for capital defense work

articulated by the ABA," standards to which SCOTUS refers to as "guides to determining what is reasonable," which provides that efforts must be made to discover all reasonably available mitigation and evidence to rebut aggravators. *Wiggins,* 539 U.S. at 524; *see* AM. BAR ASS'N, GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES (rev. ed. 2003) ("ABA guidelines"). Counsel improperly delegated his duty to investigate mitigation to Allen's aunt, Myrtle Hudson ("Hudson"). P2796, 2811-13, 2817. Though counsel concedes that he understands ABA guidelines to require establishing "a family tree" and to talk to everybody, "grandparents all the way through," counsel deficiently only spoke with Hudson and a sister whose name he did not remember. P2796-97, 2813, 2816. Hudson even gave him a list of people to contact and told him that Barbara Ann Capers ("Capers") wanted to testify, but Hudson was the ***only*** lay witness that counsel called to testify at trial. P2753. At the EH, Counsel claimed Hudson said Allen's daughters did not want to be involved, so he did not pursue interviewing them. P2837. However, he did not independently verify that sentiment, even though he knew some of Allen's children were in prison and could easily be found in "thirty seconds on the computer." P2812, 2815-16, 2837. Although counsel believed Allen's daughters told police they were present during the crime and were alleged to be involved, a reasonable attorney would have at least interviewed them in order to make an informed decision as to whether to call them to testify. P2843-45. Worse yet, counsel admitted that Allen's daughters had the potential to be witnesses in the guilt phase too, but he still did not seek to speak with them. P2860.

As in *Williams v. Allen*, 542 F.3d 1326, 1340 (11th Cir. 2008), despite the availability of Allen's family members, counsel only sought mitigation from Hudson and obtained an

incomplete life history of Allen by relying entirely on Hudson's account. Hudson, the only lay witness to testify at Allen's trial, briefly mentioned some of Allen's abusive relationships, which would have led a reasonable attorney to investigate further. R22/1880-83, 1886; *see also Wiggins*, 539 U.S. at 527. In fact, based on the EH testimony, countless police reports existed where Allen was the victim of physical and sexual abuse. Although counsel was aware that a police report should have existed if Allen was beaten, he did not recall looking for criminal records to find potential witnesses who were arrested for injuring Allen. P2830-31. Allen's school records also should have been red flags to investigate further. P2929. Although counsel was aware that Allen was not high functioning, he was deficient in failing to ensure the jury was aware of Allen's borderline functioning and learning difficulties, instead of only one casual mention. R21/1750, P2959, 2987, 2833. As a result of counsel's deficiencies, he only suggested ***two*** nonstatutory mitigators and no statutory mitigation in his sentencing memorandum. R6/923. His whole argument and analysis of the mitigation encompassed less than one page. R6/923-24. Notably, the State's memorandum actually suggested more mitigators. P891. It is clear that counsel did not exercise reasonable professional judgment.

a. Mitigation Related to Allen's Lifetime of Traumatic Abuse

The FSC claimed that the EH testimony that counsel failed to present related to Allen's background was cumulative, because

> [a]t trial, counsel presented the testimony of Dr. Wu, Dr. Gebel, and Allen's aunt Myrtle Hudson that outlined Allen's mental health issues and the physical and sexual abuse she suffered while growing up and as an adult. The jury heard of her issues with impulse control, her intracranial brain injuries, and the traumatic childhood and violent relationships she endured.

Allen, 261 So. 3d at 1273. However, in light of the evidence presented, that was an unreasonable determination of the facts related to counsel's deficiencies, and as shown below,

an unreasonable application of the prejudice prong. *See infra* pp. 30-35. Contrary to the FSC's assertions, there was ***no mention*** of the abuse Allen suffered as a child during her penalty phase. However, at the EH, Capers testified that Allen's mother subjected Allen to physical abuse almost every single day of her childhood and she witnessed her beating Allen with her hands and fists. P2639-40, 2663, 2678-79. Allen's mother would also beat Allen with belts, whip her with sticks, and slap her in the face. P2678-79. In fact, when Allen was about twelve, her mother beat Allen so badly that Capers had to call the police. P2640. Capers also testified about the degrading abuse that both she, Allen, and the other children in their family endured at the hand of Capers' father (Allen's grandfather). P2648-49. Allen's grandfather would line up all of the boys and girls naked, including Capers and Allen, and go down the row beating all of the children with three oak switches until they bled. P2649. He would also whip Allen with sticks. P2679. Allen also witnessed her grandfather being abusive to Capers' mother and his other wife, Irene. P2650. On multiple occasions, in the presence of Allen, Capers saw Curtis bust Irene's lip and black her eyes with his fist. P2651-52. At the EH, Hudson also testified to the abuse Allen suffered throughout childhood. When Allen was about seven, Hudson witnessed Allen's mother grab her by her hair, push her head under the water in the bathtub, and hold her head underwater. P2729-30. On a couple occasions, Hudson also witnessed Allen's mother beat Allen with a belt until she left swollen marks on Allen. P2730. The people who Allen was supposed to be able to trust to make her feel safe and protected as a child were the aggressors perpetrating abuse on her. The jury at Allen's trial was not privy to ***any*** of these horrific details about Allen's abusive childhood.

Additionally, the FSC's opinion is an unreasonable determination of the facts because

the jury only heard minimal mentions of the physical and sexual abuse Allen suffered. For example, in Allen's penalty phase, Hudson only briefly mentioned that Allen had "been a victim of some sexual abuse." R22/1883. There was an immediate objection as to predicate and the only discussion of the sexual abuse was Hudson answering in the affirmative that she spoke with Allen, received facts about it, and knew Allen was hospitalized. R22/1884. Hudson admitted that she was not in the vicinity when it happened. R22/1884. The only other minor reference was Michael Gebel, M.D. ("Dr. Gebel") stating that medical records referenced "a possible sexual assault." R21/1745.

Notably, the evidence of Allen's history of sexual assault presented during postconviction was accurate, more significant, and compelling. Allen was the victim of sexual assault on multiple occasions, perpetrated mostly by the men in her family. Capers testified that Allen was sexually molested by her brother, her grandfather, her grandfather's brother (Uncle Roy), and another man. P2642-48. As a young girl, when Allen's mother went to jail, Allen stayed with her grandfather, but she told Capers that she wanted to stay with her instead because he was sexually molesting her. P2642-43, 2665. Uncle Roy also sexually molested Allen every other weekend when he visited Allen's grandfather. P2645. Capers observed Uncle Roy touching Allen in private places, grabbing Allen's breasts, and kissing Allen on the mouth. P2645-46. Uncle Roy also sexually abused Capers and the other children in the family, sometimes in front of Allen. P2646. However, due to the ineffectiveness of counsel's mitigation investigation and presentation, the jury did not hear ***any*** of this poignant testimony.

Similar to the defendant in *Porter* joining the Army to escape his horrible family life, the physical, emotional, and sexual abuse Allen suffered during childhood was so severe that

Capers even forged Allen's mother's name to send Allen to Job Corps in an attempt to help Allen escape her abusive family. P2641, 2667-69; *see also Porter*, 558 U.S. at 34. Sadly, upon Allen's return she fell into a string of abusive relationships and domestic violence. P2652. However, there were only brief mentions of these events during Allen's penalty phase. Hudson briefly mentioned domestic violence incidents, but Hudson was not present during most of the instances that she described. R22/1880-83, 1886. In contrast, at the EH, Capers and two of Allen's children, Alvinia and Carlos Ragoo, testified to witnessing firsthand Allen being beaten by multiple ex-boyfriends. P2652-55, 2684-85, 2770-73. Allen's ex-boyfriend, Brian Watkins ("Watkins"), also testified in detail to the voluminous amount of violence he perpetrated on Allen over the years. P2602-12.

Watkins subjected Allen to traumatic physical and mental abuse. Watkins had a violent relationship with Allen for about five years in the 1990s and they have a child together. P2598, 2602, 2624. He hit her with his fist and with other objects and even attended domestic violence classes to get charges dropped. P2602-03. He would also choke her until she nearly passed out. P2612. He often hit her and choked her when she was pregnant. P2603-05. While she was pregnant, he would grab her, cover up her mouth and nose until he felt her go limp or lightheaded and when he let go of her, she would gasp for air. P2604-05. They drank every day, and although Allen did not smoke marijuana, he would hold her down and blow smoke in her nose, a practice he continued even while she was pregnant. P2606. They also had a fight in Winn-Dixie where he hit her in the head with a hammer two or three times. P2608-09, 2611. She ended up in the hospital with a gash on her head, and he was arrested. P2610-11.

At the EH, Allen's family also testified to witnessing the violence Watkins perpetrated

upon Allen. Allen's daughter, Alvinia, also witnessed Watkins frequently being aggressive towards Allen. P2684. The worst time that she remembers is when he hit Allen at the laundromat, dragged her to the car, and kept hitting her. P2685. Allen's son, Carlos, also remembers Watkins regularly hitting Allen, giving her black eyes and busted lips, and throwing her down stairs and choking her. P2770. If Allen tried to escape, Watkins would grab her clothes and rip them off. P2771. Hudson witnessed Watkins kick in a heavy door while pregnant Allen was behind it; after the door came down on her, he stomped on it while she was underneath it. P2735. Capers also witnessed Watkins beat up Allen many times, including a time that he and another boy punched and kicked Allen while she was pregnant. P2654-55.

Allen's family also testified to the traumatic violence she suffered in her other relationships, which resulted in multiple miscarriages. In her 20s, Allen was beat up by her then-boyfriend, Bill Skane ("Skane"), and when Capers visited her in the hospital, she was unrecognizable, had injuries to her face, could not get out of bed, and could not speak. P2652-54. Hudson also visited Allen in the hospital after Skane beat up Allen and she escaped from the trunk of his car. P2736. She was disfigured, lost the baby she was pregnant with, and was in the hospital over a week. P2737. Allen's son, Carlos, also witnessed another boyfriend of Allen's, Kevin Green ("Green"), hit her, punch her with closed fists, give her black eyes, and put her in the hospital. P2772-73. He remembers Allen crying and being emotional when she had a miscarriage as a result of Green beating her. P2773.

Based on the extensive EH testimony of the violence that Allen suffered, the witnesses were not only able to detail the actual physical injuries to Allen's head, but also able to corroborate other symptoms of the brain injuries she has endured due to the violence. As a

teenager, Allen experienced a cerebral accident that her family refers to as a stroke and has memory loss. P2641-2, 2738, 2966. She also complained of headaches and migraines. P2601.

The FSC was unreasonable in finding that all of this mitigation that counsel deficiently failed to unearth was cumulative. There is a distinction between the jury hearing limited references to domestic violence and sexual abuse versus the jury hearing that Allen lived in a constant state of trauma due to the violence and abuse that was inflicted on her since childhood by her family and boyfriends. All of these witnesses were available at the time of trial and expressed that they were willing to testify, but counsel either failed to contact them or failed to have them testify. P2615-16, 2619, 2625-27, 2634-35, 2674-75, 2678, 2690-92, 2774-75. If these other individuals had testified at Allen's trial and if Hudson was asked the proper questions at trial, the jury would have assigned substantially greater weight to mitigation because these individuals personally witnessed Allen being attacked regularly. In addition, their testimony was not cumulative to Hudson's because their testimony detailed the pattern of abuse Allen endured her whole life from multiple individuals, which led to her PTSD.

b. Mitigation Related to Allen's Mental Health

In postconviction, William Russell, Ph.D. ("Dr. Russell"), a forensic psychologist, evaluated Allen. Unlike Dr. Gebel, who testified at Allen's trial, he was provided with details of the crime, among other records, and interviewed several family members of Allen. P2620, 2876, 2923, 2916, 2930, 3010. Dr. Russell determined that Allen suffered from complex PTSD currently, as well as at the time of the crime. P2966. He is well versed in recognizing PTSD because he has worked with children and families who experienced severe trauma, such as physical or sexual abuse. P2909-10, 2914. Through meeting with Allen and reviewing records,

Dr. Russell found that Allen had a physically and sexually abusive background and experienced significant chaos and violence in her life. P2932-33. Upon speaking to Allen's family, he found the damage that she was exposed to was more extensive than she presented. This was evident by Allen's memory problems, her exposure to physical trauma, genetics, and her dissociative amnesia where she blocks out memories. P2933-34. Dr. Russell was able to diagnose Allen with PTSD because he had comprehensive background information for Allen, which included family interviews. P2980. Attempting to make a full analysis with just one client interview is ineffective when there is an abundance of available mitigation background information. P2930-31. Dr. Russell concluded that if he had been given the limited information that Dr. Gebel had, and was unable to interview any of Allen's family members, he would not have had enough information to establish PTSD. P2980.

Protective factors are factors a child has growing up to help them cope with and meet challenges of life. P2934-35. Allen grew up in a chaotic, unstable environment moving frequently, where some of her homes subjected her to physical and sexual abuse. P2935-36. She had no stable adult figure to mirror or to turn to after suffering abuse. *Id*. She also had no support for academic success and dropped out of school. P2936. She was not provided guidance or support by the adults in her life because most of them were also not high-functioning individuals and many were involved with drugs. P2938-39. Knowing nothing else, Allen replicated that same unstable pattern with her children. P2944-46. She lacked an environment that encouraged brain development through school, social support, and active activities, which inhibited her ability to cope with traumatic stress and increased her risk of future violence. P2959. The episodes of physical, mental, and sexual abuse perpetrated upon

Allen all combined to create situations where she is susceptible to emotional mental health damage. P2934. *See supra* pp. 19-24. Allen has all the predisposing factors of developing PTSD after trauma. P2955-58. Counsel testified that he was familiar with the "DSM-IV"[5] and PTSD at the time of trial. P2794-95. However, he was not using the DSM during interviews to ascertain issues that could be used as mitigation. P2795.

At the EH, the lower court heard testimony from Watkins, Capers, Hudson, and Allen's children, Alvinia Ragoo and Carlos Ragoo. Their testimony substantiated Allen's self-reports and Dr. Russell's diagnosis, and also provided further nonstatutory mitigation. As detailed above, the witnesses established that Allen was subjected to physical and sexual abuse since childhood, and Dr. Russell confirmed that these traumatic events are the source of Allen's PTSD. P2946-49; *see supra* p. 19-24. PTSD has three areas of symptomology - reexperiencing, avoidance of reminders of the trauma, and increased arousal (emotional dysregulation) - which the lay witnesses also corroborated at the EH. P2974, *see* DSM at 463-68.

Dr. Russell noted that Allen physically demonstrates anxiety and stress when asked to discuss these traumatic experiences, which is a clear example of reexperiencing. P2952-53. Allen also reported having dreams about the incidents. P2952, 3084. The witnesses noted that Allen suffers from constant, excessive sweating. P2599-2600, 2738, 2768. Consequently, she tends to carry a towel, and Dr. Russell said she would rub her hands faster and wring the towel when describing the traumatic abuse. P2953. Watkins recalled Allen showing physical signs of anxiety and frustration, and having emotional crying fits. P2599-2600, 2609, 2613. Capers

[5] AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS FOURTH EDITION, TEXT REVISION (2000) ("DSM")

also saw Allen exhibit signs of anxiety by shaking and sweating. P2656. Further, Carlos Ragoo testified that he was diagnosed with depression, anger issues, and other mental illness, and he saw many of the same symptoms in Allen. P2768-69

At the EH, Dr. Russell testified that Allen currently shows avoidance of trauma-related stimuli by refusing to come out of her cell and refusing meals. P2953-54. Allen has experienced trembling and panic attacks when coming out of her cell. P2954. Similarly, Allen's son recalled that Allen would often lock herself in her room for days. P2766. The lay witnesses noted Allen's unusual sleep patterns of sleeping all day, or for two to three days straight. P2601, 2613, 2656, 2739-40, 2758, 2767-68. Allen had a problem trusting people and having friends and told her daughter not to trust people. P2686. Oversleeping, paranoia, and trust issues are PTSD symptoms. P2967-68, 2976.

Dr. Russell testified that Allen's pattern of reckless, aggressive behavior and emotional dysregulation demonstrated increased arousal, which is when she has difficulty managing her emotional reactions. P2954, 2977. Carlos Ragoo said she often had mood swings where she would lose control and had temper tantrums where she would throw things. P2766-67, 2777. Dr. Russell found she also had difficulty concentrating which is tied to her memory issues and supported by her school records. P2977-78. Trembling when she leaves her cell also shows hypervigilance. P2978. Two persistent symptoms of increased arousal must be shown for PTSD, and Allen has three. P2978-79.

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." *Simmons v. State,* 105 So. 3d 475, 506 (Fla. 2012) (quoting *Rose*

v. State, 675 So. 2d 567, 573 (Fla. 1996)). However, at Allen's trial, "neither of her experts was asked if he had an opinion about this mitigator." *Allen v. State*, 137 So. 3d 946, 965 (Fla. 2013). Accordingly, counsel set up his experts, and his client, for failure. Counsel knew that Allen was leery about fully cooperating with Dr. Gebel during her 2007 evaluation because a guard was in the room. P2861-62, R21/1745. Combined with the fact that Dr. Gebel did not evaluate Allen for statutory mitigation, counsel was deficient in failing to either have him visit her for a reevaluation or have another expert evaluate her. P3064-66. Although Dr. Gebel's report specified what records he considered and there was also no mention of the crime or statutory mitigation, counsel did not request a follow-up meeting or assessment from any expert because he thought Dr. Gebel's report was "more than sufficient." P2887. Counsel was also deficient in not giving the experts enough information to formulate an educated opinion, including not providing the experts with the facts of the crime or the circumstances surrounding it. P3065-66. Prior to Dr. Gebel testifying, counsel still did not provide any additional information for him to consider, not even the details of the crime. P2890, R21/1751-52, 1758-61. In addition, Joseph Wu, M.D. ("Dr. Wu") was not provided enough background to determine anything other than what Allen's PET scan showed and answer hypotheticals instead of giving an opinion as to how Allen was affected. P3062-63, 3067-69. Counsel also failed to accommodate a meeting between Dr. Gebel or Dr. Wu and Allen's family, not even Hudson, even though he was communicating with her. P2724, 2814, 2885.

Notably, through the totality of the information provided, Dr. Russell found that the weighty statutory mitigator of "the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance" applied to Allen's case.

P2968-69, 2971, 2995, 3069; *see also Rose,* 675 So. 2d at 573. The extreme emotional disturbance was related to Allen's PTSD and factors such as her environment, leaving her vulnerable to emotional dysregulation when faced with the loss of her money. P2995-96. The longer she 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. P3027-28. Allen was unable to think logically and rationally. P2972. Dr. Russell confirmed that if an expert had not conducted interviews with Allen's family, an expert would not have been able to find this statutory mitigator. P3071-72. Therefore, counsel was also prejudicially ineffective in failing to further investigate whether this weighty statutory mitigator applied, especially since the other mitigation counsel presented was insubstantial.

The FSC also unreasonably determined that Dr. Russell's opinion was weakened and his findings were rebutted by State expert Michael Gamache, Ph.D. ("Dr. Gamache"). *See Allen*, 261 So. 3d at 1274. This determination of the facts was unreasonable because Dr. Gamache never even spoke with Allen. P3243. Dr. Gamache ***did not*** conduct any evaluation of Allen, he simply disagreed with Dr. Russell's diagnosis and did not think counsel or the trial experts missed anything significant. P3163, 3247. Accordingly, Dr. Gamache's testimony has no relevance as Allen's diagnosis, and is limited by what records he reviewed. He went on to describe PTSD and symptoms required for diagnosis and opined that Allen did not suffer from it. P3166-73, 3176, 3180-99, 3233-41. Dr. Gamache did not find evidence of some of the symptoms or any statutory mitigators, but he had only relied on her self-report and records. P3174, 3207-08. He has never met Allen and did not consult with any witnesses or speak with Allen's family. P3211, 3242-43. Notably, he admitted that he did not speak with anyone other

than the prosecutor. P3243. Although he was not requested to provide an evaluation in this case, Dr. Gamache agreed that it is very important to look for evidence to corroborate the self-report because the individual may not tell him something or tell him something inconsistent. P3235-36, 3247. He agreed that information from a third party could indicate that he would need to inquire further. P3237. Dr. Gamache did not evaluate Allen, personally obtain her self-report, or speak with her family; therefore, he did not have the same information that Dr. Russell obtained and used to formulate his diagnosis of Allen. Dr. Gamache's opinion of Allen is unreliable and speculative.

II. Allen was Prejudiced by Trial Counsel's Deficient Performance

The FSC claimed that Allen failed to establish prejudice because the testimony presented in postconviction was cumulative to that which was presented at trial. *Allen*, 261 So. 3d at 1273-74. This decision involves an unreasonable application of *Strickland*. The FSC also unreasonably determined that Allen's jury heard evidence of Allen's mental health issues, "the physical and sexual abuse she suffered while growing up and as an adult," "and the traumatic childhood and violent relationships she endured." *Id*. at 1273. This finding is clearly refuted by the record since absolutely no evidence of the abuse Allen suffered as a child was presented to the jury, nor was the extent of Allen's sexual abuse and traumatic violence she perpetually suffered her entire life. The jury was also not informed how any of this abuse led to her PTSD. As a result, the sentencing judge and jury ***did not*** hear "substantially similar evidence during the penalty phase." *Sochor v. Sec'y Dept. of Corr.*, 685 F.3d 1016, 1031 (11th Cir. 2012).

"The appropriate analysis of the prejudice prong of *Strickland* requires an evaluation of 'the totality of the available mitigation evidence-both that adduced at trial, and the evidence

adduced in the [evidentiary hearing]-in reweighing it against the evidence in aggravation.'" *Bottoson v. Moore*, 234 F.3d 526, 534 (11th Cir. 2000) (quoting *Williams v. Taylor,* 529 U.S. 362, 397-98 (2000)). Consequently, when the totality of Allen's mitigation evidence presented at trial and during postconviction is reweighed against the minimal evidence in aggravation, the confidence in the outcome of Allen's penalty phase is undermined. Allen was prejudiced because the mitigation "omitted by counsel's deficient investigation "paints a vastly different picture of [her] background than that created by the actual penalty-phase testimony. By failing to provide such evidence to the jury, though readily available, trial counsel's deficient performance prejudice[s her] ability to receive an individualized sentence." *Debruce v. Comm'r, Alabama Dept. of Corr.*, 758 F.3d 1263, 1276 (11th Cir. 2014) (internal citations and quotations omitted). Accordingly, as the FSC did not properly apply the prejudice analysis, the FSC's decision is also an unreasonable application of *Strickland* and its progeny.

The similarities of Allen's claim to cases where higher courts have granted relief for ineffective assistance of counsel illustrates that relief must be granted here because "there is no possibility fairminded jurists could disagree that the state court's decision conflicts" with the precedents of clearly established Federal law. *Harrington v. Richter*, 562 U.S. 86, 102 (2011). Allen's case exhibits many similarities to *Porter*, 558 U.S. 30. Notably, both cases involved ***unanimous advisory jury recommendations*** out of the Eighteenth Judicial Circuit Court, in and for Brevard County, Florida. *Porter v. State*, 788 So. 2d 917, 920 (Fla. 2001). Similar to *Porter*, Allen's counsel "did not even take the first step of interviewing witnesses or requesting records." *Porter*, 558 U.S. at 40. Like Allen, Porter also presented evidence in

postconviction of his abusive childhood and witnessing family violence. *Id*. at 33. Like Allen, 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*) also found no statutory mitigating circumstances or prejudice. *Id*. at 36-37. Just as this Court found that Porter's counsel was ineffective, which SCOTUS found was the correct disposition, this Court must reach the same result in Allen's case. *Id*. at 38; *see also Porter v. Crosby*, 6:03CV1465ORL31KRS, 2007 WL 1747316, at *32 (M.D. Fla. June 18, 2007).

The mitigation that 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 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, 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*, 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 Allen, Rompilla also lived in terror because he was abused and beat up by a parent. *Id*. Similarly, other defendants were also granted relief under *Strickland* when, like Allen, their juries were not privy to the details of their nightmarish abusive childhoods. *See Williams v. Taylor*, 529 U.S. 362; *Johnson v. Sec'y, DOC*, 643 F.3d 907 (11th Cir. 2011); *Ferrell v. Hall*, 640 F.3d 1199 (11th Cir. 2011); *Debruce,* 758 F.3d 1263. Based on the relief granted in the aforementioned

similar cases, it is clear that Allen must be granted relief based on 28 U.S.C. § 2254(d).

Justice Pariente's dissenting opinion[6] is further evidence of the fact that the FSC's decision was an unreasonable determination of the facts, and contrary to, or involved an unreasonable application of clearly established Federal law, as determined by SCOTUS.

> [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.
> . . .
> 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.

[6] Justice Quince also dissented.

> 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.
>
> . . .
>
> 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.***

Allen, 261 So. 3d at 1289-90, 1292 (emphasis added).

In denying relief, the FSC unreasonably determined that "[t]he additional mitigation testimony would have, at most, only added weight" to the existing mitigating circumstances. *Allen*, 261 So. 3d at 1274. The FSC unreasonably applied *Strickland* in holding that "[t]he additional mitigation presented would not have outweighed the established aggravating factors to undermine the confidence in the outcome such that Allen would have received a life sentence" and finding no prejudice under *Strickland*. *Allen*, 261 So. 3d at 1272, 1274-75. On the contrary, there is a reasonable probability that if this multitude of additional mitigation had been presented to the jury, Allen would have received a life sentence. Only ***two*** aggravators were found independently by the trial court in Allen's case and Allen contends that one of those aggravators should be stricken, which would leave only one aggravator remaining. *See infra* pp. 61-71. Accordingly, even if the additional mitigation testimony only added weight to the existing mitigating circumstances as the FSC suggests, that is an important distinction in a case with minimal aggravation such as Allen's.

The FSC also cited that "the jury's recommendation of death was unanimous" as part

of its support for finding that Allen was not prejudiced. *Allen*, 261 So. 3d at 1274. As Justice Pariente pointed out in her dissent, the majority unreasonably fails to take into consideration the effect of *Hurst* on the analysis, which significantly altered the question of prejudice. *Id.* at 1291-92 (Pariente, J., dissenting). At the very least, if this significant mitigation had been presented at trial, Allen would have received at least one vote recommending life and in light of *Hurst*, she would have already been entitled to a new penalty phase where she could only receive the death penalty if a jury unanimously voted for death. *See supra* pp. 4-13. In denying Allen relief on prejudice grounds the FSC unreasonably applied SCOTUS precedent, including *Strickland* and *Williams v. Taylor*. Therefore, Allen is entitled to a new penalty phase.

III. The FSC Opinion Violates Allen's Eighth and Fourteenth Amendment Rights

The FSC decision is also contrary to Allen's rights to due process and equal protection of laws under the Fourteenth Amendment and the Eighth Amendment, because the law must be applied consistently to all capital defendants. "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 v. Georgia*, 428 U.S. 153, 188 (1976). The FSC arbitrarily denied relief to Allen even though the FSC granted relief to other capital defendants pursuant to *Strickland* under similar facts.

As in *Bevel v. State*, 221 So. 3d 1168, 1177-78 (Fla. 2017), counsel failed "to conduct a constitutionally adequate mitigation investigation." The FSC opined, "where the jury's vote recommending death was dependent on one juror's vote, our confidence has been undermined when counsel was deficient in presenting mitigation to the jury, because '[t]he swaying of the vote of only one juror would have made a critical difference.'" *Id.* at 1179 (quoting *Phillips v.*

State, 608 So. 2d 778, 783 (Fla. 1992)). In light of circumstances similar to Allen's case, the FSC found that Bevel met the prejudice prong of *Strickland* and his death sentence, which was also based on a ***unanimous*** jury recommendation, was vacated. *Id*. at 1182. Similarly, in *Bevel*, "the quality and depth of the postconviction evidence painted a more complete and troubling picture of Bevel's background than was presented to the jury and the trial court." *Id*. at 1180. Like Bevel's counsel, Allen's counsel was similarly ineffective in failing to interview family members, obtain records, and investigate and present expert testimony regarding her PTSD, her cognitive deficits, her early childhood sexual and physical abuse, and how these factors interacted with her multiple traumatic brain injuries to affect her mental state at the time of the crime. *Id*. at 1179-80, 1182. Just as in *Bevel*, Allen's postconviction mental health expert also offered a qualitatively more favorable opinion, including Allen being under the influence of extreme emotional disturbance at the time of the crime. *Id*. at 1180, P2995. In addition, Dr. Russell was provided with the details of the crime and other background information not previously provided to Allen's trial experts that he found essential in forming his opinion, a distinction that the FSC found "critical to note" in *Bevel*. *Id*., P2980, 3069, 3071-72.

Further, in *Ellerbee v. State*, 232 So. 3d 909, 926 (Fla. 2017), Ellerbee's trial counsel was deficient for many of the same reasons as Allen's counsel due to failing "to explore and present various aspects of Ellerbee's childhood," PTSD, and abuse. The extensive amount of mitigation uncovered in postconviction for Ellerbee was nearly identical to the mitigation uncovered for Allen, including evidence of physical abuse by a parent that affected emotional and cognitive development. *Id.* at 928-32. Like in *Ellerbee*, Allen's EH testimony also "painted a much darker picture" of her childhood." *Id*. at 926–27. Just like Allen's counsel, Ellerbee's

counsel also failed to explore how the abuse ***affected*** Ellerbee. *Id*. at 931-32. As in *Ellerbee*, close family members witnessed the abuse Allen suffered and her PTSD symptoms, but were not contacted by counsel, which "resulted in an incomplete presentation of mitigation." *See id*. at 932. However, unlike Allen, the FSC found that Ellerbee was prejudiced by the deficient mitigation investigation and presentation and held that he was entitled to a new penalty phase even if he was not receiving relief under *Hurst*. *Id.*

"The Eighth Amendment to the United States Constitution and [the FSC's] proportionality review require that the death penalty "be reserved only for those cases that are the most aggravated and least mitigated." *Williams v. State*, 37 So. 3d 187, 205 (Fla. 2010) (quoting *Crook v. State,* 908 So. 2d 350, 357 (Fla. 2005)). Finding only two aggravators, the trial court in Allen's case did not find her case to be more aggravated than *Bevel*. *Allen*, 261 So. 3d at 1266. Bevel also only had two aggravators applicable to the count of first-degree murder where he had received a unanimous jury recommendation for death. *Bevel*, 221 So. 3d at 1175. *Ellerbee* was even more aggravated than Allen, in fact "the trial court found the existence of four statutory aggravators, which it merged into three." 232 So. 3d at 915. Further, Allen's counsel presented so little mitigation that the trial court was only able to find four nonstatutory mitigating circumstances. *Allen*, 261 So. 3d at 1266. Six nonstatutory mitigators were found by the trial court in *Bevel*, 221 So. 3d at 1175, and significantly, ***twenty-three*** nonstatutory mitigators were found in *Ellerbee*. 232 So. 3d at 915-16. Consequently, as Allen's trial court found less mitigating circumstances and the same or less aggravating circumstances in Allen's case, the FSC should have determined that Allen's counsel was more deficient than counsel in *Bevel* and *Ellerbee* and that Allen was prejudiced more than Bevel and Ellerbee by

her jury not being privy to this additional mitigation.

Counsel was deficient in the same ways as counsel for Bevel and Ellerbee and the mitigation uncovered for Allen in postconviction is practically identical to Bevel's and Ellerbee's. Other than the fact that Allen is a female, there is no other difference between her, Bevel, and Ellerbee. Therefore, as the facts of Allen's ineffective assistance of counsel claim warrant relief just as much or more than Bevel and Ellerbee's, under the Eighth and Fourteenth Amendments, Allen's *Strickland* claim must be granted, her death sentence must be vacated, and she must be granted a new penalty phase.

GROUND THREE

Allen alleged in Claims 5 and 6 of the motion for postconviction relief that counsel provided prejudicial ineffective assistance of counsel during the guilt phase by failing to object to multiple improper comments and misrepresentations in the State's guilt phase closing argument and rebuttal closing argument. The lower court held an EH on this claim, and found that Allen failed to establish prejudice and no cumulative error existed. P1962, 1965, 1966, 1967, 1969. The FSC affirmed the lower court's denial of relief by finding no prejudice. *Allen*, 261 So. 3d at 1270-72. The FSC did not address the deficient performance prong of any of these instances of prosecutorial misconduct; therefore, this Court must examine this element of the *Strickland* claim *de novo. Id*.; *see Rompilla,* 545 U.S. at 390. The FSC's resolution of this claim was an unreasonable application of clearly established federal law, specifically *Strickland v. Washington*, 466 U.S. 668 (1984), *Berger v. United States*, 295 U.S. 78 (1935), and the Sixth Amendment to the United States Constitution. Further, in many respects, the state court made an unreasonable determination of the facts in light of the state court record.

I. Improper Prosecutorial Vouching and Misstatements

"Statements made by a prosecutor, implicitly backed by the authority of [his] office, can have a powerful effect on a jury." *Pope v. Sec'y, Florida Dept. of Corr.*, 752 F.3d 1254, 1270 (11th Cir. 2014) (citing *Berger*, 295 U.S. at 88). Accordingly, it is improper for a prosecutor to misstate facts or the testimony of a witness. *See Berger*, 295 U.S. at 84. Counsel's failure to object to multiple improper prosecutorial comments and misstatements during guilt phase closing arguments and failing to move for a mistrial constituted prejudicial ineffective assistance of counsel under *Strickland*, 466 U.S. 668.

In its guilt phase closing, the State misstated the elements of first-degree felony murder:

> And even if you want to believe that cocaine was a factor, well, like the doctor said there is a number of factors that could have contributed to this death. Her obesity, her size, made her less able to withstand the trauma. But you know what, if you read the felony murder instruction, we don't have to prove even how she died. ***All we have to prove is that during the course of the kidnapping she died. And it doesn't matter how. That's the law.***

R20/1632-33. The State insinuated that even if the victim, Wenda Wright's ("Wright") death was caused by her own voluntary cocaine intoxication that Allen would still be guilty of first-degree felony murder and counsel failed to object. Counsel was deficient under *Strickland* in failing to object to the misstatement of the law and failing to ensure that a curative instruction was given so that there was no question that death by voluntary drug use would not satisfy the elements of first-degree felony murder. Instead, the jury was incorrectly led to believe that the law was, if Wright died during the kidnapping, no matter how she actually died, then Allen should be found guilty of first-degree felony murder.

The FSC found no prejudice "considering the totality of the correct descriptions of the elements of felony murder available to the jury." *Allen*, 261 So. 3d at 1270. Counsel's deficient

performance prejudiced Allen in her guilt phase because her jury was told the wrong law in closing. As the misrepresentation was not brought to the jury's attention, if they found Wright died of cocaine intoxication they would not know Allen was ***not*** guilty of first-degree felony murder. The verdict has no interrogatories, therefore it is unknown if the jury relied on the State's misstatements and found that Wright died of cocaine intoxication but still found Allen guilty of first-degree felony murder instead of finding her not guilty or guilty of a lesser included offense. R5/794. Under *Strickland*, due to counsel's deficient performance in failing to object to the State's felony murder misstatements, there is a reasonable probability that the confidence in the guilt phase of Allen's trial is undermined.

During the State's guilt phase closing, the prosecutor also improperly said, "Now, I will tell you this, okay, there is no one in this courtroom, no one, that finds it more distasteful to have to plea bargain with co-defendants than me." R20/1562. "When you are looking at these cases, you have to look at, you know, in some instances, who is the most culpable, who is the most responsible, and who caused everything to happen. There is the person right there (indicating [to Allen])." R20/1563. In essence, the prosecutor was bolstering Quintin Allen's ("Quintin") testimony by vouching for his credibility and advising the jurors that although plea bargains are distasteful, it was proper in this case because he thought Allen was the most culpable and responsible. Counsel was deficient by failing to object to either statement.

Worse yet, the State's comment was false because it was admitted on the record prior to voir dire that informal discussions regarding a plea offer with Allen ***did*** take place. R10/8-10. The State later compounded the problem by stating in his rebuttal closing argument there was no evidence of that and implying that counsel was dishonest and should not have asked

Quintin if he knew Allen was offered a deal because the statement was false. R20/1625-26. If Allen had been interested in taking a plea offer, which appears to be the exact same plea offer that Quintin accepted, it would have been conditioned upon testifying against Quintin, just as his plea offer was conditioned upon testifying against her. R15/860; R16/1022. No other evidence linked the co-defendants to the murder; therefore, the State needed one of the co-defendants to testify against the other. Counsel was deficient by not objecting to the mischaracterization and by not requesting that the jury be instructed about the informal plea offer discussions. Under *Strickland*, Allen was prejudiced because there is a reasonable probability that, but for counsel's deficiency, the outcome would have been different.

II. Improper Comments and Misstatements Related to Wright's Cause of Death and the HAC Aggravator

The State also made numerous improper comments related to both Wright's cause of death and the aggravating circumstance of "the capital felony was especially heinous, atrocious, or cruel" ("HAC"). The State misrepresented the testimony of Sajid Qaiser, M.D. ("Dr. Qaiser") multiple times during the closing argument, the first instance was:

> She is the one that was holding that belt around her neck so tightly that it would even cause petechia, the little pinpoint blood vessels that pop in your eyes. Okay? So tight ***Dr. Qaiser said that you don't get that unless it is held real tight***. Margaret Allen is the one that did that.

R20/1581. The lower court correctly found that "the State's argument is inconsistent with the evidence" is supported by the record. P1966, R19/1473. The FSC did not address deficient performance, but referred to the argument as a "misstatement". *Allen*, 261 So. 3d at 1270. Therefore, it is clear that counsel rendered deficient performance by failing to object to this misrepresentation, which made it seem like Wright was violently strangled until her blood vessels popped. As the absence of petechia shows that either strangulation did not occur or that

strangulation was very tight, there is a reasonable doubt as to whether strangulation actually occurred. Under *Strickland*, Allen was prejudiced because there is a reasonable probability that, but for counsel's deficiency, the outcome would have been different.

The State also argued to the jury in its closing:

> Now, I would suggest to you, all right, and you can take this for discussion, that placing a rope around someone's neck and holding it there for ***three or four minutes***, because that is what Dr. Qaiser said it would take, okay, ***three or four minutes***, all right, that may have some aspects of premeddation [sic] here.

R20/1578-79. Dr. Qaiser actually testified that it would take a person ***four to six minutes*** to die from strangulation. R18/1448. Quintin testified that the belt was only around Wright's neck for ***three minutes***. R15/914-915. Counsel was deficient in not objecting to the misrepresentation and not requesting a curative instruction. The FSC held that there was no prejudice and that the "prosecutor's statement that it takes 'three or four' minutes to die of strangulation was not wholly inconsistent with the evidence presented at trial that it takes 'four to six minutes' to die of strangulation, because 'four' is a correct amount of time." *Allen*, 261 So. 3d at 1271. However, this unreasonable determination of the prejudice analysis under *Strickland* fails to consider that three minutes was not only a misstatement of the time it would take a person to die from strangulation, but also the exact amount of time that the co-defendant turned State witness claimed Wright was strangled. As Dr. Qaiser admitted if the belt was not around Wright's neck for at least ***four*** minutes, ***she could not have died from strangulation***. R18/1448. Counsel's failure to object to the misstatement prejudiced Allen because if it takes ***four to six minutes*** for a person to die from strangulation and Wright died within ***three minutes*** of the belt being held around her neck, there is a reasonable doubt that even if strangulation did occur, it did not cause Wright's death. Therefore, there is a reasonable probability that if

counsel objected, the jury would have found Allen not guilty or guilty of a lesser offense.

In addition, the State also misstated Robert Whitmore, M.D.'s ("Dr. Whitmore") autopsy report and said there was "evidence of ***internal*** injuries," and "***contusions on both sides of the neck***." R20/1629-30. However, the autopsy report actually specified to see "External Evidence of Injury" and he notated that one 2 x 2 inch contusion was on the right side and one 1 ½ x 2 inch contusion was on the left. P1577-78. Under the Internal Examination section, no internal injuries to the neck were reported. P1580. Competent counsel would have objected to the State's misleading characterization of the autopsy report and requested a curative instruction that no internal injuries were found and the sizes of the two contusions differed. In addition, as the autopsy report was not introduced into evidence, competent counsel would have objected to the State reading the report to the jury. Allen was prejudiced because the misstatements would convince the jury to believe that Wright was violently strangled, but if the argument was corrected, the jury would have heard that no internal neck injuries were reported in the autopsy report and only two small contusions (not ligature marks) were present. Therefore, there is a reasonable probability that the jury would have found Allen not guilty or guilty of a lesser offense.

Allen was prejudiced in both phases of her trial by counsel's deficiencies in failing to object to these misstatements regarding Wright's cause of death and HAC and move for a mistrial. Taken with the cumulative effect of the original medical examiner's autopsy report that stated cocaine intoxication was a cause of death and found no ligature marks, her symmetrical and otherwise atraumatic neck, and Wright's obesity and health issues, there is a reasonable probability that the outcome of Allen's guilt phase is undermined because

strangulation may not have occurred. *See* P1575-1604. This was especially prejudicial to Allen because no expert such as Daniel J. Spitz, M.D. ("Dr. Spitz") testified to explain the inconsistencies with Dr. Whitmore's report or to provide further support that strangulation was unlikely to have occurred. *See infra* pp. 61-71. As a death by strangulation supports HAC, Allen was also prejudiced in the penalty phase of her trial. The State's inflammatory and misleading remarks that Wright was brutally strangled with a belt pulled so tightly that it caused internal injury to Wright's neck and burst the blood vessels in Wright's eye is horrifying and would sway a jury to find HAC. Without a strong HAC aggravator, especially with her additional mitigation, there is a reasonable probability that at least one juror would have voted for a life sentence. *See supra* p. 13-38. Allen was prejudiced in both her guilt phase and penalty phase because there is a reasonable probability that, but for counsel's deficiency in failing to object to these misstatements, the outcome of each proceeding would have been different.

III. Cumulative Effect of Instances of Prosecutorial Misconduct

The FSC unreasonably held that the claim of cumulative error failed because of its findings that each individual subclaim was without merit. *Allen*, 261 So. 3d at 1272. As Quintin and Dr. Qaiser were the sole evidence against Allen and as to Wright's cause of death, without the cumulative effect of counsel's deficiencies, a reasonable probability exists that the jury would have found Allen not guilty or guilty of a lesser offense, therefore confidence in the outcome of her guilt phase is undermined. Further, Allen's trial, "as a whole, was fundamentally unfair and outside of the bounds of the Constitution." *Conklin*, 366 F.3d at 1210.

The State's improper comments had a doubly prejudicial effect on Allen by persuading the jury to not only find Allen guilty of felony murder, but also to persuade them to vote for

the death penalty due to providing support for HAC. Allen was prejudiced in her penalty phase by the cumulative effect of all of these unobjected-to improper arguments because the jury was instructed prior to deliberations, "[Y]ou can take into consideration what you have learned in the guilt phase and the penalty phase." R22/1976. The trial court deviated from standard jury instructions and the jury was led to believe that anything they learned during guilt phase, including closing arguments, could be considered when voting for their recommendation. R5/842. The jury was also not specifically instructed during any point in the penalty phase that "what the attorneys say is not evidence or your instruction on the law." FL ST CR JURY INST 2.7; *see also* FL ST CR JURY INST 7.11. Further, the State's mischaracterizations made Allen look unsympathetic and undeserving of mercy, and under *Hurst*, a vote for mercy is especially important because the death penalty cannot be imposed if one juror votes for a life sentence. *See supra* pp. 4-13. Consequently, there is a reasonable probability that counsel's failure to object undermined confidence in the outcome. Therefore, Allen is entitled to a new trial.

GROUNDS FOUR AND THIRTEEN

Allen alleged in Claim 8 of the motion for postconviction relief that counsel provided prejudicial ineffective assistance of counsel during the penalty phase by failing to object to and move for a mistrial based on multiple instances of prosecutorial misconduct in Allen's penalty phase. The lower court held an EH on this claim, and found that Allen failed to show that she was prejudiced. P1976-90. The FSC affirmed the lower court's denial of relief, finding no prejudice. *Allen*, 261 So. 3d at 1277-82. The FSC did not address the deficient performance prong on any of these instances of prosecutorial misconduct; therefore, this Court must examine this element of the *Strickland* claim *de novo. Id*.; *see Rompilla* 545 U.S. at 390. The

FSC's resolution of this claim was an unreasonable application of clearly established federal law, specifically *Strickland*, 466 U.S. 668, *Berger v. United States*, 295 U.S. 78 (1935), and the Sixth Amendment to the United States Constitution. Further, in many respects, the state court made an unreasonable determination of the facts in light of the state court record.

I. Prosecutorial Misconduct Related to Impermissible Non-Statutory Aggravating Factors

a. Convictions for Nonviolent Felonies

In Florida, the State is ***only*** permitted to present evidence of the aggravating circumstances provided in section 921.141, Florida Statutes, "which does not include a defendant's convictions for nonviolent felonies" presented under the pretense that it is being admitted for another purpose, which includes under the guise of witness impeachment. *Poole v. State*, 997 So. 2d 382, 392 (Fla. 2008) (citing *Hitchcock v. State*, 673 So. 2d 859, 861 (Fla. 1996)). However, during the State's cross-examination of Dr. Gebel, under the guise of witness impeachment, the State improperly insinuated that Allen had multiple drug convictions and irrelevantly brought up that she had previously been in prison.

> State: Okay. You reviewed some medical records. You reviewed some jail records. ***Did you also review the prison records of the Defendant as well?***
>
> Dr. Gebel: According to my notes there was correctional facility records. I don't know what they consisted of.
>
> State: So, you don't know if those were county jail records or ***prison records where she had been in prison before?***
>
> Dr. Gebel: I have no knowledge of that.

R21/1757-58. A member of the jury may have previously thought the terms "jail" and "prison" were interchangeable. However, the specific way the State asked the questions highlighted that the two terms were not the same and insinuated that Allen was frequently imprisoned.

Further, the State did not lead into drug-related questions by asking if Allen used drugs, which could be relevant to mitigation. Instead, the State suggested that Allen did not merely consume drugs by asking Dr. Gebel, "Now, you are aware the Defendant has been ***involved*** in drugs for a number of years, correct?" R21/1758. He went on to testify that Allen denied drug use and he did not find anything in the physical record showing drug use. R21/1758-59. Even still, the State asked, "So, you don't know about her past drug convictions?" and Dr. Gebel replied, "No." R21/1759. The improper exchange implied that Allen had numerous nonviolent convictions. The State's intent to unduly influence and inflame the jury was obvious.

During the State's cross-examination of Hudson, the State again solicited similarly inappropriate testimony. Hudson was asked, "So, that would have been about the time she got out of prison in 1999 that you became a mother figure?" R22/1891. To which she replied, "I don't know." *Id*. The State later asked, "So, that would have been when she got released from prison back in 1999?" and Hudson replied, "Yes, sir." *Id*. If the State truly wanted to inquire about the timeframe in which Hudson was a mother figure to Allen, it could have been accomplished without asking about Allen being in prison. The State even went on to ask whether Hudson "was acquainted with [Allen] prior to her going to prison." *Id*. This disingenuous and inflammatory question fully ignored the fact that Hudson testified on direct examination, and on cross-examination just minutes prior, that she knew Allen since birth and Allen stayed with her as a child. R22/1877-78, 1891. Clearly, the State was just maliciously emphasizing that Allen was previously in prison.

Moreover, even though Allen only had ***one*** conviction for selling drugs, the State knowingly elicited false prejudicial testimony from Hudson by asking, "You were aware that

she was convicted *several* times for selling drugs, right?" R22/1891-92; *see infra* pp. 83-85. In response, Hudson simply agreed. R22/1892. To further emphasize the false testimony and inflammatory statements, the State argued to the jury during the closing argument, "You heard about the Defendant's time in prison for previous drug sale convictions." R22/1930.

These instances of prosecutorial misconduct regarding Allen's prison history for a nonviolent offense and supposed multiple convictions for selling drugs were egregious and the State's deliberate intent to vilify Allen was blatantly obvious. Competent counsel would have known she only had ***one*** prior conviction for the sale of drugs and realized any plural mention of convictions was a lie. R5/881-82. Therefore, counsel deficiently failed to object or move for a mistrial due to these instances of the State presenting inadmissible aggravation in the form of unverified information regarding nonviolent offenses and their punishments.

The lower court correctly found the statements about Allen's drug convictions were improper, but erred in finding no prejudice. P1976. The FSC did not determine deficiency, but in finding no prejudice, unreasonably determined that the "prosecutor's comments about Allen's time in prison and her convictions for drug sales were isolated, and did not approach the same level of impropriety as comments in other cases where [the FSC] has granted relief." *Allen*, 261 So. 3d at 1277. However, Allen was prejudiced by all of this related misconduct, because the State left the jury with the impression that Allen was a drug dealer who never learned her lesson. The jury would think that she continued the same immoral criminal behavior and went on to be convicted multiple times for dealing drugs, failing to be rehabilitated, instead of one time almost nine years prior to this incident she was accused of.

The FSC also unreasonably determined that Allen was not prejudiced because "the

testimony that Allen was involved in a lifestyle of drugs led the trial court to find that such involvement was a nonstatutory mitigator." *Allen*, 261 So. 3d at 1277. However, the sentencing order titles the mitigator as "the defendant grew up in a neighborhood where there were acts of violence and illegal drugs" and the mitigator is almost exclusively supported by testimony from the *Spencer*[7] hearing, which is held outside of the presence of the jury. R6/960-61. Therefore, Allen ***was*** prejudiced because her ***jury*** did not hear any explanation about her sole conviction for selling drugs or any information that would allow the jury to assign more weight to her mitigation or find her more deserving of a mercy vote. Instead, the jury only heard inflammatory aggravation that Allen spent time in prison, supposedly had multiple convictions for selling drugs, and could be dangerous. Accordingly, the State deliberately created a risk that the jury would give undue weight to this inadmissible nonstatutory aggravation when recommending Allen's sentence. Allen was prejudiced by counsel's deficiencies because the jury may have thought that the life of career criminal drug dealer who already spent time in prison was not a life worth saving. Therefore, there is a reasonable probability that, but for counsel's deficiencies, Allen would have received at least one vote for a life sentence.

b. Dangerousness

Florida's "death penalty statute does not authorize a dangerousness aggravating factor." *Kormondy v. State*, 703 So. 2d 454, 463 (Fla. 1997). Prior to Allen's trial, her Motion to Preclude Improper Argument ("Motion to Preclude") was granted, which sought to preclude the State from arguing the defendant's future dangerousness and cited to *Kormondy*. R4/583-91, 621-25. The State was indisputably on notice that it was an improper argument, and as

[7] *Spencer v. State*, 615 So. 2d 688 (Fla. 1993).

Kormondy was cited, the State also knew it was improper to elicit that testimony on cross-examination because those were the exact facts of *Kormondy*. *See* 703 So. 2d at 460-63.

In an attempt to elicit improper testimony, the State initiated an inflammatory exchange regarding future dangerousness during Dr. Wu's cross-examination. *See Allen*, 137 So. 3d at 960. The State asked, "So, [an episode of a violent act from Allen] could happen, say, in the future to a prison guard, correct?" R21/1855. The State followed up with, "So, you are saying to a reasonable degree of medical probability she is a risk to any prison guard who is watching her in the future?" *Id*. Counsel finally objected based on speculation and the trial court sustained the objection. R21/1855-56. No curative instruction or motion for mistrial was sought. The State's questions were blatantly improper and in no way related to probing Dr. Wu's opinion that Allen's ability to conform her conduct to the requirements of the law was substantially impaired at the time of the offense. *Zant v. Stephens*, 462 U.S. 862, 885 (1983).

In Point III of Allen's direct appeal brief, she claimed reversible error occurred in relation to these improper comments regarding future dangerousness, which is detailed in Ground Thirteen of the Petition. The State's inflammatory comments were considered on direct appeal, but the FSC noted that counsel did not preserve the issue for review and as such, she would have to "demonstrate that the error was fundamental to be entitled to relief." *See Allen*, 137 So. 3d at 960-62. Fundamental error was not found. *Id*. at 962. However, on direct appeal, the FSC did find that the State's questions to Dr. Wu were improper and the State was clearly "attempting to improperly allege Allen's future dangerousness, without a valid basis." *Id*. at 961. Under *Strickland*, counsel was deficient in specifically failing to object to each improper statement on the basis that "the State was impermissibly attempting to elicit testimonial

evidence assessing Allen's likely future dangerousness" and move for a mistrial. *See id*. at 961. Therefore, the deficiency prong of the *Strickland* claim as detailed in Ground Four is satisfied.

The comments were reviewed on direct appeal by the FSC under the standard for fundamental error, which is a higher standard than the *Strickland* prejudice standard. "Fundamental error is that which 'reaches down into the validity of the trial itself to the extent that a verdict...could not have been obtained without [that] error.'" *Floyd v. State*, 850 So. 2d 383, 403 (Fla. 2002) (quoting *Archer v. State*, 673 So. 2d 17, 20 (Fla. 1996)). Whereas under *Strickland*, "a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would ***reasonably likely have been different*** absent the errors." 466 U.S. at 696. Therefore, the FSC's postconviction decision that Allen could not establish prejudice under *Strickland* because the State's comments did not amount to fundamental error on direct appeal, is contrary to, or an unreasonable application of *Strickland*. *Allen*, 261 So. 3d at 1278. Now, under both *Strickland* and *Hurst*, a reasonable probability of a different result only requires a reasonable probability that if counsel was not deficient, ***one*** juror would have been swayed to vote for life. *See Bevel*, 221 So. 3d at 1179; *see supra* pp. 4-13. As these improper questions would lead the jury to believe that Allen was a danger to society including prison guards, it is reasonable that it caused at least one juror to determine that her life was not worth saving and vote for the death penalty, thereby prejudicing Allen.

c. Lack of Remorse

Florida has held that "lack of remorse should have no place in the consideration of aggravating factors." *Pope v. State,* 441 So. 2d 1073, 1078 (Fla. 1983). "Any convincing evidence of remorse may properly be considered in mitigation of the sentence, but absence of

remorse should not be weighed either as an aggravating factor nor as an enhancement of an aggravating factor." *Id*. Although Allen did not introduce any evidence of remorse, on the State's cross-examination of Dr. Wu, the State insinuated that Allen lacked remorse.

> State: Okay. Let's talk a little bit about impulse controls. Doctor, isn't it true that somebody who actually suffers from full-blown impulse control, that one of the clinically significant signs of that is that immediately after they have this impulse outburst, they are overwhelmed with remorse?
>
> Dr. Wu: It depends. That is true in some cases but not all cases.
>
> State: Okay. ***Did you see and study anything about Margaret Allen that she had any level of remorse after this murder occurred?***
>
> Dr. Wu: I don't have specific details of the circumstances. I don't know what her -- I don't know about those facts.

R21/1851. The lower court erred in finding the comments proper. P1977; *see Atwater v. State*, 626 So. 2d 1325, 1328 (Fla. 1993) (trial court erred in permitting the State on cross-examination to ask doctor whether a person with antisocial personality showed remorse). The second comment was especially improper because the State was not inquiring about the disorder or completeness of investigation as the lower court wrongly claimed. P1977. Dr. Wu stated that he reviewed a PET scan of Allen and some of her records, but he never said he met her or interviewed her. R21/1800, 1815-16. The State was improperly planting lack of remorse in the jurors' minds. Although counsel testified that he was familiar with prosecutorial misconduct such as "[i]ssues of remorse being brought up during the penalty phase," he still failed to object. P2792-93. The FSC unreasonably found no prejudice, however this deficiency prejudiced Allen in her penalty phase by adding an improper additional nonstatutory aggravator. *Allen*, 261 So. 3d at 1278. There is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

II. Prosecutorial Misconduct Related to Improper Arguments

a. "Golden Rule" Argument and Misstatement of Evidence

Florida has held that "golden rule" arguments asking "jurors to place themselves in the victim's position" are improper. *Davis v. State*, 928 So. 2d 1089, 1121 (Fla. 2005); *see also Mosley v. State*, 46 So. 3d 510, 520 (Fla. 2009). Also, the "imaginary scenario" argument is a subtle form of the "golden rule" argument occurring "where the prosecutor asks the jurors to put his or her own imaginary words in the victim's mouth." *Williamson v. State*, 994 So. 2d 1000, 1006 (Fla. 2008). The State was indisputably on notice that these arguments were prohibited based on the granting of Allen's Motion to Preclude. R4/583-91. Regardless, during the penalty phase closing argument, the State blatantly ignored the prohibition of "golden rule" arguments by stating:

> Now, let's talk about the strangulation and what somebody goes through. Dr. Qaiser tried to give you some idea of what physiological, mental process ***you*** go through when ***you*** are being strangled. Okay? Forget about the part where ***you*** have got water – the liquids being poured on ***your*** face. What did he tell us? The first thing is, ***you*** are going to have difficulty breathing when that strap is placed around ***your*** neck. ***You*** cannot get ***your*** breath. Okay? Use your common sense. I mean, ***all of us have*****, you know, run somewhere, maybe *we* have a medical condition, asthma or whatever, it is scary when *you* can't get *your* breath.** All right?

R22/1920. The State went on to continue vividly painting a picture for the jurors to envision the pain and terror of Wright's last moments and added an imaginary script.

> Panic. Dr. Qaiser told us there would be panic. A sense of not being able to get your breath. A sense of this pain above and below the ligature mark. The desire to survive. That basic human instinct. You know, I want to live. I don't want to die. I want to see my children again. I want to see my companion again. And finally the jerky movements Dr. Qaiser told us about. The movement of the head and the neck. And finally the shaking. And it is left on there for three or four minutes. Death. Those are the last few moments of Wenda Wright's life.

R22/1921. Most of the comments the State claimed that Wright made are not found anywhere in the record and none are actual quotes. Thus, the statements are the imaginary words of the

State, not facts in evidence, and were argued to inflame the passion and sympathy of the jury.

Counsel was deficient under *Strickland* in failing to object to any of these statements. Competent counsel would have recognized the State's repeated use of "you" pronouns and literally inviting the jurors to think of a time when they were personally unable to breathe to be obvious "golden rule" arguments and objected and moved for a mistrial. Competent counsel would have also objected to the State putting imaginary words in Wright's mouth because none of the statements quoted what she supposedly said. Although not mentioned the first time that the State asked Quintin what Wright said when the belt was around her neck, Quintin later added that Wright said she wanted to go home to her kids. R15/914, 1005. Otherwise, the next closest remark to anything the State argued was that Quintin claimed Wright said "Please stop" and please let her go. R15/914, 1005. Therefore, counsel was also deficient in not objecting on the grounds that the State was misstating the evidence. *See Berger*, 295 U.S. at 84.

The FSC unreasonably found no prejudice, but counsel's ineffectiveness in failing to object to the "golden rule" arguments prejudiced Allen under *Strickland*. *Allen*, 261 So. 3d at 1279. These inflammatory statements unduly inflamed the sympathy and passions of the jury to Allen's detriment and were on the forefront of the jurors' minds when they deliberated. If counsel had objected, the jurors would not be imagining themselves going through the terror and panic of not being able to catch their breath while replaying the imaginary script of Wright's last moments that the State fabricated and would have been more likely to vote for mercy. Accordingly, there is a reasonable probability that, but for counsel's deficiencies, the result of the proceeding would have been different.

b. Improper Vouching and Misstatement of the Law

A Florida jury is neither compelled nor required to recommend or impose a death sentence, even if aggravation outweighs mitigation. *See Brooks v State,* 762 So. 2d 879, 902 (Fla. 2000). It is also improper for the State to "cloak [its] case with legitimacy as a bona-fide death penalty prosecution, much like an improper 'vouching' argument" or to personalize himself in the eyes of the jury to gain sympathy. *Id.; Ruiz v. State*, 743 So. 2d 1, 7 (Fla. 1999). However, during closing argument, the State advised the jury:

> [T]here are cases where the recommendation for the death penalty is warranted. This is that case. … It is not going to be an easy decision. It's not easy to stand up here and ask a jury to recommend a death penalty. ***But in certain cases it is what the law calls for***. It's what justice calls for.

R22/1932. The lower court found that the statement regarding "what the law calls for" was improper, but did not find prejudice. P1989-90. As the law never requires a death sentence be imposed, counsel was deficient in failing to object and move for a mistrial based on the State misstating the law and cloaking the State's case with legitimacy as a death case. Counsel should have also objected on the grounds that the State was attempting to gain sympathy from the jurors and moved for a mistrial.

The FSC unreasonably found no prejudice, but counsel's deficiency prejudiced Allen because the jury was improperly told that her case is one where the ***law*** calls for the death penalty, leading the jury to believe that the law (and justice) required imposition of death. *Allen*, 261 So. 3d at 1279. The jury sympathized with the prosecutor for having the difficult task of asking them to sentence Allen to death because the law supposedly required it.

c. Denigration of Mitigation and Defense Counsel and Misstatements

In Florida, it is improper for the State to denigrate mitigation during closing arguments or to attack the manner counsel conducted the defense. *Williamson,* 994 So. 2d at 1014; *Braddy*

v. State, 111 So. 3d 810, 853-54 (Fla. 2012). It is also improper for the State to misstate the facts or urge a jury to consider facts not in evidence. *See Berger*, 295 U.S. at 84. The State inappropriately argued in closing:

> And then I said, well, Doctor, what if you knew those were the facts in this case because that is exactly what she did? Wouldn't that change your opinion? Well, blah, blah, blah, no, that really wouldn't change my opinion. And you know why? Because he was paid $3,000 to come in here and say that she had cognitive disorders.

R22/1926. The argument exceeded the bounds of commenting on the evidence and inappropriately implied that the jury could not believe counsel or his arguments. Counsel rendered deficient performance in failing to object to this denigration of mitigation and attack on counsel and move for a mistrial. Further, it was also a misstatement of the evidence because Dr. Gebel never testified that his opinion would not change if he knew the facts of the case. In fact, just the opposite occurred. He testified that if he knew the facts of the case that it may change the severity or degree of her injury, but it would not change the fact that she has been injured throughout the years. R21/1761. Therefore, counsel was also deficient in failing to object to the State misstating Dr. Gebel's testimony. *See Berger*, 295 U.S. at 84.

The FSC unreasonably determined that Allen was not prejudiced "[g]iven the overwhelming evidence of guilt presented." *Allen*, 261 So. 3d at 1280. That is the improper standard because Dr. Gebel testified in the penalty phase as to mitigation regarding Allen's organic brain damage and resulting mental impairments. *See Zant,* 462 U.S. at 885. Allen was prejudiced by counsel's deficiencies because the State's argument that Dr. Gebel was dishonest and had no integrity substantially affects the jury finding and weighing mitigation. The comments also lead the jury to believe that counsel was deceptive and Dr. Gebel was fabricating his diagnosis and would say anything for a sum of money, which undermines

Allen's mental health mitigation. Absent counsel's deficiencies, there is a reasonable probability that the penalty phase outcome would have been different.

The State also misstated Dr. Wu's testimony regarding Allen's PET scan, claiming that Dr. Wu said he relied on MRIs and CAT scans, and wrongly argued his diagnosis was invalid because there was no MRI or CAT scan. R22/1928. However, Dr. Wu actually testified that "PET scans have been shown to be more sensitive than in [sic] CAT and MRI scans in detecting traumatic brain injury." R21/1817. Dr. Wu did say it is not a standalone diagnostic test, but he said to make a diagnosis you consider any history of head trauma and other signs and symptoms of behavioral, cognitive, or psychiatric changes consistent with head trauma. R21/1817-18. On cross, Dr. Wu specifically stated that a MRI is not always done in conjunction with a PET scan, although it would be preferable, it is not essential and he would not lack any necessary information without it. R21/1856-57. Dr. Wu did not mention any necessity for a CAT scan.

As it was not necessary for Dr. Wu to rely on a MRI or CAT scan in formulating his diagnosis, counsel ineffectively failed to object to this misstatement and move for a curative instruction. Further, this argument also improperly denigrates the mental health mitigation presented by Dr. Wu. Accordingly, competent counsel would have objected on that basis as well. There is a reasonable probability that the penalty phase outcome would have been different, because counsel's failure to object allowed Dr. Wu's diagnosis to appear to have no factual basis, which the jury would consider when finding and weighing mitigation.

d. Inflammatory Comments

In Florida, closing argument must not be used to inflame the minds and passions of the jurors or inject elements of emotion and fear into the jury's deliberations. *Bertolotti v. State*,

476 So. 2d 130, 134 (Fla. 1985); *Garron v. State*, 528 So. 2d 353, 359 (Fla. 1988). Although the trial court also prohibited these arguments by granting Allen's Motion to Preclude, during the penalty phase closing, the State made many improper references to systematic torture and waterboarding. R22/1919, R4/583-91. Counsel deficiently failed to object to these inflammatory misstatements of the evidence. Waterboarding is defined as "an interrogation technique in which water is forced into a detainee's mouth and nose so as to induce the sensation of drowning." *Waterboarding*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/waterboarding (last visited Aug. 15, 2019). There was no evidence that what Quintin alleged Allen did to Wright constituted waterboarding, which the State even acknowledged in guilt phase closing by stating, "I don't recall anybody ever saying that liquids were poured down her mouth or throat." R20/1574.

Waterboarding and systematic torture have constantly been in news headlines with a negative connotation, especially around the time of trial, and describing the events of Wright's death as such would have elicited negative emotion in the jurors' minds. P442. As jurors are unlikely to know the exact definition of waterboarding in order to deduce if the State was exaggerating, there is a reasonable probability that counsel's deficiency undermined the outcome because Allen was portrayed as a terrorist whose life was not worth saving.

e. Bad Character

In Florida, if a defendant does not testify or present witnesses to testify about the defendant's good character, it is improper for the State to present evidence of bad character. *Martinez v. State*, 761 So. 2d 1074, 1082 (Fla. 2000). Although Allen did not present character evidence, the State made these inflammatory and judgmental remarks in closing:

> You heard about the Defendant's time in prison for previous drug sale convictions. You heard about her children, her son in prison for 11 years and one of her daughters is in prison for five years. And her other daughter is with her grandmother. ***And we can only hope that there may be some hope for that daughter.***

R22/1930. The inappropriateness of the first sentence is discussed above; however, the State's extraneous comment suggesting that Allen is a bad mother and her daughter is better off without her is also improper, and prohibited by her Motion to Preclude. R4/583-91; *see supra* pp. 46-49. Counsel was deficient in failing to object to these inflammatory remarks regarding Allen's purported bad character. There is a reasonable probability that counsel's deficiency undermined the penalty phase because the argument prejudicially inflamed the passions of the jury by portraying Allen as being irresponsible, unsympathetic, and undeserving of mercy.

f. Bolstering and Misstatements

It is improper for the prosecutor to use the status and influence of the government to bolster the believability of his case. *See United States v. Garza*, 608 F.2d 659, 666 (5th Cir. 1979). Further, misstating facts and witness testimony are classic examples of prosecutorial misconduct. *See Berger*, 295 U.S. at 84. In closing, the State improperly asserted, "First of all, what I wrote down was [Dr. Gebel] said, no major brain issue with the Defendant. No major brain issues with the Defendant. Okay?" R22/1923. The State later reiterates the point, "And, again, the first doctor says no major brain injury." R22/1928.

Counsel was deficient in failing to object to these remarks, request a curative instruction, and move for a mistrial. Dr. Gebel testified that "[w]ithin a reasonable degree of medical probability she does fit a patient who has brain damage" and that the brain damage is organic in nature due to physical damage to the frontal and temporal lobes of her brain. R21/1750-51. Counsel allowed the State to argue these misstatements regarding Allen's brain

injury instead of clarifying that Dr. Gebel just said Allen did not seem to have a "major brain injury in terms of weakness in an arm or a leg or anything in those terms." R21/1745.

There is a reasonable probability that counsel's deficiency undermined the outcome because misstating that Allen had no major brain issues devalued her mental mitigation yet again, causing the jury to assign less weight to mental health mitigation. Further, even if the jury could not recall what Dr. Gebel said, they were likely to believe that the prosecutor was correct because he said that he wrote it down. *See generally Pope*, 752 F.3d at 1270.

III. Cumulative Effect of the Instances of Prosecutorial Misconduct

The FSC unreasonably held that the claim of cumulative error failed because of its findings that each individual subclaim was without merit. *Allen*, 261 So. 3d at 1282. However, Allen's penalty phase, "as a whole, was fundamentally unfair and outside of the bounds of the Constitution," due to the cumulative effect of counsel failing to object to each of these instances of prosecutorial misconduct. *Conklin*, 366 F.3d at 1210; *see also Garza*, 608 F.2d at 665-66. The totality of the improper questions and comments by the State during cross-examination and during closing argument must be reviewed. *See Strickland*, 466 U.S. at 695-96. Taken as a whole, the improper comments affected Allen's rights and had a substantial influence on her jury. As the misconduct diminished her mitigation and added improper nonstatutory aggravators, her jury was unable to properly assign weight to factors or determine if aggravators outweighed mitigators. Further, many of the improper arguments that counsel failed to object to were emphasized at closing. The multitude of egregious unobjected to errors were fresh in the jurors' minds when they retired to consider her sentence.

Allen is entitled to relief due to the cumulative effect of the prejudice caused by

counsel's deficiencies during the penalty phase alone. In addition, as discussed above, the cumulative effect of the prosecutorial misconduct during Allen's guilt phase and the trial court's deviation from the standard jury instructions also severely prejudiced her penalty phase. *See supra* pp. 38-45. Accordingly, under *Strickland*, counsel's egregious deficiencies throughout the entire trial cumulatively prejudiced Allen and undermined the confidence in the outcome of her penalty phase. Therefore, Allen is entitled to a new penalty phase.

GROUND FIVE

Allen alleged in Claim 11 of the motion for postconviction relief that counsel provided prejudicial ineffective assistance of counsel by failing to present a forensic expert to testify on Allen's behalf regarding independent findings that both corroborated the findings of the medical examiner who performed Wright's autopsy (Dr. Whitmore) and challenged the testimony of Dr. Qaiser (Chief Medical Examiner after Dr. Whitmore left the office). The lower court held an EH on this claim, and found that counsel's strategy to challenge Dr. Qaiser through cross-examination instead of hiring a forensic expert was not unreasonable under prevailing norms and also found no prejudice. P2004. The FSC affirmed the lower court's denial of relief, finding that counsel was not deficient and that Allen could not show prejudice. *Allen*, 261 So. 3d at 1284. The FSC's resolution of this claim was an unreasonable application of clearly established federal law, specifically *Strickland v. Washington*, 466 U.S. 668 (1984) and the Sixth Amendment to the United States Constitution. Further, in many respects, the state court made an unreasonable determination of the facts in light of the state court record.

The FSC is incorrect in its statement that "counsel's decision not to call the forensic expert was a strategic one and he was not deficient." *Allen*, 261 So. 3d at 1284. The record

does not show that counsel considered and rejected alternative courses of action as required, or even considered anything other than just cross-examining Dr. Qaiser and trying to get Dr. Whitmore's report in to evidence. P2804, 2809. At the EH, Counsel even admitted that he does not recall if it was a conscious choice not to bring in an expert to establish that there were no ligature marks on Wright. P2810-11. In retrospect, counsel thought he cross-examined Dr. Qaiser extensively, so he did not feel like he needed any other expert to testify to what Dr. Whitmore said. P2875; s*ee Strickland*, 466 U.S. at 689 ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time"). However, counsel's basic cross-examination of Dr. Qaiser was ineffective because as counsel admitted at the EH, Dr. Qaiser just disagreed with counsel on everything and was not going to explain how his opinion could possibly be wrong. *See* P2808. Counsel's failure to hire an expert also allowed the State to erroneously assert during the guilt phase that Dr. Whitmore "just plain missed" the ligature marks on Wright and to claim that the marks were visible even to a juror's untrained eye. R19/1493-94.

Counsel's representation was not reasonably effective in many ways. On April 21, 2010, counsel filed a Motion to Exclude Dr. Qaiser from testifying, but the motion was denied a week later. R5/729. On May 3, 2010, Allen's trial was set for September 13, 2010. R5/725-26, 730. Although counsel knew in April that Dr. Qaiser was permitted to testify, he did not even depose Dr. Qaiser until mere weeks before trial, on August 20, 2010. Even at that late date, counsel should have at least attempted to confer with an expert since Dr. Qaiser's opinion was jarringly different from Dr. Whitmore's. Competent counsel would have set Dr. Qaiser's

deposition as soon as he was informed that Dr. Whitmore was unavailable and Dr. Qaiser would be testifying instead. Then, upon realizing at the deposition that Dr. Qaiser's opinion was substantially different from the autopsy report, and worse for his client, counsel would have had more than enough time to hire an independent forensic pathologist to verify which findings were correct. Competent counsel would have had the expert review the autopsy report and photographs, toxicology report, investigative reports, and the depositions of Quintin, Dr. Whitmore, and Dr. Qaiser, and give an opinion. Postconviction expert Dr. Spitz was available to testify at trial and based on his EH testimony, his findings corroborate Dr. Whitmore's autopsy report, refute Dr. Qaiser's testimony, and undermine HAC. *See* P3343-46.

At the EH, counsel testified that other than Quintin's testimony, the other major portion of the State's case was Dr. Qaiser. P2801-02. Counsel was shocked at Dr. Qaiser's "report since it was diametrically opposed to Dr. Whitmore's." P2802. Counsel said Dr. Qaiser changed the autopsy findings and found ligature marks, so his findings were converse to Dr. Whitmore's and also corroborated Quintin's testimony. P2803. When asked, "But an important aspect of your trial preparation would be to confront Quintin's claim as to bindings of the wrist and challenge the ligatures?" counsel replied, "Probably, yes." P2804. Counsel agreed it would have been important to establish that no evidence of ligature marks existed. P2804. Counsel even conceded that he was aware that he would not be able to effectively challenge testimony on ligature marks because Dr. Qaiser disagreed with everything he said. P2807-08.

At trial, when shown State's Trial Exhibits 38, 39, and 42, Dr. Qaiser claimed to find strangulation and ligature marks on Wright's neck. R18/1433-35, 1436, R21/1722, R9/1327, 1329, 1335. He testified that Wright's cause of death was homicidal violence in which "ligature

and strangulation is deemed important cause of death." R18/1442. ***Dr. Qaiser admitted that the ligature marks were not found by Dr. Whitmore, who conducted the actual autopsy***. R21/1729-30. Notably, just as Dr. Whitmore did not find ligature marks, neither did Dr. Spitz, a forensic pathologist who is also the Chief Medical Examiner for Macomb and St. Clair Counties in Michigan, who testified at the EH. P2882, 3290, 3302. Dr. Spitz's EH testimony illustrates the importance of counsel hiring an expert. Dr. Spitz found that the lines on Wright's neck were clearly not parallel like a ligature mark, but were simply indicative of skin fold, especially in an obese individual. P3290. He found that ***Wright's "body does not show indicators or findings that would support a conclusion of ligature strangulation."*** P3289.

At the EH, Dr. Qaiser continued to claim that the marks in the photographs of Wright's neck were evidence of forced ligature application. P3105. He also claimed that State's Exhibit 2 showed sharp, straight parallel lines consistent with a belt or a strap and inconsistent with natural folds of skin. P3105-06, PS3849. Notably, this photograph was not introduced at trial. P3099-3102, 3123. He marked his findings on another copy of the photograph, and upon review, Dr. Spitz found there was no correlation between Dr. Qaiser's "lines and anything anatomic or injury wise on the unmarked photograph." P3124-26, 3299, PS3849, 3853. Dr. Spitz also reviewed State's Trial Exhibit 39 and the copy marked by Dr. Qaiser, and found that the head was again pulled to the side and there are two lines that are not parallel which represent folds in the skin. P3300-01, R9/1329, PS3851. Dr. Spitz pointed out that Dr. Qaiser had marked one of the lines he described, but the other line marked higher up does not correlate with anything in particular, but may be an additional fold. P3301-02. The second line Dr. Spitz described was not even marked by Dr. Qaiser at all. P3302. As decomposition causes

challenges, if Wright's body was not decomposing, it would have probably been more clear that the lines represented folds of skin. P3303.

Dr. Qaiser's testimony also overreached in other areas. At the EH, Dr. Qaiser testified that Wright's protruding tongue in State's Trial Exhibit 33 indicated strangulation. P3107-08; R9/1317. However, Dr. Spitz said that simply indicates gas formation during decomposition. P3306. Protrusion of the tongue can occur during a suicidal hanging, but not a strangulation. P3307-09. At trial, Dr. Qaiser testified in front of the jury that based on contusions, he believed Wright's body sustained "maybe 30, 40, 50, 100" blows. R21/1713. However, Dr. Spitz only found 15 areas, which corroborates Dr. Whitmore's findings. P1575-81, 3304-05.

Petechiae are dot like hemorrhages that are common in the face, eyelids, and eye membranes when a neck compression occurs. P3290-91. No petechiae were present on Wright. P3290. In State's Exhibit 3, Dr. Spitz observed a small non-specific scleral hemorrhage on the left eye. P3327-28, PS3997. He did not think it was petechiae because it would usually be smaller and come in a cluster. P3327-28. As Wright was faced down and decomposed, and blood vessels rupture as part of the decomposition process, he did not make much of it. P3327-28, 3342. Although the State again wanted to insist that petechiae was present, just as in its penalty phase closing argument, no specific findings of petechiae were made in this case by Dr. Spitz, Dr. Whitmore, or Dr. Qaiser. P1577, 3342-43, R20/1581, *see supra* pp. 41-44.

Dr. Spitz testified at the EH that if a ligature was pulled tightly on Wright's neck for three minutes, like Quintin claimed, he would expect some injury related to that. P3321. ***"[T]he findings on the body don't quite corroborate what is being indicated or stated."*** P3323. In the overwhelming majority of neck compressions there is some hemorrhage in the neck

musculature, however here there were no injuries. P3292. This testimony is important to refute Dr. Qaiser's disagreement with Dr. Whitmore's autopsy report, which found Wright's neck to be symmetrical and atraumatic. R19/1471. Also, if occlusion of the airway occurred instead of the carotid arteries, there is usually evidence of fractures of thyroid cartilage or hyoid bone that is unaffected by decomposition. P3314. None of these findings of ligature strangulation were present. P3290. If the jury heard Wright's injuries, or lack thereof, did not support Quintin's testimony of the events surrounding her death, ***all*** of his testimony would be called into question and discounted. The fact that Dr. Spitz's testimony undermines Quintin's credibility is incredibly important because, in both of its opinions, the FSC heavily relied on his testimony of the events surrounding Wright's death. *Allen*, 137 So. 3d 946; *Allen*, 261 So. 3d 1255.

To clarify further, Dr. Spitz testifying that a ligature is "within the broad realm of possible" does ***not*** mean that ligature strangulation actually occurred. P3323. In fact, he stressed that it is "an unlikely situation." P3346. However, he did concede that if the death happened ***instantaneously*** that indicia of ligature strangulation may not be present. P3321. Regardless of whether Wright was either not strangled or died instantaneously, the HAC aggravator is severely undermined because in the only possible way that Wright could have been asphyxiated, Wright would have lost consciousness in 10 to 15 seconds and until then would have been able to breathe, speak, and had no pain or fear. P3295-97.

Further, although unfounded, Dr. Qaiser testified multiple times at trial that a person who is unconscious can feel pain. R19/1474, R21/1709-12, 1728, *see infra* pp. 80-83. Notably, if asphyxiation by occlusion of the carotid arteries had occurred, it does not involve pain or fear because the individual is able to breathe and speak before passing out. *See* P3295-97. This

narrowing of the vessels results in unconsciousness very quickly (10-15 seconds) and no pain is involved. P3295-96. Once unconscious, there would be no sensation of pain and a complete loss of awareness of their surroundings. P3313-14. This testimony refutes Dr. Qaiser's trial testimony of panic, difficulty breathing, and a sense of choking. R21/1724, 1727.

At trial, Dr. Qaiser also disagreed with Dr. Whitmore's indication that Wright's toxicology report showed a high level of cocaine and caused her death. R19/1470, R18/1444. Dr. Qaiser did not believe the amount of cocaine present in Wright's system even ***contributed*** to her death. R18/1445. However, the EH testimony of Dr. Spitz, which corroborates Dr. Whitmore's autopsy report, supports the fact that cocaine intoxication did play a part in her death. P3344-45. This creates reasonable doubt as to how Wright died, particularly combined with her morbid obesity, heart problems, and cirrhosis of the liver. P3318-19.

At the EH, the State even assisted Dr. Spitz in undermining Wright's cause of death and the HAC aggravator. Both parties agreed Wright was morbidly obese, had a pre-existing cardiac condition, and cirrhotic liver. P3318-19. Dr. Spitz agreed with the State's contention that the asphyxiation process could have been accelerated and death could have occurred sooner due to her conditions. P3319. The State suggested that Wright could have died of cardiac arrest when the belt was around her neck, and therefore did not show signs of ligature strangulation. P3320-21. Dr. Spitz agreed that if Wright died "very, very quickly" or "instantaneously" as the State suggested at the EH, then it is possible that traditional signs of strangulation may not be present. P3321. At the EH, the State said that Wright was "a heart attack waiting to happen." P3319. If counsel had called Dr. Spitz to testify at trial, and the jury had heard this line of cross-examination, there is a reasonable probability that Allen would not

have been found guilty as charged, but if she was convicted of first-degree murder, at least one juror would have voted in favor of life.

Although Dr. Qaiser did not participate in the autopsy, failed to follow Dr. Whitmore's findings, and presented uncontroverted claims that lacked scientific basis, as counsel did not present expert testimony at trial, the jury was left to believe Dr. Qaiser's testimony regarding cause of death and the HAC aggravator. P3122. Notably, by the time the EH took place, Dr. Qaiser was on administrative probation. P3110-18. Further, Dr. Qaiser corroborated co-defendant Quintin's testimony, thus leaving Dr. Qaiser's testimony unchallenged in any meaningful way also erroneously strengthened the credibility of Quintin's testimony. The jury would have instead 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. P3277. He admitted that, even when hired by the defense in a first-degree murder case, most of the time he agrees completely with the State's expert medical examiner. P3340.

The FSC unreasonably found that Dr. Spitz's testimony "would not have undermined the State's case to any significant extent." *Allen*, 261 So. 3d at 1284. Counsel's ineffectiveness in not presenting the testimony of an independent forensic expert severely prejudiced Allen in both phases of her trial. The cause of death and HAC aggravator were heavily tied to Dr. Qaiser's brutal strangulation testimony, which Dr. Spitz's testimony called into question. Further, in the penalty phase, the jury was able to consider all evidence from the guilt phase as well, including Quintin's testimony. Competent counsel would have known that relying solely on cross-examining Dr. Qaiser would not be as effective as presenting his own expert witness. Having a reputable expert testify about the inconsistencies would have allowed the jury to

assign more legitimacy to Dr. Whitmore's findings than counsel's simple cross-examination where the jurors in essence just had the word of the obviously biased defense counsel to rely on, especially since the autopsy report was not admitted as evidence at trial. An expert would have been received better by the jury and would have explained why Dr. Qaiser's opinions were speculative or incorrect. P3333. Consequently, there is a reasonable probability that the outcome of both phases of Allen's trial would have been different if an expert testified.

In Allen's guilt phase, she was specifically prejudiced as to the findings regarding the cause of Wright's death. If Dr. Spitz had been called to testify at Allen's trial, he would have explained the autopsy photographs to the jury and shown that no ligature marks were present and that it was unlikely Wright was strangled. P3289-90, 3302. This is especially prejudicial because Dr. Qaiser disagreed with Dr. Whitmore's indication that Wright's toxicology report showed a high level of cocaine and caused her death. R19/1470, R18/1444. Dr. Qaiser did not believe the amount of cocaine present in Wright's system even ***contributed*** to her death. R18/1445. However, the testimony of Dr. Spitz, which corroborates Dr. Whitmore's autopsy report, supports the fact that cocaine intoxication played a part in her death. P3344-45. This creates reasonable doubt as to how Wright died, particularly combined with her morbid obesity, heart problems, and cirrhosis of the liver. P3318-19. Accordingly, Allen's convictions must be vacated and a new trial granted.

Allen was severely prejudiced in the penalty phase of her trial. The trial court only found two aggravators: (1) the murder was committed while the Defendant was engaged, or was an accomplice, in the commission of a kidnapping; and (2) HAC. R6/951-53. As no premeditation was found, if the first aggravator did not exist, Allen would not have even been

death penalty eligible. Therefore, HAC was essentially the sole aggravator independently found by the trial court. Although Allen was convicted of kidnapping which is what made her eligible for felony murder, and subsequently the death penalty, the facts of Allen's case are not what a layperson would think of when hearing the term "kidnapping". It was not as if she violently abducted a child from their front yard. In fact, under the principal theory, the jury could convict Allen of kidnapping and felony murder even if she was not present at the time of death, if they thought she somehow incited Quintin to kill Wright. R20/1652. Therefore, it is evident that HAC was the deciding factor convincing the jury to vote for a death sentence.

There is a reasonable probability that but for counsel's deficiency in failing to present expert testimony to challenge Dr. Qaiser's findings, the outcome of Allen's penalty phase would have been different. The forensic expert's testimony would have either undermined or eliminated the HAC aggravator. *See Brown v. Sanders*, 546 U.S. 212, 220 (2006) (invalidated sentencing factor renders the sentence unconstitutional by adding an improper element to the aggravation scale in the weighing process). Dr. Whitmore's autopsy report and Dr. Spitz's testimony at the EH do not support the version of events that Quintin testified to, which the lower court and the FSC found to have supported the HAC aggravator. *Allen*, 137 So. 3d at 963-64; P2003. This undermines the credibility and reliability of all of Quintin's testimony, including the testimony where he claimed Wright was terrorized, scared, screaming, and pleading, and therefore aware of her impending death. *Id*. This testimony from Quintin, the biased co-defendant who received a plea deal to testify against Allen, taken together with the false testimony of Dr. Qaiser is likely what the jury relied on too. However, Dr. Spitz's testimony that the findings on Wright's body do not quite corroborate what Quintin stated

refutes Quintin's testimony and undermined Quintin's credibility as a whole. P3323. As Dr. Spitz testified, if Wright was asphyxiated, in the only possible way the body supports, she would have lost consciousness in 10 to 15 seconds and until then would have been able to breathe, speak, and had no pain or fear. P3295-97. In light of this testimony, the mitigation also weighs heavier in comparison, especially if the mitigation found in postconviction had been presented. If counsel had not been deficient, there is a reasonable probability that at least one juror would have voted for a life sentence, even if it was just out of mercy. Just one juror voting against a death sentence would have made Allen eligible for a new penalty phase under *Hurst*. *See supra* pp. 4-13. Therefore, at the very least, Allen is entitled to a new penalty phase.

GROUND SIX

Allen alleged in Claim 3 of the motion for postconviction relief that counsel provided prejudicial ineffective assistance of counsel by unreasonably eliciting detrimental false testimony from Quintin that Allen poured chemicals ***in*** Wright's eyes and mouth when Quintin only said Allen poured substances ***on*** Wright. Counsel was also ineffective by eliciting testimony on recross-examination that the substances were bleach, ammonia, nail polish remover, and hairspray when Quintin had already conceded on redirect-examination that he could only identify rubbing alcohol. The lower court held an EH on this claim, and found that "there is no prejudice, as there is no reasonable probability that additional impeachment would have produced a different result." P1956. However, Allen's claim did not suggest that competent counsel would have impeached Quintin further; it asserted that competent counsel would not have elicited this unfavorable testimony at all. The lower court's findings focused more on impeachment and the potential presence of bleach than the heart of the claim, which

was that counsel should not have elicited this testimony. *See* P1955-56. Nonetheless, the FSC affirmed the lower court's denial of relief, finding counsel was not deficient and also that even if counsel was deficient, Allen has not suffered prejudice. *Allen*, 261 So. 3d at 1275-76. The FSC's resolution of this claim was an unreasonable application of clearly established federal law, specifically *Strickland v. Washington*, 466 U.S. 668 (1984) and the Sixth Amendment to the United States Constitution. Further, in many respects, the state court made an unreasonable determination of the facts in light of the state court record.

The majority of counsel's cross-examination of Quintin elicited less favorable testimony than what Quintin and the State had already put in front of the jury. Although the State did not assert that substances were poured ***in*** Wright's mouth or eyes, counsel elicited such testimony from Quintin. R16/1036. Then counsel pushed Quintin to specifically reiterate all of the chemicals he mentioned on direct examination, including bleach, and additionally encouraged Quintin to testify that ammonia was present. R16/1038-39. Throughout the cross-examination, likely in an attempt to impeach the witness, counsel incompetently continued to highlight all of the chemicals and where each was poured. *See* R16/1036-63. Counsel asked if Allen poured ammonia in Wright's mouth and when Quintin responded, "I told you she poured the chemicals on the face," counsel continued to push the subject until Quintin finally agreed the chemicals were poured in Wright's mouth. R16/1042-44. Competent counsel would have instead impeached Quintin with other less damaging discrepancies from his interview that would not support the HAC aggravator.

On redirect-examination, the State actually brought up the portion of Quintin's interview that referred to liquids being poured on Wright. R16/1073-74.

> State: Okay. So, you don't really know if it was bleach? If it was lye? If it was hairspray? Other than the alcohol, you could smell that -- and we are talking about rubbing alcohol, right?
>
> Quintin: Yes, sir.
>
> State: Okay. Other than the alcohol, you are not sure what these liquids were?
>
> Quintin: Yes, sir.

R16/1074. This testimony actually helped Allen and mitigated some of the harsh effects of counsel's deficient and prejudicial line of cross-examination questioning. However, on recross-examination, counsel unreasonably decided to solicit testimony that Quintin could identify all the substances even though he just admitted on redirect examination that he could not. Counsel elicited testimony that Quintin knew what bleach looked like and smelled like, and that he saw a bleach bottle. R16/1077. Counsel also had Quintin admit that nail polish remover was present, and that both bleach and nail polish remover were poured in Wright's face, eyes, and down her mouth. R16/1077. In addition, counsel convinced Quintin that he knew ammonia and hair spritz were the other substances. R16/1078. Counsel should have realized how damaging his cross-examination was and not made matters worse during recross-examination by essentially trying to prove that ***he*** was right at the expense of his client, Allen.

The FSC unreasonably determined that

> Counsel's questions regarding which substances were poured, and the elicitation of Quintin's answer regarding nail polish, ammonia, and bleach, were appropriate because counsel was impeaching Quintin by attempting to show the inconsistencies in his testimony. Counsel's elicitation of this testimony on recross-examination was a reasonable tactical decision that resulted in the impeachment of Quintin. Additionally, his testimony about the bleach was further impeached by the forensic evidence and Dr. Qaiser's testimony that no evidence of bleach was found on Wright. Trial counsel was therefore not deficient for the strategic decision to impeach Quintin in that manner.

Allen, 261 So. 3d at 1275. However, counsel's decision was not reasonable because he could

have impeached Quintin with other inconsistencies from his police interview that did not support the HAC aggravator. Also, the FSC misstates Dr. Qaiser's testimony which was only that he did not see any indication in Dr. Whitmore's report that bleach or other caustic substances were poured down Wright's throat. R19/1487. As Dr. Qaiser only viewed Dr. Whitmore's autopsy photographs and report, Dr. Qaiser could not give his own opinion on the subject. R19/1487. He could only testify to whether he saw it in the report. Quintin's testimony that chemicals were poured ***on*** Wright and ***in*** Wright's eyes and mouth was never refuted.

Under *Strickland*, these deficiencies prejudiced Allen in her penalty phase because the details that counsel elicited supported the HAC aggravator and inflamed the passions of the jury to feel that Allen was less deserving of mercy. Pouring chemicals in a person's eyes and mouth is substantially more torture than Quintin's original testimony of pouring rubbing alcohol on a person's face. Notably, counsel insisted that Quintin commit to the existence of worse chemicals that were more caustic, such as bleach and ammonia, which a juror would know the mixture creates a dangerous, toxic gas and find much crueler than rubbing alcohol or hairspray. Quintin's testimony and his credibility was vital to establish the HAC aggravator, one of only two aggravators independently found by the trial court, and for the FSC to uphold the existence of the HAC aggravator. *Allen*, 137 So. 3d at 963-64. Without soliciting this inflammatory testimony to support HAC, there is a reasonable probability that mitigation would have weighed heavier and at least one juror would have voted for life. Under *Hurst*, if Allen received one vote for a life sentence, she would have been granted a new penalty phase.

Furthermore, the effect of these deficiencies is even more prejudicial when you consider the cumulative effect of counsel's other instances of ineffectiveness, especially when

considered with the other evidence undermining the HAC aggravator, such as the testimony of Dr. Spitz. *See Conklin*, 366 F.3d at 1210; *see also supra* pp. 61-71. Therefore, there is a reasonable probability that the outcome of Allen's penalty phase would have been different because the HAC aggravator would have been undermined by diminishing Quintin's testimony and credibility and by challenging Dr. Qaiser's testimony, the only other support for HAC. If the jury had not heard the damaging testimony from Quintin elicited by counsel and had heard Dr. Spitz's testimony, there is even more of a reasonable probability that the jurors would not unanimously find HAC and would have been more willing to find Allen deserving of mercy. Accordingly, Allen is entitled to a new penalty phase.

GROUND SEVEN

Allen alleged in Claim 2 of the motion for postconviction relief that counsel provided prejudicial ineffective assistance of counsel by failing to impeach Quintin with his prior inconsistent statements to Detective Gary Boyer ("Detective Boyer") indicating that Allen ***did not*** pour bleach on Wright. The lower court held an EH on this claim, and found that counsel was not unreasonable in failing to impeach Quintin and there was no prejudice to either phase of Allen's trial. P1951-52. The FSC affirmed the lower court's denial of relief, finding counsel's strategy was not unreasonable and finding no prejudice. *Allen*, 261 So. 3d at 1285. The FSC's resolution of this claim was an unreasonable application of clearly established federal law, specifically *Strickland v. Washington*, 466 U.S. 668 (1984) and the Sixth Amendment to the United States Constitution. Further, in many respects, the state court made an unreasonable determination of the facts in light of the state court record.

Contrary to the previous ground where counsel went too far in attempting to impeach

Quintin and elicited statements harmful to Allen's defense, here counsel failed to impeach him on a favorable inconsistency. Counsel failed to show that Quintin's trial testimony regarding bleach being poured on Wright conflicted with his prior statements to Detective Boyer. As such, Allen received ineffective assistance of counsel in violation of *Strickland*, 466 U.S. 668. At trial, Quintin testified on direct examination:

> Um, I get up and I hold Ms. Wenda down. Margaret Ann goes to her personal bathroom and she comes out with ***bleach*** that [sic] used to wash clothes; spritz, which is for the hair; nail polish remover, and green rubbing alcohol.

R15/903.

> State: Okay. All right. Do you know how many different liquid objects were poured on Ms. Wright's face?
>
> Quintin: As I stated, it was the ***bleach***, the green rubbing alcohol, the spritz for hair, fingernail polish remover. And that is all I can remember, sir.

R15/906. However, this testimony differs from his 9:54 p.m. interview with Detective Boyer on February 10, 2005, approximately two days after Wright's death:

> Boyer: What type of chemicals was it?
>
> Quintin: I wasn't, I couldn't---***all I can remember alcohol.***
>
> Boyer: Okay.
>
> Quintin: But I know it was a whole bunch of different stuff, cause her bathroom, when y'all go to look in the bathroom, she got a million different hair, different kind of products.
>
> Boyer: Any ***bleach*** or anything?
>
> Quintin: Yeah (yes), she got boxes of bleach. But I don't, ***she ain't have no bleach bottle***, less [sic] she had done poured it in a hair products bottle.
>
> Boyer: Okay. So it's hair products stuff that she was pouring on her?
>
> Quintin: Yeah (yes), alcohol, stuff like that.

R7/1113-14.

> Boyer: Was there something that happened between her ***pouring the bleach***--- or the, ***not the bleach but the hair products***, and when you thought she was dead? Did your aunt do anything with any of the belts or anything?
>
> Quintin: She, she kept the belts. I don't know what she did with them.

R7/1115. There was also no mention of bleach in Quintin's first interview with detectives earlier that evening, at 8:15 p.m. P1606-80. In the first interview, Quintin suggested that the other substances may have been hairspray or ammonia, but Quintin only knew alcohol was one of the substances because he could smell it. P1628-29. Counsel could have also used that first interview to impeach Quintin and show that he could only identify the rubbing alcohol. However, counsel did not even attempt to impeach Quintin with either interview. Based on these statements, it is not likely that Allen even ***possessed*** any bleach to pour on Wright because Quintin stated that she ***did not*** have a bleach bottle and only had boxes of bleach, which do not contain liquids. R7/1113. The fact that Quintin could smell the other liquids that he claimed were poured is further evidence that bleach was ***not*** involved. R7/1039; R16/1074. Bleach would have had a distinct smell even if it had been poured into another bottle, therefore Quintin would have mentioned it in his interview just as he mentioned the scent of the alcohol. R7/1039; R16/1077. Notably, it appears that the detectives suggested the idea of bleach to Quintin through their questioning and Quintin later adopted the idea of bleach being present once he became a State witness.

Counsel was also familiar with Quintin's November 9, 2009 deposition, which showed Quintin's story changed after he accepted a plea offer from the State. At this point Quintin was claiming that a gallon bottle of bleach was present. P1757-58. Quintin's deposition statements were more favorable to the State and put counsel on notice that Quintin was likely to testify similarly at trial. Impeaching Quintin would have been consistent with counsel's trial strategy

because counsel did impeach Quintin on some inconsistencies. R16/1054-55. Counsel was even able to compel Quintin to admit that none of those statements agreed and his initial statement to detectives was the truth. *Id*. Competent counsel would have found that to be a perfect time to impeach Quintin with his prior inconsistent statement to Detective Boyer that bleach was not poured on Wright. Quintin likely would have just admitted he did not know if bleach was present like he did on redirect, prior to counsel incompetently insisting on recross-examination that Quintin knew bleach was present. Conversely, if Quintin agreed that bleach was present, it would have called into question the truthfulness of his testimony stating his initial statement to detectives was the most reliable. Either way he answered would have shown the jury that not only is Quintin forgetful and unreliable, but his stories are more embellished each time he tells them. However, instead of impeaching Quintin with his prior inconsistent statement that Allen ***did not pour bleach on Wright***, counsel actually made matters worse by incompetently eliciting testimony alleging that Allen poured bleach ***into Wright's mouth and eyes***. R16/1037-44, 1077, *see supra* pp. 71-75. Counsel ended up incompetently painting a picture of Allen torturing Wright more than the State and Quintin originally alleged during their opening argument and direct examination.

Under *Strickland*, counsel was deficient by failing to impeach Quintin's trial testimony with his prior inconsistent statement. The lower court erred in pointing to Dr. Qaiser's testimony to show that Quintin's testimony was refuted. P1952. Similarly, the FSC erroneously determined that counsel's trial strategy of "choosing to rely on Dr. Qaiser's testimony that no evidence of bleach was found ***on*** Wright to demonstrate that Quintin's testimony should not be believed" was not unreasonable. *Allen*, 261 So. 3d at 1285. The evidence reflects that Dr.

Qaiser only testified that he did not see in Dr. Whitmore's report that bleach or any other caustic substances were poured ***down Wright's throat***. R19/1487. As Dr. Qaiser did not conduct the autopsy and only viewed Dr. Whitmore's autopsy photographs and report, Dr. Qaiser could not even give his own opinion on the subject. R19/1487. Therefore, it would have been impossible for counsel to rely on Dr. Qaiser's testimony as the FSC suggested because Dr. Qaiser gave no opinion regarding bleach being poured ***onto Wright***. Accordingly, Quintin's testimony was never impeached or refuted.

Allen was prejudiced in her guilt phase because Quintin was the sole witness to testify about the events surrounding Wright's death and implicate Allen. If the jury was shown that Quintin had changed his story and was not credible, that would have compounded Quintin's bias of being a co-defendant-turned-State-witness due to taking a plea deal instead of facing the death penalty himself. Therefore, there is a reasonable probability that at least one juror would not have believed him. As such, under *Strickland*, confidence in the outcome of Allen's guilt phase is undermined. Accordingly, Allen is entitled to a new trial.

In addition, Allen was prejudiced in her penalty phase. Quintin's testimony that Allen poured bleach on Wright would have been on the juror's minds when they considered whether the HAC aggravator was applicable. This unchallenged testimony presented the jury with an aggravated HAC scenario where bleach was poured on Wright. If counsel had impeached Quintin on this point and the jury heard that Allen did not even ***possess*** a bleach bottle, the jury would determine that Quintin lacked credibility and HAC would be undermined. As only two aggravators were found including HAC, Allen was prejudiced because the credibility of Quintin was essential to the State's case, including proving HAC. Under *Strickland*, there is a

reasonable probability that at least one juror would have voted for life if Quintin's testimony was impeached, especially taken together with HAC also being undermined by the testimony of Dr. Spitz. *See supra* pp. 61-71. Consequently, confidence in the outcome of Allen's penalty phase is undermined because even one vote for life would have entitled Allen to a new penalty phase under *Hurst*. *See supra* pp. 4-13. Therefore, Allen is entitled to a new penalty phase.

GROUND EIGHT

Allen alleged in Claim 7 of the motion for postconviction relief that counsel provided prejudicial ineffective assistance of counsel by failing to object to or meaningfully refute Dr. Qaiser's testimony regarding unconscious people feeling pain. The lower court held an EH on this claim, and found that due to Dr. Qaiser stating that he could not testify within a reasonable degree of medical probability that there was a sensation of pain in this case, any testimony that an unconscious person could feel pain was discredited. R21/1728, P1970. As a result, the lower court found that counsel was not unreasonable in failing to object and there was no prejudice. P1971. The FSC affirmed the lower court's denial of relief, finding that "counsel was not deficient for failing to object to the testimony" and also finding no prejudice. *Allen*, 261 So. 3d at 1276-77. The FSC's resolution of this claim was an unreasonable application of clearly established federal law, specifically *Strickland v. Washington*, 466 U.S. 668 (1984), *Crawford v. Washington*, 541 U.S. 36, 42 (2004), and the Sixth Amendment to the United States Constitution. Further, in many respects, the state court made an unreasonable determination of the facts in light of the state court record.

The Confrontation Clause of "[t]he Sixth Amendment guarantees a defendant the right to be confronted with the witnesses ***against him***." *Melendez-Diaz v. Massachusetts*, 557 U.S.

305, 313 (2009) (emphasis in original); *see also Crawford v. Washington*, 541 U.S. 36, 42 (2004). However, the State's only penalty phase witness, Dr. Qaiser, began his testimony with:

> Okay. See, the portion of whether the people who are unconscious, either they are minimally unconscious, mildly, moderate, or severely or profoundly unconscious, do they perceive pain or not. There is very little known about that. But the studies have been done, especially in Belgium, in Europe, and here also in the United States and all the other parts of North America.
> . . .
> So, the conclusion was, as I said before in my statement, too, that they register the pain, but it is not necessarily that they will outwardly manifest it.

R21/1709-11. Dr. Qaiser was bolstering his opinion by becoming a conduit for other individuals who were unable to be cross-examined. The State later asked if Wright "could have been experiencing the pain even if she is rendered unconscious" and Dr. Qaiser agreed, "That's true." R21/1712. Dr. Qaiser also made reference to an unconscious person's ability to feel pain in the guilt phase. R19/1474. Counsel deficiently failed to object to any of this speculative, inflammatory hearsay testimony on the grounds that the testimony was improper bolstering and violated the Confrontation Clause of the Sixth Amendment because counsel was unable to cross-examine the individuals who conducted the studies. Counsel also did not move for a mistrial. To compound the issue, Dr. Qaiser testified on cross:

> That is what I said in the very beginning of today's discussion with the jury, that is [sic] not necessary that the outward manifestation of pain will be there. But **as far as the perception of pain by the subject, you cannot rule that out.** And studies have shown that this has taken place.

R20/1728.

The FSC also unreasonably determined that

> counsel made a strategic decision not to object and rather to cross-examine Dr. Qaiser because he chose as a matter of strategy to attempt to refute the testimony. He ultimately succeeded in getting Dr. Qaiser to acknowledge on cross-examination that he could not definitively say that Wright felt pain within a reasonable degree of medical probability. This discredited his earlier testimony.

Allen, 261 So. 3d at 1276. Although Dr. Qaiser agreed that he could not testify within a reasonable degree of medical probability that there ***was*** a sensation of pain ***in this case***, that does not mean that the jury was left with the impression that unconscious people could not feel pain. R21/1728. Notably, he still said in his prior sentence that ***he could not rule out that Wright perceived pain*** and he claimed that studies have shown it has taken place. R21/1728. Just because Dr. Qaiser testified that he was ***uncertain*** whether there was a sensation of pain in this case does not mean the jurors were left with the impression that Wright ***did not*** feel any pain while she was unconscious. Dr. Qaiser testified that a person being strangled would lose consciousness after 10 to 20 seconds and would take four to six minutes to die. R21/1734-35. Therefore, Dr. Qaiser's highly prejudicial testimony still left the possibility open for the jury to think that Wright may have felt pain during the majority of the four to six minutes she was unconscious, but alive.

Worse yet, at the EH, Dr. Spitz confirmed that Dr. Qaiser's assertion of feeling pain during unconsciousness is "completely at odds with mainstream medicine." P3311-12. He testified that "[t]here is no more pain once an individual is unconscious." P3311. Mainstream medicine indicates that brainwaves continue up to the point of death, but once unconscious, pain cannot be perceived. P3312-13. Dr. Spitz knew of no studies indicating people felt pain while unconscious. P3333. Studies have shown activity in the brain while unconscious, but that does not mean the person is having the sensation of pain. P3333.

In light of *Strickland*, counsel's deficient performance prejudiced Allen in her penalty phase. The jury was led to believe that Wright could feel pain while she was unconscious, which is a detail that would weigh heavily on their minds when determining the existence of

the HAC aggravator or whether Allen deserved a vote for mercy. Since counsel did not object or introduce testimony of an expert such as Dr. Spitz to show that Dr. Qaiser's testimony was scientifically inaccurate, the jury was unaware that the statement that unconscious people feel pain was not supported by any accepted medical science. *See supra* pp. 61-71. If counsel had, no juror would even be able to ***wonder*** if Wright felt any pain after she was unconscious. P3311-13. Therefore, a reasonable probability exists that if counsel was not deficient, the HAC aggravator would have been undermined and at least one juror would have voted for life. Therefore, Allen is entitled to a new penalty phase.

GROUND NINE

Allen alleged in Claim 10 of the motion for postconviction relief that in violation of *Giglio v. United States*, 405 U.S. 150 (1972) and the Fourteenth Amendment, the State elicited false testimony during Hudson's cross-examination that Allen was convicted several times for selling drugs and allowed the false testimony to go uncorrected. The lower court held an EH on this claim, and acknowledged that the State did not dispute that Allen had only one conviction for the sale of drugs, but found that evidence of prior drug convictions was not material. P1995. The FSC found that the claim was "procedurally barred because it should have been raised on direct appeal where the facts supporting the claim were available" and went on to say that even if not barred, it failed on the merits. *Allen*, 261 So. 3d at 1286. The FSC's resolution of this claim was an unreasonable application of clearly established federal law, specifically *Giglio*, 405 U.S. 150, *Napue v. Illinois,* 360 U.S. 264 (1959), and the Fourteenth Amendment to the United States Constitution. Further, in many respects, the state court made an unreasonable determination of the facts in light of the state court record.

A conviction obtained through the State's use of false testimony or failure to correct false testimony, is a denial of due process under the Fourteenth Amendment. *Napue*, 360 U.S. at 265, 269. SCOTUS has held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Therefore, if the State knew the testimony was false, "[a] new trial is required if 'the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury…'" *Giglio*, 405 U.S. at 154 (quoting *Napue*, 360 U.S. at 271).

Although Allen only had one conviction for selling drugs, the prosecutor knowingly solicited false testimony from Hudson by asking, "You were aware that she was convicted several times for selling drugs, right?" R5/881; R22/1891-92. Hudson replied in the affirmative. R22/1892. After the prosecutor knowingly presented this false testimony, the State also knowingly allowed this false testimony to go uncorrected. The effect of this misconduct on the jury was magnified when the State later argued to the jury in closing argument, "You heard about the Defendant's time in prison for previous drug sale convictions." R22/1930.

The State indisputably had access to Allen's criminal history because the State prepared the Criminal Punishment Code Scoresheet. R5/881-83. Further, the State was clearly aware of the particulars of Allen's criminal history prior to trial because the State filed a Notice of Intent to Seek Habitual Felony Offender Penalties on March 18, 2005. R3/340. Thus, as the FSC correctly agreed, "[t]he record demonstrates that the State violated *Giglio* with respect to Hudson's testimony. *Allen*, 261 So. 3d at 1287.

The FSC unreasonably held that "the false evidence presented by the State is

immaterial, because there is no reasonable possibility that the number of prior drug convictions that Allen had contributed to the jury's sentencing recommendation" and "the State's use of this false evidence was harmless beyond a reasonable doubt." *Id*. However, the State cannot show that this false testimony regarding convictions for the sale of drugs is immaterial or harmless. It is reasonable that this false testimony contributed to Allen's death sentence because the jurors concluded that she had at least four or five convictions for selling drugs. This conclusion follows from the reasonable logic that two would have been a "couple" and three would have been a "few". Based on this false testimony, the jury would consider Allen a career criminal drug dealer whose life did not deserve saving, when in all actuality, Allen only had ***one*** conviction for selling drugs almost nine years prior to these charges and fourteen years prior to trial (and that conviction should not have been disclosed, *see supra* pp. 46-49). Further, jurors would consider that sentences tend to be based on prior criminal history. As Allen was falsely portrayed as a morally bankrupt drug dealer who spent time in prison and still continued to break the law and be convicted several times, jurors would feel obligated to vote for the higher penalty and less likely to vote for mercy. The false testimony denied Allen due process and contributed to her death sentence. Therefore, Allen is entitled to a new penalty phase.

GROUND TEN

Allen alleged in Claim 9 of the motion for postconviction relief that counsel provided prejudicial ineffective assistance of counsel during the penalty phase by questioning Hudson about Allen growing up around "drugs, thugs, and violence" and reinforcing it as a theme, even though he did not intend to use it as a mitigating circumstance. The lower court held an EH on this claim, and found that there was no reasonable probability that the jurors hearing about the

"drugs, thugs, and violence" impacted the sentencing decision and no prejudice was found. P1994. The FSC affirmed the lower court's denial of relief, finding "[c]ounsel was not deficient in bringing up that line of questioning, despite the phrase that was elicited during it," and also found that Allen failed to show prejudice. *Allen*, 261 So. 3d at 1283. The FSC's resolution of this claim was an unreasonable application of clearly established federal law, specifically *Strickland v. Washington*, 466 U.S. 668 (1984) and the Sixth Amendment to the United States Constitution. Further, in many respects, the state court made an unreasonable determination of the facts in light of the state court record.

Under *Strickland*, counsel was deficient in bringing out testimony from Hudson that Allen was a part of a culture of "drugs, thugs, and violence" and even more deficient for repeating the phrase back to her, which reinforced it in front of the jury. R22/1878-79. Competent counsel also would not have emphasized to the jury in closing argument that Allen grew up in a culture of "drugs, thugs, and violence". R22/1934, 1943. Based on the record, the FSC unreasonably determined that counsel's questioning was "strategic and purposeful." *Allen*, 261 So. 3d at 1283. In hindsight, at the EH, counsel claimed that he elicited the testimony to show that Allen was affected by living in a violent atmosphere around others who were not law abiding, sold drugs, and were aggressive. P2828-30; *see Strickland*, 466 U.S. at 689 ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time"). If counsel had actually intended to bring out the fact that drugs and violence ran rampant in the neighborhood she grew up in, he could have accomplished it in a different manner without detrimental labels

such as "thugs". However, counsel's sentencing memorandum clearly establishes that at the time of trial it was not counsel's strategy to bring out this testimony as mitigation because the State was the only party to even suggest it as a mitigating circumstance. R6/891. As there is no mention in counsel's memorandum of Allen's neighborhood, the violent atmosphere in which she grew up, or ***any*** mitigation related to this phrase, it is evident that counsel was oblivious that the mitigator had even been established. R6/906-24. In fact, counsel was further deficient in only devoting less than a page of the memorandum to mitigation as a whole and only suggesting two nonstatutory mitigators total. R6/923-24. Moreover, if eliciting this testimony was truly a theme of counsel's mitigation case as he hollowly claimed at the EH, then counsel was even more deficient in his failure to adequately investigate mitigation to support this theme. P2829; *see supra* pp. 13-38.

In part of its decision that counsel was not deficient, the FSC also unreasonably determined that "[t]his evidence supported the trial court's finding of the nonstatutory mitigator that Allen grew up in a violent and drug-infested neighborhood. The testimony elicited by trial counsel thereby amounts to the same information established by counsel and found by the trial court." *Allen*, 261 So. 3d at 1283. The trial court did find that "the defendant grew up in a neighborhood where there were acts of violence and illegal drugs" was a nonstatutory mitigator and assigned it "some weight". R6/960-61. However, Allen's ***jury*** was not privy to the testimony that the trial court found to support that mitigator because the support was presented almost exclusively at the *Spencer* hearing which is held outside the presence of the jury. R6/960-61. The jurors were instead left with a harmful catchy phrase that placed Allen in a negative light and allowed jurors to find her undeserving of mercy. This distinction is even

more crucial under *Hurst*, because if Allen had received a nonunanimous jury recommendation, she would have received a new penalty phase. *See supra* pp. 4-13.

Under *Strickland*, Allen was prejudiced by counsel's deficiencies in her penalty phase. The word "thug" has a negative connotation and unduly influenced the jury to find that Allen was a criminal who participated in drugs and violent behavior. A thug is commonly defined as "a brutal ruffian or assassin: gangster, tough." *Thug*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/thug (last visited Aug. 12, 2019). In fact, at the EH, counsel even defined the word "thug" negatively as "[s]omeone who causes trouble, pushes people around, [and] is not in tune with the rights of other people." P2828. Regardless of which definition went through each juror's mind, it is evident that counsel's continuous reinforcement of these pejorative words cast Allen in a negative light and made Allen look callous, undeserving of mercy, and unduly influenced the jury to recommend death.

Worse yet, the State picked up on the catchy "drugs, thugs, and violence" language and repeated it two more times in their closing. R22/1930. This catchphrase undoubtedly stuck in the minds of the jurors and was at the forefront of their minds during deliberations. Particularly since one of the last things counsel said to the jury in closing argument was, "Drugs, thugs, and violence. That's one of the keys here." R22/1943. But for counsel's deficiency in bringing out this harmful testimony and reinforcing it, there is a reasonable probability that the outcome of Allen's penalty phase would have been different in that at least one juror would have voted for a life sentence. *See supra* pp. 4-13. Further, if counsel had not been prejudicially ineffective in other areas and had properly presented a complete picture of the abuse that Allen suffered her entire life, then the theme of "drugs, thugs, and violence" that he elicited may not have

been as damaging. However, the jury was not made aware of Allen's actual traumatic background. S*ee supra* pp. 13-38. Therefore, Allen is entitled to a new penalty phase.

GROUND ELEVEN

Allen alleged in Claim 1 of the motion for postconviction relief that counsel provided prejudicial ineffective assistance of counsel when he failed to challenge Juror Carll ("Carll") for cause or strike her peremptorily. The lower court held an EH regarding whether counsel was ineffective for failing to strike Carll peremptorily, however she was denied an EH regarding whether counsel was ineffective for failing to challenge Carll for cause. P650-51. The lower court found that Carll's bias against Allen was not "plain on the face of the record" and prejudice was not established. P1948-49. The lower court also found that counsel made a strategic decision to keep Carll as a juror and the decision was reasonable. P1949. The FSC affirmed the lower court's denial of relief, finding that Carll was not actually biased and prejudice was not established. *Allen*, 261 So. 3d at 1286. The FSC's resolution of this claim was an unreasonable application of clearly established federal law, specifically *Strickland v. Washington*, 466 U.S. 668 (1984) and the Sixth Amendment to the United States Constitution. Further, in many respects, the state court made an unreasonable determination of the facts in light of the state court record.

Counsel failed to challenge Carll for cause or strike her peremptorily. Although Carll made many statements that showed that she was biased and under the facts of Allen's case, to seat her on the jury would be a vote for the death penalty, the FSC unreasonably determined that Carll was not actually biased. *Allen*, 261 So. 3d at 1286. Carll specifically stated that she was "pro death" and said, "I believe in the death penalty. I believe if you commit a crime and

someone dies during that time, you should be recommended for the death penalty." R11/220. When counsel asked Carll for an example of what would cause her to vote for a life sentence, her answer promptly reverted back to recommending the death penalty:

> Carll: Like the defendant was part of a party that ***kidnapped a person*** but didn't actually kill that person themselves but was involved in it just by association, I would think couldn't be put to death for that. ***But if the person actually committed the death with a bunch of other people and participated in the physical death, they should be recommended for the death penalty***.
>
> Counsel: ***Everybody involved should be recommended for death penalty?***
>
> Carll: ***If they had a hand in the death.***

R11/221. She evaded counsel's question and her comments show that she possessed actual bias. She provides a scenario where she would not think someone ***could*** be put to death, however she is actually stating an example of felony murder by principal, which even if a juror only believed some of Quintin's testimony, Allen would still be guilty of and eligible for the death penalty. Counsel knew the State alleged that Allen was part of a party who kidnapped and killed Wright. As the allegations were that Allen not only had a hand in Wright's death, but actually committed or actively participated in Wright's death, counsel was deficient in failing to move to strike Carll for cause. Even if the motion was denied, competent counsel would have used a peremptory strike on Carll due to her impartial comments.

When counsel later asked Carll if she would "listen to the aggravating circumstances and the mitigating circumstances," she answers,

> Absolutely. Yeah. ***I believe that the death penalty should be used in certain circumstances where someone was a direct result of a death***. But I also believe that if you are a party of somebody's death, it doesn't necessarily mean they deserve to die themselves. It has a lot to do with the actual participation and the planned event and what happened that day that made that person die.

R11/249-50. Although Carll claimed she would ***listen*** to the aggravators and mitigators, her

response shows that she did not appear to understand the concept because she continued to discuss levels of participation that would result in her automatically recommending the death penalty. Carll made it clear that the certain circumstances where the death penalty should be used were "where someone was a direct result of the death." R11/250. She did not qualify her statement by saying there were any circumstances where that would ***not*** be the case. She only reiterated that if someone was "a party of somebody's death" that person did not necessarily deserve the death penalty. R11/250. Her definition of a "party of someone's death" is evident when reviewed in context with her next sentence and her earlier statement:

> Like the defendant was part of a party that kidnapped a person but didn't actually kill that person themselves but was involved in it just by association, I would think couldn't be put to death for that. But if the person actually committed the death with a bunch of other people and participated in the physical death, they should be recommended for the death penalty.

R11/221.

The only favorable statement Carll made was that she could objectively listen to mental health evidence. R12/372-73. No efforts were made to ensure Carll could be impartial and there was no attempt to rehabilitate her either. She never wavered from her predetermined belief that a person who committed or participated in a death should be recommended for the death penalty. R11/221, 250. Carll also never indicated that she would lay aside her strong predetermined belief that those who have a hand in the death of another should receive the death penalty. Further, Carll was never specifically asked if she could render her verdict solely upon the evidence presented and the instructions on the law given to her by the court.

Counsel knew the State alleged that Allen was part of a party who kidnapped and killed Wright and that co-defendant-turned-State-witness Quintin's testimony was going to assert that Allen directly caused Wright's death. Although the State's allegations were that Allen not

only had a hand in Wright's death, but actually committed or actively participated in Wright's death, counsel did not move to strike Carll for cause. The circumstances that Carll indicated that she would recommend the death penalty were ***identical*** to the circumstances the State was going to argue and that Quintin was going to testify to in Allen's case. Based on the totality of Carll's responses and the circumstances in Allen's case, it would have been clear to competent counsel that seating Carll on Allen's jury was an automatic vote for the death penalty.

Counsel also did not use a peremptory strike on Carll due to her impartial comments. At the EH, counsel testified that he did not have any independent recollection, but based on reading the trial transcript, he thought Carll had been sufficiently rehabilitated. P2866. Counsel claimed that he thought he had to keep Carll due to concerns looking forward down the line to who was next. P2866-67. These statements conflict with the record and demonstrate that counsel had absolutely no recollection of his actual thought process during Allen's jury selection and instead provided generic self-serving answers. The record shows that Carll was venirewoman #2, therefore counsel had many opportunities to strike or back strike her peremptorily. R5/771. Back strikes were allowed and utilized. R12/466. It is indisputable that counsel could have easily struck Carll peremptorily because there were two peremptory strikes remaining when he said that he found the jury acceptable. R12/468-69. At the time that he accepted the jury and the selection of alternates began, only two people from the panel remained. R12/469. The trial court had to bring in another panel in order to select alternates, making it impossible for counsel to look down the line to a panel that would be arriving the next day. R12/473. In fact, even the following day, counsel could have back struck Carll because the trial court stated that back striking would be permitted until the jury was sworn.

R12/472-74. Counsel later conceded that at the time of the EH he could not note any specific red flags that he saw in the jurors after Carll or specific feelings as to why he would want her instead of them. P2888-89. Keeping Carll on the jury was clearly not a strategic decision. Even if counsel truly believed that he made a strategic decision, it cannot be seen as reasonable. *See Strickland*, 466 U.S. at 690. It would be unreasonable for competent counsel to decide to sit mute and allow a biased juror to serve on the jury.

As it is logical to assume both parties would have challenged the same members of the venire if Carll was struck, the next juror would have been Mr. Morrissey, the second alternate, because the first alternate, Ms. Auger, deliberated in the penalty phase after Juror Holznecht was dismissed. R14/744; R21/1788-95. Mr. Morrissey indicated he was impartial by stating he could recommend the death penalty based upon "the severity and the circumstances." R13/622-23. As Mr. Morrissey was actually impartial, there is a reasonable probability that if he had actually deliberated, the outcome of Allen's penalty phase would have been different. Notably, just one vote for a life sentence would have entitled Allen to a new penalty phase under *Hurst*. Therefore, the FSC's decision was also contrary to, or involved an unreasonable application of *Strickland* and Allen must receive a new penalty phase in front of an impartial jury of her peers.

GROUND TWELVE

Allen alleged in Point I of her initial brief on direct appeal that the trial court erred in excluding State witness James Martin's ("Martin") testimony that co-defendant turned State witness, Quintin, admitted to choking Wright to death. The FSC denied relief, and found that "[e]ven if the trial court's exclusion of this proffered testimony was in error, it is harmless beyond a reasonable doubt." *Allen,* 137 So. 3d at 956-58. The FSC's resolution of this claim

was an unreasonable application of clearly established federal law, specifically *Chambers v. Mississippi*, 410 U.S. 284 (1973) and the Fourteenth Amendment to the United States Constitution. Further, in many respects, the state court made an unreasonable determination of the facts in light of the state court record.

The state's star witness, co-defendant turned State witness Quintin, clearly placed the blame for Wright's death on Allen, claiming that Allen beat and choked her with a belt while Quintin either merely stood by, or participated to a lesser extent by holding Wright down and loosely holding onto one end of the belt after Wright had already been strangled by the defendant and was no longer moving. Allen's defense was that Quintin committed the killing when she left the house to search for her purse. The other co-defendant turned state witness, Martin, who pled to being simply an accessory after the fact, having admitted to helping dispose of the body, was not present during Wright's death. However, he admitted on cross-examination that he was housed in an adjoining cell to Quintin and discussed the case. Counsel attempted to question Martin about an admission Quintin made to him in jail where Quintin admitted to using a special leg hold to choke Wright, the same type of leg hold he used to "nearly choke" a fellow inmate during their incarceration. This was a statement Martin made during his deposition. However, the State objected to its admissibility and counsel proffered:

> Martin: I remember saying that there. I remember saying he got a special hold that he used to chock [sic] her with. In that -- yeah, he can choke her with. Because he nearly choked the boy out in jail with that same hold.
>
> Counsel: I am going to continue in the deposition. I asked you then, "Quintin said that," question.
> And you said, "Yes."
> "So, did you hear him say he chocked [sic] her?"
> "Yeah."
> …

> Martin: But I didn't say that he told me.
>
> Counsel: Well, again, I asked you - - and your answer at the top of Page 12, Line 2, "He said he had a special hold with his leg that choked her."
> I said, "Quintin said that?"
> And you said, "Yes."
> "So, if you did hear him say he choked her?"
> Answer, "Yeah."

R17/1263-64. Martin then questioned the accuracy of the deposition, denying that he said that, and also indicating that he instead said, "yeah he probably did choke her. Because how can a 140 pound woman choked a 290 –" [whereupon the State cut off the witness's answer with an objection to the proffer]. R17/1265. The State argued that this statement against Quintin's penal interest was inadmissible because Martin was now disputing the accuracy of his deposition answer, Quintin was not unavailable, and the statement did not bear the requisite indicia of reliability, citing *Chambers*. R17/1265-90. The trial court agreed and excluded the evidence of Quintin's admission. The exclusion denied Allen her right to cross-examine a witness and present evidence on her own behalf.

The FSC unreasonably held that *Chambers* was inapposite. *Allen,* 137 So. 3d at 957. As in *Chambers*, the testimony rejected by the trial court was critical to Allen's defense and "bore persuasive assurances of trustworthiness and thus was well within the basic rationale of the exception for declarations against interest." 410 U.S. at 302. The question is "whether the statement was sufficiently against the declarant's penal interest that a reasonable person in the declarant's position would not have made the statement unless believing it to be true." *Williamson v. United States*, 512 U.S. 594, 603–04 (1994). The FSC also unreasonably claimed that the hearsay exception of a statement against penal interest did not apply because Quintin was not unavailable and there were "no corroborating circumstances to show the

trustworthiness of Quintin's alleged confession." *Allen,* 137 So. 3d at 957. Although Quintin had testified, he was unavailable in terms of this statement because the statement was clearly against his penal interest and Quintin has a Fifth Amendment right against self-incrimination. Therefore, it is reasonably likely that Quintin would have invoked his right if confronted with this statement, which would render him unavailable based on Fla. Stat. § 90.804 and Fed. R. Evid. 804. *See United States v. Salerno*, 505 U.S. 317, 321 (1992).

Further, the context of this declaration against penal interest shows its trustworthiness. Quintin made this statement to his friend and co-defendant, Martin, while incarcerated on the charges of this case and while discussing the facts of this case. As such, the declaration was made to a friendly confidant and clearly inculpated him in the actual killing of Wright, exposing himself to criminal liability. Accordingly, he had no reason to fabricate this admission. It is clear that a person in Quintin's position would not have made the statement unless he believed it to be true. In addition, the contents of the self-inculpatory statement of Quintin are consistent with Allen's defense and corroborated by other evidence presented at trial. Before the State cut him off in his proffer, even Martin tried to bring attention to the fact that it was inconceivable that a woman of Allen's stature could have inflicted these injuries upon the 311-pound victim, which is further support that Quintin must have killed Wright.

This admission by Quintin was crucial to Allen's case, bore an indicia of reliability, having been made spontaneously to a friendly fellow conspirator, was not contrary to the other evidence presented, and was unquestionably against Quintin's interests. The FSC unreasonably found that the exclusion of this evidence was harmless and did not violate due process. *Allen,* 137 So. 3d at 957. However, it is clear from the facts of this case, where the ***sole***

unsubstantiated evidence linking Allen to the actual killing (as opposed to Allen merely being involved in the disposal of the body) is biased, having come from a co-defendant to the crime who was offered a deal for his testimony, Allen must be permitted to present evidence that the co-defendant was the sole or primary cause of the Wright's death instead. Therefore, Allen is entitled to a new trial.

GROUND FOURTEEN

Allen alleged in Points II and IV of her initial brief on direct appeal that Allen's death sentence was impermissibly imposed because the trial court found an improper aggravator and abused its discretion by failing to consider (or improperly minimizing weight given to) highly relevant and appropriate statutory mitigators, and by finding that the aggravation outweighed the mitigation. The FSC denied relief. *Allen,* 137 So. 3d at 962-69. The FSC's decision was an unreasonable application of clearly established federal law, specifically the Eighth and Fourteenth Amendments to the United States Constitution. Further, in many respects, the state court made an unreasonable determination of the facts in light of the state court record.

"An invalidated sentencing factor (whether an eligibility factor or not) will render the sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process." *Brown,* 546 U.S. at 220. The evidence was insufficient to establish a kidnapping; therefore, the "during the course of the kidnapping" aggravator is not applicable and Allen should not have been allowed to receive a death sentence. Allen was only charged with first-degree felony murder during the course of a kidnapping, and kidnapping with the intent to inflict bodily harm or terrorize the victim. Under section 787.01(1)(a) of the Florida Statutes, the term "kidnapping" requires "intent to . . . 2. Commit or facilitate commission of

any felony[,] 3. Inflict bodily harm upon or terrorize the victim or another person." As a literal construction of the statute could potentially convert almost any forcible felony into kidnapping, the statute does not apply to unlawful confinement or movements that are incidental to other felonies. *Faison v. State*, 426 So. 2d 963, 966 (Fla. 1983). However, the FSC unreasonably found the aggravator existed because there was "sufficient evidence to support 'kidnapping with the intent to "inflict bodily harm upon or to terrorize the victim or another person,' and the kidnapping was not merely incidental to the killing." *Allen*, 137 So. 3d at 959, 962. The State did not prove that the confinement was not simply incidental to the killing because the facts indicate that up until the acts that killed Wright, she was not restrained or confined. *See* Petition pp. 80-81. Based on Quintin's testimony, it was only during the acts of the actual strangulation that Wright was in any way confined, and by this time, the confinement was merely incidental to the killing. If the kidnapping charge fails, so does the "during the course of a kidnapping" aggravator. Further, as there was no allegation or proof of premeditation in this case, this point is critical because the allegation of this aggravator is the ***sole*** reason this was a first-degree felony murder case, and in turn, eligible for a sentence of death.

The FSC unreasonably determined that the trial court did not err in finding the HAC aggravator by finding that Quintin's testimony supported Wright was "conscious and aware of her impending death." *Allen*, 137 So. 3d at 964. Indeed, the support for this aggravator was primarily the testimony of the co-defendant turned State witness, Quintin, but the HAC aggravator was not proven at trial. In addition, if one was to believe his testimony, Dr. Qaiser testified that it was likely Wright lost consciousness upon the initial blows to her head and he could not say whether Wright would have regained consciousness, but if she had, strangulation

would have again caused her to lose consciousness rapidly, within 10 to 20 seconds. R18/1447-48; R21/1734. Further, Dr. Qaiser testified that he could not say whether Wright felt any pain from strangulation. R19/1475. The evidence of no defensive wounds and the testimony indicated that Wright did not offer any resistance and did not struggle, and as the onset of unconsciousness would have been quick, there was no prolonged foreknowledge of death.

A court acts in "an arbitrary and capricious manner by failing to treat adequately the evidence [] presented in mitigation of the sentence." *Parker v. Dugger*, 498 U.S. 308, 313 (1991). The trial court rejected the statutory mitigator of "under the influence of extreme mental or emotional disturbance." *See* Petition pp. 82-83. In doing so, it applied the wrong law. The trial court rejected this factor simply finding that there was no testimony of alcohol or drugs being the cause of the crime, apparently believing that drugs and alcohol were the only basis to find this factor. R6/954. The FSC agreed that the analysis was improper but unreasonably found "the trial court's incorrect analysis harmless beyond a reasonable doubt." *Allen*, 137 So. 3d at 965. The FSC also unreasonably upheld the trial court's rejection of the statutory mitigator of "substantial impairment to appreciate the criminality of her conduct or conform her conduct to the requirements of the law" by finding that neither of Allen's experts at trial testified that she was ***substantially*** impaired as required by the language of the statute. *Allen*, 137 So. 3d at 965-66. This is an unreasonable determination of the facts because the mitigation presented regarding this factor, at the very least, supports much higher weight as a nonstatutory mitigator than "some weight". *See* Petition pp. 83-86.

The FSC unreasonably held that "The trial court did not abuse its discretion in its assignment of weight to the nonstatutory mitigators" and the death sentence was proportional

in her case. *Allen*, 137 So. 3d at 967, 969. In the trial court's final conclusion weighing the aggravating and mitigating circumstances, the trial court sentenced Allen to death, and its reasoning was that "[t]here is no excuse or justification for the Defendant's conduct." R6/962. However, the trial court again applied the wrong standard in its ruling. If an "excuse" or "justification" for the killing existed then that fact would totally ***prevent*** a conviction for first-degree murder. The mitigation here instead should simply mitigate the sentence from death, as the law requires. The strong, unrefuted evidence that Allen's organic brain damage directly and significantly contributed to these crimes is substantial mitigation entitled to great weight. The minimization of the unrebutted statutory and nonstatutory mitigation at trial, the emphasis on improper aggravation, and the failure to follow precedent makes Allen's death sentence constitutionally unsound. Therefore, Allen is entitled to a new penalty phase.

RELIEF REQUESTED

Under the AEDPA, this Court can grant habeas relief because the state court's decision was based on an unreasonable determination of the facts in light of the evidence presented at the state court proceedings. *See Wiggins*, 539 U.S. at 528; *see* 28 U.S.C. § 2254(d)(2). Allen has rebutted factual findings on which the state courts relied on by clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1). Furthermore, this Court can grant habeas relief because the state court's decision was contrary to or involved an unreasonable application of clearly established federal law to the evidence in the state court proceedings. *See* 28 U.S.C. § 2254(d)(1). Accordingly, Allen respectfully requests that this Court find that her Constitutional rights were violated in accordance with the foregoing Grounds, grant her writ, and vacate and set aside her convictions and sentences or grant such other relief that it deems just and proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of August, 2019, I electronically filed the foregoing PETITIONER'S MEMORANDUM OF LAW IN SUPPORT OF HER PETITION UNDER 28 U.S.C. § 2254 FOR WRIT OF HABEAS CORPUS, with the Clerk of the Court by using the CM/ECF system, which will send notice of electronic filing to Doris Meacham, Assistant Attorney General, Office of the Attorney General, 444 Seabreeze Blvd, 5th Floor, Daytona Beach, Florida 32118, at Doris.Meacham@myfloridalegal.com and capapp@myfloridalegal.com on this 20th day of August, 2019. I further certify that a true copy of the foregoing was mailed to the following non-CM/ECF participant: Margaret A. Allen, DOC# 699575, Lowell Correctional Institution, 11120 Northwest Gainesville Road, Ocala, Florida 34482-1479.

/s/ Lisa M. Bort
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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

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

DEATH PENALTY CASE

Appendix H

Respondents' Corrected Response to Petition for Writ of Habeas Corpus and Memorandum of Law, filed February 18, 2021.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

MARGARET A. ALLEN,
Petitioner,

v. **CASE NO. 6:19-cv-296-Orl-40DCI**

SECRETARY, DEPARTMENT OF CORRECTIONS and ATTORNEY GENERAL, STATE OF FLORIDA,
Respondents.
_____/

RESPONDENTS' CORRECTED RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS AND MEMORANDUM OF LAW

COMES NOW, Respondents, Secretary, Florida Department of Corrections, and Attorney General, State of Florida by and through the undersigned Assistant Attorney General, and files this Corrected Response to the Petition for Writ of Habeas Corpus filed herein. Respondents respectfully submit that this Petition should be summarily denied for the reasons stated herein.

STATEMENT REGARDING STATE COURT RECORD

The state court record supporting Petitioner Margaret Allen's conviction and sentence is being filed under separate cover as an appendix to this response, which consists of the records, appellate briefs, and court opinions generated in all state proceedings related to Petitioner's custody as challenged in her Petition. A Master Index appears at the beginning of the Appendix. References to the state court record will cite to the appropriate exhibit and page number within the appendix.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On September 21, 2010, in the Eighteenth Judicial Circuit of Florida, Margaret Allen was convicted by a jury in the first-degree murder and kidnapping of Wenda Wright. On September 23, 2010, the jury recommended the death penalty by a unanimous vote and the court followed their recommendation. The salient facts underlying Petitioner's conviction were set forth by the Florida Supreme Court as follows in the direct appeal opinion:

> On March 8, 2005, Margaret A. Allen was indicted for the first-degree murder and kidnapping of Wenda Wright. Wright's domestic partner, Johnny Dublin, last saw Wright leaving his home with Allen. Wright never returned home. A few days after Wright went missing, Quintin Allen, Margaret Allen's co-defendant and the State's main witness turned himself in to the police and told the police about the events that led up to Wright's death. Quintin also took the police to the location in which he, Allen, and James Martin buried Wright's body.
>
> **Guilt Phase**

A jury trial commenced on September 13, 2010. Johnny Dublin testified for the State. Dublin testified that on the day Wright went missing, Allen came to Dublin and Wright's house and whispered something into Wright's ear. In response, Wright and Allen left the house together. A little while later, Allen returned to Dublin's house and told Dublin that Wright stole about $2000 of Allen's money and Allen asked Dublin if she could search his house. Dublin obliged and Allen searched Dublin's house. Dublin testified that he noticed that Allen had scratches on her when she came back to his house. Dublin asked Allen where Wright was, and Allen responded that she was still at Allen's house. Dublin testified that the next day, Allen came back to his house and asked him where Wright was. Dublin testified that Quintin was with Allen.

Quintin Allen testified for the State. He acknowledged that he was serving a fifteen-year sentence of incarceration followed by five years' probation for his guilty plea for second-degree murder based on his involvement in Wright's murder. Quintin testified that he was at Allen's house on the day of the murder when Allen noticed that her purse was missing. Allen left her house and told Quintin to stay with her children. Allen returned to her house with Wright and asked Quintin to come inside. Allen told Quintin that Wright must have stolen Allen's purse because Wright was the only person at Allen's house before the purse went missing. Allen and Quintin searched for the purse. Allen left the house again and told Quintin not to let Wright leave if she tried. At one point while Allen was gone, Wright tried to leave; Quintin told Wright that Allen wanted her to stay, and Wright obliged.

Upon Allen's return, Quintin plaited Allen's hair. Quintin testified that at one point Wright started crying and begged Allen to let her go home. Wright attempted to leave Allen's house and Allen hit Wright on the head; Wright fell to the ground. Quintin testified that Allen had a gun and told him that if he did not help her with Wright, she would shoot him, so Quintin held Wright down on the floor. While he held Wright down, Allen found chemicals including bleach, fingernail polish remover, rubbing alcohol and hair spritz and poured them all onto Wright's face. At one point, one of Allen's children walked into the room in which this was taking place, and Allen told the child to rip off a piece of duct tape for Allen. Allen attempted to put the duct tape over Wright's mouth, but because Wright's face was wet from the chemicals

that were poured on her face, the duct tape would not stick to her skin. Allen retrieved belts from her closet and beat Wright with them. Quintin then tied Wright's feet together with one of the belts. Quintin testified that at that point Wright was not struggling. Allen then put one of the belts around Wright's neck and pulled. At one point, Wright said, "Please, stop. Please stop. I am going to piss myself." Wright's body started shaking and after about three minutes, Wright did not move. Allen then told Quintin to get some sheets to tie Wright's hands together in case Wright woke up.

Quintin left soon after the incident. Allen called Quintin throughout the night, but he did not answer her calls. The next day, Allen found Quintin at the barbershop. Quintin testified that Allen still had the gun. Quintin got into the truck that Allen was driving; James Martin was also in the truck. Allen told Quintin that Wright was dead. Allen then told Quintin that he had to help her get rid of the body.

Allen, Quintin, and Martin drove to Lowe's to buy plywood to help move Wright's body from inside the house into the truck. They also borrowed a dolly hand truck from a local shop to help move the body. Quintin testified that upon returning to Allen's house, Wright's body had been moved from where he had last seen her and had been wrapped in Allen's carpet. They were eventually able to get Wright's body into the truck. Then, all three took shovels from Allen's mother's tool shed and drove to an area off of the highway to dump Wright's body. Quintin and Martin dug a hole while Allen stood as a lookout. They placed Wright's body in the hole, covered the hole with debris, and took the carpet with them. They threw the carpet into a dumpster outside of a truck stop and picked up Allen's daughter from school. Quintin went to the police and turned himself in. Quintin also took the police to the place where Wright's body had been buried.

James Martin testified that he was sentenced to sixty months' incarceration for his participation in hiding Wright's body. Martin testified that on the day of the murder, he was at Allen's house helping her repair a car. Allen asked Martin to help her search for her purse, and Martin did. He testified that he left Allen's house around 10 p.m. to get a starter belt for the car. Martin finished repairing the car and asked Allen if she had any cocaine. She did not, so Martin left Allen's house, found cocaine, came back to Allen's house, and smoked it. Martin

testified that when he got back from finding the cocaine, Wright was the only one at Allen's house. Martin testified that the timing of the events of the day was unclear because he had been high. Martin testified that he slept at Allen's house until the morning and got a ride from Allen when she took her children to school. At that point, Allen told Martin that she needed help. Allen and Martin went back to Allen's house, and Martin saw Wright's body. Martin testified that Allen told him, "He must have hit her too hard." Martin testified that he noticed a bandana tied around Wright's hands.

Allen told Martin that they had to bury Wright's body. Allen sent Martin to Allen's brother's house to borrow a truck. Martin testified that the truck was never found by police. Martin testified that the entire plan, including getting the plywood at Lowe's was Allen's idea. Martin testified that he was the only smoker of the group, and he dumped all of the ashtrays out of the car after they buried the body. When they got back to Allen's house, Quintin left, and Martin cleaned the nylon strap that had been used to secure the carpet around Wright's body. Martin also washed the truck but testified that he did not know what became of the vehicle. Martin was at Allen's house when the police came to Allen's house with a search warrant.

On cross-examination, Martin testified that it was Quintin who first told Wright that she could not leave. Martin also testified that Quintin gave directions to bury the body. The defense elicited that Martin told Allen's sister that Quintin "did this." On redirect, the State elicited from Martin that he was asleep and did not see who killed Wright. Denise Fitzgerald, a crime scene technician, testified that she exhumed Wright's body and located a cigarette butt in the vicinity. The State and defense stipulated that the DNA found on the cigarette butt was consistent with Martin's DNA.

Dr. Sajid Qaiser, a forensic pathologist and chief medical examiner for Brevard County, testified that while he did not perform the autopsy on Wright, he had reviewed the autopsy report. He testified that Dr. Robert Whitmore 1, the medical examiner who had performed the autopsy on Wright was no longer the chief medical examiner. Dr. Qaiser testified that a body cannot bruise once dead and that Wright had bruising in the following places: upper and lower eye lid, front and back of her ear, left torso, all over the left side, trunk, right hand, thigh, knee, left eyebrow,

forehead, upper arm and shoulder area. Additionally, Wright's chest, hands, torso, face, and lower lip had contusions. Wright's wrist showed signs of ligation, meaning her hands were tied. Wright's neck showed signs of ligation, meaning that she was either hung or something was tied tightly around her neck. Dr. Qaiser testified that his medical conclusion was that Wright's death was the result of homicidal violence, and strangulation and ligature were an important cause of death. Dr. Qaiser testified that Wright was morbidly obese, with an enlarged heart, which contributed to her death. He testified that it would take from four to six minutes of strangulation to die. He could not tell whether she was rendered unconscious during the beating.

The State rested, and the defense filed a motion for judgment of acquittal asserting that the State had not proven the underlying charge of kidnapping for felony murder. The trial court denied the motion, and the defense rested without calling any witnesses. The jury found Allen guilty of first-degree murder and kidnapping.

Penalty Phase

The penalty phase commenced on September 22, 2010. Dr. Qaiser testified on behalf of the State. He acknowledged that he could not determine what kind of pain Wright felt before she died. Dr. Qaiser reiterated that Wright had about eight to ten bruises on her face. He also testified that someone would feel a sense of panic and pressure during strangulation.

On cross-examination by the defense, Dr. Qaiser acknowledged that he did not know whether Wright was conscious during the majority of the attack. Dr. Qaiser also testified that someone would lose consciousness after about ten to twenty seconds of strangulation and would die after about four to six minutes. After Dr. Qaiser's testimony, the State rested.

Dr. Michael Gebel, a neurological physician, testified for the defense. He testified that he had reviewed Allen's records and spoken with Allen. He determined that Allen suffered from numerous head injuries, including at least four incidents in which Allen lost consciousness. He testified that Allen's records included emergency room visits in 1995 and 1996 during which she was treated for facial and head trauma and bite wounds. He also testified that she was treated in 1989 for a drug

overdose. Dr. Gebel testified that Allen had significant intracranial injuries and was at the lower end of intellectual capacity. He testified that Allen had organic brain damage, which would destroy impulse control. He opined that this brain damage might affect her ability to appreciate the criminality of her conduct and that she would have difficulty conforming her conduct to the requirements of the law. He also testified that Allen would not be able to create a complex plan. He acknowledged that Allen was not cooperative enough for him to determine whether Allen was substantially mentally impaired, but that she had lost the ability to control her mood.

On cross-examination, the State elicited Dr. Gebel's opinion that a person with Allen's brain injuries would not be able to create and follow through with a plan such as the one Allen executed to discard Wright's body. Upon the doctor finding out the facts of this case, he stated that while that would change the severity of his diagnosis of Allen, it would not change her brain injuries.

Dr. Joseph Wu, a neuropsychiatry and brain imaging specialist, testified on behalf of the defense that he reviewed Allen's PET scan. He testified that Allen had at least ten traumatic brain injuries, mostly to the right side of her brain, resulting in asymmetrical changes, specifically in the frontal lobe. Dr. Wu testified that damage to the frontal lobe affects impulse control, judgment, and mood regulation. He also testified that her brain injuries would make it hard for Allen to conform her conduct to the requirements of society. He testified that she would have an overreaction to slight provocation, but that Allen's injuries should not impair her planning abilities.

Dr. Wu testified that Allen's ability to understand and regulate proportionate responses in a consistent manner was significantly impaired. He also testified that it would be difficult for her to consistently conform her conduct to the requirements of society.

Myrtle Hudson, Allen's aunt, testified that Allen had an unstable childhood in a violent and drug-infested neighborhood. Hudson testified that she never knew Allen to abuse drugs, but Allen drank alcohol. Hudson knew of at least two abusive relationships in which Allen was beaten to the point of unconsciousness. She also thought Allen had been sexually abused as a child.

Spencer Hearing

Myrtle Hudson testified that Allen became part of the neighborhood culture, drinking alcohol and selling drugs. Bessie Noble, an advocate for prisoners, testified that Allen had an abusive and bad life. Tara Posey, Allen's cousin, testified that Allen was a good person and friend, but she had a tough and violent life, and had a problem with alcohol. She also testified that Allen sold drugs so that she could provide for her children. April Smith, Allen's sister-in-law, testified that Allen was a good person with a hard life. Irene Posey, Allen's grandmother, testified that Allen had a good childhood, living with her intermittently. She testified that Allen had been a good child and that she did not commit this crime.

Margaret Allen testified on her own behalf regarding her harsh upbringing, including selling drugs and being abused. She recounted that she suffered head injuries as a result of being beaten. She acknowledged that she had been previously charged with drug and gun possession charges. She testified that she did not kill Wright. On cross-examination, Allen admitted that she had been arrested for assault and battery and that her daughter told the police that Allen committed the instant crime.

The State elicited victim impact testimony from Dublin that Wright was a good person and that she and Allen had been good friends. Diane Baxter, Wright's sister-in-law, Maria Jackson, Wright's sister, and Ralph Baxter gave victim impact statements regarding the impact Wright's murder had on the family.

The jury recommended a sentence of death by a unanimous vote. The trial court found two aggravators: (1) the capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit a kidnapping (great weight); and (2) the capital felony was especially heinous, atrocious, or cruel (great weight). The trial court found no statutory mitigation and found the following nonstatutory mitigation: (1) defendant has been the victim of physical abuse and possible sexual abuse in the past (some weight); (2) defendant has brain damage as a result of prior acts of physical abuse

> and the brain damage results in episodes of lack of impulse control (some weight); (3) defendant grew up in a neighborhood where there were acts of violence and illegal drugs (some weight); and (4) defendant would help other people by providing shelter, food or money (little weight). The trial court concluded that the aggravating circumstances outweighed the mitigation. Thus, the trial court imposed the sentence of death.

Allen v. State, 137 So.3d 946, 951- 955 (Fla. 2013) (footnotes omitted). (AA, Exhibit E). [1]

Petitioner raised four issues on direct appeal: (1) whether the trial court erred in excluding the testimony of State witness James Martin that former co-defendant-turned-State-witness Quintin admitted to choking the victim to death; (2) whether the trial court erred in adjudicating Allen guilty of the kidnapping charge, and whether the trial court erred in adjudicating Allen guilty of first-degree felony murder predicated on the kidnapping charge; (3) whether reversible error occurred when the prosecutor repeatedly asked the defendant's mental health expert about the future dangerousness of the defendant; and (4) various claims regarding whether Allen's death sentence is impermissibly imposed. (AA, Exhibit B). The State filed an answer brief on July 19, 2012. (AA, Exhibit C). Allen filed a reply brief on October 18, 2012. (AA, Exhibit D).

[1] Citations to the Advance Appendix, are AA, followed by Exh. _ for exhibit number, followed by P_ for page number.

The Florida Supreme Court found each of these claims meritless and upheld Allen's convictions and sentence of death. *Id.* at 969. After the Florida Supreme Court issued its opinion affirming her judgment and sentence on July 11, 2013, Allen filed a motion for rehearing. (AA, Exhibit F). The Florida Supreme Court denied the motion for rehearing on July 25, 2013, (AA, Exhibit G), and on May 22, 2014, the Florida Supreme Court issued its mandate. (AA, Exhibit H). Allen filed a Petition for Writ of Certiorari with the United States Supreme Court, which was denied on October 14, 2014. *Allen v. Florida*, 135 S. Ct. 362 (2014). (AA, Exhibit L).

On September 21, 2015, Allen filed a Motion to Vacate Judgment and Sentence pursuant to Florida Rules of Criminal Procedure 3.851 (AA, Exhibit M, p. 403-477). In her motion, Allen raised fourteen (14) claims with sub-parts:

> Claim 1: Counsel was ineffective in failing to strike Juror Carll for cause or peremptorily.
>
> Claim 2: Counsel was ineffective in failing to impeach Quintin Allen with his statement to Detective Boyer indicating that Defendant did not pour bleach on the victim.
>
> Claim 3: Counsel was ineffective in eliciting testimony from Quintin during cross examination that Defendant poured bleach, nail polish remover, and ammonia on the victim when Quintin previously testified during direct that he could only say it was rubbing alcohol.
>
> Claim 4: Counsel was ineffective in failing to impeach Quintin's testimony that he only went along with Defendant until he could turn himself in with his statements to Sandra Pinson that he wanted her to help him leave town and in failing to cross examine Quintin regarding his possession of $4,000.00 two days after the murder.

Claim 5: Counsel was ineffective in failing to object to prosecutorial misconduct guilt phase closing arguments where the prosecutor misled the jury by implying that Defendant was not offered a plea bargain because she was more culpable.

Claim 6: Counsel was ineffective for failing to object to the prosecutor's misrepresentations of the evidence and the applicable law in the guilt phase closing arguments.

Claim 7: Counsel was ineffective in failing to object to testimony of Dr. Qaiser that unconscious people can feel pain when Dr. Qaiser was a conduit for the unnamed studies of other experts who were not available for cross examination, thereby violating the confrontation clause.

Claim 8: Counsel was ineffective in failing to object and move for a mistrial based on prosecutorial misconduct during the penalty phase.

Claim 9: Counsel was ineffective in asking Myrtle Hudson if Defendant became a part of the culture of "drugs and thugs and violence".

Claim 10: The State committed a *Giglio* violation in the penalty phase when it elicited and failed to correct false testimony that Defendant was convicted several times for selling drugs.

Claim 11: Counsel was ineffective for failing to present expert testimony that the autopsy did not allow for a specific cause of death, that the autopsy photos did not show ligature strangulation, that the victim's cocaine level was capable of causing or contributing to death, that there was no objective evidence that caustic substances were poured on the victim, and that an unconscious person can no longer feel pain or suffering.

Claim 12: Counsel was ineffective in failing to elicit testimony from Dr. Wu to establish that Defendant's brain injury impaired her capacity to conform her conduct to the requirements of the law and that Defendant was under the influence of extreme emotional distress at the time of the capital offense.

Claim 13: Counsel failed to conduct a reasonably competent mitigation investigation and was ineffective by failing to investigate and present

> testimony regarding Defendant's chaotic childhood and her various mental health issues which rendered Defendant under the influence of extreme mental or emotional disturbance at the time of the capital offense.
>
> Claim 14: Counsel was ineffective in failing to call Quintin Allen at the penalty phase to testify to Defendant's demeanor at the time of the offenses.

The State filed its Response on November 20, 2015. (AA, Exhibit M, p. 519-572). On February 12, 2016, Allen filed an amended motion addressing *Hurst v. Florida*, 136 S. Ct. 616 (2016) and Chapter 2016-13, Laws of Florida. (AA, Exhibit M, p. 578-593). The State filed its Response on April 4, 2016. (AA, Exhibit M, p. 654-668). On December 8, 2016, Allen filed a second motion to amend in response to the Florida Supreme Court's opinions in *Perry v. State*, 210 So.3d 630 (Fla. 2016) and *Hurst v, State,* 202 So.3d 40 (Fla. 2016). (AA, Exhibit M, p. 731-747). The State filed its Response on December 23, 2016. (AA, Exhibit M, p.761-770).

On March 15, 2016, after conducting a *Huff* hearing,[2] the state postconviction court issued an order scheduling an evidentiary hearing on claims 3, 4, 11, 12, 13, and 14, pursuant to a stipulation of the parties, and on claims 2, 5, 6, 7, 8, 9, and 10. In regard to claim 1, a hearing was denied on Sub claim (a) but granted on Sub claim (b). (AA, Exhibit M, p. 649-653).

[2] *See Huff v. State*, 622 So. 2d 982 (Fla. 1993) (requiring the trial court to allow the parties the opportunity to argue the merits of holding an evidentiary hearing on a defendant's postconviction claims).

The evidentiary hearing on Allen's initial postconviction motion was held on April 10-12, 2017. (AA, Exhibit M, p. 2559-3363). Allen called eight witnesses: Brian Watkins, a former boyfriend; two aunts, Barbara Capers and Myrtle Hudson; Allen's children, Alvinia Ragoo and Carlos Ragoo; trial counsel, Frank Bankowitz; and two hired consultants, Dr. William Russell, a psychologist; and Dr. Daniel Spitz, a medical examiner from Michigan. The State called one witness: Dr. Sajid Qaiser, a medical examiner from Brevard County, Florida, and rebuttal witness, Dr. Michael Gamache, a psychologist.

Evidentiary Hearing Facts

Brian Watkins was called as a witness by the defense. He testified regarding his relationship with Allen. They dated for about five years, from 1992 until 1997, during which time they had a child together, Latisha Watkins. (AA, Exhibit M, p. 2597-98; 2623-24). Watkins testified that the relationship between him and Allen was violent and that they would "abuse each other." (AA, Exhibit M, p. R2603). He described one altercation that occurred in Winn-Dixie. He stated that she hit him, after which he hit her back. They then proceeded to fight in several aisles of the store, during which she stabbed him with a box cutter, and he hit her in the head with a hammer. (AA, Exhibit M, p. 2608-09). As a result of these arguments, he went to a batterer's intervention or domestic violence class a couple of times. (AA, Exhibit M, p. 2602). When they committed violent acts towards each other, they

occasionally dropped the charges against the other, but he never pressed charges against Allen. Watkins described Allen as exhibiting behaviors that included hand and feet sweating, anxiety, frustration, and "little fits." (AA, Exhibit M, p. 2599). He stated that Allen slept all day and would complain of headaches. (AA, Exhibit M, p. 2601). He did not know whether or not Allen sought medical treatment for her problems. (AA, Exhibit M, p. 2602). Watkins testified to having three state-level felony convictions and one federal conviction. (AA, Exhibit M, p. 2571). He served ten years at Coleman Correctional facility before being released to a halfway house. (AA, Exhibit M, p. 2614). When asked about the trial, he stated that no one from Allen's defense team spoke to him. (AA, Exhibit M, p. 2615). He testified that at the time of Allen's trial, he was living in a halfway house, but he would have spoken to them and testified in court. (AA, Exhibit M, p. 2626-27). On cross-examination, Watkins testified that although he knew Allen was having a trial, he made no effort to let it be known that he was ready to testify. He attributed that to the fact that he had done so much time in prison and did not want to get caught up in the system. (AA, Exhibit M, p. 2618). Watkins admitted that he was reluctant to get involved and if Allen's defense had looked for him, he may or may not have been cooperative. (AA, Exhibit M, p. 2619). In response to questions regarding his relationship with Allen, Watkins testified that he was the aggressor. He stated that Allen was sometimes violent towards him, but regardless of what Allen said, "I am a man … I

would act out … I know better than to put my hands on a woman." (AA, Exhibit M, p. 2623-24). Watkins also admitted that both he and Allen sold drugs and financially helped each other. (AA, Exhibit M, p. 2620-22). Watkins stated he was not familiar with Dr. Russell and had not spoken to him prior to the day of his testimony. (AA, Exhibit M, p. 2619-20).

Barbara Ann Capers was called as a witness by the defense. She is Allen's older aunt by ten years. She testified that there were times she lived in the same household as Allen along with Allen's mother, Alvaina, and Allen's brother, Peter. (AA, Exhibit M, p. 2632-33, 2635-36, 2660-61). She recalled that Allen was "slow" in school and had a stroke as a teenager which affected her speech and memory. (AA, Exhibit M, p. 2641-42). Capers described Allen's childhood as rough, stating that she witnessed Allen's mother beating Allen almost daily. (AA, Exhibit M, p. 2639, 2663). Capers also testified to the sexual abuse by male relatives that Allen sustained while growing up. (AA, Exhibit M, p. 2642). She testified Allen claimed Capers' father, Curtis, Allen's grandfather, sexually and physically abused her. (AA, Exhibit M, p. 2643, 2648). Allen also claimed her own brother sexually assaulted her. (AA, Exhibit M, p. 2648). However, Capers testified that she had no personal knowledge of these incidents. Capers testified to only having personal knowledge of the sexual abuse of Allen by her father's brother, Roy Posley. (AA, Exhibit M, p. 2645). Capers witnessed Brian Watkins physically abusing Allen, including when

Allen was pregnant. (AA, Exhibit M, p. 2654-55). Capers described that when Allen was in her twenties, she was badly beaten by another boyfriend which resulted in her being hospitalized. (AA, Exhibit M, p. 2653). Capers said Allen exhibited signs of anxiety, slept a lot, would shake and have sweaty hands or feet. (AA, Exhibit M, p. 2656). Capers testified that she was contacted by one of Allen's attorneys prior to trial. She was available to testify at the trial in 2010 but no one asked her to testify. (AA, Exhibit M, p. 2634). Capers stated that during the postconviction proceedings, she spoke with Dr. Russell about Allen's case. (AA, Exhibit M, p. 2634). She went on to say that she was also available to speak with a doctor in 2010 about Allen but no one asked her to speak to a doctor at that time. (AA, Exhibit M, p. 2635). On cross-examination, Capers testified that although a friend told Capers that Allen had killed someone and was arrested, she never visited Allen in jail. (AA, Exhibit M, p. 2670-71). Capers, however, did attend the trial and was present when her sister, Myrtle Hudson, testified about how Allen was beaten. (AA, Exhibit M, p. 2672-73). Capers stated she was also present when two doctors testified at trial. (AA, Exhibit M, p. 2673). Capers was questioned regarding whether anyone asked her to testify on Allen's behalf. In response, she admitted that she was present when the attorneys told Hudson that they wanted her to testify at the trial. (AA, Exhibit M, p. 2674-75). When asked why Allen slept all day, Capers admitted that Allen slept all day because she would go out at night and come home drunk. (AA, Exhibit M, p. 2658). Capers

has three felony convictions and two convictions for crimes of dishonesty. (AA, Exhibit M, p. 2571).

Alvinia Ragoo was called as a witness by the defense. She is Allen's daughter, born in 1989. (AA, Exhibit M, p. 2681). She testified that her stepfather, Brian Watkins, lived with them from 1989 through 1995. During that time, she witnessed her stepfather physically abusing Allen. (AA, Exhibit M, p. 2684-85). Ms. Ragoo recalled living with her grandmother the first time Allen went to prison. (AA, Exhibit M, p. 2687). She stated she was not in prison at the time of the murder but was in prison when her mother went to trial. (AA, Exhibit M, p. 2688). The witness did not recall talking to Allen's lawyers or any doctors about her mother's life at the time of trial. (AA, Exhibit M, p. 2691). She stated that she would have been willing to testify on her mother's behalf. However, she was able to talk to Dr. Russell during the postconviction proceedings. (AA, Exhibit M, p. 2692). During cross-examination it was brought up that the police believed she was present when her mother killed the victim. (AA, Exhibit M, p. 2692-93). Alvinia Ragoo testified that she was at the house that day and recalled seeing Wenda Wright and Quintin Allen. (AA, Exhibit M, p. 2693). She testified to being deposed in 2005[3] but could not recall the lawyer's name. (AA, Exhibit M, p. 2691). She admitted that at that

[3] The deposition was entered as Defense Exhibit 1. (AA, Exhibit M, p. 1557-74; 2703).

deposition, she said she did not want to talk and did not give any information. (AA, Exhibit M, p. 2695, 2702). When asked if she would have taken the same position at trial, Ragoo replied, "Maybe not." (AA, Exhibit M, p. 2702). The witness has four prior felony convictions. (AA, Exhibit M, p. 2571).

Myrtle Hudson was called as a witness by the defense. She is Allen's aunt. (AA, Exhibit M, p. 2721). She testified that she spoke with Allen's trial counsel on a regular basis and helped him get in touch with relatives, some of whom did not have a telephone. (AA, Exhibit M, p. 2722-23). Hudson recalled Allen's mother had a quick temper and that there were occasions Hudson saw Allen's mother hit Allen with a belt. (AA, Exhibit M, p. 2728, 30). Hudson stated that she had testified at Allen's trial about the abuse Allen suffered from Brian Watkins and former boyfriend, Bill Skane. (AA, Exhibit M, p. 2734, 2736). Hudson never spoke to any doctor before trial about Allen, but she would have been willing to do so. (AA, Exhibit M, p. 2724). She did speak with Dr. Russell during postconviction proceedings. (AA, Exhibit M, p. 2724). During cross-examination, Hudson stated that she took several relatives to Orlando to meet with Allen's trial counsel, including Allen's mother. (AA, Exhibit M, p. 2751-52). She testified that she gave Bankowitz a list of names of people he needed to talk to. (AA, Exhibit M, p. 2753). Hudson admitted that during the penalty phase, she testified about Allen being around drugs and that she was in an abusive relationship in which she was beaten

unconscious. (AA, Exhibit M, p. 2746). Hudson also admitted to testifying that Allen sold drugs at night and slept during the day. (AA, Exhibit M, p. 2744, 2751, 2755). Hudson has seven felony convictions and nine convictions for crimes of dishonesty. (AA, Exhibit M, p. 2571).

Carlos Ragoo was called as a witness by the defense. He is Allen's son. He is incarcerated and has four felony convictions. (AA, Exhibit M, p. 2571, 2761-62). He testified to witnessing Allen being abused by Brian Watkins and another boyfriend. (AA, Exhibit M, p. 2770-72). He stated he observed Allen experience mood swings in which she would throw temper tantrums. (AA, Exhibit M, p. 2766). He stated that he would have testified on his mother's behalf at trial, but no one contacted him. (AA, Exhibit M, p. 2774). During cross-examination, Carlos Ragoo admitted that Allen went to clubs at night and that she sold drugs. (AA, Exhibit M, p. 2784-85).

Allen's trial attorney, Frank Bankowitz, was called as a witness by the defense. He is a solo practitioner who has been practicing criminal law for 43 years. (AA, Exhibit M, p. 2789-90, 2809). He has been death qualified for approximately 10 years. (AA, Exhibit M, p. 2791). Bankowitz testified that he had defended approximately five or six death penalty phases prior to this case. (AA, Exhibit M, p. 2794). Bankowitz testified that he spoke to prosecutor Russ Bausch on a fairly regular basis about dropping the death penalty, but the State Attorney's Office would

not agree. (AA, Exhibit M, p. 2793). Bankowitz testified he was familiar with the DSM-IV, "a psychological testing" used by neuropsychologists, psychologists, and psychiatrists. (AA, Exhibit M, p. 2794-95). He was also familiar with Post Traumatic Stress Disorder. (AA, Exhibit M, p. 2795). Bankowitz stated he took over Allen's case from the Public Defender's Office about a year or a year and a half before the trial began. (AA, Exhibit M, p. 2791, 2880). He reviewed all of the documents from the Public Defender's Office. (AA, Exhibit M, p. 2797, 2880). The mitigation investigation had already been done and witnesses were already lined up, including the key mitigation witness, Dr. Wu.[4] (AA, Exhibit M, p. 2790-91; 2795). In preparing for mitigation, Bankowitz spoke to Dr. Wu as well as Allen's aunts, Myrtle Hudson and Hudson's sister, Barbara Capers. (AA, Exhibit M, p. 2796). He remembered he had regular contact with them and asked them to line up family members. (AA, Exhibit M, p. 2796). Bankowitz testified that Hudson told him that Allen was sexually and physically abused, including having multiple hospital stays and being beaten into unconsciousness and becoming unrecognizable. (AA, Exhibit M, p. 2857-58). He testified that he attempted to reach other family through Hudson, who told him that Allen's daughters would not cooperate – that they did not want any part of it. Bankowitz testified that there was an allegation that two of the

[4] Dr. Joseph Wu is a medical doctor with a specialization in neuropsychiatry.

daughters may have been involved in the crime and that is why they did not want to be involved in the case. (AA, Exhibit M, p. 2843-47). He felt that the credibility of the daughters would have been in question. He also recalled that one of Allen's aunts did not want to testify due to health issues. (AA, Exhibit M, p. 2813, 2845). He remembered Myrtle Hudson testified that Allen grew up around "drugs, thugs, and violence" a phrase that he did not bring up himself. (AA, Exhibit M, p. 2814-15, 2858-59).

Bankowitz testified that he met with Allen monthly and reviewed all the evidence with her, but she did not want to talk about the case and did not want her daughters involved. (AA, Exhibit M, p. 2878-79). He admitted he did not speak to the daughters and was somewhat fearful that if they said something inconsistent with a prior statement, they could be impeached. (AA, Exhibit M, p. 2880-81).

Bankowitz stated that the Public Defender's Office already had the autopsy report by the time he got the case. (AA, Exhibit M, p. 2797). Bankowitz became aware of Dr. Gebel through the Public Defender's Office. (AA, Exhibit M, p. 2860). Bankowitz felt that Dr. Gebel and Dr. Wu were more than sufficient experts to handle the mental health aspect of the case. (AA, Exhibit M, p. 2875-76). He recalled that Dr. Gebel, a psychologist, met with Allen once to gather information for mitigation but she was uncooperative. (AA, Exhibit M, p. 2861). Based upon the history he reviewed, Dr. Gebel told the jury about the traumatic brain injuries Allen

suffered. (AA, Exhibit M, p. 2862). Dr. Gebel also testified about Allen's impulse control, frontal lobe disorder in her brain and issues that would prevent her from thinking and acting in a normal fashion. (AA, Exhibit M, p. 2863). Bankowitz stated that he presented information to the jury that, if Allen felt wronged in some way or taken advantage of, she might have the inability to control an impulse to react quickly. (AA, Exhibit M, p. 2863). He did not ask Dr. Gebel to meet with Allen again because Bankowitz looked at Gebel's report and thought that it was more than sufficient. (AA, Exhibit M, p. 2887).

Bankowitz also used Dr. Wu as an expert on the PET scan. (AA, Exhibit M, p. 2863). Dr. Wu opined in front of the judge and jury that Allen's brain did not function as a normal brain would in particular areas of her brain. (AA, Exhibit M, p. 2864). Dr. Wu also testified about the impulse control problem that Allen exhibited. If Allen perceived that someone had done her wrong, Allen might react in a manner that somebody else would not. (AA, Exhibit M, p. 2864). Bankowitz testified that both Dr. Gebel and Dr. Wu presented testimony that would create mental health mitigators to the jury and for the judge to consider. (AA, Exhibit M, p. 2864-65).

Bankowitz stated he received an amended witness list which listed another medical examiner. He filed a Motion to Continue because the State had switched doctors fairly close to the trial. (AA, Exhibit M, p. 2883-84). Bankowitz said he was a little shocked at Dr. Qaiser's report since it was diametrically opposed to Dr.

Whitmore's report. (AA, Exhibit M, p. 2802). Bankowitz testified that he believed he brought up the issue of Dr. Qaiser acting as a witness in the State's case but he could not recall if he filed a formal motion. (AA, Exhibit M, p. 2802). Bankowitz deposed Dr. Qaiser in August 2010. (AA, Exhibit M, p. 2802-03).

Bankowitz spoke to Dr. Whitmore by telephone. Dr. Whitmore, who was in Alaska, made it clear that he was not coming to Brevard County. (AA, Exhibit M, p. 2835). Dr. Whitmore's report listed the cause of death as homicidal violence with cocaine intoxication and the manner of death as a homicide. (AA, Exhibit M, p. 2842). Dr. Qaiser found ligature marks which Dr. Whitmore did not reference in his autopsy report. (AA, Exhibit M, p. 2803, 2853). Bankowitz referred to the report consistently during cross-examination and showed it to Dr. Qaiser. The jury saw it as well. (AA, Exhibit M, p. 2810). Dr. Qaiser did not write a report. (AA, Exhibit M, p. 2852).

Bankowitz testified that he cross-examined Dr. Qaiser and there was nothing else he would have cross examined him about. (AA, Exhibit M, p. 2854). Bankowitz presented to the jury the fact that the opinion of Dr. Whitmore, who actually performed the autopsy differed from that of Dr. Qaiser, who looked only at the photographs and paperwork. (AA, Exhibit M, p. 2855). He pointed out Dr. Qaiser never saw the victim's body nor did he perform the autopsy. (AA, Exhibit M, p. 2855). Bankowitz also noted that Dr. Qaiser acknowledged in his testimony that he

could not specify if Wenda Wright could feel any pain. (AA, Exhibit M, p. 2856, 2874). Bankowitz testified that he did not feel as though he needed another expert to cumulatively say the same thing that Dr. Whitmore said in his report. (AA, Exhibit M, p. 2875).

Bankowitz believed that he cross-examined co-defendant Quintin Allen extensively and that both of the medical examiners testified that no caustic chemical was poured on the victim. (AA, Exhibit M, p. 2868-69). The defense's theory was that Quintin Allen may have taken Margaret Allen's money and that Quintin was making things up to cover up his act of thievery. (AA, Exhibit M, p. 2870).

In regard to the testimony of the Pinsons, Bankowitz testified that they had become uncooperative after their daughter was murdered in Titusville. (AA, Exhibit M, p. 2871). Bankowitz also noted that Pinson's deposition testimony "was all over the ballpark" about whether Quintin had money or could get money or what he was doing. (AA, Exhibit M, p. 2872). After determining that their testimony was inconsistent and considering that they were uncooperative, Bankowitz decided that he did not want something coming out that he did not want to come out. (AA, Exhibit M, p. 2872).

In regard to Juror Carll, Bankowitz did not have an independent recollection of her but upon reading the transcript, he felt that she was sufficiently rehabilitated. (AA, Exhibit M, p. 2866). He also felt that if he removed her from the jury, he was

concerned about other people that were further down the line. (AA, Exhibit M, p. 2866). Bankowitz, who has tried many cases over the years, testified that he considers many things while selecting jurors, including body language and whether or not they were sleeping when he was talking to him. (AA, Exhibit M, p. 2866-67). Bankowitz felt that Juror Carll was sufficiently rehabilitated, and, in considering what was left, he had to keep her. (AA, Exhibit M, p. 2867). He did not move to strike her. (AA, Exhibit M, p. 2888).

Bankowitz testified that the jury was told that its decision as to death was a recommendation at the time of the trial. (AA, Exhibit M, p. 2889-90). Bankowitz could not testify as to what the jury believed. (AA, Exhibit M, p. 2889-90). It was his opinion that the jury's role was not minimized. (AA, Exhibit M, p. 2891). The jury's instruction indicated that the judge must place great weight on the jury's recommendation. (AA, Exhibit M, p. 2891).

When the prosecutor made a reference during the guilt phase closing argument about plea bargains with Quintin Allen, Bankowitz knew that this information had been brought out to the jury during the direct and cross-examination of Quintin. (AA, Exhibit M, p. 2873-74). The jury also knew that Quintin had originally been indicted by the grand jury. (AA, Exhibit M, p. 2873).

Bankowitz testified that during closing arguments of the guilt phase, he could have been consulting with Allen at that moment when the State referenced Dr.

Whitmore's report during closing argument. (AA, Exhibit M, p. 2876). Bankowitz also noted that if he referenced Dr. Whitmore's report during his closing, he would not have objected to the State referencing it because he would have opened the door to it. (AA, Exhibit M, p. 2877). Bankowitz also testified that he did not object to the State reading Dr. Whitmore's report in closing arguments because it reinforced what he had already done in closing. (AA, Exhibit M, p. 2810).

Dr. William Russell was called as a witness by the defense. He is a psychologist licensed in Pennsylvania. (AA, Exhibit M, p. 2909, 2911). He has testified only for the defense in other States regarding mitigation in death penalty cases, but never in Florida. (AA, Exhibit M, p. 2911-12, 2924). In regard to the death penalty, Dr. Russell testified that he believes that the research or literature supports that it is not effective in deterring crime. (AA, Exhibit M, p. 2925, 2996).

Dr. Russell reviewed records from Allen's hospitalizations, schools, and the jail. He also spoke to relatives and wrote a report based on his observations of her. (AA, Exhibit M, p. 2927-28). Dr. Russell testified that the traumatic stresses that he found in the Defendant's life were physical and sexual abuse and witnessing violence as a child. (AA, Exhibit M, p. 2947-48). In his opinion, Allen suffered from Complex Post Traumatic Stress Disorder due to her exposure to multiple stressors over a period of time, including physical violence, developmental problems, a violent neighborhood, and alcohol abuse. (AA, Exhibit M, p. 2966).

Using the DSM-IV guide, he found symptoms of PTSD, including Allen's excessive sleeping, anger outbursts, memory lapses, and difficulty concentrating. (AA, Exhibit M, p. 2976-79).

Dr. Russell administered the Stanford-Binet IQ test to Allen and in his opinion, Allen was "slightly delayed." (AA, Exhibit M, p. 2960-61, 2964). Dr. Russell opined that the Defendant was suffering from a state of extreme emotional disturbance at the time of the homicide. (AA, Exhibit M, p. 2968-69).

Russell reviewed testimony from Dr. Michael Gebel and Dr. Wu. (AA, Exhibit M, p. 2972). Dr. Russell was aware that the jury heard testimony about Allen's background, poverty, and the neighborhood. (AA, Exhibit M, p. 2997-99). Dr. Russell was also aware that Dr. Gebel testified at trial that he had reviewed Allen's records from schools, hospitals, DOC's medical records and correctional facility records. (AA, Exhibit M, p. 3000). Russell knew Dr. Gebel also told the jury that he was aware of Allen's history of suffering head injuries throughout the years which came from Allen's self-report and hospital records. (AA, Exhibit M, p. 3000). Dr. Russell recalled Dr. Gebel telling the jury about Allen's emergency room visits for facial and head trauma and possibly a sexual assault from 1996 as well as a 1989 admission for a drug overdose and a psychological evaluation. (AA, Exhibit M, p. 3001).

Dr. Russell affirmed that Dr. Gebel indicated that Allen was hesitant to completely cooperate with his mental status test. (AA, Exhibit M, p. 3001). Dr. Russell confirmed that it was Dr. Gebel's opinion that within a reasonable degree of medical certainty, Allen fit a patient who has brain damage. (AA, Exhibit M, p. 3002-03). Dr. Russell said Dr. Gebel described to the judge and jury what organic brain injury was by describing it as frontal and temporal lobe damage and that it affects impulse control, and the inability to think things through in a clear and concise pattern. (AA, Exhibit M, p. 3003). Dr. Russell acknowledged that it was Dr. Gebel's opinion that Allen had a lesser ability to appreciate the criminality of her conduct. (AA, Exhibit M, p. 3003). Further, it was Dr. Gebel's opinion that Allen would have difficulty conforming her conduct to the requirements of law. (AA, Exhibit M, p. 3004-05). Dr. Russell affirmed that Dr. Gebel testified that because of her disability, Allen would have an inability to control her mood and an inability to understand that when someone loses control of their mood there may be certain consequences. (AA, Exhibit M, p. 3004). Dr. Russell was also asked about the testimony of Dr. Wu, a medical doctor who specializes in brain imaging. (AA, Exhibit M, p. 3005). Dr. Russell confirmed that during the trial, Dr. Wu reviewed a PET scan administered to Allen, explained what a PET scan was, and testified that the Allen's medical records indicated at least ten cases of traumatic head injury. (AA, Exhibit M, p. 3005). It was Dr. Wu's opinion that Allen had frontal lobe

damage as a result of a head injury. (AA, Exhibit M, p. 3006). Dr. Russell recalled Dr. Wu explained that damage to the frontal lobe, which controls impulse, could cause a person to react disproportionally and sometimes catastrophically to what was perceived as a wrong or insult. (AA, Exhibit M, p. 3006). Dr. Wu attributed frontal lobe injury and all of the things that go with it to Allen. (AA, Exhibit M, p. 3006).

Dr. Russell also recalled Myrtle Hudson testifying during the penalty phase that Allen had violent, abusive relationships, was beaten into unconsciousness and physically unrecognizable as a result of the injuries, and that she grew up around drugs, thugs, and violence. (AA, Exhibit M, p. 3007).

Dr. Russell testified that the jury heard all of the things that he testified about at the evidentiary hearing. (AA, Exhibit M, p. 3009). He also testified that the DOC records that he reviewed were not created until after the trial. (AA, Exhibit M, p. 3009-10). He testified that he deviated from the Stanford-Binet test and attempted to validate its results with the Validity Indicator Profile but could not because Allen could not complete the test. (AA, Exhibit M, p. 3364, 3367). There is no test that indicates whether or not Allen was malingering on the Stanford-Binet test. (AA, Exhibit M, p. 3059).

The mental health records from prison included several reports of having mental health evaluations completed on Allen and multiple instances of her refusal to participate. (AA, Exhibit M, p. 3079). Dr. Russell was shown several records from

prison in which the Defendant was found to have no signs of significant mental or emotional impairment, or she refused the assessment. (AA, Exhibit M, p. 3079-81). Dr. Russell stated that when he went to a home to talk to the Defendant's relatives, he did not feel the need to talk to every single person who was present at the house. (AA, Exhibit M, p. 3010-11).

Dr. Russell explained that having a diagnosis of Post-Traumatic Stress Disorder does not always affect a person's mood in everything that they do. (AA, Exhibit M, p. 3019). Although Dr. Russell testified that Allen isolates herself from others, he also stated that she was not isolated when she was out selling drugs at night. (AA, Exhibit M, p. 3021-22). Allen also had two other people – Quintin Allen and James Martin – at her house before the murder took place. Dr. Russell opined that PTSD was "building" but "she was able to act." (AA, Exhibit M, p. 3023). Dr. Russell acknowledged that the murder did not happen in seconds but that the victim suffered an escalating pattern of physical abuse over a lengthy period of time. (AA, Exhibit M, p. 3024-25). Dr. Russell testified that Allen acknowledged being upset and looking for her money but denied committing the homicide or holding the victim against her will. (AA, Exhibit M, p. 3026-27).

The State called Dr. Sajid Qaiser, the chief medical examiner for Brevard County. (AA, Exhibit M, p. 3097, 3109-10).[5] He recalled testifying at trial that there was evidence indicating ligature strangulation on the victim. (AA, Exhibit M, p. 3098). A photograph depicting the left side of Wenda Wright's neck and ear indicated "a patchy distribution of the contusion." A photograph of the right side of her neck showed "the same thing … it is a complete belt … the clear sharp lines, the upper line and the lower line." (AA, Exhibit M, p. 3104, 3106, 3108, State Exhibit 2, AA, Exhibit M, p. 1553-54). Another photograph (AA, Exhibit A-9, p. 1338-39) indicated that, Wright's strap muscles below the hyoid bone depicted patchy hemorrhages in those areas, which in Dr. Qaiser's opinion, was evidence of the "forced application" of a ligature. (AA, Exhibit M, p. 3104-05). In Dr. Qaiser's opinion, the parallel, sharp lines were not a natural fold of skin as "the fold of the skin will not be going that way parallel to each other and in a straight line. They will be in a different distribution." (AA, Exhibit M, p. 3106).

[5] The parties stipulated to Dr. Qaiser's qualifications and the lower court took judicial notice of same. (AA, Exhibit M, p. 3097-98). In addition, Qaiser said he was placed on administrative probation for the period of August 2016-2017, if the probation was not terminated before the end of that time period. (AA, Exhibit M, p. 3110). Qaiser disagreed with defense counsel's assertion that "probable cause" was found by the Medical Examiner's Commission of negligence on Qaiser's part in some cases which prompted the implementation of Qaiser's probationary period. (AA, Exhibit M, p. 3111-17).

Dr. Qaiser knew Dr. Whitmore's autopsy report did not make a finding as to ligature marks, but rather, findings of "contusions … on the right side and the left side of the neck." (AA, Exhibit M, p. 3119). Dr. Qaiser testified he was aware of the facts of the case. After reviewing the entire autopsy file, and taking Quentin Allen's statement into consideration, Dr. Qaiser determined the manner of death was homicide. (AA, Exhibit M, p. 3106, 3120, 3121). Dr. Qaiser's findings were consistent with Quentin Allen's testimony at trial. (AA, Exhibit M, p. 3107, 3108). He stated that a photograph taken during the autopsy (AA, Exhibit A-9, p. 1316-17) showed the victim's tongue protruding which is common whenever pressure is applied to the neck in a case of strangulation, either hanging or by ligature strangulation. (AA, Exhibit M, p. 3107-08). Dr. Qaiser reviewed defense expert Dr. Spitz's deposition and his report and disagreed with Spitz's conclusion. (AA, Exhibit M, p. 3107, 3108, 3122).

The State also called Dr. Michael Gamache. Forensic psychologist Dr. Michael Gamache has been in practice for thirty years. His work is divided between court appointments, and retention by the State and the defense. (AA, Exhibit M, p. 3152-54). His work is equally divided between court appoints, retention by the State, and the same for defense work. (AA, Exhibit M, p. 3154). He testifies as an expert between 100-150 times a year. (AA, Exhibit M, p. 3155). Dr. Gamache reviewed documents including discovery from the investigation and trial, prison records,

medical records, school records, Stanford-Binet test results, the notes of a psychologist involved in the early part of Allen's case, Dr. Greenblum's notes, the trial testimony of Drs. Wu and Gebel, the sentencing order, and Dr. Russell's deposition and report. (AA, Exhibit M, p. 3160-62, 3209-10, 3213-16). He did not conduct any interviews or consultations with witnesses. (AA, Exhibit M, p. 3211). In Dr. Gamache's opinion, however, there was not anything significant that trial defense counsel or trial defense experts missed in presenting additional mitigation at trial. (AA, Exhibit M, p. 3163). There were no "glaring oversights or omissions." (AA, Exhibit M, p. 3163). Dr. Gamache was aware the defense presented evidence to the jury of Allen's alleged episodes of physical, sexual, and domestic abuse, as well as her childhood situation. (AA, Exhibit M, p. 3164-66). The jury heard experts testify that Allen suffered from organic brain damage. (AA, Exhibit M, p. 3165). Dr. Wu presented images from a PET scan indicating asymmetry in Allen's brain and that Wu concluded Allen suffered from impulse control problems. (AA, Exhibit M, p. 3165-66).

Dr. Gamache reviewed Dr. Russell's report which, in Russell's opinion, stated Allen suffered from "post-traumatic stress disorder (PTSD)". (AA, Exhibit M, p. 3166). However, Dr. Gamache testified that merely being exposed to a traumatic stressor is not sufficient to diagnose a person with that condition. (AA, Exhibit M, p. 3167). Dr. Gamache explained that PTSD is commonly diagnosed in military

veterans, and yet, the majority of veterans who experience traumatic events do not develop PTSD. (AA, Exhibit M, p. 3171). In addition, PTSD typically develops fairly quickly after exposure to a traumatic stressor. (AA, Exhibit M, p. 3185). In Allen's case, if Allen had PTSD, she would have developed signs and symptoms shortly after she experienced her childhood traumas. (AA, Exhibit M, p. 3185). Signs and symptoms can last several months, can resolve on their own, or resolve with treatment. (AA, Exhibit M, p. 3186-87). Dr. Gamache's approach is to obtain a self-report from the person and look for any evidence of corroboration. (AA, Exhibit M, p. 3235).

The information Gamache reviewed did not indicate Allen had intrusive dreams or flashbacks of abuse suffered during her childhood. (AA, Exhibit M, p. 3173). In addition, if PTSD is going to be argued as a mitigator, Allen would need to present some evidence that she was having intrusive dreams at the time of the crime and that it "had some nexus, some relationship, to the criminal behavior." (AA, Exhibit M, p. 3173-74). Although testimony was presented at trial that Allen had been exposed to traumatic stressors, "there was no psychometric evidence and no clinical evidence that she met the diagnostic criteria for PTSD." (AA, Exhibit M, p. 3175). Allen was never diagnosed with PTSD prior to the crime. In addition, her prison records subsequent to the murder did not indicate mental health professionals found she suffered from PTSD, either. (AA, Exhibit M, p. 3177, 3178). Prison

records also indicated there were times Allen refused to participate in mental health assessments. (AA, Exhibit M, p. 3179). In Dr. Gamache's opinion, there is no historical evidence that Allen had the signs and symptoms at the time of the offense. (AA, Exhibit M, p. 3180). Further, in Dr. Gamache's opinion, there was logical connection between the events that occurred at the time of the crime with traumatic experiences that Allen suffered in her life. (AA, Exhibit M, p. 3182).

Dr. Gamache testified, there was no indication whatsoever that Allen in any way associated the victim or the victim's behavior with any of these historical events or traumatic stress that she has experienced. (AA, Exhibit M, p. 3194). Wenda Wright was not associated with any of the male partners who had abused Allen nor was Wright associated with any of the family members who had abused or sexually assaulted Allen. (AA, Exhibit M, p. 3184).

In Dr. Gamache's opinion, there were no marked alterations of arousal or reactivity associated with Allen's traumatic events. (AA, Exhibit M, p. 3194-95). Gamache "was not aware of anything specific to the crime events in this case that would have triggered this kind of reactivity on Allen's part." (AA, Exhibit M, p. 3195). Gamache explained that anger in and of itself in not definitive as a PTSD. "People can get aroused and angry but they don't have post-traumatic stress disorder (PTSD)." (AA, Exhibit M, p. 3196). There must be a nexus with the traumatic stressors that result in the angry reaction. (AA, Exhibit M, p. 3196). He also noted

that Allen did not exhibit signs of "depersonalization" at the time of the murder. (AA, Exhibit M, p. 3198). Neither Allen, nor others that observed her at the time of the offense described an extended period of time "like she is outside of her body; that she is in a dream that she is just observing this and not an actor in this." (AA, Exhibit M, p. 3198-99). Nor did Allen describe any type of account that "this whole thing was like a dream to me." None of that is documented in the records provided to Dr. Gamache. (AA, Exhibit M, p. 3199).

Dr. Gamache concluded that, in his opinion, Allen was not suffering from PTSD at the time of the crime. (AA, Exhibit M, p. 3188). He disagreed with defense trial experts Drs. Wu and Gebel. (AA, Exhibit M, p. 3227). There were no historical medical or psychological records that documented that Allen was ever diagnosed with PTSD. (AA, Exhibit M, p. 3200). While awaiting trial, Allen's county jail records indicated there were no mental health issues and there was no record of administering psychotropic medications. (AA, Exhibit M, p. 3204). There were no records of Allen being diagnosed as intellectually disabled. (AA, Exhibit M, p. 3205, 3228). Test scores did not indicate a diagnosis of PTSD. (AA, Exhibit M, p. 3205). Tests administered by defense expert Dr. Russell indicated errors in the administration scoring. (AA, Exhibit M, p. 3205). Allen, however, answered only some questions and refused to continue. As a result, Dr. Gamache said, "there is no basis to conclude that the scores Dr. Russell got were valid, because they are

inconsistent with historical scores and his testing was not valid." (AA, Exhibit M, p. 3206).

In Dr. Gamache's opinion, there was no support for the conclusion that at the time of the murder, Allen was suffering from extreme mental or emotional disturbance. This was based on trial testimony regarding possible neurological impairment, possible psychological impairment, or possible exposure to lifelong traumatic stressors. (AA, Exhibit M, p. 3207-08). In addition, in Dr. Gamache's opinion, there was no support for the conclusion that Allen was unable to conform her behavior to the requirements of the law at the time. (AA, Exhibit M, p. 3208).

Dr. Daniel Spitz was called as a witness by the defense. He is the Chief Medical Examiner for Macomb County, Michigan and St. Clair County, Michigan. (AA, Exhibit M, p. 3274). He testified that as a medical examiner he has trained law enforcement. (AA, Exhibit M, p. 3340). He reviewed a case for the Innocence Project. (AA, Exhibit M, p. 3339). The defense paid him a fee of $350 an hour. (AA, Exhibit M, p. 3337). On two occasions, Dr. Spitz has been found not to be credible in criminal postconviction proceedings. (AA, Exhibit M, p. 3278). He reviewed an autopsy report from Dr. Whitmore, autopsy and scene photographs, investigation reports, toxicology report, and testimony from Quintin Allen, Dr. Qaiser, and a deposition of Dr. Whitmore. (AA, Exhibit M, p. 3281-82). Dr. Spitz testified to reviewing about 50 photographs. (AA, Exhibit M, p. 3282). He testified that Dr.

Qaiser said that there were 50 or 60 contusions or maybe a hundred different contusions. (AA, Exhibit M, p. 3289).

Dr. Spitz testified that the victim's body did not show indicators or findings that would support a conclusion of ligature strangulation. (AA, Exhibit M, p. 3289). He testified that there were no ligature contusions or ligature marks and that was based upon what Dr. Whitmore described in his autopsy report as well as review of the photographs. (AA, Exhibit M, p. 3289-90). Dr. Spitz testified that the lines on the victim's neck are not parallel lines – that they are curved lines indicative of skin folds of the neck, especially in a large obese individual. (AA, Exhibit M, p. 3290). He testified that there were no other indicia of neck compressions, such as petechial hemorrhages. (AA, Exhibit M, p. 3290).

Dr. Spitz testified that Dr. Whitmore's report described 15 areas of bruising. (AA, Exhibit M, p. 3304). He agreed with Dr. Whitmore's assessment, which does not describe any ligatures marks. (AA, Exhibit M, p. 3305). He explained that the victim's tongue was protruding because of decomposition. (AA, Exhibit M, p. 3306). Dr. Spitz opined that with a horizontal ligature, there is no force or pressure pushing the tongue up and out. (AA, Exhibit M, p. 3309). He testified that he could not exclude ligature – that it was within the range of possibility. (AA, Exhibit M, p. 3323). He agreed that a medical examiner can miss something that is obvious, especially in a decomposed body. (AA, Exhibit M, p. 3324). Dr. Spitz testified that

if Dr. Whitmore had found petechiae, it would have been one more feature that the neck was compressed. (AA, Exhibit M, p. 3326). After being shown a photograph of the victim's left eye, (AA, Exhibit M p. 1555-56), Dr. Spitz said it was a small hemorrhage and could be petechial hemorrhage. (AA, Exhibit M, p. 3326-27). Dr. Spitz testified that the victim died because of homicidal violence that cannot be specifically characterized. (AA, Exhibit M, p. 3315). He testified that it is unknown what caused the death, but asphyxia is a possible cause. (AA, Exhibit M, p. 3316, 3346).

Dr. Spitz also testified that once a person is unconscious, they do not experience any more pain. (AA, Exhibit M, p. 3311). He testified that a person having a belt pulled around their neck would experience anxiety. (AA, Exhibit M, p. 3329). Dr. Spitz referred to the case as being an altercation between two people, saying the injuries did not indicate that the victim was beaten. (AA, Exhibit M, p. 3330). Dr. Spitz testified that he did not know what the jury heard. (AA, Exhibit M, p. 3332).

On August 2, 2017, the circuit court issued its Order Denying Defendant's Motion to Vacate Judgments and Sentences, Amendment to Motion to Vacate, and Second Amendment to Motion to Vacate. (AA, Exhibit M, p. 1939-2299). Petitioner appealed the denial of postconviction relief to the Florida Supreme Court on August

29, 2017. (AA, Exhibit M, p. 2300-2302). Her Initial Brief was filed on January 26, 2018 (AA, Exhibit N, p. 1-103) and she raised the following claims:

> Argument I: The lower court erred in denying Allen's claim that her death sentence is unconstitutional under the Sixth Amendment, Eighth Amendment, and *Hurst.*
>
> Argument II: The lower court erred in denying Claim Thirteen of Allen's Motion and finding that counsel was not prejudicially ineffective in violation of *Strickland* by failing to adequately investigate, prepare, and present Allen's available mitigation.
>
> Argument III: The lower court erred in denying Claims Five and Six of Allen's Motion, which argued that counsel provided prejudicial ineffective assistance in violation of *Strickland* when he failed to object to multiple improper comments and misrepresentations made by the prosecutor in the guilt phase closing argument.
>
> Argument IV: The lower court erred in denying Claim Eight of Allen's Motion, which argued that counsel provided prejudicial ineffective assistance in violation of *Strickland* by failing to object and move for a mistrial based on multiple instances of prosecutorial misconduct in the penalty phase.
>
> Argument V: The lower court erred in denying Claim Eleven of Allen's Motion, which argued that counsel violated *Strickland* and provided prejudicial ineffective assistance by failing to present available expert testimony that corroborated the original medical examiner's findings and refuted Dr. Qaiser's testimony.
>
> Argument VI: The lower court erred in denying Claim Three of Allen's Motion, which argued that counsel was prejudicially deficient in violation of *Strickland* when he elicited testimony from Quintin that Allen poured chemicals in Wright's eyes and mouth. Counsel was also prejudicially ineffective by soliciting testimony that multiple chemicals were poured on Wright when Quintin had already conceded on redirect-examination that he could only identify rubbing alcohol.

Argument VII: The lower court erred in denying Claim Two of Allen's Motion, which argued that, in violation of *Strickland*, counsel was prejudicially ineffective when he failed to impeach Quintin with his statements to Detective Gary Boyer ("Detective Boyer") indicating that Allen did not pour bleach on Wright.

Argument VIII: The lower court erred in denying Claim Seven of Allen's Motion, which argued that counsel violated *Strickland* by providing prejudicial ineffective assistance when he failed to object to Dr. Qaiser's testimony that unconscious people can feel pain.

Argument IX: The lower court erred in denying Claim Ten of Allen's Motion by finding the State did not violate *Giglio v. United States*, 405 U.S. 150 (1972) when it elicited and failed to correct false testimony that Allen was convicted several times for selling drugs.

Argument X: The lower court erred in denying Claim Nine of Allen's Motion, which argued that counsel provided prejudicial ineffective assistance in violation of *Strickland* when he elicited testimony from Hudson about Allen's culture of "drugs, thugs, and violence".

Argument XI: The lower court erred in denying Claim One of Allen's Motion, which argued that counsel provided prejudicial ineffective assistance by failing to challenge biased Juror Carll ("Carll") for cause or strike her peremptorily.

The Answer brief of Appellee was filed on April 5, 2018. (AA, Exhibit O, p. 1-101). Allen's Reply brief was filed on May 14, 2018. (AA, Exhibit P, p. 1-38). Petitioner did not file a petition for writ of habeas corpus in state court.

The Florida Supreme Court entered its opinion affirming the denial of postconviction relief on December 20, 2018. (AA, Exhibit Q) (revised opinion January 7, 2019). *Allen v. State*, 261 So.3d 1255 (Fla. 2019). (AA, Exhibit T, p. 1255-92). Their order will be quoted below when relevant to address Petitioner's

arguments. The mandate issued January 23, 2019. (AA, Exhibit U). Petitioner did not file a petition for writ of certiorari in the United States Supreme Court.

On February 14, 2019, Petitioner filed the instant Petition for Writ of Habeas Corpus in the United States District Court, Middle District of Florida. This response is offered pursuant to this Court's Order of February 12, 2020. (Doc. 14).

TIMELINESS OF FEDERAL HABEAS PETITION

The instant petition for writ of habeas corpus was filed on February 14, 2019 (Doc. 1) and is subject to the limitations provided by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). *Woodford v. Garceau*, 538 U.S. 202, 210 (2003). Pursuant to the AEDPA, such petitions must be filed within one year of the time the state court conviction became final. See 28 U.S.C. § 2254(d). However, the proper filing of a petition for state collateral relief tolls the running of the statute of limitations and the time during which such a petition is pending shall not be counted. 28 U.S.C. § 2244(d)(2).

In the instant case, Petitioner's conviction became final on October 14, 2014, when the United States Supreme Court denied certiorari review of the Florida Supreme Court's opinion affirming her death sentence. *Allen v. State*, 137 So.3d 946 (Fla. 2013), *cert. denied*, *Allen v. Florida*, 135 S. Ct. 362 (2014). On September 21, 2015, Petitioner filed her state court postconviction motion, with twenty-three days remaining to file her habeas petition. The statute of limitations was tolled during the

pendency of her state court postconviction proceedings which concluded on January 23, 2019, when the Florida Supreme Court issued its mandate following its opinion affirming the denial of postconviction relief. *See Nyland v. Moore*, 216 F.3d 1264, 1267 (11th Cir. 2000) (under Florida law, appellate order is pending until mandate issues). As Petitioner filed the instant petition twenty-two days after the mandate issued, her petition appears timely under the one-year statute of limitations.[6]

STANDARD OF REVIEW

As noted, this petition is governed by the provisions of section 2254 of the United States Code, as amended by the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA). *Penry v. Johnson*, 532 U.S. 782 (2001); *Putman v. Head*, 268 F.3d 1223 (11th Cir. 2001); *Bottoson v. Moore*, 234 F.3d 526, 530 (11th Cir. 2000). AEDPA affects this Court's review of both factual findings and legal rulings entered by the state courts in the rejection of Petitioner's claims. Pursuant to 28 U.S.C. §2254(e)(1), this Court's review of the state courts' factual findings must be highly deferential; such findings are presumed correct, unless rebutted by Petitioner with clear and convincing evidence. *Fugate v. Head*, 261 F.3d 1206, 1215 (11th Cir. 2001); *Bottoson*, 234 F.3d at 531.

[6] If Respondents' calculations are incorrect, this Court may still dismiss a petition as untimely under AEDPA. *See Day v. Crosby*, 391 F.3d 1192 (11th Cir. 2004), *aff'd*, *Day v. McDonough*, 547 U.S. 198 (2006).

Similarly, the legal rulings of claims adjudicated in state courts only provide a basis for federal relief where the state court adjudication was either "contrary to, or involved an unreasonable application of" clearly established federal law as determined by the United States Supreme Court, or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings." See, 28 U.S.C. § 2254(d)(1); *Harrington v. Richter*, 562 U.S. 86 (2011); *Rutherford v. Crosby*, 385 F.3d 1300 (11th Cir. 2004). In *Williams v. Taylor*, 529 U.S. 362 (2000), the United States Supreme Court discussed these standards at length. The Court explained that a state court decision is "contrary to" clearly established federal law if either (1) the state court applied a rule that contradicts the governing law set forth by Supreme Court case law, or (2) when faced with materially indistinguishable facts, the state court arrived at a result different from that reached in a Supreme Court case. The question is whether the state court correctly identified the proper rule of law to be applied. *Putman*, 268 F.3d at 1241; *Bottoson*, 234 F.3d at 531. A state court decision is not "contrary to" established federal law even if a federal court might have reached a different result relying on the same law. *Williams*, 529 U.S. at 406.

A state court conducts an "unreasonable application" of clearly established federal law if it identifies the correct legal rule from Supreme Court case law, but unreasonably applies that rule to the facts of the petitioner's case. *Putman*, 268 F.3d

at 1241. An unreasonable application may also occur if a state court unreasonably extends, or unreasonably declines to extend, a legal principle from Supreme Court case law to a new context. *Id.* It should be noted that an "unreasonable application" does not mean that the federal law was incorrectly or erroneously applied; the application must be "objectively" unreasonable. *Williams*, 529 U.S. at 412; *Breedlove v. Moore*, 279 F.3d 952 (11th Cir. 2002). It is also important to recognize that "clearly established federal law" refers only to the holdings of the United States Supreme Court, as opposed to dicta, at the time of the relevant state law decisions. *Putman*, 268 F.3d at 1241.

In *Brecht v. Abrahamson*, 507 U.S. 619 (1993), the Supreme Court set forth the standard for relief where error is determined, on habeas review, to exist. "The test is whether the error 'had substantial and injurious effect or influence in determining the jury's verdict.' Under this standard, habeas petitioners may obtain plenary review of their constitutional claims, but they are not entitled to habeas relief based on trial error unless they can establish that it resulted in 'actual prejudice.'" *Brecht*, 507 U.S. at 637. Although no constitutional error has occurred in this case, any possible error would clearly be harmless beyond any reasonable doubt based on the facts and the record herein.

THE AEDPA STANDARD FOR FEDERAL EVIDENTIARY HEARINGS

No evidentiary hearing is warranted in this case on any of Petitioner's claims. The Eleventh Circuit Court of Appeals has acknowledged that the AEDPA brought a significant change to the standards governing the granting of evidentiary hearings in federal habeas cases. In *Breedlove v. Moore*, 279 F.3d 952, 959 (11th Cir. 2002), the court stated:

> One purpose of the AEDPA has been to simplify and speed the federal habeas process; consistent with this goal, the AEDPA added the following provision to § 2254:
>
> > If the applicant has failed to develop the factual basis of a claim in state court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that-
> >
> > (A) the claim relies on
> >
> > > (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
> > >
> > > (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
> >
> > (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(e)(2).

This provision places a fairly stringent limitation on the power of the federal courts to order evidentiary hearings in habeas cases. Indeed, if a petitioner fails to develop an adequate factual record in the state courts, an evidentiary hearing could only be ordered if one of the two narrow exceptions to the general rule prohibiting such hearings applied.

The burden is on the petitioner in a federal habeas corpus proceeding to show the necessity for an evidentiary hearing. *See, e.g. Williams v. Griswald*, 743 F.2d 1533 (11th Cir. 1984); *Birt v. Montgomery*, 725 F.2d 587 (11th Cir. 1984). No evidentiary hearing is required by a district court if a state court has made findings of fact, as the federal courts must presume those facts to be correct. *Townsend v. Sain*, 372 U.S. 293 (1963); 28 U.S.C. § 2254(d). In this case, none of Petitioner's grounds rely on "a new rule of constitutional law made retroactive to cases on collateral review by the Supreme Court that was previously unavailable." § 2254(e)(2)(A)(i). Nor does he rely on "a factual predicate that could not have been previously discovered through the exercise of due diligence." *Id*. § 2254(e)(2)(A)(ii).

INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS

In *Strickland v. Washington*, 466 U.S. 668 (1984), the United States Supreme Court established a two-part test for reviewing claims of ineffective assistance of counsel, which requires a defendant to show that (1) counsel's performance was deficient and fell below the standard for reasonably competent counsel, and (2) the

deficiency affected the outcome of the proceedings. The first prong of this test requires a defendant to establish that counsel's acts or omissions fell outside the wide range of professionally competent assistance and that counsel's errors were "so serious that the defendant was deprived of counsel as guaranteed by the Sixth Amendment." *Strickland*, 466 U.S. at 687, 690. The second prong requires the defendant to show that counsel's "errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable," and that there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. *Id*. at 687, 695. The Supreme Court has noted that "[s]urmounting *Strickland*'s high bar is never an easy task." *Harrington v. Richter*, 562 U.S. 86, 105 (2011) (quoting *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010)).

A proper *Strickland* analysis requires a court to eliminate the distorting effects of hindsight and evaluate counsel's performance from counsel's perspective at the time, and to indulge a strong presumption that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Strickland*, 466 U.S. at 689. Judicial scrutiny of attorney performance must be highly deferential. "It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Id*. at 689. A defendant

bears the heavy burden of proving that counsel's representation was unreasonable under prevailing professional standards and was not a matter of sound trial strategy, and that prejudice resulted. *Id*.

In order to overcome *Strickland's* presumption of reasonableness, Petitioner must show that "no competent counsel would have taken the action that his counsel did take." *Chandler v. United States*, 218 F.3d 1305, 1315 (11th Cir. 2000). In *Chandler v. United States*, 218 F.3d 1305, 1315 (11th Cir. 2000), the Eleventh Circuit Court of Appeals noted that given the applicable principles and presumptions, "the cases in which habeas petitioners can properly prevail . . . are few and far between." *Id*. at 1313. As recognized in *Hammond v. Hall*, 586 F.3d 1289, 1324-25 (11th Cir. 2009):

> Under AEDPA, however, [a Petitioner] must do more than satisfy the *Strickland* standard. *See* 28 U.S.C. § 2254(d). Because the [Florida] courts have already rejected these ineffective assistance claims, [a Petitioner] must show that their decision to deny relief on these claims was an objectively unreasonable application of the *Strickland* standard. *See Schriro v. Landrigan*, 550 U.S. 465, 473, 127 S. Ct. 1933, 1939, 167 L.Ed.2d 836 (2007) ("The question under AEDPA is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable-a substantially higher threshold."); *Bell v. Cone*, 535 U.S. 685, 699, 122 S. Ct. 1843, 1852, 152 L. Ed. 2d 914 (2002); *Rutherford v. Crosby*, 385 F.3d 1300, 1309 (11th Cir. 2004) ("[T]he AEDPA adds another layer of deference.... [The petitioner] must also show that in rejecting his ineffective assistance of counsel claim the state court applied *Strickland* to the facts of his case in an objectively unreasonable manner.") (internal quotation marks and citation omitted).

Cf. Knowles v. Mirzayance, 556 U.S. 111 (2009) (noting *Strickland* standard of review is doubly deferential under 28 U.S.C. § 2254(d)(1)).

Federal habeas courts assessing claims of ineffective assistance previously adjudicated in state court "must guard against the danger of equating unreasonableness under *Strickland* with unreasonableness under § 2254(d)." *Id.* In reviewing *Strickland* claims under the AEDPA, the pivotal question is whether the state court's application of the *Strickland* standard was unreasonable. This inquiry is different from asking whether defense counsel's performance fell below *Strickland*'s standard. *Id.* Because "[t]he standards created by *Strickland* and § 2254(d) are both highly deferential," it follows that "when the two apply in tandem, review is doubly so." *Morton v. Sec'y, Fla. Dept. of Corr.*, 684 F.3d 1157, 1167 (11th Cir. 2012) *citing Harrington v. Richter*, 526 U.S. 86, 99 (2011) (internal quotation marks and citations omitted).

GROUND ONE

Exhaustion: Allen's raised this as a *Hurst* claim in her amendment to her motion for post-conviction relief. The lower court summarily denied this claim and the Florida Supreme Court affirmed. *Allen v. State*, 261 So.3d 1255 (Fla. 2019). Accordingly, the claim raised here has been exhausted.

Merits: Allen argues that she is entitled to relief from her death sentence following the rulings in *Hurst v. Florida*, 136 S. Ct. 616 (2016) and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016).

In *Hurst v. State,*[7] the Florida Supreme Court expanded the scope of the United States Supreme Court's decision in *Hurst* by instituting requirements for additional jury findings regarding sufficiency and weighing and added a unanimity requirement. *Hurst,* 202 So.3d at 63 (stating "the United States and Florida Constitutions, as well as the administration of justice, are implemented by requiring unanimity in jury verdicts recommending death as a penalty before such a penalty may be imposed"). Because the expansion of *Hurst* in *Hurst v. State* is based on Florida law, this claim is futile, as this Court does not re-examine state court decisions based on state law. Furthermore, in denying Allen's claim in state court, the Florida Supreme Court's decision was neither "contrary to, or involved an unreasonable application of, clearly established Federal law" or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented" in state court proceedings. 28 U.S.C. § 2254(d)(1),(2).

[7] The Florida Supreme Court, after re-analyzing *Hurst* and other precedent, receded from their Hurst decision stating "we recede from *Hurst v. State* except to the extent it requires a jury unanimously to find the existence of a statutory aggravating circumstance beyond a reasonable doubt." *State v. Poole*, No. 292 So.3d 694, at 13 (Fla. 2020).

In *Davis v. State*, 207 So.3d 142, 174 (Fla. 2016), the Florida Supreme Court found that when the jury unanimously recommends a death sentence, their unanimous recommendation "allow[s] us to conclude beyond a reasonable doubt that a rational jury would have unanimously found that there were sufficient aggravators to outweigh the mitigating factors." (emphasis added). In instant case, the jury unanimously recommended that death was the appropriate sentence.

In addition, there was no underlying constitutional violation in this case. Allen became eligible for a death sentence given her guilt phase conviction for the contemporaneous violent felony of kidnapping. The unanimous verdict by Allen's jury establishing her guilt of this contemporaneous felony was clearly sufficient to meet the Sixth Amendment's factfinding requirement, and she was properly rendered eligible for a death sentence at that point. As the United States Supreme Court has unequivocally held, "a defendant convicted of murder is eligible for a death sentence if at least one aggravating circumstance is found." *McKinney v. Arizona*, 140 S. Ct. 702, 705 (2020)[8]; *Alleyne v. United States*, 570 U.S. 99, 115-16 (2013) (the Court explained that "[t]he essential point is that the aggravating fact produced a higher range, which, in turn, conclusively indicates that the fact is an

[8] Notably, the Court also held that *Hurst v. Florida*, like *Ring* before it, is not retroactive. *McKinney*, 140 S. Ct. at 708 ("*Ring* and *Hurst* do not apply retroactively on collateral review").

element of a distinct and aggravated crime."); *Jenkins v. Hutton*, 582 U.S. ___, 137 S. Ct. 1769 (2017) (confirming the constitutionality of an Ohio death sentence based on a jury's guilt-phase determination of facts); *Waldrop v. Comm'r, Alabama Dep't of Corr*., 15-10881, 2017 WL 4271115, at *20 (11th Cir. Sept. 26, 2017) (unpublished) (In rejecting a *Hurst* claim the Court explained: "Alabama requires the existence of only one aggravating circumstance in order for a defendant to be death-eligible, and in Mr. Waldrop's case the jury found the existence of a qualifying aggravator beyond a reasonable doubt when it returned its sentence, and such a recommendation is "precisely what [this Court] determined in *Hurst v. Florida* to be constitutionally necessary to impose a sentence of death." *Id*. at 175.

Furthermore, the Florida Supreme Court has unequivocally held that an aggravating circumstance can include a contemporaneous violent felony conviction or a prior violent felony conviction. *See State v. Poole*, No. 292 So.3d 694, at *13 (Fla. 2020), *reh'g denied*, clarification granted, 292 So.3d 659 (Fla. 2020) (holding that contemporaneous violent felony convictions "satisfied the requirement that a jury unanimously find a statutory aggravating circumstance beyond a reasonable doubt."); *see also Smith v. State*, --- So.3d ---, 2020 WL 1057243, at *6 (Fla. Mar. 5, 2020) ("The existence of previous violent felonies was an aggravating circumstance that rendered *Smith* eligible for the death penalty and satisfied the mandates of the United States and Florida Constitutions.").

Allen also argues that since the jury only recommended imposition of the death penalty, there is a "Caldwell issue." *See Caldwell v. Mississippi*, 472 U.S. 320 (1985). The Florida Supreme Court has repeatedly rejected challenges to the standard jury instructions in death penalty cases pursuant to *Caldwell*. *Hall v. State*, 212 So. 3d 1001, 1032-33 (Fla. 2017). "To establish a *Caldwell* violation, a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law." *Dugger v. Adams*, 489 U.S. 401, 407 (1989); *see also Romano v. Oklahoma*, 512 U.S. 1, 9 (1994). Thus, references and descriptions that accurately characterize the jury's and judge's sentencing roles under Florida law do not violate *Caldwell*.

Even under the current death penalty statute, the jury's final unanimous recommendation of death is still an "advisory" verdict as the judge is free to disagree with the jury's recommendation of death and sentence a defendant to a life sentence. After such a decision is made, under double jeopardy principles a defendant "can no longer be put in jeopardy of receiving the death penalty." *Williams v. State*, 595 So. 2d 936, 938 (Fla. 1992). The judge remains the final sentencing authority in guilty verdict. *See* § 13A-5-45(e)."). The jury is told their recommendation is given "great weight" and if given, only rarely would a trial judge impose a sentence not recommended by the jury. Thus, characterizing the jury as "advisory" is an accurate

description of the role assigned to the jury by Florida law and there is no *Caldwell* violation.

Allen has not demonstrated that the state court ruling was either contrary to, or an unreasonable application of clearly established Supreme Court precedent. As this issue was decided on completely independent state grounds, Allen cannot seek relief through an improper successive federal habeas petition. The federal habeas statute is limited to claims based on the federal constitution. 28 U.S.C. § 2254(a); *Swarthout v. Cooke,* 562 U.S. 216,219 (2011) (observing that the "habeas statute 'unambiguously provides that a federal court may issue a writ of habeas corpus to a state prisoner "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States"'") (citation omitted). It is "'not the province of a federal habeas court to reexamine state court determinations on state-law questions.'" *Wilson v. Corcoran,* 562 U.S. 1, 5 (2010) (quoting Estelle v. McGuire, 502 U.S. 62, 67-68 (1991)).

Accordingly, this claim must be rejected under the AEDPA.

GROUND TWO

Exhaustion: Allen's ineffectiveness claims were raised in state court, which denied them, and affirmed on appeal by Florida's high court. *Allen v. State*, 261 So.3d 1255 (Fla. 2019). Accordingly, the claims raised here have been exhausted.

Merits: Under AEDPA, this Court's review of a state ruling on the merits of a federal constitutional claim is highly restricted; Allen must show that the state court decision is either "contrary to" or an "unreasonable application" of established federal law. 28 U.S.C. § 2254(d)(1); *Williams v. Taylor*, 529 U.S. 362, 405-410 (2000). The established federal law on a claim of ineffective assistance of counsel is *Strickland v. Washington*, 466 U.S. 668 (1984). *Williams*, 529 U.S. at 416; *Putman*, 268 F.3d at 1241. Under *Strickland*, a defendant must show that his lawyer's performance fell below an objective standard of reasonableness, and that the deficient performance prejudiced the defendant; that is, that there is a reasonable probability that the outcome of the case would have been different if the lawyer had provided adequate assistance. *Van Poyck v. Florida Dept. of Corrections*, 290 F.3d 1318 (11th Cir. 2002); *Chandler v. United States*, 218 F.3d 1305, 1313-1315 (11th Cir. 2000) (en banc), *cert. denied*, 531 U.S. 1204 (2001). In the state court, proper analysis of this claim requires a court to eliminate the distorting effects of hindsight and evaluate the performance from counsel's perspective at the time, and to indulge a strong presumption that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment; the burden is on the defendant to show otherwise. *Strickland*, 466 U.S. at 689.

On habeas review, this Court is limited to examination of whether the state court's ruling was either contrary to or an unreasonable application of established

federal law, and whether the court's factual determinations are unreasonable. These considerations are necessarily different from what might be required under a direct application of *Strickland*; the state court's legal determinations must be objectively unreasonable to merit relief, and deference to the state court's factual determinations is required. Here, the record is clear that counsel's performance was reasonable. The state court was correct in denying Allen's motion for post-conviction relief alleging that trial counsel was ineffective for failing to adequately investigate, prepare, and present available mitigation because trial counsel mounted a reasonable investigation into Allen's background and medical history. Furthermore, there can be no prejudice because there is no reasonable probability that Allen would have received a life sentence in the penalty phase had any additional witnesses testified, as the information provided at the evidentiary hearing was cumulative.

The state court granted Allen an evidentiary hearing on her claim, and Allen presented testimony from a number of witnesses, including her trial attorney, Frank Bankowitz; various family members; and a mental health expert. In rebuttal, the State called their mental health expert. After hearing testimony, the state postconviction court issued a detailed order denying Allen's claim that her counsel was ineffective for failing to investigate and present mitigation evidence. The state court denied Allen's claim based on a finding that she failed to establish deficient

performance and prejudice as required by *Strickland v. Washington*, 466 U.S. 668 (1984). (AA, Exhibit M, p. 1939-2299).

Allen challenged this ruling on appeal, and the Florida Supreme Court, also applying the *Strickland* standard, affirmed the denial of relief:

> **Failure to properly investigate and present additional mitigation evidence**
>
> Allen argues that trial counsel was ineffective for failing to investigate and present certain mitigating evidence about Allen's traumatic background and mental health during the penalty phase. Specifically, she claims that additional mitigation evidence should have been uncovered and presented, including the existence of post-traumatic stress disorder (PTSD) and extensive sexual and physical abuse. We conclude that the absence of this mitigating evidence does not satisfy *Strickland*'s requirement of prejudice.
>
> At the evidentiary hearing, Allen presented the testimony of Allen's former boyfriend, who testified that he sold drugs with Allen and frequently physically abused her throughout the duration of their relationship. He recounted instances of extremely violent episodes, described Allen having frequent anxiety attacks, and stated that he could not say whether he would have testified at trial had he been asked. He further testified, inconsistently with his other statements, that he also believed that he either more than likely or would have spoken with the defense team had they approached him. He testified that at the time of Allen's trial in 2010, he was living in a federal halfway house after serving ten years in prison. In addition, another of Allen's aunts gave extensive and detailed testimony that Allen suffered physical and sexual abuse as a child at the hands of her mother, grandfather, and brother and that she experienced severe domestic violence as an adult. She stated that Allen suffered from intense anxiety and that she would have testified at trial had she been asked. Allen's daughter also stated that she would have testified at trial if she had been asked. She testified to seeing her mother being beaten up by multiple boyfriends and admitted that she had not been forthcoming in her deposition

immediately after the murder. Allen's son testified that he would have been available to testify at Allen's trial, if asked, and that he witnessed Allen's physical abuse and frequent mood swings when he was a child.

Dr. Russell testified at the evidentiary hearing for Allen. In preparation for his testimony, he met with Allen and several family members to discuss her childhood and behavioral problems. He testified of his theory that Allen's childhood traumas caused her to suffer from PTSD, which he said she experienced at the time of Wright's murder. He then testified that in light of Allen's history, records, discussions with her family, and observable emotional dysregulation, she could have been in a state of extreme emotional disturbance at the time of the homicide. He stated that persons who are unable to control their emotions would eventually lose their ability to think rationally if faced with the situation that Allen faced the day of the homicide. He testified that had he only reviewed the limited information given to Dr. Gebel at trial, he would not have been able to come to the PTSD diagnosis. He admitted on cross-examination that Allen did not tell him what she was thinking or feeling at the time of the homicide, and that Allen denied murdering Wright.

Dr. Gamache, the State's expert at the evidentiary hearing, testified that after reviewing numerous records, including the discovery related to the case and investigation and Allen's medical and psychological records, he did not believe that any significant mitigation evidence was left out of Allen's penalty phase. He testified that the jury was informed by Dr. Gebel and Dr. Wu in sufficient detail of Allen's childhood trauma, past sexual and physical abuse, and domestic violence. He also explained that Allen currently exhibited no PTSD symptoms and had never been diagnosed with the disorder, other than by Dr. Russell. He also stated that there was no evidence that Allen displayed PTSD symptoms at the time of the homicide.

Allen's trial counsel testified at the evidentiary hearing that he made several attempts to talk to Allen's family members and asked Allen's aunt, Myrtle Hudson, several times when he could speak with them. He testified that Allen did not want to discuss the case when he met with her and that she did not want her daughter involved in the case. He stated that he made no attempts to talk with Allen's daughter because he was told that she would be uncooperative and did not want

anything to do with Allen. He testified that he was hesitant to put her on the stand because she could be impeached. He further testified that he was never provided with any of the names of Allen's former boyfriends but that he asked Allen who they were.

Trial counsel also testified that he believed that psychologist Dr. Gebel and neuropsychiatrist Dr. Wu were sufficient to testify to Allen's mental health issues at the penalty phase. Dr. Gebel reviewed Allen's history and interviewed Allen once, telling the jury about the significant intracranial injuries she suffered, as well as her frontal lobe disorder, decreased cognitive ability, and impulse control issues that would prevent Allen from behaving normally and from understanding the consequences of her behavior. Dr. Wu explained to the jury that certain areas of Allen's brain did not function normally and that she suffered from lack of impulse control.

At trial, counsel presented the testimony of Dr. Wu, Dr. Gebel, and Allen's aunt Myrtle Hudson that outlined Allen's mental health issues and the physical and sexual abuse she suffered while growing up and as an adult. The jury heard of her issues with impulse control, her intracranial brain injuries, and the traumatic childhood and violent relationships she endured.

Upon review of the trial court's order and record, we conclude that defense counsel's mitigation investigation did not prejudice Allen. Had the additional mitigation evidence been introduced as Allen claims, there is no reasonable probability that the outcome would have been different. First, Allen overemphasizes the value of evidentiary hearing testimony presented by Allen's family members and Dr. Russell. The testimony presented regarding Allen's background was cumulative to the mitigation already presented at trial. This Court has "repeatedly held that counsel is not ineffective for failing to present cumulative evidence." *Jones v. State*, 998 So. 2d 573, 586 (Fla. 2008); *see also Rhodes v. State*, 986 So. 2d 501, 512-13 (Fla. 2008) ("Even if we were to find counsel's conduct deficient, [the defendant] cannot demonstrate prejudice. Any testimony the additional witnesses would have provided would have been cumulative to that provided by the witnesses at resentencing. . . . The additional testimony would only have added to the mitigation already found. Even if given more weight, the mitigation would not outweigh the . . . strong aggravators . . . .").

The absence of the more specific evidence regarding Allen's traumatic upbringing therefore does not render the penalty phase unreliable. Further, the jury's recommendation of death was unanimous, and the trial court found that the State established two significant aggravators: (1) committed while Allen was engaged in the commission of kidnapping; (2) especially heinous, atrocious, or cruel. *See Allen*, 137 So.3d at 953-54. In light of this aggravation, Allen has not established how the additional mitigation presented at the evidentiary hearing would impact the balancing of aggravating and mitigating factors by the jury. *See England v. State*, 151 So.3d 1132, 1138 (Fla. 2014) ("For a defendant to establish that he was prejudiced by trial counsel's failure to investigate and present mitigation, the defendant 'must show that but for his counsel's deficiency, there is a reasonable probability he would have received a different sentence. To assess that probability, we consider the "totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the [postconviction] proceeding"—and "reweig[h] it against the evidence in aggravation." ' ") (quoting *Dennis v. State*, 109 So.3d 680, 695 (Fla. 2012))).

Moreover, defense counsel's failure to present more evidence of Allen's mental health did not prejudice Allen. Dr. Russell testified that Allen was likely under the influence of an extreme emotional disturbance at the time of the crime, but admitted on cross-examination that Allen never told him what was going through her mind at the time of the capital felony. He also conceded that she denied killing Wright. The value of his opinion that she suffered from an extreme mental or emotional disturbance at the time of the homicide is therefore weakened. Further, the State's rebuttal expert, Dr. Gamache, rebutted Dr. Russell's findings, testifying that there was insufficient evidence from which to conclude that Allen suffered from PTSD throughout her life and at the time of the homicide. The additional mitigation presented would not have outweighed the established aggravating factors to undermine the confidence in the outcome such that Allen would have received a life sentence. *See Jones*, 998 So. 2d at 585 (determining that there was no reasonable probability that evidence of the defendant's mental health history would have led to a different outcome where the State had established three aggravating factors, including the HAC aggravator); *Breedlove v. State*, 692 So. 2d 874, 878 (Fla. 1997) (holding that aggravating factors of HAC, prior violent felony, and murder committed during the course of a burglary overwhelmed

> mitigation testimony presented regarding childhood abuse and alcohol abuse).
>
> Further, based on trial testimony, the trial court found, as nonstatutory mitigating factors, that Allen was a victim of physical abuse, possible sexual abuse, and that she has brain damage. The additional mitigation testimony would have, at most, only added weight to these mitigating circumstances. Allen has failed to establish that her sentence would have been different had the court given more weight to these nonstatutory mitigators. *See Jones*, 998 So. 2d at 587. Our confidence in the outcome is not undermined.
>
> For these reasons, we affirm the postconviction court's denial of this claim.

(AA, Exhibit T, p. 1272-75). Contrary to Petitioner's argument, the state courts properly concluded that Allen's trial counsel conducted a reasonable investigation into potential mitigation evidence.

I. Deficient Performance of Trial Counsel

Bankowitz stated he took over Allen's case from the Public Defender's Office about a year or a year and a half before the trial began. (AA, Exhibit M, p. 2791, 2880). He reviewed all of the documents from the Public Defender's Office. (AA, Exhibit M, p. 2797, 2880). The mitigation investigation had already been done and witnesses were already lined up, including the key mitigation witness, Dr. Wu.2 (AA, Exhibit M, p. 2790-91; 2795).

In preparing for mitigation, Bankowitz spoke to Dr. Wu as well as Allen's aunts, Myrtle Hudson and Hudson's sister, Barbara Capers. (AA, Exhibit M, p.

2796). He remembered he had regular contact with them and asked them to line up family members. (AA, Exhibit M, p. 2796). Bankowitz testified that Hudson told him that Allen was sexually and physically abused, including having multiple hospital stays and being beaten into unconsciousness and becoming unrecognizable. (AA, Exhibit M, p. 2857-58). He testified that he attempted to reach other family through Hudson, who told him that Allen's daughters would not cooperate – that they did not want any part of it. Bankowitz testified that there was an allegation that two of the daughters may have been involved in the crime and that is why they did not want to be involved in the case. (AA, Exhibit M, p. 2843-47). He felt that the credibility of the daughters would have been in question. He made several attempts to talk to Allen's family members and asked Allen's aunt, Myrtle Hudson, several times when he could speak with them. He also recalled that one of Allen's aunts did not want to testify due to health issues. (AA, Exhibit M, p. 2813, 2845).

Allen's trial counsel testified at the evidentiary hearing that he met with Allen monthly and reviewed all the evidence with her, but she did not want to talk about the case and did not want her daughters involved. (AA, Exhibit M, p. 2878-79). He admitted he did not speak to the daughters and was somewhat fearful that if they said something inconsistent with a prior statement, they could be impeached. (AA, Exhibit M, p. 2880-81). He stated that he made no attempts to talk with Allen's daughter because he was told that she would be uncooperative and did not want

anything to do with Allen. He testified that he was hesitant to put her on the stand because she could be impeached. In fact, trial counsel explained in great detail, that he had valid strategic reasons for not calling them. It appeared that they were somehow involved in the crime and that their credibility may be called into question. (AA, Exhibit M, p. 2844-45). *See Fennie v. State*, 855 So. 2d 597, 605-06 (Fla. 2003) (noting that trial counsel was not ineffective for failing to call an "unpredictable witness," and had trial counsel gambled and presented such a witness only to have the witness inculpate the defendant, collateral counsel would now be claiming ineffective assistance of counsel for presenting the witness). The Supreme Court of the United States has noted that "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Strickland*, 466 U.S. at 690-91. Moreover, the Court stated that "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.* "A strategic decision by defense counsel will be held to constitute ineffective assistance only if it was so patently unreasonable that no competent attorney would have chosen it." *Kelly v. United States*, 820 F.2d 1173, 1176 (11th Cir. 1987) (per curiam) (quotation and citation omitted).

Trial counsel's failure to interview Brian Watkins and present him as a witness also fails to show deficiency or prejudice. Mr. Watkins' testimony would have done more harm than good. His testimony at the hearing would have included their time together when they sold drugs, and that Allen had a violent nature. The testimony about abusive relationships was introduced through Myrtle Hudson, without testimony about Allen's violence coming into play. *Waters v. Thomas*, 46 F.3d 1506, 1512 (11th Cir. 1995) ("Which witnesses, if any, to call, and when to call them, is the epitome of a strategic decision, and it is one that we will seldom, if ever, second guess.").

There is also competent, substantial evidence to support the state court's finding that trial counsel mounted a reasonable mitigation investigation with regard to Allen's mental health. Bankowitz stated that the Public Defender's Office already had the autopsy report by the time he got the case. (AA, Exhibit M, p. 2797). Bankowitz became aware of Dr. Gebel through the Public Defender's Office. (AA, Exhibit M, p. 2860). Bankowitz felt that Dr. Gebel and Dr. Wu were more than sufficient experts to handle the mental health aspect of the case. (AA, Exhibit M, p. 2875-76). He recalled that Dr. Gebel, a psychologist, met with Allen once to gather information for mitigation but she was uncooperative. (AA, Exhibit M, p. 2861). Based upon the history he reviewed, Dr. Gebel told the jury about the traumatic brain injuries Allen suffered. (AA, Exhibit M, p. 2862). Dr. Gebel also testified about

Allen's impulse control, frontal lobe disorder in her brain and issues that would prevent her from thinking and acting in a normal fashion. (AA, Exhibit M, p. 2863). Bankowitz stated that he presented information to the jury that, if Allen felt wronged in some way or taken advantage of, she might have the inability to control an impulse to react quickly. (AA, Exhibit M, p. 2863). He did not ask Dr. Gebel to meet with Allen again because Bankowitz looked at Gebel's report and thought that it was more than sufficient. (AA, Exhibit M, p. 2887).

Bankowitz also used Dr. Wu as an expert on the PET scan. (AA, Exhibit M, p. 2863). Dr. Wu opined in front of the judge and jury that Allen's brain did not function as a normal brain would in particular areas of her brain. (AA, Exhibit M, p. 2864). Dr. Wu also testified about the impulse control problem that Allen exhibited. If Allen perceived that someone had done her wrong, Allen might react in a manner that somebody else would not. (AA, Exhibit M, p. 2864). Bankowitz testified that both Dr. Gebel and Dr. Wu presented testimony that would create mental health mitigators to the jury and for the judge to consider. (AA, Exhibit M, p. 2864-65).

Allen has failed to show that her attorney was ineffective for failing to investigate and interview additional family members and present additional expert mental health testimony regarding PTSD, cognitive deficits, childhood trauma, brain injuries and how these factors caused extreme mental or emotional disturbance and/or substantially impaired her capacity to conform her conduct to the

requirements of the law. Defense attorney Bankowitz performed a reasonable mitigation investigation and did present evidence on each of these issues, save PTSD that Dr. Russell opines was present. (AA, Exhibit M, p. 2010-15). Despite Petitioner and her family's lack of cooperation, and Petitioner's lack of desire to present mitigation at all, trial counsel's investigation cannot be described as anything less than thorough.

Allen has not established that her counsel's performance fell below an objective standard of reasonableness.

A. Mitigation Related to Allen's Lifetime of Traumatic Abuse

Myrtle Hudson was called as a witness by the defense. She is Allen's aunt. (AA, Exhibit M, p. 2721). She testified that she spoke with Allen's trial counsel on a regular basis and helped him get in touch with relatives, some of whom did not have a telephone. (AA, Exhibit M, p. 2722-23). Hudson recalled Allen's mother had a quick temper and that there were occasions Hudson saw Allen's mother hit Allen with a belt. (AA, Exhibit M, p. 2728, 30). Hudson stated that she had testified at Allen's trial about the abuse Allen suffered from Brian Watkins and former boyfriend, Bill Skane. (AA, Exhibit M, p. 2734, 2736). Hudson admitted that during the penalty phase, she testified about Allen being around drugs and that she was in an abusive relationship in which she was beaten unconscious. (AA, Exhibit M, p.

2746). Hudson also admitted to testifying that Allen sold drugs at night and slept during the day. (AA, Exhibit M, p. 2744, 2751, 2755).

Barbara Ann Capers was called as a witness by the defense. She is Allen's older aunt by ten years. Capers described Allen's childhood as rough, stating that she witnessed Allen's mother beating Allen almost daily. (AA, Exhibit M, p. 2639, 2663). Capers also testified to the sexual abuse by male relatives that Allen sustained while growing up. (AA, Exhibit M, p. 2642). She testified Allen claimed Capers' father, Curtis, Allen's grandfather, sexually and physically abused her. (AA, Exhibit M, p. 2643, 2648). Allen also claimed her own brother sexually assaulted her. (AA, Exhibit M, p. 2648). However, Capers testified that she had no personal knowledge of these incidents. Capers testified to only having personal knowledge of the sexual abuse of Allen by her father's brother, Roy Posley. (AA, Exhibit M, p. 2645).

While Allen presented several witnesses at the evidentiary hearing that testified regarding the difficult childhood experienced by Allen, the testimony was simply cumulative to the evidence that was presented during the trial. As noted in the Florida Supreme Court's opinion from direct appeal:

> Myrtle Hudson, Allen's aunt, testified that Allen had an unstable childhood in a violent and drug-infested neighborhood. Hudson testified that she never knew Allen to abuse drugs, but Allen drank alcohol. Hudson knew of at least two abusive relationships in which Allen was beaten to the point of unconsciousness. She also thought Allen had been sexually abused as a child.

Allen, 137 So.3d at 955. (AA, Exhibit E, p. 4).

Allen presented no new non-statutory mitigation regarding her background that could have been considered by the trial court. *See Hodges v. State*, 885 So. 2d 338, 351 (Fla. 2004) ("Even with the postconviction allegations regarding Hodges' upbringing, it is highly unlikely that the admission of that evidence would have led four additional jurors to cast a vote recommending life in prison.").

b. Mitigation Related to Allen's Mental Health

At trial, Dr. Wu testified that there were reports that Allen had at least ten cases of traumatic injuries, most of which involved the head. (AA, Exhibit A-21, p. 1816). He testified that she had damage to the frontal lobe of her brain. (AA, Exhibit A-21, p. 1820). Dr. Wu testified that a person with frontal lobe damage does not have the same ability to regulate and control the impulses as a normally functioning frontal lobe individual would have. (AA, Exhibit A-21, p. 1823). In the direct appeal opinion, the Florida Supreme Court noted that Dr. Wu testified that Allen's brain injuries would make it hard for Allen to conform her conduct to the requirements of society. *Allen*, 137 So.3d at 955. (AA, Exhibit E, p. 4). He testified that she would have an overreaction to slight provocation, but that Allen's injuries should not impair her planning abilities. *Id.* Dr. Wu testified that Allen's ability to understand and regulate proportionate responses in a consistent manner was significantly impaired. *Id*. He also testified that it would be difficult for her to consistently conform her conduct to the requirements of society. *Id.*

During the postconviction hearing, Allen presented Dr. Russell, in an effort to argue that trial counsel was ineffective in developing mental health mitigation. However, trial counsel is entitled to rely on the opinions of a qualified mental health expert even if the defendant discovers an expert with a more favorable opinion in postconviction. *Rodgers v. State*, 113 So.3d 761, 770 (Fla. 2013). *See Wyatt v. State*, 78 So.3d 512, 533 (Fla. 2011) ("As this Court has repeatedly held, a defendant cannot establish that trial counsel was ineffective in obtaining and presenting mental mitigation merely by presenting a new expert who has a more favorable report.") (*citing Peede v. State*, 955 So. 2d 480, 494 (Fla. 2007)); *Asay v. State*, 769 So. 2d 974, 986 (Fla. 2000) (stating that trial counsel's reasonable investigation is not rendered incompetent merely because the defendant has now secured the testimony of a more favorable expert in post-conviction).

During the evidentiary hearing, Allen's expert, Dr. Russell, testified that Allen suffered from PTSD, although she was never diagnosed with PTSD prior to the crime and her prison records subsequent to the murder did not indicate that mental health professionals found she suffered from PTSD. (AA, Exhibit M, p. 2966, 3177-78). While Dr. Russell concluded that Allen suffered from PTSD, Dr. Gamache testified that merely being exposed to a traumatic stressor is not sufficient to diagnose a person with that condition. (AA, Exhibit M, p. 3167). Dr. Gamache explained that PTSD is commonly diagnosed in military veterans, and yet, the

majority of veterans that experience traumatic events do not develop PTSD. (AA, Exhibit M, p. 3171). In addition, PTSD typically develops fairly quickly after exposure to a traumatic stressor. (AA, Exhibit M, p. 3185). In Allen's case, if Allen had PTSD, she would have developed signs and symptoms shortly after experiencing her childhood traumas. (AA, Exhibit M, p. 3185).

Dr. Gamache's approach is to obtain a self-report from the person and look for any evidence of corroboration. (AA, Exhibit M, p. 3235). Dr. Gamache based his opinion on DOC records pertaining to Allen, as to both her classification records and medical and psychological records. He reviewed the reports of various doctors that had seen and evaluated Allen to include: Dr. Riebsame, Dr. Greenblum and Dr. Russell, as well as the trial testimony presented by Dr. Wu and Dr. Gebel. (AA, Exhibit M, p. 3160-61). Dr. Gamache explained what the criteria of a PTSD diagnosis was and its applicability to Allen. (AA, Exhibit M, p. 3166-3172). The information Dr. Gamache reviewed did not indicate Allen had intrusive dreams or flashbacks of abuse during childhood. (AA, Exhibit M, p. 3173). Although testimony was presented at trial that Allen had been exposed to traumatic stressors, "there was no psychometric evidence and no clinical evidence that she met the diagnostic criteria for PTSD." (AA, Exhibit M, p. 3175).

In Dr. Gamache's opinion, there is no historical evidence that Allen had the signs and symptoms at the time of the offense and no logical connection between the

events that occurred at the time of the crime with traumatic experiences that Allen suffered in her life. (AA, Exhibit M, p. 3180-3182). He gave as an example: a military veteran suffering from PTSD who hears a car backfire. The veteran thinks it's a gunshot. This event brings back the emotions and memories of being under gunfire, which in turn leads to a sequence of behaviors. (AA, Exhibit M, p. 3181). The impetus for the murder was the theft of Allen's money. There was no indication whatsoever that Allen in any way associated the victim or the victim's behavior with any of these historical events or traumatic stress that she has experienced. (AA, Exhibit M, p. 3194). Dr. Russell stated that he found her under an extreme mental/emotional disorder at the time of the crime, yet he admitted Allen has never told him what was going through her mind at the time. (AA, Exhibit M, p. 3084-3086). In fact, Dr. Russell admitted that Allen never told him anything, that she denied the homicide and his conclusions were based on his training and experience. (AA, Exhibit M, p. 3026-3028).

Dr. Gamache concluded that in his opinion, Allen was not suffering from PTSD at the time of the crime. (AA, Exhibit M, p. 3188). Dr. Gamache also noted that Dr. Riebsame had administered two objective psychological tests relevant to PTSD and found that her responses were not consistent with the signs and symptoms of someone suffering from PTSD. (AA, Exhibit M, p. 3174-75, 3204). "Simply presenting the testimony of experts during the evidentiary hearing that are

inconsistent with the mental health opinion of an expert retained by trial counsel does not rise to the level of prejudice necessary to warrant relief. *Dufour v. State*, 905 So. 2d 42, 58 (Fla. 2005). Dr. Gamache opined that there was not anything significant that trial defense counsel or trial defense experts missed in presenting additional mitigation at trial. (AA, Exhibit M, p. 3163). Dr. Russell himself admitted during the hearing that the jury heard all of the things that he testified about at the evidentiary hearing, save for the PTSD diagnosis which was not supported by the evidence. (AA, Exhibit M, p. 3009). *See Raleigh v. State*, 932 So. 2d 1054, 1061 (Fla. 2006) (affirming denial of relief where trial court found that the postconviction expert was "essentially no more than a better repackaging" of the trial mental health expert's testimony).

II. Allen Fails to Establish Prejudice

A defendant claiming ineffective assistance of counsel must explain how the failure to call the uncalled witness prejudiced the outcome of the trial. *Nelson v. State*, 875 So. 2d 579, 583 (Fla. 2004). Even if the Court were to conclude that trial counsels' actions in failing to call these witnesses during the penalty phase amounted to deficient performance, Petitioner still must demonstrate that she suffered prejudice as a result. To establish prejudice, a petitioner must demonstrate that there is a reasonable probability that but for counsel's errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694. "To assess that probability,

we consider the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding—and reweigh it against the evidence in aggravation." *Porter v. McCollum*, 558 U.S. 30, 41 (2009) (citing *Williams v. Taylor*, 529 U.S. 362 (2000) (internal quotations omitted)); *see also Sears v. Upton*, 561 U.S. 945, 956 (2010). If "the available mitigating evidence, taken as a whole, might well have influenced the jury's appraisal" then prejudice has been shown. *Wiggins v. Smith*, 539 U.S. 510, 538 (2003) (quotation omitted). "In that process, what matters is not merely the number of aggravating or mitigating factors, but their weight." *Reed v. Sec'y, Fla. Dep't of Corr*., 593 F.3d 1217, 1240-41 (11th Cir. 2010).

In the instant case, the trial court found two aggravators: (1) committed while the Defendant was engaged in the commission of kidnapping; and (2) especially heinous, atrocious or cruel. Both aggravators were assigned great weight. Given the significant aggravators found and the comparatively weak mitigation found, it is unlikely that the additional mitigation presented would have been enough to outweigh the established aggravation. *See Hall v. State*, 212 So.3d 1001 (Fla. 2017).

The fact that Allen provided more witnesses at the hearing than trial counsel presented during the trial does not make the presentation of mitigation evidence more thorough. Even if Brian Watkins, Barbara Capers, Alvinia Ragoo, and Carlos Ragoo had testified in front of the jury, there is nothing substantially different or

more mitigating in their testimony than what the jury heard though Allen's aunt. The testimony presented during the Rule 3.851 evidentiary hearing concerned the same subject matter and was largely cumulative to the evidence heard by the jury during the penalty phase. *See Cullen v. Pinholster*, 131 S. Ct. 1388, 1409-10 (2011) finding no reasonable probability that the new evidence would have changed the jury's verdict where the evidence presented in post-conviction "largely duplicated the mitigation evidence at trial"); *see also Connor v. Sec'y, Fla. Dep't of Corr*., 713 F.3d 609, 626 (11th Cir. 2013) (noting "*Strickland* does not require penalty-phase counsel to present cumulative evidence in mitigation to render effective assistance.") (citation omitted); *Boyd v. Comm'r, Ala. Dep't of Corr*., 697 F.3d 1320, 1341 (11th Cir. 2012) (finding no prejudice where the jury heard similar non-statutory mitigation evidence during the penalty phase in a less detailed form); *Holsey v. Warden, Ga. Diagnostic Prison*, 694 F.3d 1230, 1266 (11th Cir. 2012) (same). The evidence presented during the post-conviction evidentiary hearing would not have altered the sentencing profile presented to the jury, and some of the evidence presented was of questionable mitigating value. *See Cullen*, 131 S. Ct. at 1410 (*citing Wong v. Belmontes*, 558 U.S. 15 (2009) (taking into account that certain mitigation evidence would have exposed the petitioner to further aggravating evidence)).

Neither deficient performance nor prejudice can be discerned from defense counsel's investigation and presentation of mental health evidence or background evidence in the penalty phase. As the Florida Supreme Court's decision was not contrary to or an unreasonable application of clearly established federal law, this Court should deny the instant claim.

III. The FSC Opinion Does Not Violate Allen's Eighth and Fourteenth Amendment Rights

The issue before this Court is whether the fact finder, presented with all of the foregoing mitigation evidence, "would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695. "Proportionality review compares the sentence of death with other cases in which a sentence of death was approved or disapproved." *Palmes v. Wainwright*, 460 So. 2d 362 (Fla. 1984). The Court must "consider the totality of circumstances in a case and compare it with other capital cases. It is not a comparison between the number of aggravating and mitigating circumstances." *Porter v. State*, 564 So. 2d 1060, 1064 (Fla. 1990), *cert. denied*, 498 U.S. 1110 (1991).

A proportionality review is purely a matter of state law. While the Florida Supreme Court conducts a comparative proportionality analysis in death penalty cases, it is not constitutionally required to do so. *See Pulley v. Harris*, 465 U.S. 37, 50-51 (1984) ("There is . . . no basis in our cases for holding that comparative

proportionality review by an appellate court is required in every case in which the death penalty is imposed . . . We are not persuaded that the Eighth Amendment requires us to take that course."). Additionally, the Florida courts did not unreasonably apply the tenets of *Furman v. Georgia*, 408 U.S. 238 (1972) and *Spaziano v. Florida*, 468 U.S. 447 (1984) because the conclusion that the death penalty for this murder is proportional is not arbitrary, capricious, or irrational. It is instead supported by competent, substantial evidence and case law.

Profitt and *Gregg* left it to the states to decide how to focus "attention on the particularized nature of the crime and the particularized characteristics of the individual defendant." *Gregg,* 428 U.S. at 206. To the extent this claim is based on state law, this Court must defer to the state court's conclusions. Further, the Florida Supreme Court's factual findings are supported by the record and this Court must defer to the state court's assessment.

GROUND THREE

Exhaustion: Allen's ineffectiveness claims were raised in state court, which denied them, and affirmed on appeal by Florida's high court. *Allen v. State*, 261 So.3d 1255 (Fla. 2019). Accordingly, the claims raised here have been either exhausted or procedurally barred.

Merits: Allen's next claim asserts that counsel was ineffective for failing to object to allegedly improper comments by the prosecutor during the guilt phase

closing argument. The lower court held an EH on this claim and found that Allen failed to establish prejudice and no cumulative error existed. As with the previous claim, Allen's challenge is strictly circumscribed by the limitations of habeas review; we are not here to address *de novo* Allen's ineffectiveness claims; we only address whether the state court's resolution of the claim employed a reasonable interpretation of the facts, and applied the applicable Federal law in an objectively reasonable manner. The lower court's rejection of this claim was not unreasonable and habeas relief, therefore, is not warranted.

I. Improper Prosecutorial Vouching and Misstatements

Allen first argues that her trial counsel was ineffective for failing to move for a mistrial and object to the prosecutor's misstatement of the elements of first-degree felony murder during closing argument. The state court granted Allen an evidentiary hearing on her sub-claim and found that Allen failed to establish prejudice. Allen challenged this ruling on appeal, and the Florida Supreme Court, also applying the *Strickland* standard, affirmed the denial of relief:

> **Failure to object to improper prosecutorial comments and misstatements and to move for a mistrial during guilt phase closing arguments**
>
> Subclaim 1
>
> Allen first claims that trial counsel should have objected and requested a curative instruction when the prosecutor misstated that, to prove first-degree felony murder, the State only needed to prove that Wright died during the kidnapping, not how she died.

> The record shows that the prosecutor stated during closing argument, "All we have to prove is that during the course of the kidnapping she died. And it doesn't matter how." However, earlier in the argument, the prosecutor also accurately described each of the elements of first-degree felony murder, which includes proving that the death occurred as a consequence of the kidnapping. The State also correctly presented the elements of first-degree felony murder on a visual display to the jury, and the elements were contained in the jury instructions.
>
> Allen argues that counsel's performance prejudiced her jury by influencing them to believe that Allen could still be guilty of felony murder even if the cocaine intoxication, and not the strangulation, caused Wright's death. However, Allen has failed to demonstrate prejudice, considering the totality of the correct descriptions of the elements of felony murder available to the jury. *See Carratelli v. State*, 961 So. 2d 312, 324 (Fla. 2007) ("Under *Strickland*, to demonstrate prejudice a defendant must show that there is a reasonable probability—one sufficient to undermine confidence in the outcome—that, but for counsel's unprofessional errors, the result of the proceeding would have been different.") (citing *Strickland*, 466 U.S. at 694). There is no reasonable probability that, but for counsel's failure to object, the outcome would have been different. Our confidence in the outcome is not undermined. Because Allen has failed to establish the prejudice prong, we need not address deficiency. *See Strickland*, 466 U.S. at 697 ("[T]here is no reason for a court deciding an ineffective assistance claim . . . to address both components of the inquiry if the defendant makes an insufficient showing on one."). Therefore, we conclude that the trial court properly denied postconviction relief on this claim.

Allen, 251 So.3d. 1255 at 1269-70. (AA, Exhibit T, p. 1269-70). The state court properly denied this sub-claim.

The elements of the charges were included in the jury instructions and the State also presented these elements on an enlarged visual display to the jury. While Allen points to the fact that the State had to prove that the death occurred "as a

consequence of" the kidnapping, the State's closing argument made this very same point:

> Element number two, now, you will notice there is an A or B. A or B, not both. Okay? So, element number two can either be:
>
> The death of Wenda Wright occurred as a consequence of and while Margaret Ann Allen was engaged in the commission of kidnapping. Or the death occurred as a consequence while Margaret Ann Allen was attempting to commit the crime of kidnapping.

(AA, Exhibit A-20, p. 1579-1580). Counsel cannot be held deficient for failing to make a baseless objection.

Allen next claims her counsel was deficient in failing to object when the State implied that she was not offered a plea bargain because she was more culpable. Allen further claims that the State misled the jury about the fact that plea discussions were had between the State and defense prior to trial. The Florida Supreme Court found:

> Subclaim 2
>
> Allen claims that trial counsel should have objected when the prosecutor mentioned his distaste for plea bargaining with codefendants and indicated that Allen was more culpable than Quintin. Allen also claims that counsel should have objected when the prosecutor denied that evidence of a plea offer to Allen existed, and that counsel should have requested that the jury be instructed about the plea offer discussions that took place. This claim is without merit because Allen has failed to establish prejudice. There is not a reasonable probability that, but for counsel's failure to object, the outcome would have been different. Allen is therefore not entitled to relief on the merits.

Allen, 261 So.3d at 1270 (AA, Exhibit T, p. 1270). The state court properly denied this sub-claim.

Logical inferences may be drawn, and counsel is allowed to advance all legitimate arguments. *Thomas v. State*, 748 So. 2d 970, 984 (Fla. 1999). The facts of the case as presented to the jury indicated that Allen believed the victim stole her money and ultimately tortured and killed her. (AA, Exhibit A-20, p. 1561-63). The State's comments regarding who was most culpable and responsible are logical inferences the jury could reasonably infer based on facts in evidence. Likewise, the details of Quintin's plea bargain came into evidence. Once the defense raised the question whether Allen had been offered a deal to testify against Quintin, it was proper for the State to comment to a lack of evidence to support this claim.

Furthermore, the statements were not misleading. The informal plea offer, which was referenced by the State prior to trial never addressed the requirement that Allen would need to testify against Quintin in exchange for the offer. There was no error by defense counsel in failing to request an instruction that the prosecutor had discussed a twenty-year prison sentence, to correct the prosecutor's misleading statement. The statement was not misleading. Moreover, under Florida Rule of Criminal Procedure 3.172(i) evidence of an offer later withdrawn is not admissible in any proceeding against the person who made the plea offer. Counsel cannot be ineffective for failing to raise a meritless claim. *Teffeteller v. Dugger*, 734 So. 2d 1009, 1019 - 1020 (Fla. 1999).

II. Improper Comments and Misstatements Related to Wright's Cause of Death and the HAC Aggravator

Allen also claims there were improper comments related to the victim's cause of death and HAC aggravator. Allen claims trial counsel erred in failing to object to the State's following argument:

> She is the one holding that belt around her neck so tightly that it would even cause petechia, the little pinpoint blood vessels that pop in your eyes. Okay? So tight that Dr. Qaiser said that you don't get it unless it is held real tight. Margaret Allen is the one that did that.

(AA, Exhibit A-20, p. 1581).

The state court granted Allen an evidentiary hearing on her sub-claim and found that Allen failed to establish prejudice. Allen challenged this ruling on appeal, and the Florida Supreme Court, also applying the *Strickland* standard, affirmed the denial of relief:

> Subclaim 3
>
> Allen claims that trial counsel should have objected when the prosecutor stated that petechia results from a tight strangulation. Allen argues that counsel's deficient performance prejudiced her jury because it reduced doubt in the jury members' minds that strangulation actually occurred.
>
> The record shows that in the guilt phase closing argument, the prosecutor stated that "[Allen] is the one holding that belt around her neck so tightly that it would even cause petechia, the little pinpoint blood vessels that pop in your eyes. Okay? So tight that Dr. Qaiser said that you don't get it unless it is held real tight." On cross-examination, Dr. Qaiser testified that "whenever the strangulation is complete and really tight, you won't see petechia" and noted that he "did not see" evidence of petechia in the autopsy photographs.

> Allen has failed to demonstrate that counsel's failure to object to the prosecutor's misstatement prejudiced her. The evidence presented at trial showed that Wright was tortured, bound, and strangled by Allen. Whether petechia occurred from the strangulation of Wright does not weaken the evidence made available to the jury. Further, the jury heard from Dr. Qaiser that petechia does not occur during a tight strangulation, and that the autopsy photos did not reveal that petechia occurred. In light of this, there is no reasonable probability that, but for counsel's failure to object, the outcome would have been different. Our confidence in the outcome is not undermined. Because Allen has not demonstrated prejudice, we need not address the deficient performance prong. *See Strickland*, 466 U.S. at 697. Therefore, we conclude that the circuit court properly denied relief on this claim.

Allen, 261 So.3d at 1278 (AA, Exhibit T, p. 1278). The state court properly denied this sub-claim.

Dr. Qaiser explained petechia on multiple occasions. First, he explained as follows:

> STATE: What is petechia?
>
> DR. QAISER: Petechia is whenever you apply the manual strangulation or ligation strangulation you will see small spots on the face, especially on the eye area and within the - unintelligible -. But that is - if you take both cases of strangulation, you will see it gets small in the manual strangulation. And also whenever the strangulation is complete and really tight, you won't see petechia.

(AA, Exhibit A-19, p. 1473). Dr. Qaiser also explained the absence of petechia later in the proceedings as follows:

> STATE: Okay, Now counsel was asking you some questions about petechia. Did you see in those photographs any evidence of petechia at all?
>
> DR. QAISER: No. I did not see that.

> STATE: Okay. And that could indicate meaning it was very tightly ligature strangulation, correct?
>
> DR. QAISER: That's correct.

(AA, Exhibit A-19, p. 1489).

Dr. Qaiser's consistent testimony regarding the fact that petechia does not occur when there is a very tight strangulation supported Quintin's testimony about how Allen strangled the victim.

Allen next claims that the State misrepresented testimony regarding Dr. Qaiser's testimony in reference to the time it takes to die from strangulation. The prosecutor made the following statement in closing argument:

> Now, I would suggest to you, all right, and you can take this for discussion, that placing a rope around someone's neck and holding it there for three or four minutes, because that is what Dr. Qaiser said it would take, okay, three or four minutes, all right, that may have some aspects of premeddation [sic] here.

(AA, Exhibit A-20, p. 1578-79).

The state court granted Allen an evidentiary hearing on her sub-claim and found that Allen failed to establish prejudice. Allen challenged this ruling on appeal, and the Florida Supreme Court, also applying the *Strickland* standard, affirmed the denial of relief:

> Subclaim 4

> Allen argues that trial counsel should have objected when the prosecutor stated that it takes "three or four minutes" to die of strangulation.
>
> The record shows that during the State's direct examination, Dr. Qaiser testified in response to the question, "How long does it take a person to strangle – to die from strangulation?" that "[w]ithin four to six minutes only a person can die." Quintin testified at trial that Allen held the belt "around [Wright's] neck for three minutes," and that Wright stopped moving after three minutes. In the guilt phase closing argument, the prosecutor made the following statement: "[Y]ou can take this for discussion, that placing a rope around someone's neck and holding it there for three or four minutes, because that is what Dr. Qaiser said it would take, okay, three or four minutes, all right, that may have some aspects of premeditation here."
>
> Allen has failed to demonstrate prejudice. The prosecutor's statement that it takes "three or four" minutes to die of strangulation was not wholly inconsistent with the evidence presented at trial that it takes "four to six minutes" to die of strangulation, because "four" is a correct amount of time. Allen has not shown that there is a reasonable probability that, but for hearing the misstated amount of time, the jurors would not have found Allen guilty. Therefore, no prejudice occurred. *See Carratelli*, 961 So. 2d at 324. Our confidence in the outcome is not undermined. Because Allen has not demonstrated prejudice, we need not address the deficient performance prong. *See Strickland*, 466 U.S. at 697. Therefore, we conclude that the circuit court properly denied relief on this claim.

Allen, 261 So.3d at 1271. (AA, Exhibit T, p. 1271). The state court properly denied this sub-claim.

Dr. Qaiser testified it takes four to six minutes to die from strangulation. (AA, Exhibit A-18, p. 1448). Stated another way, four minutes would be the shortest time it would take to die, and six minutes would be the longest time it would take to die. A careful reading of the State's argument demonstrates that the State did not in fact

misrepresent Dr. Qaiser's testimony. The State, when using strangulation evidence to argue premeditation, recalled that Dr. Qaiser testified it would take three or four minutes to die from strangulation. (AA, Exhibit A-20, p. 1578-89). By utilizing the word "or" the State recognized within this comment that one of these numbers could have been mistaken and, in fact, such was the case. Four was the accurate amount of time and three was not. The State's argument was not a misrepresentation of the evidence.

Furthermore, Allen cannot show prejudice. Since the State was arguing premeditation, the State would have benefited more, and Allen prejudiced more, if the State argued that it takes a longer amount of time for a person to die from strangulation than what was established at trial rather than a shorter amount of time.

Allen next claims that the State misrepresented testimony regarding the autopsy report. Allen takes exception with the following State argument:

> Then on top of that Dr. Whitmore said --- it's sort of vague what he said -- atraumatic neck, but then he says, "see evidence of internal injuries," and then we read that in which he says there is [sic] contusions on both sides of the neck.

(AA, Exhibit A-20, p. 1629-30).

The state court granted Allen an evidentiary hearing on her sub-claim and found that Allen failed to establish prejudice. Allen challenged this ruling on appeal, and the Florida Supreme Court, also applying the *Strickland* standard, affirmed the denial of relief:

Subclaim 5

> Allen argues that trial counsel should have objected and requested a curative instruction when the prosecutor misstated that Wright's neck injuries were internal instead of external. Allen argues that this prejudiced her jury because the misstatement regarding internal injuries would have convinced them that Wright was violently strangled, a conclusion they might not have reached had they heard the truth that her neck injuries were merely external.
>
> The record shows that the prosecutor stated during direct examination of Dr. Qaiser that the autopsy report "refers to *external* evidence of injury." In the guilt phase closing argument, the prosecutor read aloud from Dr. Whitmore's autopsy report, stating, "Then on top of that Dr. Whitmore said—it's sort of vague what he said—atraumatic neck, but then he says, 'see evidence of *internal* injuries,' and then we read that in which he says there is contusions on both sides of the neck."
>
> Counsel's failure to object to this minor misstatement was not prejudicial to Allen. Based on the totality of the record, which shows that Allen bound, tortured, beat, and strangled Wright, confidence in the outcome is not undermined so as to establish prejudice. *See Carratelli*, 961 So. 2d at 324. Had the jury not heard the prosecutor say that Wright's neck injuries were "internal," there is no reasonable probability that the outcome would have been different. We need not address the deficient performance prong. *See Strickland*, 466 U.S. at 697. Accordingly, we conclude that the circuit court properly denied relief on this claim.

Allen, 261 So.3d at 1271. (AA, Exhibit T, p. 1271).

The state court properly denied this sub-claim. The only error identifiable in the State's argument was the word "internal" which was a misstatement of the word "external" and under the circumstances of this case this was not a factor that resulted in any prejudice to Allen. Dr. Qaiser testified as to the evidence of ligation and that she suffered a ligature strangulation. (AA, Exhibit A-18, p. 1428, 1443). He

explained that the lack of petechia could indicate a very tight strangulation. Quintin's testimony as to the manner the victim was strangled also comports with Dr. Qaiser's testimony. Even Dr. Spitz agreed that a ligature strangulation was feasible. (AA, Exhibit M, p. 3324). Allen kidnapped, tortured and strangled the victim. Whether the strangulation caused internal injuries as opposed to external injuries is of no significance to a HAC finding.

That Allen's chosen defense failed to produce either an acquittal or reduction of charge has never been the proper measure of counsel's effectiveness. Allen's attorney chose a reasonable defense, and Allen's present disenchantment merely reflects her dismay at the result. Counsel's decision to eschew risky arguments that were either irrelevant to or in actual conflict with the chosen defense was reasonable, and the state court did not unreasonably apply *Strickland* in denying relief.

Allen's final claim is based upon the cumulative effect of the preceding sub-claims. The Florida Supreme Court affirmed the denial of relief:

> Subclaim 6
>
> Allen argues that the cumulative impact of the alleged errors deprived her of her right to a fair trial. However, Allen has failed to establish error as to the denial of any claim raised. Because each individual subclaim is either without merit or procedurally barred, the claim of cumulative error fails. *See Anderson v. State,* 18 So.3d 501, 520 (Fla. 2009) (rejecting a cumulative error claim when the individual claims did not establish ineffective assistance of counsel); *Israel v. State*, 985 So. 2d 510, 520 (Fla. 2008) (holding that where individual alleged claims of error are "procedurally barred or without merit, the claim of cumulative error also necessarily fails") (quoting *Parker v. State*, 904

> So.3d 370, 380 (Fla. 2008)). Accordingly, we affirm the circuit court's finding that Allen is not entitled to relief on this claim.

Allen, 261 So.3d at 1272 (AA, Exhibit T, p. 1272).

Because none of Allen's various sub-claims had merit, the state court properly denied her claims. The Florida Supreme Court's decision affirming this denial is not contrary to or an unreasonable application of clearly established federal law. Accordingly, this Court should deny Ground Three of Allen's habeas petition.

GROUNDS FOUR AND THIRTEEN

Exhaustion: Allen's ineffectiveness claims were raised in state court, which denied them, and affirmed on appeal by Florida's high court. *Allen v. State*, 261 So.3d 1255 (Fla. 2019). Accordingly, the claims raised here have been exhausted.

Merits: Allen's next claim asserts that counsel rendered ineffective assistance by failing to object and move for a mistrial based on prosecutorial misconduct in the penalty phase closing arguments. The lower court's rejection of this claim was not unreasonable and habeas relief, therefore, is not warranted.

I. Prosecutorial Misconduct Related to Impermissible Non-Statutory Aggravating Factors

a. Convictions for Nonviolent Felonies

Allen first claims the State committed misconduct by raising questions about two witnesses' knowledge of Appellant's criminal history during the penalty phase. At the outset, Allen's scoresheet indicates that she was previously convicted of one

(1) Sale of Cocaine charge and three (3) Possession of Cocaine charges. Allen also has felony convictions for Carrying a Concealed Firearm, Possession of a Short-Barrel Shotgun and Felon in Possession of Concealed Weapon. (AA, Exhibit A-6, p. 938). Accordingly, any claim alleging that the State incorrectly referred to Allen having multiple drug convictions or felony convictions is misguided. Additionally, each time the State referred to Allen's criminal history, the record reflects that the door to such impeachment had been opened. The trial court denied this sub-claim holding:

> The Court finds this issue was raised on direct appeal as fundamental error.
>
> As the Defendant failed to show that the comments amounted to fundamental error on direct appeal, she fails to demonstrate that counsel's failure to object to the comments resulted in prejudice under *Strickland, See Serrano v. State*, 42 Fla. L. Weekly S545 (Fla. May 11, 2017), '[b]ecause [Serrano] could not show the comments were fundamental error on direct appeal, he likewise cannot show that trial counsel's failure to object to the comments resulted in prejudice sufficient to undermine the outcome of the case under the prejudice prong of the *Strickland* test." *Chandler v. State*, 848 So. 2d 1031, 1046 (Fla. 2003); *see also Thompson v. State,* 759 So. 2d 650, 664 (Fla. 2000) ("Because none of these prosecutorial comments would have constituted reversible error had they been objected to at trial, we affirm the trial court ruling summarily denying this claim.").

(AA, Exhibit M p. 1978-79).

The Florida Supreme Court affirmed the lower court's denial of this sub-claim and, utilizing the standard set forth by the United States Supreme Court in *Strickland* found that Allen had failed to meet her burden under *Strickland:*

Sub-claim 1

Allen claims that trial counsel should have objected, requested a curative instruction, and moved for a mistrial when the prosecutor stated during cross-examination of Dr. Gebel that Allen was involved in drugs and had previously served time in prison, and misstated during cross-examination of Myrtle Hudson that Allen was convicted several times for selling drugs. She argues that counsel's deficiencies prejudiced her penalty phase by making the jury believe she was a career criminal unworthy of mercy.

The record shows that Dr. Gebel testified for the defense at trial that Allen suffered traumatic brain injuries. On cross-examination, the prosecutor asked Dr. Gebel if he had reviewed Allen's prison records, and Dr. Gebel answered that according to his notes, he did not know what type of records they were. The prosecutor responded, "So, you don't know if those were county jail records or prison records where she had been in prison before?" The prosecutor also asked if Dr. Gebel was aware that Allen had been "involved in drugs for a number of years." Myrtle Hudson also testified for the defense at trial, and the prosecutor asked her if she was "aware that [Allen] was convicted several times for selling drugs, right?"

However, nothing in the record undermines confidence in the outcome of the penalty phase, but rather supports the postconviction court's finding that there is no prejudice. *See Sochor v. State*, 883 So. 2d 766, 771-72 (Fla. 2004) (citing *Strickland*, 466 U.S. at 694). The prosecutor's comments about Allen's time in prison and her convictions for drug sales were isolated, and did not approach the same level of impropriety as comments in other cases where this Court has granted relief. *See Brooks v. State*, 762 So. 2d 879, 905 (Fla. 2000) (remanding for new penalty phase in light of the "cumulative effect of the numerous, overlapping improprieties in the prosecutor's penalty phase closing argument"). Further, the testimony that Allen was involved in a lifestyle of drugs led the trial court to find that such involvement was a nonstatutory mitigator. In light of the penalty phase evidence and the aggravating circumstance of HAC, which is among the weightiest in Florida's death penalty scheme, *see Martin v. State*, 151 So.3d 1184, 1198 (Fla. 2014), it is clear that counsel's deficiencies did not prejudice Allen. Our confidence in the outcome is not

> undermined. Because Allen has not demonstrated prejudice, we need not address the deficient performance prong. *See Strickland*, 466 U.S. at 697. Therefore, we conclude that the circuit court properly denied relief on this claim.

Allen, 261 So.3d at 1277. (AA, Exhibit T, p. 1277). The state court properly denied this sub-claim.

While the Florida Supreme Court has denounced the State's use of a defendant's criminal history under the guise of witness impeachment, the court also noted that use of such would be proper where the defense has opened the door to such impeachment. *Geralds v. State*, 601 So. 2d 1157, 1162 (Fla. 1992) ("As we have already said, the entire line of questioning should never have occurred because the defense had not opened the door to such impeachment on direct examination.").

In the instant case, each time the State referred to Allen's criminal history, the record reflects that the door to such impeachment had been opened. Dr. Gebel's testimony was premised on the opinion that Allen has brain damage caused exclusively from trauma. Since brain damage is also commonly known to be caused by drug usage, such testimony opened the door for the State to inquire as to whether Dr. Gebel was aware of any evidence of Allen's drug usage. Dr. Gebel's response indicated that Allen denied taking drugs and that he had looked through available records. (AA, Exhibit A-21, p. 1758-59). He mentioned that he had correction facility records and correction department out-patient records, among others. When Dr. Gebel's testified that he was aware of but did not know what the "correctional

facility" records consisted of, this response certainly opened the door to the State asking if the "records" he reviewed included Allen's county jail records or prison records. (AA, Exhibit A-21, p. 1757-58).

The State inquired as to when Ms. Posey's became a mother figure to Allen. Using Allen's release date of 1999 to establish a time reference, Ms. Posey initially responded that she did not know. (AA, Exhibit A-22, p. 1891). However, when the State asked the same question again, her answer changed from "I don't know" to "yes, sir." The only reason the question regarding Allen's release date was asked more than once was because the witness failed to recall the answer when asked the first time. Myrtle Hudson specifically testified that she did not know Allen to use drugs. This testimony also clearly opened the door for the State to inquire about her knowledge of Allen's drug convictions. Furthermore, Allen fails to show prejudice. The trial court instructed the jury on the proper aggravating circumstances they could consider. The testimony presented in the penalty phase that Allen had been involved in a drug lifestyle was found to be a non-statutory mitigator. Accordingly, this sub-claim should be denied.

b. Dangerousness

Next, Allen alleges counsel was ineffective for failing to object to prosecutor comments regarding future dangerousness. The trial court denied this sub-claim holding:

> The Court finds this issue was raised on direct appeal as fundamental error.
>
> As the Defendant failed to show that the comments amounted to fundamental error on direct appeal, she fails to demonstrate that counsel's failure to object to the comments resulted in prejudice under *Strickland, See Serrano v. State*, 42 Fla. L. Weekly S545 (Fla. May 11, 2017), '[b]ecause [Serrano] could not show the comments were fundamental error on direct appeal, he likewise cannot show that trial counsel's failure to object to the comments resulted in prejudice sufficient to undermine the outcome of the case under the prejudice prong of the *Strickland* test." *Chandler v. State*, 848 So. 2d 1031, 1046 (Fla. 2003); *see also Thompson v. State,* 759 So. 2d 650, 664 (Fla. 2000) ("Because none of these prosecutorial comments would have constituted reversible error had they been objected to at trial, we affirm the trial court ruling summarily denying this claim.").

(AA, Exhibit M p. 1978-79). The Florida Supreme Court affirmed the lower court's denial of this sub-claim and, utilizing the standard set forth by the United States Supreme Court in *Strickland* found that Allen had failed to meet her burden under *Strickland:*

> Sub-claim 2
>
> Allen claims that trial counsel should have objected and moved for a mistrial when the prosecutor improperly asked Dr. Wu two questions regarding Allen's future dangerousness in prison. Allen argues that counsel's deficiencies prejudiced her in the penalty phase by leading the jury to believe that she was a danger to society.
>
> Prior to trial, the trial court entered an order granting Allen's motion to preclude improper argument. The record shows that the State violated the court's order not to make arguments about Allen's future dangerousness by asking two questions about Allen's future threat to prison guards. During cross-examination of Dr. Wu, the prosecutor asked, "So, [an episode of a violent act from Allen] could happen, say, in the future to a prison guard, correct?" The prosecutor then asked,

> "So, you are saying to a reasonable degree of medical probability she is a risk to any prison guard who is watching her in the future?"
>
> Allen previously raised this issue on direct appeal, and we found that the questions did not amount to fundamental error. *Allen*, 137 So.3d at 962. Allen therefore cannot demonstrate that the questions were prejudicial under *Strickland*. *See Serrano v. State*, 225 So.3d 737, 751 (Fla. 2017) (holding that the defendant could not establish prejudice under *Strickland* because he failed to show the comments were fundamental error on direct appeal). Our confidence in the outcome is not undermined. Because Allen has not demonstrated prejudice, we need not address the deficient performance prong. *See Strickland*, 466 U.S. at 697. Therefore, we conclude that the circuit court properly denied relief on this claim.

Allen, 261 So.3d at 1277-78. (AA, Exhibit T, p. 1277-78). The state court properly denied this sub-claim.

First, the State submits that defense counsel "opened the door" through his line of questioning of Dr. Wu. *See Rodriguez v. State*, 753 So. 2d 29 (Fla. 2000) (holding that the concept of "opening the door" allows the admission of otherwise inadmissible testimony to qualify, explain, or limit testimony or evidence previously admitted, and is based on considerations of fairness and the truth-seeking function of a trial); *see Payne v. State*, 426 So. 2d 1296, 1300 (Fla. 2nd DCA 1983) (one "opens the door" to otherwise proscribed area or topic by asking questions relating to that area). During direct, Allen elicited from Dr. Wu that individuals with the type of frontal lobe damage he had found in Defendant had more difficulty controlling their impulses and responded disproportionally to provocation. (AA, Exhibit A-21, p. 1823). She also had Dr. Wu testify that these alleged problems did not consistently

manifest themselves and did not manifest themselves in connection with the alleged cause of the brain damage. (AA, Exhibit A-21, p. 1824-26). Thus, according to Dr. Wu, the fact that the head traumas that allegedly caused the brain damage had occurred during the early 1990's but Allen had not manifested any disproportionate response until the murder in 2005 was irrelevant. (AA, Exhibit A-21, p. 1824-25). In fact, Allen directly asked Dr. Wu, "So, it can occur at any time?," and elicited an affirmative response. (AA, Exhibit A-21, p. 1826). By presenting this evidence, Allen, herself, suggested that she could be violent in the future and opened the door to the State's question. *See San Martin v. State*, 705 So. 2d 1337, 1347 (Fla. 1997).

Second, while Allen asserts that the State was referring to "a violent outbreak," the record clearly indicates that the State was referring to "a disproportionate overreaction to provocation," which is by no means definitive comment on future violence or future dangerousness. (AA, Exhibit A-21, p. 1855). The State's questions were not even directed at showing Allen could be dangerous in the future. Instead, the State was attempting to show the lack of factual support for Dr. Wu's opinion. In this vein, the State began its questioning by eliciting from Dr. Wu that he had no information showing that Allen had ever exhibited the type of lack of impulse control or disproportionate response at any time other than during this crime. (AA, Exhibit A-21, p. 1853-54). It then attempted to have Dr. Wu admit that the type of problems with impulse control he found did not happen in a random

manner, but Dr. Wu insisted that they did. (AA, Exhibit A-21, p. 1854). The State then inquired whether Dr. Wu was predicting that similar acts would occur in the future, and Dr. Wu indicated that he was not, particularly since individuals with this type of brain damage do better in prison. (AA, Exhibit A-21, p. 1855). It was only after Dr. Wu insisted that his opinion was Defendant "had a greater vulnerability of having problems with impulse control" despite the lack of evidence of such lack of control in her past and lack of expectation of such problems in the future, that the State inquired if Dr. Wu was suggesting Allen would be violent in the future. Allen objected and the objection was sustained. (AA, Exhibit A-21, p. 1855). Given these circumstances, it is clear that the State was attempting to show that Dr. Wu's opinion had no basis in fact; not that Allen would be dangerous in the future.

Furthermore, the reference to Allen's future dangerousness only occurred two times in an isolated portion of the penalty phase, and the prosecutor did not again imply that Allen would be dangerous in the future during the remainder of the cross-examination. Allen's future dangerousness was neither argued by the State in its closing argument nor relied upon in the trial court's sentencing order. Lastly, the trial court instructed the jury on the proper aggravating circumstances. Thus, these two questions by the State did not deprive Allen of a fundamentally fair penalty phase trial so as to necessitate a new penalty phase. *See generally Walker,* 707 So. 2d at 314 (finding that although it was wholly improper for the prosecutor to ask whether

Walker may kill again, the question was isolated, and the trial court properly instructed the jurors as to the aggravating facts they could consider; therefore, the error was harmless beyond a reasonable doubt). *Allen v. State*, 137 So.3d 946, 962 (Fla. 2013). Contrary to Allen's assertions, the court's resolution of this claim is not an unreasonable determination of the facts or an unreasonable application of *Strickland*. Accordingly, this sub-claim should be denied.

c. Lack of Remorse

Next, Allen argues that the State improperly yet subtly raised the issue of lack of remorse regarding the murder. The Florida Supreme Court affirmed the lower court's denial of this sub-claim and, utilizing the standard set forth by the United States Supreme Court in *Strickland* found that Allen had failed to meet her burden under *Strickland:*

> Sub-claim 3
>
> Allen claims that trial counsel should have objected when the prosecutor asked Dr. Wu if he saw Allen display signs of remorse following the murder. She argues that counsel's deficiency prejudiced her in the penalty phase by putting a nonstatutory aggravating circumstance before the jury.
>
> The record shows that Dr. Wu testified for the defense that people suffering from lack of impulse control often feel remorseful after a violent outburst. On cross-examination, the prosecutor asked Dr. Wu, "Did you see and study anything about Margaret Allen that she had any level of remorse after this murder occurred?"
>
> Allen has failed to demonstrate prejudice. Even if this question were not proper cross-examination in light of Dr. Wu's testimony on

> direct, given the overwhelming evidence of guilt presented, as well as the aggravating circumstances found by the court, there is not a reasonable probability that the jurors would have changed their minds regarding the balancing of the aggravating and mitigating circumstances solely due to hearing this question about Allen's lack of remorse. *See Sochor*, 883 So. 2d at 771 (citing *Strickland*, 466 U.S. at 694). Our confidence in the outcome is not undermined. Because Allen has not demonstrated prejudice, we need not address the deficient performance prong. *See Strickland*, 466 U.S. at 697. Therefore, we conclude that the circuit court properly denied relief on this claim.

Allen, 261 So.3d at 1278. (AA, Exhibit T, p. 1278). The state court properly denied this sub-claim.

This is not an instance where the State commented during argument about the facts which may have shown that the Allen was not remorseful about a crime or where the State directly argued to the jury that Allen has no remorse for a crime. The State was challenging the findings of a defense expert who opined that the Defendant suffered from a lack of impulse control, which as the expert explained, is at times accompanied with an overwhelming feeling of remorse whenever a person afflicted with the disorder has an impulsive outburst. (AA, Exhibit A-21, p. 1851). Clearly, Dr. Wu's opinion opened the door for the State to inquire as to the completeness of his investigation regarding this aspect of the disorder. Because the State's comment was merely a fair response to Allen's argument, it was not improper. *Pagan v. State*, 830 So. 2d 792, 809 (Fla. 2002). Trial counsel's failure to object was not unreasonable under prevailing professional norms, and there is no prejudice. Accordingly, this sub-claim should be denied.

II. Prosecutorial Misconduct Related to Improper Arguments

a. "Golden Rule" Argument and Misstatement of Evidence

Allen next alleges counsel was deficient in failing to raise a Golden Rule objection and motion for mistrial regarding the following State arguments:

> Dr. Qaiser tried to give you some idea of what physiological, mental process you go through when you are being strangled . . . The first thing is you are going to have difficulty breathing when that strap is placed around your neck. You cannot get your breath. Okay. Use your common sense. I mean, all of us have, you know, run somewhere, maybe we have a medical condition, asthma or whatever, it is scary when you can't get your breath.

(AA, Exhibit A-22, p. 1920).

> A sense of this pain above and below the ligature mark. The desire to survive. That basic human instinct. You know, I want to live. I don't want to die. I want to see my children again. I want to see my companion again. And finally the jerky movements Dr. Qaiser told us about. The movement of the head and the neck. . . . Those are the last few moments of Wenda Wright's life.

(AA, Exhibit A-22, p. 1921).

The Florida Supreme Court affirmed the lower court's denial of this sub-claim and, utilizing the standard set forth by the United States Supreme Court in *Strickland* found that Allen had failed to meet her burden under *Strickland:*

> Sub-claim 4
>
> Allen also argues that the prosecutor made an improper Golden Rule argument during closing argument. "A 'golden rule' argument asks the jurors to place themselves in the victim's position, [and] asks the jurors to imagine the victim's pain and terror or imagine how they

would feel if the victim were a relative." *Hutchinson v. State*, 882 So. 2d 943, 954 (Fla. 2004). In this case, the prosecutor stated:

> A sense of this pain above and below the ligature mark. The desire to survive. That basic human instinct. You know, I want to live. I don't want to die. I want to see my children again. I want to see my companion again. And finally the jerky movements Dr. Qaiser told us about. The movement of the head and the neck. . . . Those are the last few moments of Wenda Wright's life.

Allen claims that the prosecutor's argument improperly described the crime scene with an imaginary script and invited the jurors to place themselves in the position of the victim. Allen argues that counsel's deficiency in failing to object prejudiced her in the penalty phase by unduly inflaming the sympathy and passions of the jury against her. However, Allen has failed to demonstrate prejudice. Hearing these comments during closing argument would not have caused the jurors to weigh the aggravation or mitigation differently. The significant amount of evidence supporting the HAC aggravator in this case, such as Quintin's testimony that Allen kidnapped and tortured Wright and the medical forensic evidence of contusions and ligatures on Wright's body, shows that there is no reasonable probability that hearing the comments in question affected the jury's sentencing recommendation. *See Sochor*, 883 So. 2d at 771 (citing *Strickland*, 466 U.S. at 694). Failing to object to the prosecutor's argument did not affect the fairness and reliability of the proceeding such that confidence in the outcome is undermined.

Because Allen has not demonstrated prejudice, we need not address the deficient performance prong. *See Strickland*, 466 U.S. at 697. Therefore, we conclude that the circuit court properly denied relief on this claim.

Allen, 261 So.3d at 1278-79. (AA, Exhibit T, p. 1278-79). The state court properly denied this sub-claim.

"In general, a `golden rule' argument encompasses requests that the jurors place themselves in the victim's position, that they imagine the victim's pain and terror, or that they imagine that their relative was the victim." *Williams v. State*, 689 So. 2d 393, 399 (Fla. 3d DCA 1997). While Allen focuses on the State's word choice of "you" in support of her claim, it is clear from the context of the record, that the State was not asking the jury to imagine for themselves what it would be like to be strangled. What is more, the statements were made in reference to facts already entered in evidence. Additionally, when arguing HAC, the State may ask the jury to consider the terror and anguish that the victim was facing prior to death. *See Braddy v. State*, 111 So.3d 810, 842-43 (Fla. 2012) (A prosecutor may make comments describing the murder where these comments are based on evidence introduced at trial and are relevant to the circumstances of the murder or relevant aggravators, so long as the prosecutor does not cross the line by inviting the jurors to place themselves in the position of the victim. *See, e.g., Bailey v. State*, 998 So. 2d 545, 555 (Fla. 2008) (holding comments that encouraged jurors to visualize the actual distance between the gun and the victim, based on evidence in the record, were not improper).

The "imaginary scenario" Allen complains of, is also without merit. The comments the State made were based upon facts in evidence as the record demonstrates that Quintin testified that the victim cried and begged to go home to

her kids. *See Rogers v. State*, 957 So. 2d 538, 549 (Fla. 2007) (holding, in the context of an ineffective assistance of counsel claim, that prosecutorial comments about the victim's murder and her last moments alive were "not improper because they were based upon facts in evidence" and concluding that the comments were not "golden rule" arguments). Trial counsel's failure to object was not unreasonable under prevailing professional norms, and there is no prejudice. Accordingly, this sub-claim should be denied.

b. Improper Vouching and Misstatement of the Law

Allen next alleges counsel was deficient for failing to object and move for a mistrial when the prosecutor advised the jury that it is "not easy to stand up here and ask a jury to recommend the death penalty, but in certain cases, it is what the law calls for." (AA, Exhibit A-22, p. 1932). Allen claims this argument personalized the prosecutor in the eyes of the jury and led them to gain sympathy for him in violation of *Ruiz v. State*, 743 So. 2d 1, 6-7 (Fla. 1999). However, *Ruiz* was a blatant attempt to gain sympathy and is clearly distinguishable from the isolated comments made by the prosecutor. The Florida Supreme Court affirmed the lower court's denial of this sub-claim and, utilizing the standard set forth by the United States Supreme Court in *Strickland* found that Allen had failed to meet her burden under *Strickland:*

Sub-claim 5

> Allen claims that trial counsel should have objected when the prosecutor stated that "in certain cases" "the law calls for" a death

> penalty recommendation, because it improperly gained sympathy for the prosecutor and misstated the law. She argues that counsel's deficiency prejudiced her because the comment told the jurors that they were required to recommend death.
>
> During penalty phase closing arguments, the prosecutor stated:
>
> > [T]here are cases where the recommendation for the death penalty is warranted. This is that case . . . . It is not going to be an easy decision. It's not easy to stand up here and ask a jury to recommend a death penalty. But in certain cases it is what the law calls for. It's what justice calls for.
>
> Allen cannot show the prosecutor's comments prejudiced her. The jury instructions correctly informed Allen's jury of the law relating to the weighing of aggravators and mitigators. *Cf. Anderson*, 18 So.3d at 517 (finding no prejudice and citing previous cases where this Court "determined that the defendants were not prejudiced by the improper statements of the prosecutors because the juries were given the proper instructions for analyzing aggravating and mitigating circumstances"). Our confidence in the outcome is therefore not undermined.
>
> Because Allen has not demonstrated prejudice, we need not address the deficient performance prong. *See Strickland*, 466 U.S. at 697. Therefore, we conclude that the circuit court properly denied postconviction relief on this claim.

Allen, 261 So.3d at 1279. (AA, Exhibit T, p. 1279). The state court properly denied this sub-claim.

In the instant case, the prosecutor's mere comment that it is not easy to ask for a death recommendation pales in comparison to the comments made in *Ruiz* and cannot reasonably be deemed to be indistinguishable therefrom. Allen has also failed to show prejudice. *Brooks v. State*, 762 So. 2d 879 (Fla. 2000), "While this comment was improper, the comment still does not amount to fundamental error.

The prosecutor did not repeat this statement during the rest of his closing arguments." Similarly, the State made this singular statement and moved on. No prejudice can be found.

Trial counsel's failure to object was not unreasonable under prevailing professional norms, and there is no prejudice. Accordingly, this sub-claim should be denied.

c. Denigration of Mitigation and Defense Counsel Misstatements

Allen also alleges counsel was ineffective for failing to object where the State allegedly denigrated the testimony of Dr. Gebel and misrepresented his testimony to the jury. The State argument at issue reads as follows:

> And then I said, well, Doctor, what if you knew those were the facts in this case because that is exactly what she did. Wouldn't that change your opinion? Well,
>
> blah, blah, blah, no that really wouldn't change my opinion. And you know why? Because he was paid $3,000 to come in here and say she had cognitive disorders.

(AA, Exhibit A-22, p. 1926).

The Florida Supreme Court affirmed the lower court's denial of this sub-claim and, utilizing the standard set forth by the United States Supreme Court in *Strickland* found that Allen had failed to meet her burden under *Strickland:*

> Sub-claim 6
>
> Allen claims that trial counsel should have objected when the prosecutor stated during closing arguments that, because Dr. Gebel was

paid for his testimony, he refused to change his opinion even when faced with new facts of the case. She argues that this misrepresentation of Dr. Gebel's testimony prejudiced her by denigrating him as an expert witness, undermining her mitigation.

The record shows that during cross-examination, the prosecutor asked Dr. Gebel if his diagnosis of Allen's poor executive functioning would change a bit now that he knew more facts of the case, and Dr. Gebel replied, "It might change the degree with which she's injured, but it wouldn't change the fact that she has been injured throughout the years." Dr. Gebel then answered in the affirmative when asked if his new knowledge of the facts "might change the severity or the degree of that injury." The prosecutor also stated during closing arguments:

> And then I said, well, Doctor, what if you knew those were the facts in this case because that is exactly what she did? Wouldn't that change your opinion? Well, blah, blah, blah, no, that really wouldn't change my opinion. And you know why? Because he was paid $3,000 to come in here and say that she had cognitive disorders.

Allen did not suffer prejudice. Allen has failed to demonstrate a reasonable probability that, but for counsel's failure to object to the State's characterization of Dr. Gebel's testimony, the result of the proceeding would have been different. *See Strickland*, 466 U.S. at 694. Given the overwhelming evidence of guilt presented, there is no reasonable probability that the jurors would have changed their minds regarding the balancing of aggravating and mitigating circumstances solely due to hearing that the expert witness was paid to testify and would not change his opinion. *See Sochor*, 883 So. 2d at 771 (citing *Strickland*, 466 U.S. at 694). Our confidence in the outcome is not undermined. Because Allen has not demonstrated prejudice, we need not address the deficient performance prong. *See Strickland*, 466 U.S. at 697. Therefore, we conclude that the circuit court properly denied relief on this claim.

Allen, 261 So.3d at 1279-80. (AA, Exhibit T, p. 1279-80). The state court properly denied this sub-claim.

What the State did here, was successfully discredit Dr. Gebel's opinion regarding Allen's impaired executive functioning based on the actions she took in planning and executing the cover up after the murder. Furthermore, Allen fails to establish prejudice. The amount of evidence supporting the two aggravating circumstances in this case shows that there is no reasonable probability that, but for hearing the comments in question, the jury's recommended sentence would have been different. *See Sochor*, 883 So. 2d at 771 (citing *Strickland*, 466 U.S. at 694). Accordingly, this sub-claim should be denied.

d. Inflammatory Comments

Allen next claims counsel was insufficient for failing to object and move for a mistrial regarding the State's characterization of the actions Allen perpetrated against the victim as being similar to water boarding when the State presented closing arguments during the penalty phase.

The Florida Supreme Court affirmed the lower court's denial of this sub-claim and, utilizing the standard set forth by the United States Supreme Court in *Strickland* found that Allen had failed to meet her burden under *Strickland:*

Sub-claim 7

> Allen claims that trial counsel should have objected when the prosecutor during closing arguments characterized Allen's pouring of liquids or water on Wright's face as waterboarding torture, because the comment was inflammatory and the record contained no evidence that Allen waterboarded Wright.

During closing argument, the prosecutor stated:

> We have heard a lot of things on the news in the last couple of years about torture, systematic torture. Water boarding, pouring water on someone's face making them think that they are drowning. That is torture. That is an attempt to get somebody to fess up to something. That didn't work. And all the while, all the while, you know, think of what is going through Wenda Wright's mind. So, the liquids doesn't [sic] work.

> Allen has failed to demonstrate that the prosecutor's description of Wright's suffering as waterboarding prejudiced her penalty phase. In light of Quintin's testimony that liquids were poured on Wright's face and that she was tortured, as well as the HAC aggravating factor found by the trial court, there is no reasonable probability that the jurors would have changed their minds regarding the balancing of aggravating and mitigating circumstances solely due to hearing the prosecutor describe Allen's actions as waterboarding. *See Sochor*, 883 So. 2d at 771 (citing *Strickland*, 466 U.S. at 694). Our confidence in the outcome is not undermined. Because Allen has not demonstrated prejudice, we need not address the deficient performance prong. *See Strickland*, 466 U.S. at 697. Therefore, we conclude that the circuit court properly denied relief on this claim.

Allen, 261 So.3d at 1280-81. (AA, Exhibit T, p. 1280-81). The state court properly denied this sub-claim.

The "proper exercise of closing argument is to review the evidence and to explicate those inferences which may reasonably be drawn from the evidence." *Wade v. State*, 41 So.3d 857, 868 (Fla. 2010), *Bertolotti v. State*, 476 So. 2d 130, 134 (Fla. 1985). Attorneys are permitted wide latitude in arguing the facts and law to the jury and may draw logical inferences in doing so. *Smith v. State*, 7 So.3d 473, 509 (Fla. 2009).

While Allen cites various authorities to establish what water boarding entails, the State does not contest such. There was ample evidence adduced at trial indicating that Allen did engage in torturing the victim. The testimony of Quinten Allen described liquids being poured over her face in attempt to obtain information about Allen's missing money. Whether those liquids made their way down the victim's throat or into her eyes would not have swayed the jury one way or the other. Contrary to Allen's allegations, any negative emotion in the juror's minds were a consequence of the myriad of events leading up to the murder, not any deficiency by trial counsel. Accordingly, this sub-claim should be denied.

e. Bad Character

Allen alleges counsel rendered deficient performance in failing to object to argument that indicated that she was a bad mother.

The Florida Supreme Court affirmed the lower court's denial of this sub-claim and, utilizing the standard set forth by the United States Supreme Court in *Strickland* found that Allen had failed to meet her burden under *Strickland:*

Sub-claim 9

> Allen claims that trial counsel should have objected and moved for a mistrial during closing arguments because the prosecutor introduced evidence of Allen's bad character—that she was a bad mother because her children were in prison—without her counsel's previously opening the door by presenting evidence of good character. Allen argues that this prejudiced her because the comments portrayed her as unsympathetic and inflamed the jurors' passions.

> The record shows that Myrtle Hudson testified that two of Allen's children are in prison and one of them stays with her grandmother. The prosecutor stated during closing arguments:
>
> > You heard about the Defendant's time in prison for previous drug sale convictions. You heard about her children, her son in prison for 11years and one of her daughters is in prison for five years. And her other daughter is with her grandmother. And we can only hope that there may be some hope for that daughter.
>
> Allen did not suffer prejudice because there is no reasonable probability that hearing about Allen's poor mothering influenced the jurors' weighing of the aggravating and mitigating circumstances. Our confidence in the outcome is not undermined. *See Sochor*, 883 So. 2d at 771 (citing *Strickland*, 466 U.S. at 694). Because Allen has not demonstrated prejudice, we need not address the deficient performance prong. *See Strickland*, 466 U.S. at 697. Therefore, we conclude that the circuit court properly denied postconviction relief on this claim.

Allen, 261 So.3d at 1281. (AA, Exhibit T, p. 1281). The state court properly denied this sub-claim.

As legal support for this claim, Allen relies on *Martinez v. State*, 761 So. 2d 1074, 1082 (Fla. 2000), contending that since she presented no testimony that she was of good character, the defense did not open the door to enable the prosecution to present evidence of bad character. However, the tragic state of Allen's children was introduced by Allen and not the State. The evidence that two of her children were in prison and the third one was in the grandmother's custody was testified to by Ms. Myrtle Hudson. She indicated that, "One of her daughters stay with her grandmother. One of them just got five years in prison. And her son just got eleven

years in prison." She testified that they all had "learning disability and behavior disability" and had been in special classes at school. (AA, Exhibit A-22, p. 1888-89).

The State's arguments that are criticized by Allen constitute fair argument based on the evidence presented. Trial counsel cannot be deemed ineffective for failing to object to a fair comment which is based on the evidence presented during the trial. *Spann v. State*, 985 So. 2d 1059, 1068 (Fla. 2008) (citing *Mungin v. State*, 932 So. 2d 986, 997 (Fla. 2006)). Accordingly, this sub-claim should be denied.

f. Bolstering and Misstatements

Allen claims counsel was deficient for failing to object when the prosecutor allegedly "added the authority of his office" to the prosecutor's argument by indicating that he wrote down notes when arguing in closing: "But here is [sic] some things. First of all, what I wrote down was [Dr. Gebel] said, no major brain issues with the Defendant. No major brain issues with the Defendant. Okay?" (AA, Exhibit A-22, p. 1923). She also contends that said argument misstated the evidence.

The Florida Supreme Court affirmed the lower court's denial of this sub-claim and, utilizing the standard set forth by the United States Supreme Court in *Strickland* found that Allen had failed to meet her burden under *Strickland:*

Sub-claim 10

> Allen claims that trial counsel should have objected and moved for a mistrial during closing arguments because the prosecutor added to

> the authority of his office by saying that he wrote down Dr. Gebel's testimony. She also claims that the prosecutor misstated the doctor's testimony by claiming that the doctor said that Allen had no major brain issues or brain injury. Allen argues that this prejudiced her because the comments devalued her mental health mitigation.
>
> The record shows that on direct examination, Dr. Gebel stated that Allen suffered "intracranial injuries" and reasoned that "[w]ithin a reasonable degree of medical probability she does fit a patient who has brain damage." Dr. Gebel also testified that he was unsure if Allen had any structural brain damage, and that she did not have "any brain injury in terms of weakness in an arm or leg." In closing, the prosecutor stated, "First of all, what I wrote down was [Dr. Gebel] said, no major brain issue with the Defendant. No major brain issues with the Defendant. Okay?" The prosecutor also stated, "And, again, the first doctor says no major brain injury."
>
> Allen has failed to establish prejudice under *Strickland*. Allen has not demonstrated a reasonable probability that the outcome of the proceeding would have been different but for the prosecutor's summarizing Dr. Gebel's testimony as opining that Allen did not have a major brain injury—as Dr. Gebel equivocated regarding possible structural brain damage, which is consistent with having no major brain damage. Our confidence in the outcome is therefore not undermined. *See Sochor*, 883 So. 2d at 771 (citing *Strickland*, 466 U.S. at 694). Therefore, we conclude that the circuit court properly denied relief on this claim.

Allen, 261 So.3d at 1281-82. (AA, Exhibit T, p. 1281-82). The state court properly denied this sub-claim.

Allen cites to *United States v. Garza*, 608 F2.2d 659, 666 (5th Cir. 1979) in comparison to her case. This case is clearly distinguishable from *Garza*. In *Garza,* during rebuttal argument, the prosecutor responded:

> And he (defense counsel) said something else that kind of irritated me at one point. He said that he hoped an innocent man was not found

> guilty. I have been doing this kind of work for a long time. He's a defense lawyer, and I told you while ago that I thought Rudy Gonzales over here was a professional man. And I think these Drug Enforcement Administration people are professionals. And I think the record of being able to move from one job to another job and staying in that work as long as they have indicates [sic] that they are professionals. He talks about motive. I think their motives are pure as the driven snow. Their motives are to get out and make this world a better place to live in. A better place to live in, and I'll tell you they don't have to fabricate to do it because there is enough wrong going on and there is enough corruption going on out there that if you just go out and walk around the streets and know what you are looking at and looking for you just bump right into it. You don't have to frame anybody.
>
> And, ladies and gentlemen, if I thought that I had ever framed an innocent man and sent him to the penitentiary, I would quit. Now, I resent the innuendoes that I would stand up here and try to send an innocent man to the penitentiary, and that's what it was. I resent that because it's simply not true because, believe you me, there is presently enough work to do without fooling around with innocent people. Plenty enough. All over the place.

United States v. Garza, 608 F2.2d 659, 666 (5th Cir. 1979). The prosecutor in Allen's case mentioned in passing that he wrote down notes. The prosecutor in *Garza* rendered a full speech riddled with improper and demeaning comments. In the instant case, the prosecutor's comment cannot reasonably be deemed to be indistinguishable therefrom.

Allen also erroneously contends that said argument misstated the evidence concerning Dr. Gebel's testimony about brain damage. However, Dr. Gebel testified he did not know if she had any structural brain damage as no MRI had been done. (AA, Exhibit A-21, p. 1757). He testified that it did not seem like she "has any major

brain injury in terms of weakness in an arm or leg or anything on those terms. He testified that her mental status was questionable, but he noted she was hesitant to cooperate with the testing. (AA, Exhibit A-21, p. 1745). While the prosecutor's statement may not have quoted Dr. Gebel's remarks verbatim, it is unlikely to have had an effect on her mental health mitigation. Allen fails to show deficiency by trial counsel in failing to object to either of these remarks, and this sub-claim should be denied.

III. Cumulative Effect

Finally, Allen alleges counsel was ineffective in failing to object and move for a mistrial on the basis that the cumulative effect denied her a fair trial.

The Florida Supreme Court affirmed the lower court's denial of this sub-claim and, utilizing the standard set forth by the United States Supreme Court in *Strickland* found that Allen had failed to meet her burden under *Strickland:*

Subclaim 11

> Allen argues that the alleged errors by counsel cumulatively deprived her of a fair trial. However, because each subclaim, addressed individually, is without merit, the claim of cumulative error also necessarily fails. *See Israel*, 985 So. 2d at 520 (denying a claim of cumulative error when the individual claims did not establish ineffective assistance of counsel); *Bell v. State*, 965 So. 2d 48, 75 (Fla. 2007) ("[B]ecause we conclude that none of the [individual ineffective assistance of counsel] claims has merit, we affirm the circuit court's determination that there is no cumulative error."). Therefore, we conclude that the circuit court properly denied postconviction relief on this claim.

Allen, 261 So.3d at 1282. (AA, Exhibit T, p. 1282). The state court properly denied this sub-claim.

In order to require a new trial based on allegedly improper prosecutorial comments, the prosecutor's comments must either deprive the defendant of a fair and impartial trial, materially contribute to the conviction, be so harmful or fundamentally tainted as to require a new trial, or be so inflammatory that they might have influenced the jury to reach a more severe verdict than that it would have otherwise. *Anderson v. State*, 863 So. 2d 169, 187 (Fla. 2003). Since the sub-claims are insufficient for grounds previously raised herein, the State respectfully contends there are no errors of counsel to accumulate. The majority of the prosecutorial arguments alleged to be improper were fair comment on the evidence or inferences arising from the evidence, or proper response to the arguments of defense counsel.

Because none of Allen's various sub-claims had merit, the state court properly denied her claims. The Florida Supreme Court's decision affirming this denial is not contrary to or an unreasonable application of clearly established federal law. Accordingly, this Court should deny Grounds Four and Thirteen of Allen's habeas petition.

GROUND FIVE

Exhaustion: Allen's ineffectiveness claims were raised in state court, which denied them, and affirmed on appeal by Florida's high court. *Allen v. State*, 261 So.3d 1255 (Fla. 2019). Accordingly, the claims raised here have been exhausted.

Merits: Dr. Qaiser testified at trial, although Dr. Whitmore performed the actual autopsy. Dr. Whitmore's report listed the cause of death as homicidal violence with cocaine intoxication and the manner of death as a homicide. (AA, Exhibit M, p. 2842). Dr. Qaiser found ligature marks which Dr. Whitmore did not reference in his autopsy report. (AA, Exhibit M, p. 2803, 2853). He opined that the cause of death was homicidal violence in which ligature and strangulation was an important cause of death. Dr. Qaiser further testified that the amount of cocaine present in the victim's system did not contribute to her death. (AA, Exhibit A-16, p. 1142-44). Dr. Qaiser did agree with Dr. Whitmore's finding that obesity, cardiac issues, and cirrhosis of the liver were contributing factors to the victim's death. Allen sought to introduce Dr. Whitmore's autopsy report into evidence and the State objected. (AA, Exhibit A-19, p. 1477). The report itself was not admitted into the trial. Allen's asserts that counsel was ineffective for failing to present his own forensic expert.

In deciding whether trial counsel was deficient for failing to call an expert to rebut the State's expert, "a number of factors should be considered [:]" First among these are the attorney's reasons for performing in an allegedly deficient manner, including consideration of the attorney's tactical decisions. *See State v. Bolender*,

503 So. 2d 1247, 1250 (Fla. 1987); *Lightbourne v. State*, 471 So. 2d 27, 28 (Fla. 1985). A second factor is whether cross-examination of the State's expert brings out the expert's weaknesses and whether those weaknesses are argued to the jury. *Card v. Dugger*, 911 F.2d 1494 (11th Cir. 1990). *See Rose v. State*, 617 So. 2d 291, 297 (Fla. 1993) [.] The final factor is whether a defendant can show that an expert was available at the time of trial to rebut the State's expert. *See Elledge v. Dugger*, 823 F.2d 1439, 1446 (11th Cir. 1987); *State v. Riechmann*, 777 So. 2d 342, 354 (Fla. 2000). The state court was correct in denying Allen's motion for postconviction relief. Trial counsel had a valid strategic reason for not presenting this evidence, and Allen failed to establish any prejudice from counsel's decision. Furthermore, the evidence Allen argues should have been presented by an expert witness was presented at trial through the effective cross-examination of Dr. Qaiser by defense counsel. The lower court's rejection of this claim was not unreasonable and habeas relief, therefore, is not warranted.

The state court granted Allen an evidentiary hearing on her claim, and Allen presented testimony from Dr. Spitz and trial attorney Frank Bankowitz. The State called Dr. Sajid Qaiser, the chief medical examiner for Brevard County.

During the EH, Bankowitz testified that he received an amended witness list which listed another medical examiner. He filed a Motion to Continue because the State had switched doctors fairly close to the trial. (AA, Exhibit M, p. 2883-84).

Bankowitz testified that he believed he brought up the issue of Dr. Qaiser acting as a witness in the State's case, but he could not recall if he filed a formal motion. (AA, Exhibit M, p. 2802). Bankowitz testified that he deposed Dr. Qaiser in August 2010, (AA, Exhibit M, p. 2802-03), and that his strategy was to get in Dr. Whitmore's report through the cross-examination of Dr. Qaiser. (AA, Exhibit M, p. 246).

From the onset, trial counsel made the existence of Dr. Whitmore and his initial report known. Dr. Whitmore's report listed the cause of death as homicidal violence with cocaine intoxication and the manner of death as a homicide. (AA, Exhibit M, p. 2842). Bankowitz referred to the report consistently during cross-examination and showed it to Dr. Qaiser. The jury saw it as well. (AA, Exhibit M, p. 2810). He brought out the fact that Dr. Whitmore, the doctor who actually performed the autopsy, had opinions different from Dr. Qaiser, who only looked at photos and paperwork. (AA, Exhibit M, p. 297). His questioning of Dr. Qaiser informed the jury that Dr. Whitmore made his findings over five years prior to the trial taking place, whereas Dr. Qaiser had only been brought in on the case within a few months of trial to review the autopsy. (AA, Exhibit A-19, p. 1469). They were aware that Dr. Qaiser never saw the victim's body nor did he perform the autopsy. (AA, Exhibit M, p. 2855). Trial counsel used those distinctions to infer to the jury that Dr. Whitmore's findings were more reliable than Dr. Qaiser. Trial counsel cross-examined Dr. Qaiser extensively with Dr. Whitmore's report and felt that he did not

need any other expert to come in and say the same thing Dr. Whitmore said. (AA, Exhibit M, p. 2874-75).

While defense expert Dr. Spitz concluded that there were no ligature marks on the victim, he also admitted that he could not exclude ligature – that it was within the range of possibility. (AA, Exhibit M, p. 3323). During the evidentiary hearing, he testified that although the body didn't show the indicia on the ligature strangulation, that doesn't mean that it is completely and entirely off the table. (AA, Exhibit M, p. 3324). He testified that a medical examiner can miss something that is pretty patent, especially in a decomposed body. (AA, Exhibit M, p. 3324). Dr. Spitz did not completely discredit Dr. Qaiser's findings as scientific impossibilities, but instead agreed they were possible. After viewing the State's exhibit showing the victim's eye, he agreed that it could be a petechial hemorrhage. (AA, Exhibit M, p. 3328). He concluded that he and Dr. Qaiser "basically have a difference of opinion." (AA, Exhibit M, p. 3324). While Dr. Spitz disagreed with Dr. Qaiser's findings, Dr. Spitz did not completely discredit those findings as scientific impossibilities, but instead agreed they were possibilities.

Dr. Qaiser recalled testifying at trial that there was evidence indicating ligature strangulation on the victim. (AA, Exhibit M, p. 3098). A photograph depicting the left side of Wenda Wright's neck and ear indicated "a patchy distribution of the contusion." A photograph of the right side of her neck showed

"the same thing … it is a complete belt … the clear sharp lines, the upper line and the lower line." (AA, Exhibit M, p. 3104, 3106, 3108, State Exhibit 2, AA, Exhibit M, p. 1553-54). Another photograph (State Exhibit 44, AA, Exhibit A-9, p. 1338-39) indicated that, Wright's strap muscles below the hyoid bone depicted patchy hemorrhages in those areas, which in Dr. Qaiser's opinion, was evidence of the "forced application" of a ligature. (AA, Exhibit M, p. 3104-05). He stated that a photograph taken during the autopsy (State Exhibit 33, AA, Exhibit A-9, p. 1316-17) showed the victim's tongue protruding which is common whenever pressure is applied to the neck in a case of strangulation, either hanging or by ligature strangulation. (AA, Exhibit M, p. 3107-08). In Dr. Qaiser's opinion, the parallel, sharp lines were not a natural fold of skin as "the fold of the skin will not be going that way parallel to each other and in a straight line. They will be in a different distribution." (AA, Exhibit M, p. 3106). Dr. Qaiser knew Dr. Whitmore's autopsy report did not make a finding as to ligature marks, but rather, findings of "contusions … on the right side and the left side of the neck." (AA, Exhibit M, p. 3119). Dr. Qaiser testified he was aware of the facts of the case. After reviewing the entire autopsy file, and taking Quentin Allen's statement into consideration, Dr. Qaiser determined the manner of death was homicide. (AA, Exhibit M, p. 3106, 3120, 3121). Dr. Qaiser's findings were consistent with Quentin Allen's testimony at trial. (AA, Exhibit M, p. 3107, 3108). Dr. Qaiser reviewed defense expert Dr. Spitz's

deposition and his report and disagreed with Spitz's conclusion. (AA, Exhibit M, p. 3107, 3108, 3122). After the evidentiary hearing, the trial court denied this claim holding:

> The Court finds that there is no prejudice, as there is no reasonable probability that more thorough preparation by trial counsel by consultation with, or presentation of an expert, would have made any difference in the outcome. 'Strategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct." *Peterson v. State*, 154 So.3d 275 (Fla. 2014). Confidence in the outcome is not undermined.

(AA, Exhibit M, p. 2004). Allen challenged this ruling on appeal, and the Florida Supreme Court, also applying the *Strickland* standard, affirmed the denial of relief:

> **Failure to call a forensic expert**
>
> Allen argues the postconviction court erred in denying the claim that trial counsel was ineffective during both the guilt and penalty phases of her trial for failing to call his own forensic expert.
>
> We have held that trial counsel's decision not to call certain witnesses to testify is often reasonable trial strategy, and mere disagreement with that reasoning is not enough to show deficient performance. *See Johnston v. State*, 63 So.3d 730, 741 (Fla. 2011) (holding that counsel's failure to call defendant's friend to offer mitigation testimony was reasonable trial strategy). Cross-examination is often sufficient to reveal deficiencies in an expert's presentation, especially when re-presenting the same evidence through other witnesses would not alter the outcome. *See Anderson v. State*, 220 So.3d 1133, 1146 (Fla. 2017).
>
> A number of factors must be considered when determining whether trial counsel's decision not to call an expert to rebut the State's expert constitutes deficient performance:

> First among these are the attorney's reasons for performing in an allegedly deficient manner, including consideration of the attorney's tactical decisions. *See State v. Bolender*, 503 So. 2d 1247, 1250 (Fla. 1987); *Lightbourne v. State*, 471 So. 2d 27, 28 (Fla. 1985). A second factor is whether cross-examination of the State's expert brings out the expert's weaknesses and whether those weaknesses are argued to the jury. *Card v. Dugger*, 911 F.2d 1494 (11th Cir. 1990). *See Rose v. State*, 617 So. 2d 291, 297 (Fla. 1993)[.] The final factor is whether a defendant can show that an expert was available at the time of trial to rebut the State's expert. *See Elledge v. Dugger*, 823 F.2d 1439, 1446 (11th Cir. 1987).

State v. Riechmann, 777 So. 2d 342, 354 (Fla. 2000).

The postconviction court's order states:

> Attorney Bankowitz . . . cross-examined Dr. Qaiser extensively with Dr. Whitmore's report and felt that he did not need any other expert to come in and say the same thing Dr. Whitmore said . . . . Dr. Qaiser admitted that Dr. Whitmore performed the actual autopsy, and he was only able to view photographs. Dr. Qaiser testified that he found ligature marks on the neck, that she suffered a ligature strangulation. He agreed that Dr. Whitmore's report found contusions on the neck, and made no mention of ligature marks. Dr. Qaiser disagreed that cocaine intoxication was a contributory factor, although he admitted that was in Dr. Whitmore's report. Dr. Qaiser testified that there was no evidence of bleach or a caustic substance on Ms. Wright. Dr. Qaiser testified that he could not state within a reasonable degree of medical probability that the victim felt pain while unconscious. Everything Dr. Spitz testified to was brought out on cross-examination of Dr. Qaiser. While Dr. Spitz disagreed with Dr. Qaiser's findings, Dr. Spitz did not completely discredit those findings as scientific impossibilities, but instead agreed they were possibilities. The Court finds that counsel's strategic decision not to hire a forensic expert, but instead

> to challenge Dr. Qaiser's findings through crossexamination, [sic] was not unreasonable under prevailing professional norms.

The record supports the postconviction court's findings. The record reflects that Dr. Qaiser testified that Dr. Whitmore, not Dr. Qaiser, performed the autopsy; that the autopsy report did not mention ligature marks and did mention cocaine being a contributing factor in Wright's death; that no evidence of a caustic substance on Wright existed; and that he could not state within reason that Wright experienced pain while unconscious. Further, these admissions and weaknesses elicited from Dr. Qaiser on cross-examination were the same admissions and weaknesses that Dr. Spitz testified to at the evidentiary hearing. Therefore, the jury was informed as to the conclusions Dr. Spitz would have made if he had testified. The record also reflects that trial counsel understood the science of the case and decided that he did not need an expert to say the same thing that he elicited out of Dr. Qaiser on cross-examination with Dr. Whitmore's autopsy report. There is no deficiency when counsel had a tactical reason for not calling his own expert and his cross-examination elicited the same weaknesses that the expert would have. *Rigterink v. State*, 193 So.3d 846, 867 (Fla. 2016).

Accordingly, counsel's decision not to call the forensic expert was a strategic one and he was not deficient.

Moreover, Allen cannot show prejudice. The evidence at trial included Quintin's testimony that Wright was kidnapped, bound, beaten, and unable to leave, even as she begged to be released before and while being strangled. Dr. Spitz agreed that the death was a homicide and that ligature strangulation was possible and that he could not rule it out. He even agreed that the bruising on Wright's body could have occurred by restraint. Everything testified to by Dr. Spitz was brought out on Dr. Qaiser's cross-examination. This testimony shows that even if counsel had presented the testimony of Dr. Spitz, it would not have undermined the State's case to any significant extent. *See Abdool v. State*, 220 So.3d 1106, 1114-15 (Fla. 2017) (concluding that there was no prejudice where the expert that trial counsel "fail[ed] to consult and retain actually provided information that is consistent with the testimony presented by the State's arson expert"). Our confidence

> in the outcome is not undermined, and we conclude that the circuit court properly denied postconviction relief on this claim.

Allen, 261 So.3d at 1283-84. (AA, Exhibit T, p. 1283-84).

Allen argues that trial counsel should have hired a forensic expert, rather than rely on the cross-examination of Dr. Qaiser. However, "*Strickland* does not enact Newton's third law for the presentation of evidence, requiring for every prosecution expert an equal and opposite expert from the defense. In many instances cross-examination will be sufficient to expose defects in an expert's presentation." *Anderson v. State*, 223 So.3d 1133, 1146 (Fla. 2017), *citing Harrington v. Richter*, 562 U.S. 86 (2011). Trial counsel was able to introduce Dr. Whitmore's conflicting autopsy report through the cross-examination of Dr. Qaiser. Furthermore, the jury knew that Dr. Whitmore had previously been found to be an expert witness as a forensic pathologist, he had been Dr. Qaiser's boss, and that Dr. Whitmore was the medical examiner who actually performed the autopsy, which is significant considering the fact that Dr. Qaiser was only able to view photographs of the victims. "Counsel cannot be adjudged incompetent for performing in a particular way in a case, as long as the approach taken 'might be considered sound trial strategy.'" *Chandler v. United States*, 218 F.3d 1305, 1314 (11th Cir. 2000) (quoting *Darden v. Wainwright*, 477 U.S. 168, 106 S.Ct. 2464, 2474, 91 L.Ed.2d 144 (1986)). Counsel made a tactical decision. Petitioner has not shown that no competent counsel would have adopted the same trial strategy. *See Provenzano v. Singletary*, 148 F.3d 1327,

1332 (11th Cir. 1998) ("strategic choices are 'virtually unchallengeable'.") (citations omitted).

Trial counsel was not deficient for failing to challenge Dr. Qaiser's testimony as Allen failed to explain how any expert would raise doubts regarding Dr. Qaiser's testimony. *See Harrington v. Richter*, 562 U.S. 86 (2011) (stating that *Strickland* does not require that a defense attorney hire an expert to rebut a State's expert, and it was entirely reasonable for the court to find no prejudice when the defendant failed to offer any evidence challenging the prosecution's expert's conclusions). The admissions and weaknesses elicited from Dr. Qaiser on cross-examination were the same admissions and weaknesses that Dr. Spitz testified to at the evidentiary hearing. Therefore, the jury was informed as to the conclusions Dr. Spitz would have made if he had testified. "There is no reasonable probability that re-presenting virtually the same evidence through other witnesses would have altered the outcome in any manner." *Atwater v. State*, 788 So. 2d 223, 234 (Fla. 2001).

Even assuming that trial counsel was somehow deficient in failing to hire his own expert, the record conclusively established that there was no prejudice as a result of this alleged deficiency. As properly found by the state court, the record refuted any allegation of prejudice, as there is no reasonable probability that a more thorough preparation by trial counsel by consultation with, or presentation of an expert, would have made any difference in the outcome. Everything defense expert

Dr. Spitz testified to during the evidentiary hearing was brought out on cross-examination of Dr. Qaiser through Dr. Whitmore's autopsy report. (AA, Exhibit M, p. 3337-38). *See Henry v. State*, 948 So. 2d 609, 621 (Fla. 2000) ("*Strickland* requires defendants to show '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 a 'probability sufficient to undermine confidence in the outcome.'") (quoting *Strickland*, 466 U.S. at 694, 104 S. Ct. 2052). Clearly the evidence Allen argues should have been presented by an expert witness was presented to the jury through trial counsel's cross-examination of Dr. Qaiser. "Mere disagreement by a subsequent counsel with a strategic decision of a predecessor does not result in a showing of deficient performance". *See Occhicone v. State*, 768 So. 2d 1037, 1048 (Fla. 2000).

Lastly, there is no reasonable probability of a different result even had trial counsel hired his own expert. Dr. Spitz's testimony does not undermine a finding of heinous, atrocious and cruel, considering the horrific facts of the case. The HAC aggravator is proper ''only in torturous murders—those that evince extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another.'' *Guzman v. State*, 721 So. 2d 1155, 1159 (Fla.1998) (*citing Kearse v. State*, 662 So. 2d 677 (Fla.1995)). The Florida Supreme Court found that the State presented sufficient

evidence to establish the HAC aggravator, even absent the exact number of blows to her body or whether she felt pain in the 10, 15 or 20 seconds before she may have lost consciousness. The victim was held captive in Allen's home and begged for her life. Allen tortured the victim, beating her and pouring liquids over her face. She then strangled the victim while the victim screamed that she was going to wet herself. The victim was shaking and moving around for about three minutes after the belt was placed around her neck.

Contrary to Allen's assertions, the court's resolution of this claim is not an unreasonable determination of the facts or an unreasonable application of *Strickland.* The court correctly found that Allen's allegations were refuted by the record as she could not establish both deficient performance and prejudice as required by *Strickland*. As Allen has failed to establish any entitlement to federal habeas relief based on the state courts' resolution of this issue, this Court should deny Ground Five of Allen's habeas petition.

GROUND SIX

Exhaustion: Allen's ineffectiveness claims were raised in state court, which denied them, and affirmed on appeal by Florida's high court. *Allen v. State*, 261 So.3d 1255 (Fla. 2019). Accordingly, the claims raised here have been exhausted.

Merits: Allen's next claim asserts that the majority of counsel's cross-examination of Quintin was more damaging than what Quintin and the State had

already put in front of the jury. Generally, Allen argues that trial counsel should not have elicited testimony regarding the type of chemicals and where they were poured. "The proper purposes of cross-examination are: (1) to weaken, test, or demonstrate the impossibility of the testimony of the witness on direct examination and, (2) to impeach the credibility of the witness, which may involve, among other things, showing his possible interest in the outcome of the case." *Steinhorst v. State*, 412 So. 2d 332 (Fla. 1982). Trial counsel presented a competent and effective cross-examination. Quentin had given various versions of the events that took place and trial counsel effectively brought out these inconsistencies through cross-examination. Furthermore, no prejudice can be shown as there was other evidence in support of the HAC aggravator. The lower court's rejection of this claim was not unreasonable and habeas relief, therefore, is not warranted.

The state court granted Allen an evidentiary hearing on her claim and subsequently denied the claim based on a finding that she failed to establish deficient performance and prejudice as required by *Strickland v. Washington*, 466 U.S. 668 (1984). (AA, Exhibit M, p. 1939-2299). Allen challenged this ruling on appeal, and the Florida Supreme Court, also applying the *Strickland* standard, affirmed the denial of relief:

> **Improper eliciting of testimony that Allen poured chemicals on the victim**

Allen claims that trial counsel was ineffective during his recross of Quintin because counsel's questioning elicited testimony that Allen argues was harmful to the defense.

The record reflects that in Quintin's deposition he stated that Allen poured caustic substances "on" Wright's face. In his police statement, Quintin stated that he could not remember which specific substances were poured onto Wright, but that it was "a whole bunch of stuff." During direct examination, when asked if he knew the types of liquids that were poured onto Wright's face, he answered, "It was the bleach, the green rubbing alcohol, the spritz for hair, fingernail polish remover." On cross-examination, trial counsel asked if each of the chemicals was poured separately into Wright's eyes and mouth, and Quintin answered, "Yes, sir." On redirect examination, Quintin testified that he was not sure what liquids were poured onto Wright other than rubbing alcohol. Then, on recross-examination, when trial counsel asked several times which specific substances were poured onto Wright, Quintin testified that "bleach, nail polish remover, and ammonia" were poured "in" Wright's face and eyes and down her mouth. The record also shows that Dr. Qaiser testified that the autopsy report did not indicate that any bleach or caustic substances were ever poured down Wright's throat.

Allen asserts that Quintin's testimony on recross-examination that Allen poured bleach, nail polish remover, and ammonia in Wright's face, mouth, and eyes was more specific and damaging to her case than his previous, more generic, testimony. Allen argues that the elicitation of this testimony was deficient representation because it harmed the defense's case by painting for the jury a more painful picture of the specific harmful ways that Wright was tortured. The postconviction court found that trial counsel's tactics were not unreasonable, and we agree. The record demonstrates that counsel was not deficient in eliciting Quintin's testimony on recross-examination that bleach, ammonia, and nail polish remover were poured into Wright's eyes, mouth, and face. Quintin's testimony on direct examination specifically mentioned bleach and nail polish remover, but was inconsistent with his other testimony. In his police statement, Quintin said that he could not remember which substances were used, and he also stated on cross- and redirect examination that he could not specifically identify the types of substances poured onto Wright. Counsel's questions regarding

> which substances were poured, and the elicitation of Quintin's answer regarding nail polish, ammonia, and bleach, were appropriate because counsel was impeaching Quintin by attempting to show the inconsistencies in his testimony. Counsel's elicitation of this testimony on recross-examination was a reasonable tactical decision that resulted in the impeachment of Quintin. Additionally, his testimony about the bleach was further impeached by the forensic evidence and Dr. Qaiser's testimony that no evidence of bleach was found on Wright. Trial counsel was therefore not deficient for the strategic decision to impeach Quintin in that manner.
>
> Moreover, even if counsel was deficient, Allen has not suffered prejudice. The trial court's HAC aggravator determination was based on a multitude of evidence that was unrelated to the types of chemicals poured onto Wright. The record shows that Allen tied and bound, beat, tortured, and strangled Wright. There is not a reasonable probability that the outcome would have been different had the jury not heard the specific testimony regarding which chemicals were poured onto Wright and where they were poured. *Brant v. State*, 197 So.3d 1051, 107 (Fla. 2016) (finding no prejudice in light of the evidence for the HAC aggravator). Our confidence in the outcome is not undermined. Therefore, we affirm the denial of relief.

Allen, 261 So.3d at 1275. (AA, Exhibit T, p. 1275).

Counsel was able to get Quintin to agree that what he had testified to was not true. Counsel was able to argue during closing arguments that Quintin did not have an accurate memory and was not to be believed. The state court properly denied Allen's ineffective assistance of counsel claims relating to counsel's cross examination of State's witness Quintin Allen. Petitioner has not shown that the Florida Supreme Court's decision in rejecting her claim was contrary to or an unreasonable application of clearly established federal law, or that the state court's application of *Strickland* to the facts of her case was objectively unreasonable. *See*

Schriro v. Landrigan, 550 U.S. 465, 473 (2007) ("The question under AEDPA is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable-a substantially higher threshold."); *Rutherford v. Crosby*, 385 F.3d 1300, 1309 (11th Cir. 2004) ("[T]he AEDPA adds another layer of deference.... [The petitioner] must also show that in rejecting his ineffective assistance of counsel claim the state court applied *Strickland* to the facts of his case in an objectively unreasonable manner.") (internal quotation marks and citation omitted).

As counsel stated during the evidentiary hearing, the major reason to impeach someone was to show inconsistencies in their testimony. (AA, Exhibit M, p. 2601). The totality of Quintin's testimony about the kind of substances poured on the victim waivered throughout the course of his trial testimony. Quintin stated on numerous occasions that he did not recall or ever really know the identity of the various liquids poured on the victim (AA, Exhibit A-15, p. 905, 906; Exhibit A-16, p. 1036-44) and his statement to police made two days after the murder was just as uncertain as his testimony during trial. Trial counsel used this, as well as multiple other statements, to impeach Quintin's testimony and show that he could not be believed. (AA, Exhibit M, p. 2869).

During the State's direct examination, Quintin testified that Allen had poured bleach, alcohol, spritz, and nail polish remover onto the victim's face. He explained

that Allen brought all the liquids out at one time and poured them all out together as well. (AA, Exhibit A-15, p. 906-7). During cross-examination, trial counsel impeached Quintin's testimony by referencing his deposition in which he stated that Allen had poured the substances out one after the other as opposed to all at once. Trial counsel was able to get Quintin to state that he did not remember which statement was correct. Quentin later committed to the answer at deposition. (AA, Exhibit A-15, p. 1042, 1044). This was contrary to his direct testimony.

As for the liquids and where they were poured, during direct examination, Quintin testified that the victim was laying on her back and moving her head side to side and using her hands to try to refrain from the liquids getting into her eyes or mouth. (AA, Exhibit A-15, p. 906). During cross-examination, trial counsel impeached this testimony once again referring to Quintin's deposition in which he stated that the substances were poured in the victim's eyes and mouth. (AA, Exhibit 15, p. 1043). Significantly, by soliciting that information, trial counsel was able to later highlight the impossibility of that statement during closing argument. (AA, Exhibit A-20, p. 1598).

On direct examination, Quintin testified that he had held the victim's arms and legs while the liquids were being poured on her. During cross-examination, trial counsel once again impeached Quintin with his statement to police, in which he stated that the victim's legs were tied up and he stood by her. Trial counsel also

impeached Quintin with his deposition in which he stated that the victim was never restrained while the substances were being poured onto her face. Quintin conceded that none of the statements he made agree, and ultimately committed to the statement he made to police. This is contrary to his direct testimony. (AA, Exhibit A-16, p. 1054-55).

On direct examination, Quintin testified that he had stopped to get a dolly on the way back to Allen's house. (AA, Exhibit A-15, p. 937). During cross-examination, trial counsel impeached Quintin with his statement to police, in which he stated that the victim was already on the dolly when he got to Allen's house. Additionally, counsel was also able to impeach Quinten on the type of belt that was first put around the victim's neck, where the victim was punched and who got the bedsheet. (AA, Exhibit A-16, p. 1035-36,1055-57, 1059).

Furthermore, Allen cannot demonstrate prejudice where the State presented sufficient evidence to establish the HAC aggravator, even absent the exact chemicals poured on the victim. The victim was held captive in the Allen's home and begged for her life. Allen tortured the victim, beating her and pouring liquids over her face. She then strangled the victim while the victim screamed that she was going to wet herself.

Because Allen has failed to establish that the state court's resolution of this claim was based on an unreasonable determination of the facts or was contrary to or

an unreasonable application of clearly established federal law, this Court should deny Ground Six of Allen's habeas petition.

GROUND SEVEN

Exhaustion: Allen's ineffectiveness claims were raised in state court, which denied them, and affirmed on appeal by Florida's high court. *Allen v. State*, 261 So.3d 1255 (Fla. 2019). Accordingly, the claims raised here have been exhausted.

Merits: Allen's next claim asserts that counsel provided prejudicial ineffective assistance of counsel by failing to impeach Quintin with his prior inconsistent statements to Detective Gary Boyer indicating that Allen **did not** pour bleach on Wright, when his trial testimony was that bleach **was** poured on the victim. The state court properly denied Allen's ineffective assistance of counsel claim as the record shows that there were no inconsistent statements to impeach. Furthermore, Allen cannot prove prejudice. Quintin's testimony about bleach being poured on the victim was impeached by the definitive medical forensic evidence that no evidence of bleach was found on the victim, and there was other evidence in support of the HAC aggravator. The lower court's rejection of this claim was not unreasonable and habeas relief, therefore, is not warranted.

The trial court granted Allen an evidentiary hearing on her claim after which the trial court denied Allen's claim based on a finding that she failed to establish deficient performance and prejudice as required by *Strickland v. Washington*, 466

U.S. 668 (1984). (AA, Exhibit M, p. 1939-2299). Allen challenged this ruling on appeal, and the Florida Supreme Court, also applying the *Strickland* standard, affirmed the denial of relief:

> **Failure to impeach Quintin with prior inconsistent statements**
>
> Allen argues that trial counsel was ineffective for failing to impeach Quintin with prior inconsistent statements. She contends that counsel failed to impeach Quintin with his police statement indicating that Allen did not pour bleach on Wright, which conflicts with his trial testimony that Allen poured bleach on Wright.
>
> The record reflects that in his police statement, Quintin stated that he could not remember all of what was poured onto Wright before the homicide. He stated that Allen procured "alcohol" and hair products to pour onto Wright, that she had boxes of bleach, and that she did not have a bleach bottle but rather used a hair products bottle. He also stated that Wright's legs were tied with a belt while the liquids were poured onto her. On direct examination, Quintin testified that he personally held Wright's arms and legs down as Allen poured bleach and other chemicals on Wright's face. On cross examination, Quintin admitted that his trial testimony conflicted with his previous testimony regarding how Wright was restrained while the substances were poured on her. He testified that the statement he gave to the police was the truth, and that he had lied on direct examination.
>
> Quintin's police statement shows that he never actually stated that bleach was not poured onto Wright, but rather stated that although Allen had boxes of bleach, she did not have a *bottle* of bleach and that he was unsure what chemicals, other than alcohol, were used. These statements are not wholly inconsistent with his trial testimony. Moreover, as discussed in relation to claim three, counsel did cross-examine Quintin about many inconsistencies in his testimony and brought out this inconsistency on re-cross—choosing to rely on Dr. Qaiser's testimony that no evidence of bleach was found on Wright to demonstrate that Quintin's testimony should not be believed. This trial strategy was not unreasonable.

> For similar reasons, Allen has not demonstrated prejudice. Given that trial counsel did impeach Quintin with other inconsistent statements at trial, there is not a reasonable probability that the jury would have found Allen not guilty or that the jurors would have weighed the aggravation and mitigation differently had counsel impeached Quintin as Allen claims. "No prejudice result[s] from counsel's failure to present cumulative evidence of inconsistent statements." *Green v. State*, 975 So. 2d 1090, 1104 (Fla. 2008) (holding that counsel was not ineffective for failing to impeach with one statement because counsel impeached witness with many other inconsistent statements). The jury was aware that Quintin had lied on the stand and that his testimony was inconsistent in places. Our confidence in the outcome is therefore not undermined. We therefore conclude that the circuit court properly denied relief on this claim.

Allen, 261 So.3d 1284-85. (AA, Exhibit T, p. 1284-85).

Allen now argues that trial counsel did not go far enough in his impeachment of Quintin Allen. In this instance, the deficient performance was in failing to impeach Quintin's testimony on direct examination regarding whether or not Allen poured bleach onto the victim. Quintin testified that Margaret poured bleach, green rubbing alcohol, spritz for hair, and fingernail polish remover on the victim's face. (AA, Exhibit A-15, p. 903-906, 914). However, in his statement given two days after the murder to Detective Gary Boyer, Quintin said that all he could remember was alcohol, but that it was a whole bunch of different stuff. In Quintin's deposition, he stated that the Defendant poured bleach, ammonia, hair spritz, fingernail polish and rubbing alcohol on the victim. At deposition, he stated that the bleach was in a gallon bottle and that Allen opened the bottle and poured it on the victim's face and in her mouth. Allen claims that had Quintin been impeached on his direct testimony that

Allen poured bleach versus his original statement that he did not see a bleach bottle it would have shown he was not a reliable witness. The statement Allen identifies as impeachment evidence reads as follows:

> BOYER: What type of chemicals was it?
>
> QUINTIN: I wasn't, I couldn't—all I can remember alcohol . . . But I know it was a whole bunch of different stuff, 'cause her bathroom, when y'all go to look in the bathroom, she got a million different hair, different kind of products.
>
> BOYER: Any bleach or anything?
>
> QUINTIN: Yeah, she got boxes of bleach. But I don't, she ain't have no bleach bottle less she had done poured it in a hair products bottle.
>
> BOYER: Okay. So its hair products stuff that she was pouring on her?
>
> QUINTIN: Yeah, alcohol and stuff like that.

(AA, Exhibit A-7, p. 1113-14).

Trial counsel's impeachment of Quintin, concerning the bleach, was not unreasonable under prevailing professional norms. From a plain reading of Quintin's statement, it is clear his interview with police did not constitute a precise or clearly inconsistent statement. In fact, the relevant factual assertion pointed to by Allen was prefaced with statements of uncertainty such as "I wasn't, I couldn't – all I can remember." Even the conclusion of this line of questioning made little sense as Boyer asked if it was hair products that was poured on the victim and Quintin responded, "Yeah, alcohol and stuff like that" - alcohol is not a product commonly

associated with hair care. Under the circumstances, this statement would not have been compelling impeachment evidence even if it had been used by Allen to challenge Quintin's testimony that bleach was poured on the victim. The statement included the declarant's assertion that he had difficulty remembering what was poured on the victim at the time he made the statement, he specifically recalled it was "a whole bunch of stuff" and never clearly eliminated bleach as being a possibility.

Furthermore, Allen cannot claim she was prejudiced by this alleged deficiency. Counsel successfully impeached Quintin's testimony regarding the bleach when cross examining Dr. Qaiser as follows:

> MR. BANKOWITZ: Was there anything in the report to indicate that bleach or any other caustic substances were poured down the victim's throat?
>
> DR. QAISER: As far as I know in the report – from the report, I did not see that.
>
> MR. BANKOWITZ: Thank you, Doctor.

(AA, Exhibit A-19, p. 1487). Quintin's testimony about bleach being poured on the victim was impeached by the definitive medical forensic evidence that no evidence of bleach was found on the victim. The bleach issue was refuted by Dr. Qaiser's testimony that there was nothing in the autopsy report to indicate that bleach or any other caustic substances were poured down the victim's throat. (AA, Exhibit A-19,

p. 1487). There is no reasonable probability that additional impeachment would have produced a different result.

Allen also alleges that in the penalty phase, bleach would have featured heavily in the minds of jurors when they determined whether the heinous, atrocious and cruel aggravator was established and whether death was appropriate. Allen cannot demonstrate prejudice where there was extensive evidence supporting the HAC finding that was unrelated to whether or not bleach had been poured on the victim. When the lower court referenced the torture Wright received from Allen, the pouring of bleach was only one portion of the cruelty the victim received at the hands of the Petitioner during the court's analysis of the HAC aggravator.

> Wright was terrorized over a substantial period of time and she was aware of what was happening to her. Testimony reflects that Wright begged to be let go. When she tried to leave, Allen punched her in the head; Wright fell on the ground, and Allen continued punching her. According to Quintin, he was holding Wright down while Allen poured chemicals onto Wright's face. Allen beat Wright with belts while Wright's legs were tied. Allen then strangled Wright with a belt. Quintin testified that Wright was terrified and screamed for Allen to stop because she was going to wet herself. Wright was shaking and moving around for about three minutes after the belt was placed around her neck.

Allen, 137 So.3d at 963. (AA, Exhibit E, p.11)

Because Allen has failed to establish that the state court's resolution of this claim was based on an unreasonable determination of the facts or was contrary to or

an unreasonable application of clearly established federal law, this Court should deny Ground Seven of her habeas petition.

GROUND EIGHT

Exhaustion: Allen's ineffectiveness claims were raised in state court, which denied them, and affirmed on appeal by Florida's high court. *Allen v. State*, 261 So.3d 1255 (Fla. 2019). Accordingly, the claims raised here have been exhausted.

Merits: Allen's next claim asserts that counsel was ineffective for failing to object to Dr. Qaiser's testimony regarding unconscious people feeling pain when he was a conduit for the unnamed studies of other experts who were not available for cross examination, thereby violating the confrontation clause, and he could not say within a reasonable degree of medical certainty that the victim felt pain while unconscious. (Doc. 1 at 63).

The state court granted Allen an evidentiary hearing on her claim and denied the claim based on a finding that she failed to establish deficient performance and prejudice as required by *Strickland v. Washington*, 466 U.S. 668 (1984). (AA, Exhibit M, p. 1939-2299). Allen challenged this ruling on appeal, and the Florida Supreme Court, also applying the *Strickland* standard, affirmed the denial of relief:

> **Failure to object to Dr. Qaiser's testimony that unconscious people feel pain**
>
> Allen argues her trial counsel was ineffective for failing to object to Dr. Qaiser's testimony in the penalty phase that unconscious people have the ability to feel pain.

> The record reflects that Dr. Qaiser testified for the State that,
>
> [W]hether people who are unconscious, either they are minimally unconscious, mildly, moderately, or severely or profoundly unconscious, do they perceive pain or not. There is [very] little known about that. But the studies have been done, especially in Belgium, in Europe, and here also in the United States and all the other parts of North America . . . . So the conclusion was . . . that they register the pain, but it is not necessarily that they will outwardly manifest it.

The prosecutor then asked, "And [the victim] also could have been experiencing pain even if she is unconscious?" Dr. Qaiser answered, "That's true." On cross-examination, Dr. Qaiser also testified, "[It] is not necessary that the outward manifestation of pain will be there. But as far as the perception of pain by the subject, you cannot rule that out. And studies have shown that this has taken place." Dr. Qaiser then admitted that he definitely could not testify within a reasonable degree of medical probability that "there was a sensation of pain in the present case" while Wright was unconscious.

At the evidentiary hearing, trial counsel testified that he planned to refute Dr. Qaiser's testimony that unconscious people feel pain by cross-examining him. Trial counsel also testified that Dr. Qaiser admitted on cross-examination that in this case specifically he "couldn't say one way or the other" whether Wright experienced pain.

Allen claims that trial counsel should have objected to Dr. Qaiser's testimony because the testimony was speculative and inflammatory hearsay. However, the record establishes that counsel made a strategic decision not to object and rather to cross-examine Dr. Qaiser because he chose as a matter of strategy to attempt to refute the testimony. He ultimately succeeded in getting Dr. Qaiser to acknowledge on cross-examination that he could not definitively say that Wright felt pain within a reasonable degree of medical probability. This discredited his earlier testimony. Accordingly, the record establishes that counsel's decision was a reasonable one under the

> norms of professional conduct and, therefore, not deficient. Given that finding, we conclude that counsel was not deficient for failing to object to the testimony.
>
> Allen has also not demonstrated prejudice. Here, there was a large amount of evidence supporting the HAC aggravator finding that was unrelated to Dr. Qaiser's testimony regarding unconscious people feeling pain. Quintin testified that Allen kidnapped, bound, beat, and strangled Wright, and Dr. Qaiser testified regarding Wright's contusions and ligature marks. *Allen*, 137 So.3d at 953. This evidence was completely separate from the question of whether Wright felt pain after she was rendered unconscious. Given Quintin's testimony that Allen strangled Wright even while Wright pleaded to be released and screamed that she would wet her pants, as well as the forensic evidence of contusions on Wright's torso, there is no reasonable probability that an objection to the admissibility of Dr. Qaiser's testimony regarding pain would have affected the outcome of Allen's trial. Our confidence in the outcome is not undermined. Therefore, we affirm the postconviction court's denial of relief on this claim.

Allen, 261 So.3d at 1276-77. (AA, Exhibit T, p. 1276-77).

The state court's denial of this claim was neither contrary to, nor an unreasonable application of, clearly established federal law, nor did it involve an unreasonable determination of the facts in light of the evidence presented below. Allen admits that trial counsel established on cross-examination that Dr. Qaiser acknowledged that he **definitely could not testify** within a reasonable degree of medical probability that there was a sensation of pain in the present case while the victim was unconscious. (AA, Exhibit A-21, p. 1709-28). Therefore, any testimony that an unconscious person could feel pain was discredited. Thus, there was no basis for an objection and no prejudice. Trial counsel cannot be ineffective for failing to

make meritless arguments. *See Lukehart v. State*, 70 So.3d 503, 519 (Fla. 2011); *Raleigh v. State*, 932 So. 2d 1054, 1064 (Fla. 2006) ("[C]ounsel cannot be deemed deficient for failing to make a meritless objection.").

Furthermore, even if the testimony from Dr. Qaiser was impermissible, this claim is still without merit because Allen has not met the second of *Strickland's* two required prongs: prejudice.

Allen cannot demonstrate prejudice where there was extensive evidence supporting the HAC finding that was unrelated to whether or not the victim experienced pain after being rendered unconscious.

Accordingly, this claim should be denied.

GROUND NINE

Exhaustion: This claim was raised in Allen's postconviction motion, which found it procedurally barred under state law. The court's denial of relief was affirmed on appeal. *Allen v. State*, 261 So.3d 1255 (Fla. 2019).

Merits: Here, Petitioner claims entitlement to relief claiming the State violated *Giglio v. United States*, 405 U.S. 150 (1972) in the penalty phase when it elicited and failed to correct false testimony that Allen was convicted several times for selling drugs. The Florida Supreme Court found that the claim was "procedurally barred because it should have been raised on direct appeal where the facts supporting

the claim were available" and went on to say that even if not barred, it failed on the merits. (AA, Exhibit T, p. 1286).

Initially, Florida's application of a state-law based procedural bar is insulated from habeas review; it constitutes an independent and adequate ground for denial of habeas relief. *Coleman v. Thompson*, 501 U.S. 722 (1991). It is well established that a federal court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment. This rule applies whether the state law ground is substantive or procedural. *See Eagle v. Linahan*, 279 F.3d 926, 936 (11th Cir. 2001) (*citing Coleman v. Thompson*, 501 U.S. 722, 729, (1991)); *see also Caniff v. Moore*, 269 F. 3d 1245, 1247 (11th Cir. 2001) ("[C]laims that have been held to be procedurally defaulted under state law cannot be addressed by federal courts."). Absent showings of "cause" and "prejudice," *see Wainwright v. Sykes*, 433 U.S. 72 (1977), federal habeas relief will be unavailable when (1) "a state court [has] declined to address a prisoner's federal claims because the prisoner had failed to meet a state procedural requirement," and (2) "the state judgment rests on independent and adequate state procedural grounds." *Walker v. Martin*, 131 S. Ct. 1120, 1127 (2011) (*citing Coleman*, 501 U.S. at 729-30). Petitioner has not shown cause or prejudice that would excuse any procedural default. Likewise, she has not shown the applicability of the actual innocence exception. Since Petitioner is unable

to satisfy either of the exceptions to the procedural default bar, this claim is procedurally defaulted and barred from review.

Next, even in the absence of a state procedural bar, Allen's claim that the State violated *Giglio v. United States*, 405 U.S. 150 (1972), is without legal or factual support. To obtain relief on her *Giglio* claim, Allen had to 'prove: (1) the prosecutor knowingly used perjured testimony or failed to correct what he subsequently learned was false testimony; and (2) such use was material, i.e., that there is any reasonable likelihood that the false testimony could have affected the judgment.' *Trepal v. Sec'y, Fla. Dep't of Corr.*, 684 F.3d 1088, 1107–08 (11th Cir.2012) (internal quotation marks omitted). The trial court rejected this claim, both on a procedural basis, and, in the alternative, on its merits. Allen challenged this ruling on appeal, and the Florida Supreme Court, affirmed the denial of relief:

> ***Giglio* Claim**
>
> Allen next claims that the postconviction court erred in denying her claim that the State committed a *Giglio* violation.
>
> This claim is procedurally barred because it should have been raised on direct appeal where the facts supporting the claim were available. *See Robinson v. State*, 707 So.2d 688, 693 (Fla. 1998) (finding defendant's *Giglio* claim procedurally barred because defendant failed to raise it on direct appeal). However, even if the claim were not procedurally barred, it also fails on the merits. Allen must prove the following to establish a *Giglio* violation:
>
> > (1) the prosecutor presented or failed to correct false testimony;(2) the prosecutor knew the testimony was

> false; and (3) the false evidence was material. If the first two prongs are established, the false evidence is deemed material if there is any reasonable possibility that it could have affected the jury's verdict. The State must then ''prove that the false testimony was not material by demonstrating it was harmless beyond a reasonable doubt.'' Under the harmless error test, the State must prove ''there is no reasonable possibility that the error contributed to the conviction.''

Franqui v. State, 59 So.3d 82, 101-02 (Fla. 2011) (citations omitted) (quoting *Tompkins v. State*, 994 So.2d 1072, 1091 (Fla. 2008), and *Guzman v. State*, 941 So.2d 1045, 1050 (Fla. 2006)). Because *Giglio* claims present mixed questions of law and fact, we defer to the postconviction court's factual findings supported by competent, substantial evidence and review the court's legal conclusions de novo. *Green v. State*, 975 So.2d 1090, 1106 (Fla. 2008).

Allen argues that the State elicited and failed to correct false testimony that Allen was convicted several times for selling drugs. The record shows that the prosecutor asked Hudson on cross-examination, ''You were aware that she was convicted several times for selling drugs, right?'' Hudson answered in the affirmative. During closing arguments, the prosecutor stated to the jury, ''You heard about the defendant's time in prison for previous drug sale convictions.''

The record demonstrates that the State violated *Giglio* with respect to Hudson's testimony. The prosecutor presented and failed to correct false testimony from Hudson regarding Allen's criminal record by asking if Hudson knew that Allen was convicted many times for selling drugs. It is undisputed that Allen had only one conviction for selling drugs. The record shows that the State had knowledge of this fact because it prepared Allen's Criminal Code Scoresheet prior to trial. However, the false evidence presented by the State is immaterial, because there is no reasonable possibility that the number of prior drug convictions that Allen had contributed to the jury's sentencing recommendation. There is no reasonable possibility that the fact that the jurors heard that Allen had multiple prior drug convictions—as opposed to just one prior drug conviction— would have had an impact on their vote in the face of the evidence detailing the horrific events

> during Wright's kidnapping that resulted in her murder. We conclude that the State's use of this false evidence was harmless beyond a reasonable doubt. Therefore, we affirm the circuit court's denial of Allen's *Giglio* claim.

Allen, 261 So.3d at 1286-87. (AA, Exhibit T, p. 1286-87).

Although the state court found the underlying claim to be procedurally barred, the court, still addressed the claim on its merits. Not only was this a reasonable application of Florida law, but the Florida court's resolution of the claim plainly comports with notions of due process. The evidence of prior drug convictions was not material. There is no reasonable likelihood that the jury hearing that Allen had prior drug convictions impacted the sentencing decision. There was ample evidence for the jury to return with a death sentence, regardless of that information. In short, Allen's claim is not only procedurally barred, but lacks merit and must be rejected. Accordingly, no habeas relief is warranted.

GROUND TEN

Exhaustion: Allen's ineffectiveness claims were raised in state court, which denied them, and affirmed on appeal by Florida's high court. *Allen v. State*, 261 So.3d 1255 (Fla. 2019). Accordingly, the claims raised here have been exhausted.

Merits: Allen next claims that counsel's presentation of Myrtle Hudson's testimony regarding drugs and guns and violence was ineffective assistance of counsel. The state court found that this claim was refuted by the record and that Allen failed to show prejudice. The Florida Supreme Court affirmed the lower

court's denial of these claims and found that Allen had failed to meet her burden under *Strickland.* In addressing Allen's deficiency claim, the Florida Supreme Court found:

> **Asking if Allen became part of the culture of "drugs, thugs, and violence"**
>
> Allen argues that trial counsel was ineffective for asking if Allen became a part of the culture of "drugs, thugs, and violence."
>
> The record shows that in the penalty phase of Allen's trial, trial counsel questioned Allen's aunt, Myrtle Hudson, about Allen's neighborhood:
>
> > Q: Describe the area of town that she lived in, if you would for the jury?
> > A: We stayed in a drug neighborhood. She stayed in a drug neighborhood.
> > Q: And so, she grew up around drugs?
> > A: Drugs and thugs.
> > Q: And violence?
> > A: Yes, sir. Drugs, thugs, and violence. Yes, sir.
>
> At the evidentiary hearing, trial counsel testified that he asked Hudson about Allen's neighborhood, which elicited from her the phrase, "drugs, thugs, and violence." He testified that he did this in order to show "the atmosphere in which [Allen] lived, and that it had an effect on her." He also testified that the general theme of his mitigation was to show the negative atmosphere of Allen's cultural upbringing to the jury and its impact on her. He testified that the phrase at issue was specifically brought up by Hudson, not by him.
>
> Allen's claim is refuted by the record. The record reflects that trial counsel's questioning regarding Allen's upbringing was strategic and purposeful—he aimed to show the jury the challenging culture in which Allen lived. When asked to describe the area of town in which Allen grew up, Hudson described the neighborhood using the phrase "drugs, thugs, and violence." This evidence supported the trial court's finding

> of the nonstatutory mitigator that Allen grew up in a violent and drug-infested neighborhood. The testimony elicited by trial counsel thereby amounts to the same information established by counsel and found by the trial court. Counsel was not deficient in bringing up that line of questioning, despite the phrase that was elicited during it.

Allen, 261 So.3d at 128. (AA, Exhibit T, p. 1282-83). The lower court's rejection of this claim was not unreasonable and habeas relief, therefore, is not warranted.

The fact of the matter was that Allen did grow up around violence and drugs and that counsel was attempting to elicit information regarding Allen's upbringing so that the jury could learn the challenges she faced as a child. The record establishes that the statements were made by Myrtle Hudson in response to questions trial counsel posed to her in the attempt to present mitigation evidence. As counsel testified to during the evidentiary hearing, "it was brought up to show the atmosphere in which she lived, and that it had an effect on her." (AA, Exhibit M, p. 2828). While trial counsel did not use "the culture of the neighborhood" specifically as a mitigating circumstance, such is merely a different way of saying the same thing as the mitigating circumstance that was established, that she grew up in a neighborhood rife with acts of violence and illegal drugs.

Furthermore, there is no prejudice. There is no reasonable probability that the jury hearing the phrase, "drugs, thugs, and violence" had any impact on the decision to sentence her to death. In the instant case, the trial court found two aggravators both of which were assigned great weight. The overwhelming evidence that Allen

tortured the victim continuously by hitting her in the head, pouring chemicals in her face, beating her with belts and finally strangling her with one of the belts would have had a much greater impact and lasting impression on the minds of the jurors, than the phrase "thugs." There is no reasonable probability that the balance of aggravating and mitigating circumstances would have been different, or that the deficiencies substantially impair confidence in the outcome. In addressing Allen's prejudice claim, the Florida Supreme Court found:

> Moreover, Allen has failed to show prejudice. There is no reasonable probability that the jury hearing that Allen grew up surrounded by "drugs, thugs, and violence" impacted their balancing of the aggravating and mitigating circumstances in light of the evidence of torture and the victim's desperate pleas to go home prior to her death. *See Sochor*, 883 So. 2d at 771 (citing *Strickland*, 466 U.S. at 694); *Brant*, 197 So.3d at 1070 (finding no prejudice in light of the evidence for the HAC aggravator). Our confidence in the outcome is not undermined. We therefore conclude that the circuit court properly denied relief on this claim.

Allen, 261 So.3d at 1283. (AA, Exhibit T, p. 1283).

Respondent submits that the state courts' analysis of Allen's ineffective assistance of counsel claims was not contrary to or an unreasonable application of clearly established federal law, nor did it involve an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. The state courts satisfied the AEDPA by correctly and reasonably applying the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984) to the facts as adduced at the evidentiary hearing below in concluding that counsel's questioning was "strategic

and purposeful" and that "[t]his evidence supported the trial court's finding of the non-statutory mitigator that Allen grew up in a violent and drug-infested neighborhood. *Allen,* 261 So.3d at 1283. Accordingly, this Court should deny this claim.

GROUND ELEVEN

Exhaustion: Allen's ineffectiveness claims were raised in state court, which denied them, and affirmed on appeal by Florida's high court. *Allen v. State*, 261 So.3d 1255 (Fla. 2019). Accordingly, the claims raised here have been exhausted.

Merits: Here, Petitioner claims entitlement to relief alleging that trial counsel was ineffective for failing to challenge Juror Carll for cause or strike her peremptorily, and that Allen was prejudiced because Juror Carll was biased. Because empaneled jurors are presumed impartial, *see Smith v. Phillips*, 455 U.S. 209, 215 (1982), Allen must show that the juror selection process produced a juror who was actually biased against her to satisfy *Strickland's* prejudice prong. *Hughes*, 258 F.3d at 458. *See also Rogers v. McMullen*, 673 F.2d 1185, 1189 (11th Cir. 1982) (defendant's Sixth Amendment right to a fair and impartial jury was not violated absent a showing that a jury member hearing the case was actually biased against him); *See United States v. Khoury*, 901 F.2d 948, 955 (11th Cir. 1990) (stating absent evidence to the contrary, a court must presume the jurors were fair and impartial as they "swore to be."). When the totality of all of Juror Carll's statements are

considered, evidence of her bias against Appellant is not "plain on the face of the record."

In the instant case, an evidentiary hearing was held, during which trial counsel testified he had been practicing criminal law for 43 years. (AA, Exhibit M, p. 2809). He testified he considers a number of factors in jury selection, including body language and the alertness of a juror. When questioned regarding his thoughts on Juror Carll, he testified that he felt he had sufficiently rehabilitated her. He decided to keep her on the jury, especially considering other jury panel members that were further down the line. (AA, Exhibit M, p. 2866-67). Here, counsel made a strategic decision to keep Juror Carll and the trial court agreed, finding that Carll's bias against Allen was not "plain on the face of the record" and prejudice was not established. (AA, Exhibit M, p. 1948-49). The lower court also found that counsel made a strategic decision to keep Carll as a juror and the decision was reasonable. (AA, Exhibit M, p. 1949). On appeal, the Supreme Court of Florida affirmed:

> **Failure to adequately challenge or strike a juror**
>
> Allen argues that counsel was ineffective for failing to challenge juror Carll for cause or to strike her peremptorily because of the juror's strong predisposition for recommending the death penalty.
>
> A valid claim of ineffective assistance of counsel for failure to raise or preserve a for-cause challenge against the juror must establish that the juror "was actually biased against the defendant," such that he or she had a "bias-in-fact that would prevent service as an impartial juror." *Carratelli v. State*, 961 So. 2d at 323-24. The evidence of the juror's actual bias must "be plain on the face of the record," *id.* at 324, and

amount to "something more than mere doubt about that juror's impartiality," *Mosley v. State*, 209 So.3d 1248, 1265 (Fla. 2016). We have described the standard as follows:

> Where reasonable people could disagree about a juror's fitness to serve, the showing of prejudice required for postconviction relief is lacking.

Carratelli, 961 So. 2d at 323-24 (quoting *Carratelli v. State*, 915 So. 2d 1256, 1261 (Fla. 4th DCA 2005)). When a juror makes statements suggesting bias but later makes clear his or her ability to be impartial, actual bias will not be found. *See id.* at 327. The analysis of this issue begins with the *Strickland* prejudice prong, "as it is necessary to establish that the juror was actually biased before proving that counsel performed deficiently by failing to challenge that juror due to bias." *Patrick v. State*, 246 So.3d 253, 263 (Fla. 2018).

Allen has failed to show that juror Carll was actually biased. Competent, substantial evidence supports the postconviction court's determination that juror Carll's comments about her opinion of the death penalty did not establish actual bias. While juror Carll did express positive sentiment toward the death penalty and expressly outlined several circumstances in which she would recommend it, she confirmed upon follow-up questioning that she was flexible, would "absolutely" listen to aggravation and mitigation, and would listen to mental health evidence. juror Carll also stated that there were certain circumstances where she would not recommend the death penalty, such as if someone was "a party of someone's death." As in *Carratelli*, the record reveals that juror Carll assured the court that she was willing to listen to the evidence, be fair, and follow the law. Her statements showing that she would abide by the law and consider the evidence presented refute the claim that juror Carll was biased. Allen therefore cannot establish prejudice. *See Barnhill v. State*, 834 So. 2d 836, 844 (Fla. 2002) (holding that a juror is unqualified only if she "expresses an unyielding conviction and rigidity toward the death penalty"). Our confidence in the outcome is not undermined. We therefore conclude that the circuit court properly denied relief on this claim.

Allen, 261 So.3d at 1285-86. (AA, Exhibit T, p. 1285-86).

It cannot be said that the outcome of Allen's trial was rendered unfair or unreliable based upon counsel's asserted deficient performance in failing to challenge Juror Carll. The right to trial by jury guarantees that a criminal defendant will receive a fair trial by an impartial jury. *Irvin v. Dowd*, 366 U.S. 717, 720 (1961). The purpose of voir dire is to determine whether prospective jurors can render an impartial verdict based solely on the evidence and the court's instructions. *Rosales–Lopez v. United States,* 451 U.S. 182, 188 (1981). Thus, "voir dire plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored." *Id.*; *see also Mu'Min v. Virginia*, 500 U.S. 415, 431 (1991) ("Voir dire examination serves the dual purposes of enabling the court to select an impartial jury and assisting counsel in exercising peremptory challenges.").

Effective assistance of counsel is required during the voir dire process. *Brown v. Jones*, 255 F.3d 1273, 1279-80 (11th Cir. 2001). However, deference is afforded to counsel's actions during voir dire because voir dire is recognized to involve considerations of strategy. *Brown*, 255 F.3d at 1280; *Teague v. Scott*, 60 F.3d 1167, 1172 (5th Cir.1995). A defendant claiming ineffective assistance of counsel during voir dire must show that counsel's actions were "so ill chosen that it permeates the entire trial with obvious unfairness." *Teague*, 60 F.3d at 1172 (*quoting Garland v. Maggio*, 717 F.2d 199, 206 (5th Cir. 1983)). In addition, in order to satisfy the prejudice prong of *Strickland*, a petitioner must show that the selection process

actually produced a biased juror. *Hughes v. United States*, 258 F.3d 453, 458 (6th Cir. 2001); *see also Rogers v. McMullen*, 673 F.2d 1185, 1189 (11th Cir. 1982) (concluding a defendant's Sixth Amendment right to a fair and impartial jury cannot be violated absent a showing that a juror hearing the case was actually biased against him). The record in this case supports the state court's determination that trial counsel performed competently, and that Petitioner cannot demonstrate prejudice resulting from counsel's performance.

Although Juror Carll initially expressed support in the death penalty, a review of her statements during trial counsel's examination contradict any evidence that she was could not be fair, listen to the law, and follow the law. During voir dire, Juror Carll was asked by counsel what would cause her to vote for a life sentence, and she stated, "But if the person actually committed the death with a bunch of other people and participated in the physical death, they should be recommended for the death penalty." Counsel asked if, "Everybody involved should be recommended for the death penalty?" Juror Carll replied, "If they had a hand in the death." (AA, Exhibit A-11, p. 221). She later stated that she would listen to the aggravating and mitigating circumstances and stated that she could listen objectively to the mental health evidence. (AA, Exhibit A-11, p. 249-250, 372-372). Juror Carll explained:

> VENIREWOMAN CARLL: I think it would have a lot to do with their participation and how the death occurred by the hands of that person. I am pro death, but I would also take into account

> the events that led up to the death and how the defendant was involved.
>
> MR. BANKOWITZ: Ms. Carll, how do you feel about it? You feel that you are a flexible person?
>
> VENIREWOMAN CARLL: Yes, I think I - (unintelligible part transcript).
>
> MR. BANKOWITZ: So. You would listen to the aggravating circumstances and mitigating circumstances?
>
> VENIREWOMAN CARLL: Absolutely. Yeah. I believe that the death penalty should be used in certain circumstances where someone (sic) was a direct result of death. But I also believe that if you are a party of somebody's death, it doesn't necessarily mean they deserve to die themselves. It has a lot to do with the actual participation and the planned event and what happened that day that made that person die.

(AA, Exhibit A-11, p. 220, 249-250).

Indeed, the colloquy clearly establishes that Juror Carll would simply render her verdict based upon the evidence presented. The record clearly does not demonstrate that Juror Carll was biased. Nor did the colloquy show this juror had an inflexible attitude and was unwilling to apply the law as she would be instructed by the trial court. *See Valdes v. State*, 626 So. 2d 1316, 1321 (Fla. 1993) (challenge for cause had no merit where the record ultimately demonstrated that the jurors could lay aside any bias or prejudice and render a verdict based solely on the evidence).

Comparably, Allen's claim that Juror Carll "never indicated that she would lay aside her strong predetermined belief that those who have a hand in the death of another should receive the death penalty" is unfounded. A prospective juror is not

required to renounce their opinion stated in favor of the death penalty to be qualified to sit as a juror in a capital case. On the contrary, jurors who are unwilling to impose a death sentence under any circumstances are challengeable for cause by the State. In essence, there must be some willingness to impose the death penalty on some level in order to sit on a capital case. *See Morrison v. State*, 818 So. 2d 432, 442 (Fla. 2002) (affirming excusal of juror who stated he was not sure he could follow the law and impose the death penalty but expressed a belief in capital punishment in the limited circumstance when a person "was in my home, [and] killed my children"). In a death penalty case, a juror is only unqualified based on his or her views on capital punishment, if he or she expresses an unyielding conviction and rigidity toward the death penalty. *Barnhill v. State*, 834 So. 2d at 836, 844 (Fla. 2002). Thus, where "a prospective juror initially states that one who murders should be executed but later states that he can follow the law upon court instruction, the trial court does not abuse its discretion in denying a cause challenge." *Conde v. State*, 860 So. 2d 930, 939 (Fla. 2003).

Where a prospective juror is challenged for cause on the basis of his or her views on capital punishment, the standard that a trial court must apply in determining juror competency is whether those views would prevent or substantially impair the performance of a juror's duties in accordance with the court's instructions and the juror's oath. *Wainwright v. Witt*, 469 U.S. 412, 424 (1985). Juror Carll's statement

that she was a "flexible person" who was "absolutely" willing to listen to the aggravating and mitigating circumstances demonstrated her competence to serve on the jury. Juror Carll's responses to trial counsel evidenced her ability to listen to the evidence and follow the law. Absent proof that juror Carll harbored actual bias, Allen's claim is based on conjecture about what could have occurred and is insufficient for *Strickland* relief.

Furthermore, even if counsel was deficient for failing to strike Juror Carll, Petitioner cannot demonstrate prejudice because she has not demonstrated that any juror was biased. *See United States v. Khoury*, 901 F.2d 948, 955 (11th Cir. 1990) (stating absent evidence to the contrary, a court must presume the jurors were fair and impartial as they "swore to be."). The lower court's rejection of this claim was not unreasonable and habeas relief, therefore, is not warranted.

GROUND TWELVE

Exhaustion: Allen initially brought this claim in her direct appeal to the Florida Supreme Court, which denied relief. *Allen v. State*, 137 So.3d 946 (Fla. 2013) (AA, Exhibit E). The claim raised here has been exhausted.

Merits: Allen's next claim asserts that the trial court erred in excluding State witness James Martin's testimony regarding alleged statements made to him by Quentin Allen. Allen's suggestion that exclusion of the statement would violate the due process clause is meritless because the statement was not reliable. Further, there

was no reason to abandon the unavailability requirement of §90.804(2)(C), Fla. Stat., as Florida law would have provided an alternate means of admitting the testimony if it had been reliable.

In support of her contention of a violation of the due process clause, Allen relies on *Chambers v. Mississippi*, 410 U.S. 284 (1973). However, Allen's reliance on *Chambers* is misplaced. The *Chambers* court dealt with a situation where the defendant's request to cross-examine a witness was denied on the basis of a Mississippi common law rule that a party may not impeach his own witness. *Chambers*, 410 U.S. at 296. After the defendant was arrested for murder, another person (McDonald) made, but later repudiated, a written confession. Also, on three separated occasions, each time to a different friend, McDonald orally admitted the killing. 410 U.S. at 284. The Mississippi common law rule rests on the presumption-without regard to the circumstances of the particular case-that a party who calls a witness vouches for his credibility. *Id.* at 296. Because Chambers was defeated in his attempt to challenge directly McDonald's renunciation of his prior confession, Chambers sought to introduce the testimony of the three witnesses to whom McDonald had admitted that he shot the officer and got denied. *Id.* at 296.[9] The

[9]As a result of the rule's corollary requirement that the party calling the witness is bound by anything he might say, Chambers was effectively prevented from exploring the circumstances of McDonald's three prior oral confessions and from challenging the renunciation of the written confession. *Id.* at 297.

concern in *Chambers* was that exclusion of this critical evidence, coupled with the State's refusal to permit Chambers to cross examine McDonald denied him a trial in accord with traditional and fundamental standards of due process. The Court specifically held:

> In reaching this judgment, we establish no new principles of constitutional law. Nor does our holding signal any diminution in the respect traditionally accorded to the States in the establishment and implementation of their own criminal trial rules and procedures. Rather, we hold quite simply that under the facts and circumstances of this case the rulings of the trial court deprived Chambers of a fair trial.

Chambers, 410 U.S. at 302.

In contrast, no such denial of due process occurred in the case at bar. Allen was able to question Quentin about the subject statement against penal interests he allegedly made to Martin. In that regard, Allen does not even assert that the trial court prevented her from calling or cross-examining Quentin as a witness. In fact, when Allen cross examined Quentin, she never questioned him about making the alleged statement to Martin regarding choking Wenda Wright. Assuming, *arguendo*, Allen had used the opportunity to examine Quentin about making such a statement, she could have properly impeached Quentin through Martin's testimony, if Martin was willing to admit the statement had been made. Because the cases are not factually or procedurally similar and *Chambers* was expressly limited to its facts, Allen's due process rights have not been violated. To the contrary, Florida law, under its hearsay exceptions, would have permitted the very testimony that Mississippi law

precluded in *Chambers* had it existed in this case. *See* § 90.804, Fla. Stat. (2011). Therefore, no *Chambers* issue exists, and the state court properly excluded the challenged evidence.

In denying this claim, the Florida Supreme Court stated:

> I. Witness Testimony
>
> Allen asserts that the trial court erred in excluding testimony of State witness James Martin on cross-examination by the defense that the former-co-defendant turned-State-witness Quintin allegedly admitted choking Wright to death. We disagree.
>
> Martin testified regarding his knowledge of the events of the day of Wright's death; however, he testified that he was not present when Wright died. On cross-examination, the defense attempted to elicit from Martin that while they were incarcerated together Quintin allegedly admitted to Martin that he killed Wright. Specifically, the defense asked Martin, "Did [Quintin] ever tell you or did you ever hear him say he choked [Wright]?" The State objected and the following colloquy was proffered:
>
> > Q [defense]: Now, when you were in the jail, at any point in time did he ever tell you that he choked Wenda Wright?
> >
> > A [Martin]: No, he didn't tell me.
> > Q: Well, did you ever hear him say that, that he choked her?
> >
> > A: Nope. Q: In your deposition on page 12 . . . .
> >
> > > . . . . "He said he had a special hold with his leg, that he choked her."
> >
> > A: Yeah, but-yeah. You didn't write everything. I remember saying that there. I remember saying he got a special hold that he used to choke her with. Because he nearly choked the boy out in jail with that same hold.

Q: I am going to continue in the deposition. I asked you then, "Quintin said that," question. And you said, "Yes." "So, did you hear him say he choked her?" "Yeah. He next-he next to me, he let me read the deposition and the autopsy report." So I asked you did Quintin say that?

A: Right. In the room you asked me that and I said no.

Q: So you are disputing what the court reporter wrote down? Would you like to see it?

A: No, I don't need to see it. I know I didn't say choke hold. How can I say something if it is a lie because me and him talked like that? If me and him talked, like he didn't kill nobody and he didn't do that.

Q: All right. I am just reading the deposition. Do you agree with it or not?

A: But I didn't say that he told me.

Q: Well, again, I asked you -- and your answer at the top of page 12, line 2, "He said he had a special hold with his leg that choked her."

> I said, "Quintin said that?" And you said, "Yes." "So, if you did hear him say he choked her?" Answer, "Yeah."

A: No.

Q: So, now you are saying that he didn't say that?

A: No. What I am saying is he didn't tell me that he choked her. But he said-yeah, I know you said he choked people, but I didn't say nothing about he choked her. I said yeah he probably did choke her. Because how can a 140 pound woman choked a 290—

> The trial court excluded the testimony.

Hearsay is defined as an out-of-court statement being offered into evidence to prove the truth of the matter asserted. See § 90.801(1)(c), Fla. Stat. (2005). "Except as provided by statute, hearsay evidence is inadmissible." § 90.802, Fla. Stat. (2005). This Court reviews " 'a trial court's decision to admit evidence under an abuse of discretion standard.' " *McWatters v. State*, 36 So.3d 613, 639 (Fla. 2010) (quoting *Hudson v. State*, 992 So. 2d 96, 107 (Fla. 2008)). The trial court's discretion is not unfettered but is "limited by the rules of evidence." *Hudson*, 992 So. 2d at 107.

Allen asserts that Quintin's alleged confession to Martin is admissible under the hearsay exception of a statement against penal interest. Section 90.804(2)(c), states:

> Statement against interest.—A statement which, at the time of its making, was so far contrary to the declarant's pecuniary or proprietary interest or tended to subject the declarant to liability or to render invalid a claim by the declarant against another, so that a person in the declarant's position would not have made the statement unless he or she believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is inadmissible, unless corroborating circumstances show the trustworthiness of the statement.

§ 90.804(2)(c), Fla. Stat. (2005). This exception only applies when the declarant is unavailable. See § 90.804, Fla. Stat. (2005). Quintin was available to testify, was called as a State witness, and was cross-examined by the defense, during which the defense did not ask Quintin whether he had confessed to this crime. Furthermore, the statute specifically excludes statements tending to expose the declarant to criminal liability and offered to exculpate the accused "unless corroborating circumstances show the trustworthiness of the statement." Section 90.804(2)(c), Fla. Stat. (2005). Here, there are no corroborating circumstances to show the trustworthiness of Quintin's alleged confession.

Allen's assertion that the trial court erred in assessing Martin's credibility in determining that Quintin's alleged confession did not have sufficient circumstances of reliability to be admissible, is without merit. *See Carpenter v. State*, 785 So. 2d 1182, 1203 (Fla. 2001) ("The credibility of an in-court witness who is testifying with regard to an out-of-court declaration against penal interest is not a matter that the trial could should consider in determining whether to admit the testimony concerning the out-of-court statement."). The trial court did not base its ruling of the admissibility of Quintin's alleged confession on Martin's credibility, but rather, on the fact that there were no other corroborating circumstances to support the reliability of Quintin's alleged confession. Thus, the trial court did not err in this regard.

Even if the trial court's exclusion of this proffered testimony was in error, it is harmless beyond a reasonable doubt. *See State v. DiGuilio*, 491 So. 2d 1129, 1138 (Fla. 1986). There is no reasonable possibility the error, if any, affected the verdict in this case. As shown above, Martin denied ever saying that Quintin confessed. Martin disputed the accuracy of the deposition in which he allegedly stated that Quintin choked Wright, stating during the proffer that he instead thought Quintin probably did it but that Martin's deposition statement referred to Quintin having choked a boy in prison. Furthermore, the jury did hear testimony that Martin thought that Quintin killed Wright. Moreover, Martin testified that upon seeing Wright's body, Allen told him, "He must have hit her too hard." Thus, the testimony elicited during the proffer regarding Martin's deposition was mostly cumulative to what was already brought out during cross-examination of Martin. Further, Quintin's alleged confession would not exculpate Allen, because his confession would not negate the remainder of Quintin's testimony that Allen was the mastermind behind restraining and strangling Wright, and that both Allen and Quintin were present during and participated in the attack. We conclude that under these circumstances, there is no reasonable possibility that any error regarding this testimony affected the verdict in this case. *See Williams v. State*, 863 So. 2d 1189, 1190 (Fla. 2003) ("The question is whether there is a reasonable possibility that the error affected the verdict.") (*quoting DiGuilio*, 491 So. 2d at 1139).

Allen cites *Chambers v. Mississippi*, 410 U.S. 284 (1973), to argue that the trial court's failure to admit Quintin's alleged confession based on

this statute is a violation of due process, but this case is inapposite. Here, the trial court did not prevent Allen from calling or cross-examining Quintin as a witness. *Cf. Chambers*, 410 U.S. at 294 (a Mississippi common law rule that a party could not impeach his own witness prevented the defendant from cross-examining the witness about his prior confession to the murder in addition to the defendant being prohibit from calling several witnesses who would have testified that McDonald confessed); *see generally McWatters*, 36 So.3d at 639 n.8 ("Because the cases are not factually or procedurally similar and *Chambers* was expressly limited to its facts, *McWatters* has failed to establish a due process violation."); § 90.804(2)(c), Fla. Stat. (2005) (requiring that for admissibility of statements against penal interests offered to exculpate the accused there must be sufficient corroborating circumstances to show the trustworthiness of the statement).

Allen's alternative suggestion that the statement was admissible as an admission of a party opponent or a co-conspirator's statement is unpreserved and without merit. See § 90.803(18)(e), Fla. Stat. (2005). " 'In order to preserve an issue for appellate review, the specific legal argument or ground upon which it is based must be presented to the trial court.' " *Bertolotti v. Dugger*, 514 So. 2d 1095, 1096 (Fla. 1987) (*quoting Tillman v. State*, 471 So. 2d 32 (Fla. 1985)); see also *Doorbal v. State*, 983 So. 2d 464, 492 (Fla. 2008) ("For an issue to be preserved for appeal, it must be presented to the lower court, and the specific legal argument or ground to be argued on appeal must be part of that presentation.").

After the State objected to the admissibility of the subject statement, Allen argued that the statement could be admitted as a statement against interest. Allen now claims that this statement could have been admitted as an admission of a party opponent or a co-conspirator's statement. Thus, this argument is not preserved for review, and Allen must demonstrate that the error, if any, was fundamental, which it was not. Fundamental error is "defined as error that reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." *Anderson v. State*, 841 So.2d 390, 403 (Fla. 2003).

Even if this argument had been preserved, the claim is without merit. In order to be admitted as an admission of a party, the statement must

> be made while the conspiracy is in existence and before it is terminated. *See Calvert v. State*, 730 So. 2d 316, 319 (Fla. 5th DCA 1999) (noting that statements made after conspiracy had ended were inadmissible under section 90.803(18)(e)); see also *Brooks v. State*, 787 So. 2d 765, 772 (Fla. 2001). Even assuming the existence of a conspiracy between Allen and Quintin could be proven by a preponderance of the evidence and independent of the hearsay statement at issue, *see Foster v. State*, 778 So. 2d 906, 915 (Fla. 2000), any statement allegedly made by Quintin to Martin while they were incarcerated does not meet the admission requirements of section 90.803(18)(e), because it was not made while the conspiracy was in existence. *See Brooks*, 787 So. 2d at 772.

Allen, 137 So.3d 946 (Fla. 2013) (AA, Exhibit E, p. 5-7).

The lower court's decision was a reasonable interpretation of the facts and Allen fails to demonstrate how the court's legal conclusions are inconsistent with established federal precedent. As Allen has failed to establish any entitlement to federal habeas relief based on the state courts' resolution of this issue, this Court should deny Ground Twelve of Allen's habeas petition.

GROUND FOURTEEN

Exhaustion: Petitioner initially brought this claim in Points II and IV of her direct appeal to the Florida Supreme Court. On direct appeal Petitioner claimed that the trial court found an improper aggravating circumstance and abused its discretion by failing to consider (or improperly minimizing the weight given to) highly relevant and appropriate statutory mitigating circumstances and in finding that the aggravating circumstances outweighed the mitigating factors. In so doing, Petitioner only cited to state law cases, and the Florida Supreme Court analyzed this claim

under only state law standards. This is not enough to apprise the state court of the federal claim, and thus it is not exhausted. See *Duncan v. Henry*, 513 U.S. 364 (1995) (Reversing the grant of a federal habeas petition where "Respondent did not apprise the state court of his claim that the evidentiary ruling of which he complained was not only a violation of state law, but denied him the due process of law guaranteed by the Fourteenth Amendment," and so "The state court, when presented with respondent's claim of error under the California Evidentiary Code, understandably confined its analysis to the application of state law"). Petitioner did not adequately present her federal claim pursuant to Florida's briefing requirements because she did not provide specific argument on her federal claim. As a result, this ground is unexhausted and is now procedurally barred.

Additionally, federal habeas review does not lie for alleged errors of state law. As such, "federal habeas review of a state court's application of a constitutionally narrowed aggravating circumstance is limited, at most, to determining whether the state court's finding was so arbitrary or capricious as to constitute an independent due process or Eighth Amendment violation." *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990). When making that determination, the federal court is not to conduct a *de novo* review. Instead, the federal court must "respect [the] state court's findings of fact and application of its own law." *Id.*; *See also Barclay v. Florida*, 463 U.S. 939, 968 (1983) (Stevens, J. and Powell, J. concurring) ("It is not our role to reexamine

the trial court's findings of fact, which have been affirmed by the Florida Supreme Court. Assuming those facts to be true, there is no federal constitutional infirmity in these two findings of statutory aggravating circumstances.) Nevertheless, the Florida Supreme Court's factual findings are entirely reasonable and amply supported by the record and do not result in a capricious or arbitrary imposition of the death penalty.

To begin with, Petitioner asserts that because the confinement was incidental to Wenda's murder, there was no evidence to support the kidnapping charge, thereby relying on *Faison. Faison v. State*, 426 So. 2d 963 (Fla. 1983). However, Defendant's reliance on *Faison* is misplaced. The law is well settled by the state court that when charged with confining, abducting or imprisoning with the intent to "inflict bodily harm upon or to terrorize", under section 787.01(1)(a)(3), rather than with the intent to "commit or facilitate commission of any felony" under subsection 787.01(1)(a)(2), *Faison*, has no application.[10] *Bedford v. State*, 589 So. 2d 245 (Fla. 1991); *see also Boyd v. State*, 910 So. 2d 167, 184 (Fla. 2005); *Kopsho v. State*, 84

[10]*Faison* held that subsection 787.01(1)(a)(2) does not apply to unlawful confinements or movements that were merely incidental to, or inherent in, the nature of the underlying felony. *Id.* at 251. Under *Faison*, to support a kidnapping conviction under section 787.01(1)(a)(2) the movement or confinement must also: a) not be slight, inconsequential and merely incidental to the other crime; b) not be of the kind inherent in the nature of the other crime; and c) have some significance independent of the other crime in that it makes the other crime substantially easier of commission or substantially lessens the risk of detection. *Faison*, 426 So. 2d at 965.

So.3d 204, 218 (Fla. 2012) (holding that the State need not prove *Faison* elements to obtain conviction under section 787.01(1)(a)(3), which only requires an intent to "inflict bodily harm upon or terrorize another person"); *Waddell v. State*, 696 So. 2d 1229 (Fla. 3rd DCA 1997); *Hernandez v. State,* 913 So. 2d 36 (Fla. 3rd DCA 2005); *Sutton v. State*, 834 So. 2d 332 (Fla. 5th DCA 2003).

The State need not prove that the confinement was not incidental and inseparable from the other crime when charged under section 787.01(1)(a)(3). Here, the record supports the finding that Petitioner confined Wenda Wright with intent to inflict bodily harm upon or to terrorize her. Wenda Wright wanted to leave and go home but was not allowed. She was told by Allen (who was directed by Defendant not to let her leave) that Allen did not want her to go anywhere. (AA, Exhibit A-15, p. 922-923). When she tried to leave, Defendant punched her and knocked her on the ground. (AA, Exhibit A-15, p. 895-901). The lower court's rejection of this claim was not unreasonable and habeas relief, therefore, is not warranted.

Allen also challenges the sufficiency of the evidence to support the heinous, atrocious or cruel aggravating circumstance, asserting that it is more likely than not that Wenda Wright lost consciousness upon the initial blow to her head and her foreknowledge of death is based on speculation because there were no signs of defensive wounds. With regard to HAC, the trial court found:

> The second aggravating circumstance is whether the capital felony was especially heinous, atrocious or cruel. The Court finds the State established the aggravating circumstance of heinous, atrocious, or cruel, beyond a reasonable doubt. "[I]t is permissible to infer that strangulation, when perpetrated upon a conscious victim, involves foreknowledge of death, extreme anxiety and fear, and that this method of killing is one to which the factor of heinousness is applicable." *McWatters v. State*, 36 So. 3d 613, 643 (Fla. 2010), citing to *Ochoa v. State*, 826 So. 2d 956, 963 (Fla. 2002) (quoting *Tompkins v. State*, 502 So. 2d 415, 421 (Fla. 1986). This murder was indeed conscienceless, pitiless and undoubtedly torturous to the victim. The Court assigns this aggravator great weight.

(AA, Exhibit A-6, p. 953).

The trial court's factual findings are entirely reasonable and amply supported by the record. The Florida Supreme Court has held that even 30 to 60 seconds of terror supports the HAC aggravating circumstance. *Rolling v. State*, 695 So. 2d 278, 296 (Fla. 1997). The Florida Supreme Court has also held that "the HAC aggravator focuses on the means and manner in which death is inflicted and the immediate circumstances surrounding the death." *Brown v. State*, 721 So. 2d 274, 277 (Fla. 1998). Furthermore, "the victim's mental state may be evaluated for purposes of such determination in accordance with a common-sense inference from the circumstances." *Swafford v. State*, 533 So. 2d 270, 277 (Fla. 1988); *see also Lynch v. State*, 841 So. 2d 362, 369 (Fla. 2003) ("[T]he focus should be upon the victim's perception of the circumstances...."). And, in *Buzia v. State*, 926 So. 2d 1203, 1214 (Fla. 2006), the Florida Supreme Court upheld the finding of the HAC aggravator and stated: "Whether this state of consciousness lasted minutes or seconds, he was

'acutely aware' of his 'impending death.'" We have upheld the HAC aggravator where the victim was conscious for merely seconds."

This case is textbook example of HAC aggravator. The record reflects that Wenda Wright was terrorized over a substantial period of time and that she was aware of what was happening to her. Wenda Wright begged to be let go home because she did not know anything about Defendant's purse. (AA, Exhibit A-15, p. 897-899). When she tried to leave, Allen punched her in the head, and she fell on the ground. (AA, Exhibit A-15, p. 901-902). Allen continued punching her. (AA, Exhibit A-15, p. 901-902). According to Quentin, he was holding Wenda Wright down while Allen was pouring the chemicals onto her face. (AA, Exhibit A-15, p. 905). Allen then beat Wenda Wright with belts while her legs were tied. (AA, Exhibit A-15, p. 908-910). Quentin testified that Wenda Wright was terrified and screamed for Allen to stop because she was going to wet on herself, which indicated that she was conscious. (AA, Exhibit A-15, p. 913-914; Exhibit A-18 p. 1451). Wenda Wright was shaking and moving for around three minutes. (AA, Exhibit A-15, p. 914-915).

According to Dr. Qaiser, the cause of death was strangulation. (AA, Exhibit A-18, p. 1442-1443). Dr. Qaiser also testified that he found bruises and contusions on Wenda Wright's body which indicated that she was beaten. In particular, bruises were found on the back of the ear, forehead, left side of the torso, trunk and the leg

area. (AA, Exhibit A-18, p. 1426-1428, 1429-1430, 1431). He also found ligature marks over Wenda's wrist and neck, which indicated that she was tied and strangled. (AA, Exhibit A-18, p. 1428, 1433, 1436-38). According to Dr. Qaiser, Wenda Wright could have been conscious while suffering various blows upon her body. (AA, Exhibit A-18, p. 1446-47). He explained that if someone suffers a blow to the head, it could take 10 to 20 seconds to become unconscious, and consciousness could be regained thereafter. (AA, Exhibit A-18, p. 1446-48). According to Dr. Qaiser, it could take a person 4 to 6 minutes to die as a result of strangulation, and such a person could remain conscious during part of that process and could be aware as well. (AA, Exhibit A-19, p. 1477-1499). Also, while being strangled, Wenda could have lost control of her bladder and remain conscious at the same time. (AA, Exhibit A-18, p. 1451).

As to the pain sensation, Dr. Qaiser explained that unconscious people can feel it the same way like conscious people, but unconscious people cannot manifest it, which indicates that Wenda could feel the pain even if she was unconscious at some point during the attack. (AA, Exhibit A-21, p. 1709, 1711-12). During the strangulation, the person could lose consciousness and then regain it again; there would be a jerky movement and a sense of panic. (AA, Exhibit A-21, p. 1724-25). Dr. Qaiser found Wenda's behavior consistent with this description. (AA, Exhibit A-21, p. 1725). Further, Dr. Qaiser's testimony indicated that during the

strangulation, it takes a person 10-20 seconds to lose consciousness and 4-6 minutes to die. (AA, Exhibit A-21, p. 1734-35). Finally, given the fact that both Dr. Qaiser and Allen testified that Wenda was restrained, it is not surprising that she does not have any defensive wounds. The result reached by the Florida Supreme Court is neither contrary to, nor an unreasonable application of, clearly established federal law. The findings of that Court are well supported by the evidence, are not unreasonable based upon the facts elicited, and, under the AEDPA, the state court ruling is entitled to deference.

Allen further claims that the trial court erred in rejecting the statutory mitigators of: 1) under the influence of extreme mental or emotional disturbance; and 2) substantial impairment of Defendant's capacity to appreciate the criminality of her conduct or to conform her conduct to the requirements of the law. It is Allen's position that her experts' testimony regarding brain damage compels the finding of these two statutory mitigators could not be rejected. However, the trial court's reasons for rejecting the mitigators are supported.

While Allen insists that the evidence of brain damage that she presented showed that she was under an extreme mental or emotional disturbance at the time of the murder, neither of her experts so testified. (AA, Exhibit A-21, p. 1740-64, 1797-1859). In fact, neither of her experts was ever even asked if they had an opinion about this mitigator. (AA, Exhibit A-21, p. 1740-64, 1797-1859). Instead, both of

her experts only offered opinions on whether Allen's capacity to appreciate the criminality of her conduct or to conform her conduct to the requirements of the law was substantially impaired. (AA, Exhibit A-21, p. 1752-53, 1829-31). Given these circumstances, the trial court's finding that there was no evidence of extreme mental or emotional disturbance is supported by competent substantial evidence. Moreover, the trial court did not reject the capacity mitigator because the evidence of brain damage was unproven. It rejected the capacity mitigator because the experts' testimony regarding this mitigator was inconsistent with the facts of this case. In fact, the trial court found brain damage as non-statutory mitigation.

Allen also challenges the weight assigned by the trial judge to the mitigation evidence presented. Specifically, she claims that the trial court assigned diminished weight to the substantial mitigation and "glossed" over substantial-non statutory factors without providing any adequate analysis. A review of the penalty phase evidence and the sentencing order establishes that these claims are without merit.

Lastly, Allen argues that her sentence is disproportionate. Moreover, like the evaluation of the HAC aggravator, a proportionality review is purely a matter of state law. While the Florida Supreme Court conducts a comparative proportionality analysis in death penalty cases, it is not constitutionally required to do so. *See Pulley v. Harris*, 465 U.S. 37, 50-51 (1984) ("There is . . . no basis in our cases for holding that comparative proportionality review by an appellate court is required in every

case in which the death penalty is imposed . . . We are not persuaded that the Eighth Amendment requires us to take that course."). Additionally, the Florida courts did not unreasonably apply the tenets of *Furman v. Georgia*, 408 U.S. 238 (1972) and *Spaziano v. Florida,* 468 U.S. 447 (1984) because the conclusion that the death penalty for these two murders is proportional is not arbitrary, capricious, or irrational. It is instead supported by competent, substantial evidence and case law. This type of proportionality review is one of purely state law and is a process that has been specifically approved by the U.S. Supreme Court. See *Gregg*, 428 U.S. at 207 ("[T]he review function of the Supreme Court of Georgia affords additional assurance that the concerns that prompted our decision in *Furman* are not present to any significant degree in the Georgia procedure applied here.). Further, the Florida Supreme Court's factual findings are supported by the record and this Court must defer to the state court's assessment.

Allen has failed to meet her burden of showing that the Florida Supreme Court's decision was contrary to, or an unreasonable application of, Supreme Court law. Accordingly, this Court should deny Ground Fourteen of Allen's habeas petition.

CONCLUSION

Wherefore, Respondents respectfully requests that this Honorable Court enter an Order DENYING the Petition for Writ of Habeas Corpus filed herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic filing to: **Lisa Bort**, 12973 North Telecom Parkway, Temple Terrance, Florida 33637-0907 email: bort@ccmr.state.fl.us, support@ccmr.state.fl.us Attorney for Petitioner, this 27th day of July, 2020.

s/Doris Meacham
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ASSISTANT ATTORNEY GENERAL
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IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

MARGARET A. ALLEN,
Petitioner,

v. **CASE NO. 6:19-cv-296-Orl-40DCI**

SECRETARY, DEPARTMENT OF CORRECTIONS and ATTORNEY GENERAL, STATE OF FLORIDA,
Respondents.
_____/

RESPONDENTS' CORRECTED NOTICE OF FILING APPENDIX

COME NOW Respondents, Secretary, Florida Department of Corrections, *et al.*, by and through the undersigned Assistant Attorney General, who give notice to this Honorable Court that the Respondents' Exhibits A through T, which exceeded 200 pages in length, have been hand-delivered to this Court in paper format under separate cover on July 13, 2020. The Corrected Master Index to the Corrected Advance Appendix and Exhibits Q, T and U are being electronically filed with this notice.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic filing to: **Lisa Bort**, 12973 North Telecom Parkway, Temple Terrance, Florida 33637-0907 email: bort@ccmr.state.fl.us, support@ccmr.state.fl.us Attorney for Petitioner, this 27th day of July, 2020.

Respectfully submitted,

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COUNSEL FOR RESPONDENT

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

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

DEATH PENALTY CASE

Appendix I

Petitioner's Reply to Respondents' Corrected Response to Petition for Writ of Habeas Corpus and Memorandum of Law, filed June 16, 2021.

UNITED STATES DISTRICT COURT
Middle District of Florida
Orlando Division

MARGARET A. ALLEN,

Petitioner,

v.

DEATH PENALTY CASE
CASE NO.: 6:19-cv-296-ORL-40-DCI

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

Respondents.
_____/

PETITIONER'S REPLY TO RESPONDENTS' CORRECTED RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS AND MEMORANDUM OF LAW

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INTRODUCTION

The Petitioner, Margaret A. Allen ("Allen"), by and through her undersigned counsel, respectfully submits the following reply to Respondents' Corrected Response to Petition for Writ of Habeas Corpus and Memorandum of Law (Doc. 20) ("Response"). This reply is timely filed pursuant to the Order issued by the Court on February 17, 2021 (Doc. 19). Allen has exceeded page limits in this reply, but she already sought leave to exceed the page limits detailed in Local Rule 3.01(d) in Petitioner's Motion for Leave to File Reply to Respondents' Response to Petition for Writ of Habeas Corpus and Memorandum of Law (Doc. 16). The Order issued by the Court on February 17, 2021 (Doc. 19) granted Petitioner's Motion for Leave to File Reply.

Allen previously filed her Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody (Doc. 1) ("Petition") and Petitioner's Memorandum of Law in Support of her Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus (Doc. 13) ("Memo") and relies in large part on the arguments raised and support contained therein to refute Respondents' arguments. While Allen will not reply to every ground, issue, and argument raised by Respondents, she expressly does not abandon the issues not specifically replied to herein. Allen also represents that no additional claims are raised in this reply.

Respondents filed a Corrected Index to the Advance Appendix (Doc. 20-1). References to the state court record on appeal will cite to the appropriate exhibit and page number(s) within the appendix. All other references will be self-

explanatory or otherwise explained. All emphasis is supplied unless otherwise noted.

REPLY TO STATEMENT OF THE CASE AND PROCEDURAL HISTORY

First and foremost, as the majority of these grounds are related to ineffective assistance of counsel, this case must be reviewed with the correct lens. Despite Allen's trial counsel, Frank Bankowitz ("counsel"), testifying at the evidentiary hearing that he took over Allen's case from the Public Defender's Office about a year or year and a half before trial began, counsel actually took over the case ***two and a half years before trial***, as evidenced by the Public Defender's Office's Motion to Withdraw as Counsel filed on March 19, 2008. Ex. M pp. 2791, 2880; Ex. A-4 pp. 649-50. Counsel appeared at a hearing and began filing pleadings in April 2008, consequently it is undeniable that counsel had taken over Allen's case over two years prior to her trial. Ex. A-4 pp. 652-54. Respondents cite to counsel's false testimony on pages 20 and 62 of the Response. The remainder of the statements that require clarification in this section of the Response will be addressed in each corresponding ground.

REPLY TO GROUND ONE

Respondents argue that Allen's jury was properly instructed on their role under Florida law and that there was no violation of *Caldwell v. Mississippi*, 472 U.S. 320 (1985). Response at 54-55. However, Allen is in a different situation than many other defendants who have brought claims in light of *Hurst v. Florida*, 577 U.S. 92 (2016), because the trial judge made other extrajudicial statements.

Therefore, the FSC's opinion in Allen's case is even more unreasonable than most. The Supreme Court of Florida's ("FSC") opinion on this ground unreasonably applied federal law and also unreasonably determined the facts in light of the evidence presented in Allen's case. *See Allen v. State*, 261 So. 3d 1255, 1287-89 (Fla. 2019).

From voir dire all the way through the jury instructions, the role of Allen's jury was minimized by repeatedly emphasizing that they were merely providing an advisory recommendation and the ***judge*** would be the only person making the final sentencing decision. The judge specifically told the venire: "You do understand that ***nobody*** will impose the sentence but ***me***. Although I'm going to give great weight to your recommendation, it is ***not*** controlling. ***I can fly in the face of your recommendation or I can follow your recommendation***, with some qualifications." Ex. A-10 p. 157. The State also told the venire that, "In Florida, okay, it is the judge who makes the ultimate sentencing decision in this type of case." Ex. A-10 p. 143. All of these statements plus the jury instructions "urged the jurors to view themselves as taking only a preliminary step toward the actual determination of the appropriateness of death—a determination which would eventually be made by others and for which the jury was not responsible." *Caldwell*, 472 U.S. at 336.

The extrajudicial comments are significant because "the uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to

minimize the importance of its role." *Id.* at 333. Especially when taken together with the rest of the references to the jury's role being advisory and the jury instructions given, "one can easily imagine that in a case in which the jury is divided on the proper sentence, the presence of appellate review could effectively be used as an argument for why those jurors who are reluctant to invoke the death sentence should nevertheless give in." *Id.* Allen's case was worse than *Caldwell* because the jurors were told that only the judge would make the final sentencing decision. At least the *Caldwell* jury thought their recommendation was just subject to appellate review, not that their recommendation did not matter at all like in Allen's case. Significantly, even in cases without any extrajudicial statements, Justice Sotomayor has voiced her concern regarding the FSC's harmless error analysis in these types of cases because "[t]his approach raises substantial Eighth Amendment concerns." *Reynolds v. Florida*, 139 S. Ct. 27, 35 (2018) (Sotomayor, J., dissenting). Further, "*Caldwell* provides strong reasons to doubt that a jury would have reached the same decision had it been instructed that its role was not advisory." *Id.*

Respondents note that, post-*Hurst*, the judge is still free to show mercy and sentence a capital defendant to a life sentence even if the jury votes for a death sentence. Response at 54. While that is correct, if the jury votes for a life sentence now, the sentence is binding, and the judge can no longer sentence the defendant to death. § 921.141 (3)(a)(1), Fla. Stat. Therefore, the jury feels the gravity and weight of their decision. *See Caldwell*, 472 U.S. at 341. Allen's jury did not receive

any instruction that even if they voted for a life sentence that the judge would follow their recommendation. Instead, the judge even made additional statements to further diminish their role. Allen's death sentence "does not meet the standard of reliability that the Eighth Amendment requires." *Id*. Accordingly, Respondents are incorrect in their assertion that "characterizing the jury as 'advisory' is an accurate description of the role assigned to the jury by Florida law and there is no *Caldwell* violation." Response at 54-55.

In Justice Breyer's statement respecting denial of certiorari in *Reynolds*, 139 S. Ct. at 29, he noted that the Supreme Court of the United States ("SCOTUS") should grant certiorari in the appropriate case on "whether the Florida Supreme Court's harmless-error analysis violates the Eighth Amendment because it 'rest[s] a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere.'" *Caldwell*, 472 U.S. at 328–329. Allen's case is the proper case for a federal court to review the *Caldwell* issue. This Court should find that the FSC unreasonably applied *Caldwell* and the Eighth Amendment.

Lastly, Respondents claim, "As this issue was decided on completely independent state grounds, Allen cannot seek relief through an improper successive federal habeas petition." Response at 55. However, this petition is not a successive petition. Further, based on the analysis used and the fact that the majority of the case law cited was federal law, it is apparent that the FSC did not decide this ground on solely independent state grounds. *See Allen,* 261 So. 3d at

1287-89; *see also Michigan v. Long*, 463 U.S. 1032, 1041 (1983).

REPLY TO GROUND TWO

First and foremost, Respondents incorrectly argue that the mitigation Allen presented in postconviction was cumulative. Response at 57, 74-75. As detailed in her Memo at pages 19-20, Allen's jury did not hear ***any*** information regarding her enduring sexual violence throughout her life or being physically abused as a child. Therefore, any finding by the FSC stating that the jury heard that information was indisputably an unreasonable determination of the facts. Further, neither the jury nor the trial judge was aware that Allen suffered from Posttraumatic Stress Disorder ("PTSD"), let alone 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. "Counsel uncovered none of that evidence. Instead, he 'abandoned his investigation of [Allen's] background after having acquired only rudimentary knowledge of [her] history from a narrow set of sources.'" *Andrus v. Texas*, 140 S. Ct. 1875, 1882 (2020) (quoting *Wiggins v. Smith*, 539 U.S. 510, 524 (2003)). The factfinders at Allen's trial also only heard a fleeting indication that Allen had ***possibly*** been a victim of sexual abuse and that she was borderline functioning and exhibited learning difficulties. Ex. A-21 p. 1745, 1750; Ex. A-22 pp. 1883-84. Therefore, Respondents are incorrect in their assertion that even if all of the lay witnesses from the evidentiary hearing had testified at trial that "there is nothing substantially

different or more mitigating in their testimony than what the jury heard though Allen's aunt [Myrtle Hudson]." Response at 74-75.

I. Mitigation Related to Allen's Lifetime of Traumatic Abuse

First, it is contradictory that Respondents find fault with the fact that Barbara Capers ("Capers") did not testify at the evidentiary hearing that she had personal knowledge of observing ***each*** of the family members while they sexually assaulted Allen, and instead only testified to witnessing Uncle Roy touching Allen in private places, grabbing Allen's breasts, and kissing Allen on the mouth. Response at 68. Respondents then go on to claim that this testimony would have been cumulative and cite to the FSC opinion as support, which only states that Myrtle Hudson ("Hudson") "***thought*** Allen had been sexually abused as a child." Response at 68; Ex. M p. 2645-46; *Allen v. State*, 137 So. 3d 946, 954 (Fla. 2013). Clearly, testimony from Capers who not only ***knew*** that multiple men sexually abused Allen, but also actually ***witnessed*** at least one family member sexually assault Allen, was not cumulative to any evidence presented at trial. Due to counsel's ineffectiveness, Capers' compelling testimony confirming the horrific sexual abuse inflicted upon Allen was never heard by any of Allen's factfinders.

Despite the fact that multiple witnesses who personally witnessed the domestic violence that was perpetrated on Allen were available to testify at trial,[1]

[1] Respondents' statement that Brian Watkins ("Watkins") "may or may not have been cooperative" at the time of trial is misleading. Response at 14. Later in Watkins' testimony he clarified that he was living in a halfway house at the time and had to abide by their rules. Ex. M p. 2626. He testified that he was unsure if the halfway house would allow him to meet with the attorneys, but it is more than likely that he would have been able to speak with them. *Id*. Watkins clarified that as long as

Allen's jury only heard brief mentions of the violence Allen was subjected to through Hudson's testimony and Hudson was not present for most of the incidents. Ex. A-22 pp. 1880-83, 1886. For example, although counsel knew Allen's daughters could potentially offer exculpatory information related to her guilt phase and could definitely provide relevant information related to her penalty phase, he did not interview them or call them as witnesses. Contrary to Respondents' allegations, Counsel did not have "valid strategic reasons for not calling" Allen's daughters at trial. Response at 64. Respondents cite *Fennie v. State*, 855 So. 2d 597, 605–06 (Fla. 2003) as support, but *Fennie* is distinguishable. Response at 64. Fennie's counsel was in "constant contact" with the witness' counsel and was warned that the testimony would inculpate Fennie. *Id*. At 605. If Allen's counsel had bothered to contact the daughters and then made an educated decision not to call them at that point, that may have been reasonable, but counsel did not even look for or interview either daughter. "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable," however "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland v. Washington*, 466 U.S. 668, 690-91 (1984). Counsel did not make a reasonable investigation here. In fact, counsel's failure to interview Allen's daughters was exceptionally unreasonable because he was aware they could

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he was allowed to meet with the attorneys that he would have spoken with them and would have testified in court. Ex. M pp. 2626-27.

also have information related to the guilt phase of Allen's trial. Ex. M p. 2880. Allen's daughters could have had information that would exonerate Allen, but he did not bother to contact them to find out, let alone contact them to investigate mitigation. This so-called strategy "was so patently unreasonable that no competent attorney would have chosen it." *Kelly v. United States*, 820 F.2d 1173, 1176 (11th Cir. 1987) (quoting *Adams v. Wainwright*, 709 F.2d 1443, 1445 (11th Cir. 1983). In addition, Respondents also allege that Allen's family was uncooperative, but this is pure speculation because it appears that counsel only bothered to interview one of Allen's family members, Hudson. Response at 67.

Respondents also claim that counsel did speak to Capers. Response at 20, 62-63 (citing Ex. M p. 2796). However, counsel actually stated at the evidentiary hearing that he spoke to Allen's sister whose name he did not remember. Ex. M p. 2796-97. This statement could not have applied to Capers because she is Allen's aunt. Ex. M p. 2633. Respondents also alleged that "Capers was questioned regarding whether anyone asked her to testify on Allen's behalf. In response, she admitted that she was present when the attorneys told Hudson that they wanted her to testify at the trial." Response at 16. These statements are misleading because Capers actually said that she did not know if she was present when counsel spoke to Hudson about testifying. Ex. M pp. 2674-75. Capers said that she knew counsel called Hudson and said he wanted to put Hudson on as a witness, but counsel did not come to Capers or ask her if she wanted to speak. Ex. M p. 2675. Capers said she was present at times when counsel spoke to Hudson, but she could only hear

certain parts of the conversation because counsel and Hudson walked off by themselves to talk. Ex. M pp. 2675-76. As Justice Pariente noted in her dissent, counsel's failure to speak with Capers was exceptionally ineffective. "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." *Allen*, 261 So. 3d at 1289–90 (Pariente, J., dissenting).

Respondents also claim that "[t]he mitigation investigation had already been done and witnesses were already lined up, including the key mitigation witness, Dr. Wu." Response at 20, 62. However, counsel really said: "Actually, I took the case over from the Public Defender's Office. And in my discussions with them it ***appeared*** that the mitigation investigation and witnesses were all lined up. It was just a matter of, you know, putting that on." Ex. M pp. 2790-91. Just like the trial counsel in *Andrus*, counsel was, "by his own admissions at the habeas hearing, barely acquainted with the witnesses who testified during the case in mitigation." 140 S. Ct. at 1882. Counsel admitted that he did not even interview all of the witnesses provided by the Public Defender's Office prior to trial. Ex. M p. 2795. Worse yet, counsel claimed that Hudson was his primary contact person, but he did not even properly investigate to see if she could offer any additional mitigation.

Ex. M p. 2796. If counsel had inquired, then he would have been able to present Hudson's testimony regarding the traumatic violence and abuse Allen suffered throughout her childhood. Ex. M pp. 2729-30. Instead of Allen's jury hearing the horrific details of Allen's mother attempting to drown a seven-year-old Allen in the bathtub and beating Allen on a regular basis throughout her childhood, Hudson's testimony only came out in postconviction. *Id.* "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*, 140 S. Ct. at 1882.

II. Mitigation Related to Allen's Mental Health

Regarding Allen's mental health, Respondents claim that William Russell, Ph.D. ("Dr. Russell") was merely "an expert with a more favorable opinion in postconviction." Response at 70. He only had a more favorable opinion and was able to diagnose Allen with PTSD because he was properly provided with the background information that competent counsel would provide to a mental health expert (such as the details of the crime) and he was also given proper access to interview Allen and her family. Ex. M pp. 2620, 2876, 2923, 2916, 2930, 2966, 2980, 3010. Further, unlike the experts at trial, Dr. Russell was asked whether statutory mitigation applied. Consequently, Dr. Russell found that the weighty statutory mitigating circumstance of "the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance" was present in Allen's case. Ex. M pp. 2971, 2995, 3069. At trial, counsel was so

prejudicially ineffective that he did not even bother to ask Michael Gebel, M.D. ("Dr. Gebel") ***or*** Joseph Wu, M.D. ("Dr. Wu") if they had any opinion of whether statutory mitigating circumstances applied in Allen's case. *Allen*, 137 So. 3d at 965; *see also Simmons v. State*, 105 So. 3d 475, 506 (Fla. 2012). Accordingly, *Peede v. State*, 955 So. 2d 480, 494 (Fla. 2007) is distinguishable because the expert was able to find statutory mitigation even without being provided sufficient background information by counsel because the expert was able to interview Peede twice. Response at 70. In contrast, not only did Allen's counsel fail to provide the experts with sufficient background information, but the mental health expert at trial, Dr. Gebel, only interviewed Allen once, while a guard was present, which made her leery about participating at all. Ex. M pp. 2861-62; Ex. A-21 p. 1745.

In addition, Respondents incorrectly claimed that "Dr. Russell testified "that the jury heard all of the things that he testified about at the evidentiary hearing." Response at 29, 73 (citing Ex. M p. 3009). The context that the statement needs to be taken in is that some of the topics that Dr. Russell agreed came up at trial, such as Bessey Noble's ("Noble") testimony, were actually heard at the *Spencer*[2] hearing, which is not held in front of the jury. Ex. M p. 3008. When the State first questioned Dr. Russell about Noble, claiming the jury heard her testimony, postconviction counsel tried to object, but the judge overruled it. Ex. M pp. 2998-99. Later in the evidentiary hearing, postconviction counsel was finally able to bring the issue to the court's attention and clarify the record. Ex. M p. 3061.

[2] *Spencer v. State,* 615 So. 2d 688 (Fla. 1993).

Further, as stated throughout this ground, the evidence presented at the evidentiary hearing was not the same as what Allen's jury heard.

Respondents point out that the State's expert at the evidentiary hearing, Michael Gamache, Ph.D. ("Dr. Gamache"), testified that his "approach is to obtain a self-report from the person and look for any evidence of corroboration." Response at 71 (citing Ex. M p. 3235). Consequently, Dr. Gamache's opinion should be discounted because he did not even follow his own approach. Not only did he fail to interview Allen to obtain a self-report, but he did not interview any of her family members to look for any evidence of corroboration (although he also testified that corroboration is very important). Ex. M pp. 3211, 3235-36, 3242-43. Notably, Dr. Gamache admitted that he did not conduct his own evaluation of Allen. Ex. M p. 3247. As Dr. Russell actually evaluated Allen and followed the approach that even Dr. Gamache recommended, Dr. Russell's opinion should have been given heavy weight. Instead, the FSC unreasonably found the opposite. *See Allen*, 261 So. 3d at 1274.

Respondents also find fault with Dr. Russell's administration of the Stanford-Binet test. Response at 29, 36-37. However, Dr. Russell testified that the sole reason he administered the test was just to corroborate prior testing. Ex. M pp. 3059-61. He found that his results that Allen has borderline IQ were consistent with the record which stated the same. Ex. M pp. 3059-60. Therefore, any concerns with Dr. Russell's administration of the test are a non-issue.

Respondents cite to *Dufour v. State*, 905 So. 2d 42, 58 (Fla. 2005) for the

proposition that "[s]imply presenting the testimony of experts during the evidentiary hearing that are inconsistent with the mental health opinion of an expert retained by trial counsel does not rise to the level of prejudice necessary to warrant relief." Response at 72-73. However, *Dufour* can be distinguished in multiple ways. First, Dr. Russell's opinion was not inconsistent with Dr. Gebel's opinion. Dr. Russell was just able to better evaluate Allen because a guard was not in the room, he also corroborated self-reports with her family, and he was provided information that counsel failed to provide Dr. Gebel, such as the details of the crime. As a result, he was able to diagnose Allen with PTSD and find statutory mitigation. Ex. M pp. 3071-72. Dr. Gebel was limited in his testimony due to having limited access to Allen, no access to her family, and not being provided records from counsel. Counsel never asked Dr. Gebel whether any statutory mitigating circumstances applied, thus he may have testified at trial that the statutory mitigation applied to Allen, but counsel was too deficient to even find out. *Dufour* is also distinguishable because the FSC found that neither of Dufour's experts even "rendered a strongly favorable opinion." 905 So. 2d at 59. Further, unlike the minor aggravation present in Allen's case, "there was substantial aggravation at issue in [*Dufour*], including the CCP aggravator." *Id*. Only two aggravators were found by the trial judge in Allen's case (neither was CCP), whereas four were found in *Dufour*. *Compare Allen*, 137 So. 3d at 955, *with Dufour,* 905 So. 2d at 59. Accordingly, even without taking into consideration the multitude of other errors and deficiencies present in Allen's case, the FSC should have found that the totality

of the additional mitigation, both statutory and nonstatutory, outweighed the two aggravators and rose to the level of prejudice necessary to warrant relief.

In a similar vein, Respondents cite to *Raleigh v. State*, 932 So. 2d 1054, 1061 (Fla. 2006), which is also distinguishable. Response at 73. As detailed above and on pages 24-29 of the Memo, Dr. Russell's evaluation was not a "better repackaging" of Dr. Gebel's evaluation. Unlike in *Raleigh*, where the experts performed essentially the same tasks and had substantially similar evaluations, here counsel did not provide Dr. Gebel with the tools necessary to thoroughly evaluate Allen or to perform the same tasks as Dr. Russell. 932 So. 2d at 1061-63.

III. Counsel was Ineffective and the FSC's Opinion was Unreasonable

Based upon the foregoing arguments and clarifications, it is evident that Respondents are incorrect in their assertion that "counsel's performance was reasonable." Response at 57. Contrary to Respondents' contentions, counsel did not "mount[] a reasonable investigation into Allen's background and medical history." *Id.* Further, as a result of the litany of deficiencies in counsel's performance regarding his mitigation investigation and presentation, it was unreasonable for the FSC to find that Allen was not prejudiced. As in *Wiggins*, "the available mitigating evidence, taken as a whole, 'might well have influenced the jury's appraisal' of [Allen's] moral culpability." 539 U.S. at 538 (quoting *Williams v. Taylor*, 529 U.S. 362, 398 (2000)).

Respondents allege that "it is unlikely that the additional mitigation

presented would have been enough to outweigh the established aggravation" because the aggravation was significant and the mitigation was comparatively weak. Response at 74. Notably, Allen would not even be eligible for the death penalty without one aggravating circumstance, therefore it is implausible that one additional aggravator would be that significant that it could not be overcome by mitigation. The totality of the minimal mitigation evidence adduced at trial along with the mitigation presented at the evidentiary hearing outweigh the two aggravators. *See Porter v. McCollum*, 558 U.S. 30, 41 (2009). Further, the case that Respondents cited, *Hall v. State*, 212 So. 3d 1001 (Fla. 2017), to assert that Allen's mitigation was supposedly weak in comparison to the aggravation, had five aggravators initially. One aggravator in *Hall* was rejected on direct appeal, but "each of the four remaining aggravators were afforded great weight or very great weight." *Id.* At 1027. As Allen's case had half the aggravators and none were assigned very great weight, prejudice can be more easily found in her case. Furthermore, if counsel had not been so deficient in other areas, at least one of those two aggravators would have been either undermined or not established at all. Memo at 71-83. "A piecemeal review of each incident does not end our inquiry. We must consider the cumulative effect of these incidents and determine whether, viewing the trial as a whole, appellants received a fair trial as is their due under our Constitution." *United States v. Blasco*, 702 F.2d 1315, 1329 (11th Cir. 1983). Consequently, Allen submits that the combined impact of prejudice from all of counsel's deficiencies should be taken into consideration when considering

prejudice. *See Smith v. Sec'y, Dept. of Corr.*, 572 F.3d 1327, 1351–52 (11th Cir. 2009) (citing *Cargle v. Mullin*, 317 F.3d 1196, 1206-07 (10th Cir. 2003) ("noting the Tenth Circuit's practice of aggregating all errors in cumulative analysis, even those based on diverse legal claims, including *Strickland* and *Brady*").

Lastly, contrary to Respondents' assertions, the FSC upholding Allen's death sentence upon postconviction appeal does violate the Eighth and Fourteenth Amendments, *Furman v. Georgia*, 408 U.S. 238 (1972), and *Spaziano v. Florida*, 468 U.S. 447 (1984). Response at 76-77. "[T]he 'cruel and unusual' punishment clause of the Eighth Amendment [] require[s] legislatures to write penal laws that are evenhanded, nonselective, and nonarbitrary, and to require judges to see to it that general laws are not applied sparsely, selectively, and spottily to unpopular groups." *Furman*, 408 U.S. at 256 (Douglas, J., concurring). SCOTUS has distinctly stated that the application of the death penalty cannot be arbitrary or discriminatory. *Spaziano*, 468 U.S. at 465-66, *overruled on other grounds by Hurst v. Florida*, 577 U.S. 92 (2016). Thus, the FSC's failure to grant Allen relief on this ground was not just a proportionality issue as Respondents suggest,[3] it is a constitutional issue because relief has arbitrarily been granted to similarly situated individuals. As stated on page 38 of the Memo, the only difference between Allen and the similarly situated individuals who received relief, was that she is a female.

In conclusion, the FSC's decision was an unreasonable determination of the

[3] The FSC no longer reviews for comparative proportionality. *Lawrence v. State*, 308 So. 3d 544 (Fla. 2020). However, it should be noted that SCOTUS has stated that "[t]he concept of proportionality is central to the Eighth Amendment." *Graham v. Florida*, 560 U.S. 48, 59 (2010).

facts, and contrary to, or involved an unreasonable application of clearly established Federal law, as determined by SCOTUS. As it is clear that Allen is entitled to relief based on 28 U.S.C. § 2254(d), this Court must find that the FSC was unreasonable in its determination that Allen's counsel was not prejudicially ineffective.

REPLY TO GROUND THREE

Allen will only reply to arguments raised in the Response regarding a few of the prosecutorial misstatements made during the guilt phase of her trial. As to the remainder of the misstatements and any arguments not replied to, Allen relies on her Petition and Memo.

II. Improper Comments and Misstatements Related to Wright's Cause of Death and the HAC Aggravator

During the guilt phase of Allen's trial, the State misrepresented Sajid Qaiser, M.D.'s ("Dr. Qaiser") testimony regarding the time it takes for strangulation to cause a death. *See* Memo at 42-43. Dr. Qaiser testified that if strangulation occurred, death would occur after ***four to six minutes***. Ex. A-18 p. 1448. However, the State instead argued that death would occur after ***three to four minutes***. Ex. A-20 pp. 1578-79. Counsel's deficiency in failing to object to this misstatement was prejudicial because co-defendant turned State witness, Quintin Allen ("Quintin"), testified that a belt was only around Wenda Wright's ("Wright") neck for ***three minutes***. Ex. A-15 pp. 914-15. The State misstated the time in order to match the time that Quintin claimed Wright was strangled.

Respondents argue that "[s]ince the State was arguing premeditation, the

State would have benefited more, and Allen prejudiced more, if the State argued that it takes a longer amount of time for a person to die from strangulation than what was established at trial rather than a shorter amount of time." Response at 86. Allen submits that it was completely inappropriate and misleading for the State to even be arguing premeditation at all at trial considering that Allen was not charged with premeditated murder. Ex. A-5 p. 794. Further, the jury was only instructed on two aggravating circumstances, neither was "cold, calculated, and premeditated". Ex. A-22 pp. 1976-78. Accordingly, this misstatement prejudiced Allen in both phases of her trial.

Even if the jury had found that a strangulation occurred,[4] there would have been reasonable doubt as to Wright's cause of death if it had been made clear that a strangulation death would not occur at three minutes. Quintin testified that Wright was no longer moving at three minutes, consequently there is reasonable doubt whether her death was caused by strangulation. Ex. A-15 pp. 914-15. Wright's death could have been caused by her cocaine intoxication, morbid obesity, heart problems, and cirrhosis of the liver. Ex. M pp. 3318-19. As a result, there is a reasonable probability that the jury would have found Allen not guilty or guilty of a lesser offense. In addition, as the FSC found that the testimony of Dr. Qaiser and Quintin supported the aggravating circumstance of "the capital felony was

[4] If counsel had not been ineffective and called a forensic expert to testify, there is even more of a reasonable probability that the jury would have found that Wright had not been strangled. *See* Memo at 61-71; Ex. M pp. 3289-90, 3323, 3346; *see also Blasco*, 702 F.2d at 1329; *Cargle*, 317 F.3d at 1206-08.

especially heinous, atrocious, or cruel" ("HAC"), the State's misrepresentation of the evidence prejudiced her penalty phase. *See Allen*, 137 So. 3d at 962-64. The FSC's opinion was an unreasonable application of federal law and was also an unreasonable determination of the facts in light of the evidence presented.

The State also misstated testimony regarding the original medical examiner Robert Whitmore, M.D.'s ("Dr. Whitmore") autopsy report by stating, "it's sort of vague what he said -- atraumatic neck, but then he says, 'see ***evidence of internal injuries***,' and then we read that in which he says there is [sic] contusions on both sides of the neck." Ex. A-20 pp. 1629-30. The autopsy report actually specified to see "***External*** Evidence of Injury" and noted that a 2 x 2 inch contusion was on one side and a 1 ½ x 2 inch contusion was on the other side. Ex. M pp. 1577-78. The contusions were not even the same size, which you would expect if Wright had actually been strangled with a ligature. Ex. M pp. 3289-90. Under the ***Internal*** Examination section of the report, no internal injuries to the neck were reported. Ex. M p. 1580.

Respondents contend that this subclaim was properly denied. Response at 87-88. The State should not have been reading from the autopsy report anyhow because it was not introduced into evidence, but regardless, since the report was not in evidence for the jury to view, without counsel objecting to the misstatement, the jury had no way to even know that the misstatement occurred. Ex. A-5 pp. 847-52. Even assuming *arguendo* that whether the injuries were internal or not was insignificant to HAC as Respondents suggest, the distinction would have still been

persuasive as to whether the jurors decided to show Allen mercy when voting upon recommending a death sentence. Response at 88. An internal injury would be evidence that the conduct was much more violent than just merely an external bruise on the skin.

Respondents' argument that "[c]ounsel's decision to eschew risky arguments that were either irrelevant to or in actual conflict with the chosen defense was reasonable" is misguided. Response at 88. Objecting to a misstatement of the evidence that makes the defendant look worse than the reality should never be in conflict with any competent counsel's defense. As such, the FSC's opinion was unreasonable.

III. Cumulative Effect of Instances of Prosecutorial Misconduct

Respondents claim that "none of Allen's various sub-claims had merit" and the FSC properly denied her claim based on cumulative error. Response at 88-89. However, a "piecemeal review of each incident does not end [the] inquiry" and this Court "must consider the cumulative effect of these incidents and determine whether, viewing the trial as a whole, appellants received a fair trial as is their due under our Constitution." *Blasco*, 702 F.2d at 1329. Allen also respectfully submits that the combined impact of all of the errors across both phases of her trial should be aggregated in the cumulative analysis. *See Cargle*, 317 F.3d at 1206-08.

REPLY TO GROUNDS FOUR AND THIRTEEN

Allen will not reply to every argument raised in the Response regarding each instance of prosecutorial misconduct during the penalty phase of her trial. As to

the remainder of the misconduct and any arguments not replied to, Allen relies on her Petition and Memo.

I. Prosecutorial Misconduct Related to Impermissible Non-Statutory Aggravating Factors

a. Convictions for Nonviolent Felonies

To clarify, as to the prosecutorial misconduct in the penalty phase regarding convictions for nonviolent felonies, the ground only relates to the improper introduction of Allen's incarceration for nonviolent offenses and the inaccurate testimony elicited by the State claiming that Allen had multiple convictions for ***selling*** drugs. Memo at 46-49; Petition at 36-38. Therefore, it is irrelevant if Allen had any other convictions. Response at 89-90. Regardless, Allen's claim is not misguided as Respondents allege, because convictions for nonviolent felonies are not allowed to be used as an aggravating circumstance. *Poole v. State*, 997 So. 2d 382, 392 (Fla. 2008); *see also Geralds v. State*, 601 So. 2d 1157, 1162 (Fla. 1992). The other main point was that the State introduced false testimony that Allen had multiple drug ***sales*** convictions, which was inaccurate. Memo at 83-85; *see infra* pp. 40-42; *see also Napue v. Illinois*, 360 U.S. 264 (1959).

Respondents also claim that the door to impeachment regarding Allen's criminal history had been opened. Response at 90, 92. Even assuming *arguendo* that counsel had opened the door, then he was still ineffective. No matter how the testimony got in, counsel was either deficient for failing to object and move for a mistrial, or he would have also been deficient if he had opened the door. Either way Allen was prejudiced in her penalty phase due to counsel's deficiencies.

Respondents cite to *Geralds* claiming that "[w]hile the Florida Supreme Court has denounced the State's use of a defendant's criminal history under the guise of witness impeachment, the court also noted that use of such would be proper where the defense has opened the door to such impeachment." Response at 92 (citing 601 So. 2d at 1162). Although Allen submits that counsel did not open the door, the FSC does not specifically state that it is ***proper*** if the defense has opened the door. The *Geralds* court also stated that its decision in *Maggard v. State*, 399 So. 2d 973, 977–78 (Fla. 1981) was "directly on point." 601 So. 2d at 1162. *Maggard* "held that the State's presentation of evidence of the defendant's prior criminal record of nonviolent crimes to rebut the mitigating circumstance of no significant prior criminal activity, upon which the defendant has explicitly waived reliance, constituted reversible error." *Geralds*, 601 So. 2d at 1163 (citing *Maggard*, 399 So. 2d at 977–78). As Allen did not rely on the mitigating circumstance of no significant prior criminal activity, her situation is identical to *Maggard*, and relief was granted in both *Maggard* and *Geralds*.

In addition, *Geralds* actually demonstrates just how deficient Allen's counsel truly was in failing to object, request a curative instruction, and move for a mistrial. When the prosecutor asked a witness in *Geralds* about Geralds' number of convictions, his counsel objected, moved for a mistrial, and the court gave a curative instruction. 601 So. 2d at 1161. When the prosecutor rephrased and asked about Geralds' multiple convictions again, Geralds' counsel again objected and moved for a mistrial. *Id*. Allen's counsel deficiently failed to object at all. *Geralds*

also goes on to say, "Improperly receiving vague and unverified information regarding a defendant's prior felonies clearly has the effect of unfairly prejudicing the defendant in the eyes of the jury and creates the risk that the jury will give undue weight to such information in recommending the penalty of death." 601 So. 2d at 1163. This reasoning is exactly why Allen was prejudiced by counsel's ineffectiveness and requires a new penalty phase.

Respondents disingenuously argue that the State was using Allen's release date as a time reference when questioning Hudson. Response at 93. Respondents claim that the State made multiple references to Allen getting released from prison in 1999 because Hudson did not recall the answer to the question the first time. Response at 93. However, Hudson had just answered that she was a mother figure to Allen for the past ten years off and on. Ex. A-22 pp. 1890-91. Hudson even went on to say that Allen had been like her child all of her life and Allen stayed with Hudson when she was younger while her mother was working. Ex. A-22 p. 1891. Therefore, the State was solely intending to inflame the passions of the jury when he went on to ask if Hudson was acquainted with Allen prior to Allen going to prison. *Id*. Counsel deficiently failed to object to any of these questions. Respondents also claim that Hudson not knowing Allen to have used drugs opened the door to asking about drug convictions. Response at 93. Even if Allen had been convicted several times for selling drugs, which she had not, it does not mean that she was using drugs herself. There was no basis for the State to introduce that false testimony of nonstatutory aggravation into Allen's penalty phase and absolutely no

strategic reason for counsel not to object.

Respondents also claim that Dr. Gebel's testimony opened the door to the improper questioning. Response at 92-93. Again, even if drug use was relevant to brain damage, a conviction for selling drugs does not necessarily mean she was using drugs. When Dr. Gebel said that he had no physical record of Allen taking drugs and that Allen had denied drug usage, the State should have left it at that. Ex. A-21 p. 1758. It was completely improper for the State to then ask if Dr. Gebel knew about Allen's past drug convictions. Ex. A-21 p. 1759. The fact that Dr. Gebel knew nothing about Allen using drugs had already been asked and answered and this question just continued to inject improper nonstatutory aggravation into Allen's trial. Counsel should have objected on both grounds. Again, Allen submits that the door was not opened, and the questioning was just inappropriate and defamatory. Regardless, none of that testimony opened the door to the State asking Hudson about Allen being convicted ***several*** times for selling drugs or for the State to argue in his closing argument that Allen had spent time in prison for drug sale ***convictions***. Ex. A-22 pp. 1891-92, 1930. These statements would be inflammatory to the jury even if true, being that the statements were false and elicited by the State, the situation is exponentially more prejudicial. Memo at 83-85; *see also Napue*, 360 U.S. 264. Accordingly, the FSC's opinion was an unreasonable application of federal law and was also an unreasonable determination of the facts in light of the evidence presented.

b. Dangerousness

Respondents cite to *Rodriguez v. State*, 753 So. 2d 29 (Fla. 2000) to claim that counsel through his questioning of Dr. Wu opened the door to questions regarding dangerousness. Response at 95. Allen submits that counsel did not open the door to this line of questioning, but even assuming *arguendo* that he did, *Rodriguez* states that when admitting "otherwise inadmissible testimony to 'qualify, explain, or limit' testimony," the court must determine "whether the probative value of this testimony outweighed its prejudicial impact." 753 So. 2d at 42. Clearly, the unfair prejudice of eliciting testimony related to an improper nonstatutory aggravator that the court had already ordered to be precluded would outweigh the probative value of this testimony. *See id.* at 42-43; Ex. A-4 pp. 583-91, 621-25. Counsel was deficient in failing to properly object and if the door was supposedly opened, counsel would have still been deficient in failing to ensure that the trial court properly analyzed the prejudice of allowing such defamatory testimony. Either way, the end result is that Allen was prejudiced by the testimony elicited and the FSC's opinion was an unreasonable application of federal law and was also an unreasonable determination of the facts in light of the evidence presented.

Respondents also allege that the State was not "referring to a 'violent outbreak'" but was instead "referring to 'a disproportionate overreaction to provocation,' which is by no means [sic] definitive comment on future violence or future dangerousness." Response at 96. This argument is misleading because the

State's whole line of questioning referred to violence related to impulse control. Ex. A-21 pp. 1851-56. The State asked whether Dr. Wu knew if Allen had any episodes resulting in violence from her impulse control process. Ex. A-21 pp. 1851-52. The State went on to ask Dr. Wu if he knew of any instances where Allen committed a violent act due to inability to control impulses. Ex. A-21 p. 1852. Therefore, regardless of whether the State was attempting to discredit Dr. Wu's opinion, the State was referring to violent episodes, which is why Allen properly characterized the "it" in the question as "an episode of a violent act". Response at 96-97; Memo at 50; Ex. A-21 p. 1855.

II. Prosecutorial Misconduct Related to Improper Arguments

a. "Golden Rule" Argument and Misstatement of Evidence

Respondents incorrectly argue "that the State was not asking the jury to imagine for themselves what it would be like to be strangled." Response at 102. However, the record conclusively shows that the State was trying to get the jury to place themselves in Wright's position. Ex. A-22 p. 1920. The State even followed up by asking jurors to envision how scary it is when you cannot catch your breath due to running or a medical condition like asthma. *Id.*

Respondents also cite to *Braddy v. State*, 111 So. 3d 810, 842-43 (Fla. 2012) for the proposition that "[a] prosecutor may make comments describing the murder where these comments are based on evidence introduced at trial and are relevant to the circumstances of the murder or relevant aggravators, so long as the prosecutor does not cross the line by inviting the jurors to place themselves in the

position of the victim." In Allen's case, the State unmistakably crossed the line and did invite the jurors to place themselves in the victim's position. As *Braddy* states, "The repeated use of the pronoun 'you' suggests such an invitation." *Id*. at 843. Counsel was ineffective in failing to object to these improper arguments.

Respondents also claim that the "imaginary scenario" in the closing argument was merely based on facts in evidence. Response at 102-03. The only portion of the script that was even arguably based on facts in evidence was that Quintin claimed that Wright said she wanted to go home to her kids. Ex. A-15 pp. 914, 1005. Therefore, as argued on page 54 of the Memo, counsel was deficient in failing to object to not only the improper "Golden Rule" and "Imaginary Scenario" arguments, but also to the State's misstatement of the evidence. The FSC's opinion was an unreasonable application of *Strickland* and *Berger v. United States*, 295 U.S. 78 (1935) and was also an unreasonable determination of the facts in light of the evidence presented.

b. Improper Vouching and Misstatement of the Law

Respondents claim that *Ruiz v. State*, 743 So. 2d 1, 6-7 (Fla. 1999) is distinguishable from Allen's case, but also cite to *Brooks v. State*, 762 So. 2d 879 (Fla. 2000). Response at 104-05. Even if the improper comments in Allen's case were found to be less blatant than *Ruiz*, the comments were very similar to *Brooks*, and Brooks received relief. The prosecutor in *Brooks* similarly stated, "I would submit to you, when you look at all the facts of this case and look at the law of Florida, it is clear that this is a case that demands the death penalty for both of

those defendants for what they have done." 762 So. 2d at 901. As the comments counsel deficiently failed to object to in Allen's case also "cloak[ed] the State's case with legitimacy as a bona-fide death penalty prosecution, much like an improper 'vouching' argument," the FSC's opinion was an unreasonable application of *Strickland* and was also an unreasonable determination of the facts in light of the evidence presented. *Brooks*, 762 So. 2d at 902.

c. Denigration of Mitigation and Defense Counsel and Misstatements

Respondents argue that the State was just discrediting Dr. Gebel's opinion when it made the comments regarding his testimony in the penalty phase closing argument. Response at 107. First, Allen disagrees with the Respondents' characterization that the State "successfully" discredited Dr. Gebel's opinion. Further, any attempt to discredit a witness by denigrating the defendant's defense, mitigation, and counsel, as well as misstating the testimony of the witness, is patently improper. *See Berger*, 295 U.S. at 84; *see also Williamson v. State*, 994 So. 2d 1000, 1014 (Fla. 2008). "No prosecutor, however, may impugn the integrity of a particular lawyer or that of lawyers in general, without basis in fact, as a means of imputing guilt to a defendant." *United States v. McDonald*, 620 F.2d 559, 564 (5th Cir. 1980). In addition, the State's characterization of Dr. Gebel's testimony as "blah, blah, blah" was also inappropriate. "[A]t the very least, it is unprofessional to summarize an opponent's argument with 'blah, blah, blah,' which is substantially more dismissive that [sic] 'x, y, z' or 'this and that.'" *United States v.*

Valas, 822 F.3d 228, 245 (5th Cir. 2016). Therefore, counsel was ineffective in failing to object and the FSC's opinion was unreasonable.

e. Bad Character

Regarding the improper character comments insinuating that Allen is a bad mother, Respondents claim that the "State's arguments that are criticized by Allen constitute fair argument based on the evidence presented." Response at 111. The State did not just convey evidence, he also made an extraneous comment that we can only hope that there is some hope for Allen's daughter who resided with her grandmother (Allen's mother) at the time of trial. Ex. A-22 p. 1930. Not only did counsel deficiently fail to object to this statement, but it also highlights that he was also deficient in failing to investigate Allen's background. Memo at 13-28; *see supra* pp. 6-18. If counsel had not been ineffective in his mitigation investigation and presentation, evidence would have been presented that the grandmother, Allen's mother, was violent towards Allen and her children. As noted in Ground Two, both Hudson and Capers testified at the postconviction evidentiary hearing regarding the violent abuse that Allen's mother subjected Allen to on a daily basis, such as trying to drown Allen and leaving marks on her by beating her with belts and sticks. Ex. M pp. 2639-40, 2663, 2678-79, 2729-30. Worse yet, when Allen was about twelve, similar in age to her youngest daughter at the time, Allen's mother beat Allen so badly that Capers had to call the police. Ex. M p. 2640.

Notably, Allen's other daughter, Alvinia Ragoo ("Alvinia"), testified at the evidentiary hearing that her grandmother "whopped us," "spanked us," "whipped

us with the water hose," and poked us in the arms with safety pins. Ex. M p. 2704. The abuse was so bad that the grandmother would leave marks on the children, such as whelps from being whipped with the water hose. Ex. M p. 2705. Further, Alvinia testified that she also lived with her grandmother off and on and she still ended up in prison as the State pointed out in the same part of the closing argument. Ex. M pp. 2687-88; Ex. A-22 p. 1930. Counsel deficiently failed to object to the inflammatory comments, which prejudiced Allen's penalty phase. Further, if counsel had properly investigated and presented mitigation, there would be absolutely no contention that the comment was a fair argument based on the evidence presented. Response at 111.

III. Cumulative Effect of the Instances of Prosecutorial Misconduct

Respondents argue that "none of Allen's various sub-claims had merit" and "there are no errors of counsel to accumulate." Response at 115. However, that is the exact issue here. "A piecemeal review of each incident does not end our inquiry. We must consider the cumulative effect of these incidents and determine whether, viewing the trial as a whole, appellants received a fair trial as is their due under our Constitution." *Conklin v. Schofield*, 366 F.3d 1191, 1210 (11th Cir. 2004) (quoting *Blasco*, 702 F.2d at 1329). The totality of the improper questions and comments by the State during cross-examination and during closing arguments must be reviewed. *See Strickland*, 466 U.S. at 695-96; *see also Brooks v. State*, 762 So. 2d 879, 905 (Fla. 2000) (remanding for new penalty phase in light of the "cumulative effect of the numerous, overlapping improprieties in the prosecutor's penalty

phase closing argument"). Further, all of counsel's deficiencies in Allen's guilt phase should also be considered. Memo at 38-45; *Cargle*, 317 F.3d at 1208 (quoting *Moore v. Johnson*, 194 F.3d 586, 619 (5th Cir. 1999)) ("When, as here, the same jury considered guilt and punishment, the question is whether the cumulative errors of counsel rendered the jury's findings, either as to guilt or punishment, unreliable.") As a whole, the combined impact of the instances of prosecutorial misconduct in both phases of her trial were fundamentally unfair and deprived Allen of a fair and impartial trial in that it influenced her jury to vote for a death sentence. *See Anderson v. State*, 863 So. 2d 169, 187 (Fla. 2003). Accordingly, the FSC's opinion was an unreasonable application of federal law and was also an unreasonable determination of the facts in light of the evidence presented.

REPLY TO GROUND FIVE

First and foremost, it is important to clarify that Allen's jury never saw Dr. Whitmore's autopsy report. The autopsy report was not introduced into evidence. Ex. A-5 pp. 847-52. Respondents properly stated on page 116 of the Response that the report was not admitted at trial. However, Respondents incorrectly stated that the jury saw the report on pages 23 and 118 of the Response. Respondents may have been mistaken due to counsel's false testimony at the evidentiary hearing where counsel incorrectly stated that the jury saw the autopsy report. Ex. M pp. 2809-10. A related discrepancy is that Respondents claimed, "Everything defense expert Dr. Spitz testified to during the evidentiary hearing was brought out on

cross-examination of Dr. Qaiser through Dr. Whitmore's autopsy report." Response at 125-26. Respondents cite to pages 3337-38 of Exhibit M in support, however Daniel J. Spitz, M.D. ("Dr. Spitz") actually stated that he is essentially in agreement with Dr. Whitmore's findings and then the State incorrectly insinuated in their next question that the jury heard everything that Dr. Whitmore had to say. Ex. M p. 3338. An objection was lodged, and Dr. Spitz was never able to clarify. *Id*.

Respondents also incorrectly claim that "[o]n two occasions, Dr. Spitz has been found not to be credible in criminal postconviction proceedings." Response at 37 (citing Ex. M p. 3278). However, as postconviction counsel attempted to clarify at the evidentiary hearing by seeking to submit the actual court decisions at a later date, this is not true. Ex. M pp. 3278-81. First, there was never "two occasions," the case that the State was referring to, *State v. Clemente Aguirre-Jarquin*, was another case in the same circuit court, but in a different county. Notably, prior to Allen's evidentiary hearing, the FSC had already reversed the lower court's order that the State questioned Dr. Spitz about, vacated Aguirre's convictions, and remanded for a new trial. *Aguirre-Jarquin v. State*, 202 So. 3d 785, 795 (Fla. 2016).

Second, the State tried to insinuate at the evidentiary hearing that the lower court's decision was overturned due to *Hurst*, by asking if it was overruled due to "new death penalty law in the state of Florida," which was also not true. Ex. M p. 3279. Dr. Spitz correctly stated that to his knowledge that was not the reason the case was overturned by the FSC. *Id*. Dr. Spitz elaborated that the FSC's decision to

overturn the lower court's order was based on the totality of the evidence, which partly related to his testimony. *Id*. Dr. Spitz was correct in that statement, which is reflected by the FSC's opinion that the newly discovered evidence in Aguirre's case gave rise to a reasonable doubt as to his culpability and entitled Aguirre to a new trial. *Aguirre-Jarquin*, 202 So. 3d at 791. *Hurst* was never mentioned in the FSC's *Aguirre* opinion, possibly because the FSC only decided *Hurst v. State*, 202 So. 3d 40 (Fla. 2016) thirteen days prior. Regardless, the FSC only focused on Aguirre's guilt phase claims in its opinion. 202 So. 3d 785. It is also important to note that not only did the FSC find the testimony related to Aguirre's case reliable, Aguirre has since been exonerated. Erin Donaghue, *Murder Charges Dropped Against Exonerated Death Row Inmate*, CBS NEWS (November 5, 2018, 6:34 PM), https://www.cbsnews.com/news/clemente-aguirre-jarquin-murder-charges-dropped-against-exonerated-death-row-inmate-2018-11-05/.[5]

Lastly, the FSC has previously found Dr. Spitz to be a credible witness in the past in *State v. Fitzpatrick*, 118 So. 3d 737 (Fla. 2013). The FSC's opinion also specifically noted that Dr. Spitz was "expressly found to be credible by the postconviction court." *Id*. at 759. In *Fitzpatrick*, the postconviction testimony of Dr. Spitz refuted the testimony of an expert at trial and was paramount in the FSC

[5] Prior to the charges being dropped, the judge whose postconviction order was overturned by the FSC, Circuit Court Judge Jessica J. Recksiedler, recused herself from presiding over Aguirre's new trial after allegations of her bias surfaced. Michael Williams, *After Initial Refusal, Judge Accused of Bias Steps Aside in Controversial Death-Penalty Case*, ORLANDO SENTINEL (Mar. 15, 2018, 4:35 PM), http://www.orlandosentinel.com/news/breaking-news/os-seminole-county-judge-recuses-herself-death-penalty-case-20180315-story.html. In addition, she has previously been publicly reprimanded by the FSC for violating Canons of the Code of Judicial Conduct. *In re Recksiedler*, 161 So. 3d 398, 401 (Fla. 2015).

affirming the postconviction court's finding of ineffectiveness during Fitzpatrick's guilt phase and holding that he was entitled to a new trial. *Id.* at 750-51, 760-61, 770. This is just one example, but clearly Dr. Spitz is a credible witness.

Respondents cite to *State v. Bolender*, 503 So. 2d 1247, 1250 (Fla. 1987) for support in response to this ground. Response at 116-17. However, *Bolender* also states that "[s]trategic decisions do not constitute ineffective assistance if alternative courses of action have been considered and rejected." *Id.* This is one of the biggest issues with why counsel was ineffective. Counsel deficiently waited until the last minute to depose Dr. Qaiser and then after realizing that Dr. Qaiser's testimony was going to conflict with Dr. Whitmore's autopsy report, unreasonably failed to consider any alternative courses of action other than just trying to cross-examine Dr. Qaiser. *See Strickland*, 466 U.S. 668 at 690-91. It was clear that counsel's so-called "strategy" of only cross-examining Dr. Qaiser was not on purpose, because counsel could not even recall whether it was a conscious choice not to bring in an expert to establish that there were no ligature marks. Ex. M pp. 2810-11. Counsel's failure to properly rebut Dr. Qaiser's testimony with a forensic expert such as Dr. Spitz was "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. Counsel had a duty to make a reasonable investigation, especially since he had the red flag of a wide difference in opinion between Dr. Whitmore and Dr. Qaiser. *See id.* at 691. At that point, competent counsel would have investigated further by at least consulting with an independent expert to see which medical examiner was correct. Counsel's "failure to investigate

thoroughly resulted from inattention, not reasoned strategic judgment." *Wiggins*, 539 U.S. at 526. Accordingly, counsel's decision to only cross-examine Dr. Qaiser without bothering to investigate at all was not strategic or tactical and was unreasonable under these circumstances. *See id*. at 690-91.

In addition, if the jury heard that Wright's injuries, or lack thereof, did not support Quintin's testimony of the events surrounding her death, ***all*** of Quintin's testimony would be called into question and discounted too. The fact that Dr. Spitz's testimony undermines Quintin's credibility is incredibly important because, in both of its opinions, the FSC heavily relied on his testimony of the events surrounding Wright's death. *Allen*, 137 So. 3d 946; *Allen*, 261 So. 3d 1255. Thus, if the jury had heard Dr. Spitz's testimony, and in addition, especially if Quintin had been impeached with his prior inconsistent statement regarding the presence of bleach and if counsel had not elicited damaging testimony from Quintin, there is a reasonable probability that the jury would not have found Allen to be guilty. *See* Memo pp. 71-80; *see also Blasco*, 702 F.2d at 1329; *Cargle*, 317 F.3d at 1206-08. Further, there would be no reasonable probability that the jurors would find the existence of the HAC aggravator after hearing Dr. Spitz's testimony alone, and it would be even less probable combined with undermining Quintin's testimony. The jurors also would have been more willing to find Allen deserving of mercy. Contrary to Respondents' assertions, Allen was prejudiced in both phases of her trial by counsel's deficient performance in failing to call an expert such as Dr. Spitz to testify and to properly rebut Dr. Qaiser's findings. Response at 126-27.

The FSC's opinion was an unreasonable application of *Strickland* and its progeny and was also an unreasonable determination of the facts in light of the evidence presented.

REPLY TO GROUND SEVEN

Respondents claim that Quintin never clearly eliminated bleach as being a possible substance that he alleged was poured on Wright. Response at 138. However, on February 10, 2005, approximately two days after Wright's death, Quintin stated in his 9:54 p.m. interview with Detective Boyer that he could only remember alcohol. Ex. A-7 p. 1113. Detective Boyer asked Quintin if there was any bleach. *Id*. In response, Quintin said "she got boxes of bleach. But I don't, ***she ain't have no bleach bottle***." *Id*. Detective Boyer then verified what was alleged to be poured on Wright, and Quintin agreed that it was stuff like hair products and alcohol. Ex. A-7 pp. 1113-14. Clearly, if there was no bottle of bleach, liquid bleach was not being poured on Wright. Quintin never alleged that any powders or anything else contained in a box were used.

Respondents also argue that Quintin's testimony regarding the bleach was refuted by Dr. Qaiser's testimony that he did not see anything "in the autopsy report to indicate that bleach or any other caustic substances were poured down the victim's throat." Response at 138 (citing Ex. A-19 p. 1487). It is important to note that evidence of bleach or caustic substances being poured down one's throat is not interchangeable with whether there was evidence that bleach was poured

onto the person.[6] Dr. Qaiser's testimony did not impeach Quintin's testimony and neither did counsel, which left the jurors with the false impression that, at the very least, bleach was poured onto Wright. The unimpeached testimony also left jurors with the perception that Quintin was a credible witness, when in reality he was not reliable at all.

Accordingly, counsel was deficient in failing to impeach Quintin with this crucial point. This deficiency prejudiced Allen in both phases of her trial. Quintin was the sole evidence against Allen in her guilt phase and if the jury knew he could not be believed, the jury would not have found her guilty. Further, pouring bleach onto a person contributed to a finding of HAC in her penalty phase, which is significant because HAC was one of only two aggravating circumstances found. If the jury knew Quintin could not be believed, HAC would not have been found by the jury because Quintin's testimony was most of the support for the aggravator. *See Pearce v. State*, 880 So. 2d 561, 569 (Fla. 2004) ("The theory of admissibility is not that the prior statement is true and the in-court testimony is false, but that because the witness has not told the truth in one of the statements, the jury should disbelieve both statements.") The FSC also agreed with the trial court and found Quintin's testimony to be almost all of the support for the HAC aggravator. *Allen*,

[6] On page 24 of the Response, Respondents claimed that "Bankowitz believed that he cross-examined co-defendant Quintin Allen extensively and that both of the medical examiners testified that no caustic chemical was poured on the victim." However, that statement is misleading. At the evidentiary hearing counsel just agreed with the State's leading question that the medical findings by both doctors indicated that there was no evidence that chemicals were poured onto Wright. Ex. M p. 2869. However, the evidence actually reflects that Dr. Qaiser only testified that he did not see in Dr. Whitmore's report that caustic substances were poured ***down the throat***. Ex. A-19 p. 1487.

137 So. 3d at 963-64. The only other support was Dr. Qaiser, whose testimony competent counsel would have also challenged. Memo at 61-71; *see also Blasco*, 702 F.2d at 1329; *Cargle*, 317 F.3d at 1206-08. As counsel rendered ineffective assistance by failing to impeach Quintin on this point, the FSC's opinion was an unreasonable application of federal law and was also an unreasonable determination of the facts in light of the evidence presented.

REPLY TO GROUND EIGHT

Respondents claim there was no basis for objection regarding whether Wright could feel pain while unconscious because counsel discredited Dr. Qaiser on cross-examination. Response at 142. Conversely, counsel should have objected and presented the testimony of an expert such as Dr. Spitz because counsel's attempt to solely cross-examine Dr. Qaiser in order to discredit him was not only unreasonable, but also unsuccessful. Ex. A-21 p. 1728. Counsel's cross-examination still left the jurors with the impression that there was a possibility that Wright still felt pain after she was unconscious. *Id*.

Respondents argue that "Allen cannot demonstrate prejudice where there was extensive evidence supporting the HAC finding that was unrelated to whether or not the victim experienced pain after being rendered unconscious." Response at 143. Respondents appear to be referencing the evidence that the FSC found that was quoted on page 142 of the Response. *See Allen*, 261 So. 3d at 1276–77. However, much of the evidence that the FSC detailed was undermined in postconviction. *See* Memo at 61-71, 75-80 *see also Blasco*, 702 F.2d at 1329;

Cargle, 317 F.3d at 1206-08. Allen was prejudiced by counsel's deficient performance and the FSC's failure to make that determination was an unreasonable application of federal law and also an unreasonable determination of the facts in light of the evidence presented.

REPLY TO GROUND NINE

Respondents argue that Allen's *Giglio v. United States*, 405 U.S. 150 (1972) claim is insulated from review because the decision rests on independent and adequate state law grounds. Response at 144 (citing *Coleman v. Thompson*, 501 U.S. 722, 740 (1991)). *Giglio* is cited multiple times in Allen's FSC opinion, therefore it fairly appears that the FSC's decision rested primarily on federal law or at the very least was interwoven with such law. Allen's case is distinguishable from *Coleman* because not only was federal law mentioned in her opinion, but her claim was decided on the merits and not based solely on failing to meet time requirements. 501 U.S. at 740. Respondents also cited to *Walker v. Martin*, 131 S. Ct. 1120, 1127 (2011), which is also distinguishable because the FSC did not decline to address Allen's claim. The FSC had the opportunity to review, address, and correct the error but unreasonably failed to grant relief. *Allen*, 261 So. 3d at 1286-87; *see also Coleman*, 501 U.S. at 731, 749-50.

Respondents also argue that the claim is procedurally barred from review. Response at 144-45. However, as the FSC did still address this ground on the merits, Allen respectfully submits that this Court should too. S*ee Caldwell*, 472 U.S. at 327–28. In *Rogers v. McMullen*, 673 F.2d 1185, 1188 (11th Cir. 1982), the

FSC had reached the merits of the constitutional issue and the *Rogers* court held that where "the state courts have not relied exclusively upon (the appellant's) procedural default, *Wainwright v. Sykes* [433 U.S. 72 (1977)] does not prevent federal habeas review." (quoting *Thompson v. Estelle*, 642 F.2d 996 (5th Cir. 1981)). *Rogers* stated: "Because the Florida Supreme Court reached the constitutional issue, we are not foreclosed from addressing the merits by *Wainwright v. Sykes*." *Id.*

Although the *Wainwright v. Sykes* standard should be inapplicable here due to the actual basis of the FSC's decision being a denial upon the merits of the claim, Respondents assert that Allen "has not shown cause or prejudice that would excuse any procedural default." Response at 144. "The terms 'cause' and 'actual prejudice' are not rigid concepts; they take their meaning from the principles of comity and finality." *Engle v. Isaac*, 456 U.S. 107, 135 (1982). Although SCOTUS recognizes that one of the important interests is finality, finality is not a concern in Allen's case because she has a multitude of other postconviction claims on appeal in addition to her *Giglio* claim. *See Coleman*, 501 U.S. at 750.

Further, SCOTUS states that "the cause and prejudice standard will be met in those cases where review of a state prisoner's claim is necessary to correct 'a fundamental miscarriage of justice.'" *Coleman*, 501 U.S. at 748 (quoting *Engle*, 456 U.S. at 135). Federal habeas review is also proper here because failure to consider Allen's *Giglio* claim "will result in a fundamental miscarriage of justice." *Id. Giglio* is satisfied because the false testimony was material and there is a reasonable

likelihood that it could have affected the jury's advisory recommendation to sentence Allen to death. *See Giglio*, 405 U.S. at 154 (quoting *Napue*, 360 U.S. at 271). In fact, Allen submits that the false testimony had "a substantial and injurious effect or influence in determining the jury's" recommendation for death. *Trepal v. Sec'y, Florida Dept. of Corr.*, 684 F.3d 1088, 1117 (11th Cir. 2012) (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993)). Accordingly, this Court should find that the FSC's determination that the State's presentation of false evidence was immaterial and harmless beyond a reasonable doubt was an unreasonable application of federal law and was an unreasonable determination of the facts in light of the evidence presented. *See Allen*, 261 So. 3d at 1287. Allen also respectfully submits that the *Giglio* error should be aggregated with the rest of the issues present in Allen's case, including her *Strickland* grounds, when analyzing the cumulative effect on her trial. *See Blasco*, 702 F.2d at 1329; *see also Cargle*, 317 F.3d at 1206-08.

REPLY TO GROUND TEN

Respondents allege that counsel was strategic and purposeful in eliciting testimony from Hudson that Allen was a part of a culture of "drugs, thugs, and violence" and repeatedly reinforcing the phrase to the jury. Response at 149, 151. Even assuming *arguendo* that it was part of counsel's strategy to purposefully elicit information regarding the culture of the neighborhood that Allen grew up in, then counsel was further deficient in not actually investigating related mitigation and properly presenting this information to the jury or properly informing the trial

judge in the sentencing memorandum. The less damaging information regarding Allen's neighborhood only came out during the *Spencer* hearing, therefore Allen's ***jury*** never heard that evidence. Allen's jury ***only*** heard the catchy inflammatory phrase that put her in a negative light with no explanation. In fact, most of the information regarding the mitigator detailed in the trial judge's sentencing order was from the *Spencer* hearing, therefore counsel was also ineffective in solely presenting that information to the judge and not to the jury at Allen's penalty phase trial. Ex. A-6 pp. 960-61. Allen was prejudiced by this omission because her jury did not even hear most of the support for this mitigator that the judge had found.

Based on all of the facts surrounding the time of trial, it is clear that counsel eliciting this testimony was not purposeful or strategic. *Harrington v. Richter*, 562 U.S. 86, 109 (2011) (citing *Wiggins*, 539 U.S. at 526–27) ("courts may not indulge '*post hoc* rationalization' for counsel's decisionmaking that contradicts the available evidence of counsel's actions"). It is also evident that counsel was so deficient that he did not even realize that reinforcing that phrase in front of the jury was prejudicial. As counsel was already extremely ineffective in his mitigation investigation and presentation to the jury, this deficiency was even more prejudicial. *See* Petition at 12-31; Memo at 13-38; *see also Blasco*, 702 F.2d at 1329; *Cargle*, 317 F.3d at 1206-08. Therefore, the FSC's failure to find that counsel was ineffective was an unreasonable application of federal law and was an unreasonable determination of the facts in light of the evidence presented.

REPLY TO GROUND ELEVEN

Respondents allege that Juror Carll ("Carll") was not biased. Response at 158. Actual bias has been defined as "either an express admission of bias, or proof of specific facts showing such a close connection to the circumstances of the case that bias must be presumed." *Ward v. United States*, 694 F.2d 654, 665 (11th Cir. 1983). As a result, Allen respectfully submits that Carll did exhibit actual bias. Carll stated that she was "pro death" and believed that if the defendant committed a crime and a person died during it, the defendant should be recommended for the death penalty in order to give their life for the life that was taken. Ex. A-11 p. 220. Even when Carll tried to qualify her answer, she still admitted that she would recommend the death penalty for anyone who "had a hand in the death." Ex. A-11 p. 221. These circumstances are identical to what the State was alleging in Allen's case. Therefore, Carll was actually biased and counsel was deficient in failing to strike her for cause. At the very least, counsel should have struck her peremptorily to ensure she did not sit on Allen's jury as an automatic vote for the death penalty.

Respondents claim that Carll said that she would follow the law and render a verdict based on the evidence presented. Response at 155-58. Respondents also cite to *Hughes v. United States*, 258 F.3d 453, 459 (6th Cir. 2001) which notes the importance of "juror assurances of impartiality" in the actual bias analysis such as if a juror could render a verdict based solely on the evidence and instructions. Response at 151, 155. However, just like in *Hughes*, "[s]ignificantly absent from this case is any attempt, by counsel or the court, to rehabilitate [the] juror [] to

establish record support for the claim that [the juror] was able to cast aside her opinion and render a verdict based on the evidence presented in court." *Id*. Carll was never specifically asked if she could render her verdict solely upon the evidence presented and the instructions on the law given to her by the court.

Carll was asked if she would ***listen*** to aggravating and mitigating circumstances, but even after initially answering that she would, she immediately went right into reiterating that she would vote for the death penalty if "someone was the direct result of a death." Ex. A-11 pp. 249-50. Carll's pro-death answer also made it seem like she may not have completely understood what she was being asked. Carll also claimed that she would listen to mental health evidence. Ex. A-12 pp. 372-73. Other than those two fleeting instances, one of which she still expressed her strong feelings about the death penalty in her answer, Carll was never asked and never indicated an ability to abide by the trial court's instructions overall. *Barnhill v. State*, 834 So. 2d 836, 845 (Fla. 2002).

Respondents also incorrectly argue that counsel made a strategic decision to keep Carll on the jury based upon the other jury panel members down the line. Response at 24-25, 152. As detailed in the Memo at pages 92-93, it was impossible for counsel to have been looking ahead because a new panel needed to be brought in to finish jury selection. Ex. A-12 p. 469. Even after seeing what prospective jurors were in the new panel, counsel still would have been able to utilize a backstrike on Carll the following day. Ex. A-12 pp. 472-74. Again, counsel should have at the very least, struck Carll peremptorily. Being that it was impossible for

counsel to be looking ahead to a panel that he had not yet seen, counsel's testimony at the evidentiary hearing that his reasoning for keeping Carll was due to the jurors down the line was an impermissible "*post hoc* rationalization" for his decisionmaking that contradicted the available evidence. Ex. M pp. 2866-67; *Harrington v. Richter*, 562 U.S. 86, 109 (2011). Consequently, "counsel's actions were 'so ill chosen that it permeates the entire trial with obvious unfairness.'" *Teague v. Scott*, 60 F.3d 1167, 1172 (5th Cir. 1995) (quoting *Garland v. Maggio*, 717 F.2d 199, 206 (5th Cir. 1983)). This Court should find that the FSC's opinion was an unreasonable application of federal law and was also an unreasonable determination of the facts in light of the evidence presented.

REPLY TO GROUND FOURTEEN

Respondents claim that this ground is unexhausted and procedurally barred because Allen did not cite any federal law for this ground in her direct appeal brief. Response at 166-67. However, Allen specifically stated that "[t]hese errors render the defendant's death sentence unconstitutional in violation of the Eighth and Fourteenth Amendments to the United States Constitution." Ex. B p. 56. Allen also cited to *Eddings v. Oklahoma*, 455 U.S. 104, 114–15 (1982) in her argument regarding the mitigating circumstances. Ex. B p. 64. To elaborate,

> A litigant wishing to raise a federal issue can easily indicate the federal law basis for his claim in a state-court petition or brief, for example, by citing in conjunction with the claim the federal source of law on which he relies or a case deciding such a claim on federal grounds, or by simply labeling the claim "federal."

Baldwin v. Reese, 541 U.S. 27, 32 (2004). Therefore, contrary to Respondents'

assertions, this ground was properly exhausted at the state court level and is not procedurally barred. Response at 167.

REPLY TO RESPONSE ON GROUNDS SIX AND TWELVE

The remaining grounds have been fully argued in the Memo, with specific references to the records on appeal and relevant case law showing that Allen is entitled to habeas relief in accordance with AEDPA on each of these grounds. Based upon the state courts' unreasonable determination of the facts in light of the evidence and objectively unreasonable application of clearly established federal law, Allen requests that this Court grant her habeas writ.

RELIEF REQUESTED

Under the AEDPA, this Court can grant habeas relief because the state court's decision was based on an unreasonable determination of the facts in light of the evidence presented at the state court proceedings or because the state court's decision was contrary to or involved an unreasonable application of clearly established federal law to the evidence in the state court proceedings. *See* 28 U.S.C. § 2254(d). Accordingly, Allen respectfully requests that this Court find that her Constitutional rights were violated in accordance with the foregoing Grounds, grant her writ, and vacate and set aside her convictions and sentences or grant such other relief that it deems just and proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of June, 2021, I electronically filed the foregoing PETITIONER'S REPLY TO RESPONDENTS' CORRECTED RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS AND MEMORANDUM OF LAW, with the Clerk of the Court by using the CM/ECF system, which will send notice of electronic filing to Doris Meacham, Assistant Attorney General, Office of the Attorney General, 444 Seabreeze Blvd, 5th Floor, Daytona Beach, Florida 32118, at Doris.Meacham@myfloridalegal.com and capapp@myfloridalegal.com on this 16th day of June, 2021. I further certify that a true copy of the foregoing was mailed to the following non-CM/ECF participant: Margaret A. Allen, DOC# 699575, Lowell Correctional Institution, 11120 Northwest Gainesville Road, Ocala, Florida 34482-1479.

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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

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

DEATH PENALTY CASE

Appendix J

Petitioner's Motion to Alter or Amend Judgment and Included Memorandum of Law, filed April 26, 2022.

UNITED STATES DISTRICT COURT
Middle District of Florida
Orlando Division

MARGARET A. ALLEN,

Petitioner,

v.

DEATH PENALTY CASE
CASE NO.: 6:19-cv-296-ORL-40-DCI

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

Respondents.
_____/

PETITIONER'S MOTION TO ALTER OR AMEND JUDGMENT AND INCLUDED MEMORANDUM OF LAW

COMES NOW the Petitioner, Margaret A. Allen ("Allen"), by and through the undersigned counsel, pursuant to Federal Rule of Civil Procedure 59(e) and Federal Rule of Appellate Procedure 4(a)(4)(A)(iv), and hereby moves this Court to alter or amend the order denying her petition for a writ of habeas corpus (Doc. 22) and judgment against her. (Doc. 23). Allen does not abandon her request for relief on any ground raised in her petition, but limits her argument as follows:

INTRODUCTION

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.

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

Allen then sought postconviction relief in the Florida courts. She filed a motion for postconviction relief under Florida Rule of Criminal Procedure 3.851. This motion was denied and appealed to the Florida Supreme Court. The Florida Supreme Court revised the opinion upon rehearing but affirmed the denial of postconviction relief. *Allen v. State*, 261 So. 3d 1255 (Fla. 2019).

Allen filed the petition at issue on February 14, 2019. (Doc. 1). She filed a memorandum of law in support of her petition. (Doc. 13). Respondents filed a corrected response to the petition (Doc. 20) and Allen filed a reply. (Doc. 21). This Court denied the petition by written order on March 30, 2022, and also denied a certificate of appealability (Doc. 22). The judgment was issued on March 31, 2022. (Doc. 23). Allen moves this Court to alter or amend the judgment.

ARGUMENT

As the majority of Allen's grounds involve ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984), Allen respectfully requests this Court reconsider its decision to afford such high deference to Allen's trial counsel, Frank Bankowitz ("counsel"). This Court notes: "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." (Doc. 22 at 66). The amount of time counsel has practiced is irrelevant. This Court's only

consideration should be 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 testing process." *Strickland*, 466 U.S. at 688. By denying Allen's jury critical information in a what was literally a life-or-death situation, counsel failed to satisfy this bare minimum requirement. Further, it is clear that even seasoned attorneys can make errors, as evidenced by 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 were less egregious; a woman was not convicted and sent to death row as a result of those deficiencies.

In addition, Allen pleaded in each ground of her petition for a writ of habeas corpus that the Florida Supreme Court's adjudication also "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, this Court has only addressed whether it found that the state court's rejection of these claims was contrary to or an unreasonable application of federal law. (Doc. 22 at 16, 36, 42, 57, 62, 67, 69, 71, 73, 76, 79, 86). Allen respectfully requests this Court to alter or amend the order and judgment to decide whether an unreasonable determination of the facts occurred on each ground and thus

whether the Court can reach the issues.

GROUND ONE

This Court's denial of Ground One is based upon manifest errors of law and fact. *See Arthur v. King*, 500 F.3d 1335, 1343 (11th Cir. 2007) (manifest errors of law or fact are grounds for granting a Rule 59(e) motion). This Court found: "There is no indication that the trial judge implied that the jury recommendation was superfluous or that the jury's decision was lessened because they gave an advisory recommendation." (Doc. 22 at 16). However, this Court overlooks that Allen's case is different than most because the trial court also made extrajudicial statements that repeatedly minimized the jury's role in violation of *Caldwell v. Mississippi*, 472 U.S. 320 (1985). In addition to the numerous references to the jury's role being advisory, in Allen's case the trial court went on to erroneously instruct the venire: "You do understand that ***nobody*** will impose the sentence but ***me***. Although I'm going to give great weight to your recommendation, it is ***not*** controlling. ***I can fly in the face of your recommendation or I can follow your recommendation, with some qualifications***." Ex. A-10 p. 157. The trial court's instructions effectively imply that the judge was not even able to follow the jury's recommendation without some further qualifications being present. This is an incorrect statement of the law. *Romano v. Oklahoma*, 512 U.S. 1, 9 (1994) ("to establish a *Caldwell* violation, a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law"). Allen's death sentence "does not meet the standard of reliability that the Eighth

Amendment requires," because her jury did not feel the gravity or weight of their decision. *Caldwell*, 472 U.S. at 341.

Worse yet, the prosecutor also minimized the jury's role by telling the venire that, "In Florida, okay, it is the judge who makes the ultimate sentencing decision in this type of case." Ex. A-10 p. 143. This should have been given weightier consideration in Allen's case because Allen's jury was never instructed in the penalty phase that "what the attorneys say is not evidence or your instruction on the law." FL ST CR JURY INST 2.7. Accordingly, Allen requests that this Court alter or amend its order and judgment to grant relief on Ground One.

GROUND TWO

This Court's denial of Ground Two is based upon manifest errors of law and fact. This Court found after reviewing the record, "including the mitigating evidence produced at both trial and the post-conviction evidentiary hearing, and concludes that it does not outweigh the evidence in aggravation. Thus, the state court properly found that counsel's actions did not result in prejudice." (Doc. 22 at 29). However, the state court was not required to find that the mitigation outweighs the aggravation.

> When a defendant challenges a death sentence such as the one at issue in this 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.

Strickland, 466 U.S. at 695 (emphasis added). Allen was never required to show in any court that the mitigation outweighs the aggravation, just that there was a

reasonable probability that a juror, if not the courts, would find that the balance of aggravating and mitigating circumstances did not warrant a sentence of death. From this perspective, Allen surely met this burden when the significant and compelling mitigation that counsel failed to present is considered. Further, the United States Supreme Court 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 v. Upton*, 561 U.S. 945, 955 (2010). *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. Therefore, the state courts' decisions were contrary to, or involved an unreasonable application of, clearly established Federal law. 28 U.S.C. § 2254(d)(1).

This Court claims that the mitigation presented in postconviction was cumulative (Doc. 22 at 32-33, 35), however it is paramount to consider that some of the weightiest and impactful mitigation uncovered in postconviction was ***never*** presented to Allen's jury or trial judge. ***None*** of the physical abuse that Allen

suffered as a child at the hands of her mother and grandfather was heard at trial. Barbara Ann Capers ("Capers") witnessed young Allen being beaten by her mother almost every day. Allen's mother beat Allen with her hands, fists, and with belts, and would also whip her with sticks and slap her in the face. Ex. M p. 2639-40, 2663, 2678-79. The torture became so serious that when Allen was about twelve years old, her mother beat Allen so badly that Capers had to call the police. Ex. M p. 2640. Myrtle Hudson ("Hudson") also witnessed this violence. When Allen was about seven, Hudson witnessed Allen's mother grab her by her hair, push her head under the water in the bathtub, and hold her head underwater. Ex. M p. 2729-30. On multiple occasions, Hudson also witnessed Allen's mother beat Allen with a belt until she left swollen marks on Allen. Ex. M p. 2730.

Allen's mother was not the only family member to inflict violence upon her as a child. Allen's grandfather also perpetually abused Allen and the other children in the family. He would line up all of the boys and girls naked, including Capers and Allen, and go down the row beating all of the children with three oak switches until they bled. Ex. M p. 2649. He also whipped Allen with sticks. Ex. M p. 2679. None of this horrific childhood abuse was even mentioned at Allen's trial.

This Court stated that "Dr. Gebel noted that Petitioner also had a history of sexual assault," however, in all actuality, nothing definitive was presented to the jury. (Doc. 22 at 29). During Michael Gebel, M.D.'s ("Dr. Gebel") testimony, he listed various medical records and merely said: "A possible sexual assault in September of 1996." Ex. A-21 p. 1745. However, contrary to Allen's trial where this

possible sexual assault was mentioned in passing, in postconviction, testimony was presented that not only was Allen sexually abused by multiple men, including her brother, her grandfather, her grandfather's brother (Uncle Roy), and at least one other man, but Capers even personally witnessed Uncle Roy touching Allen in private places, grabbing Allen's breasts, and kissing Allen on the mouth. Ex. M p. 2642-48. The very men that should have been making 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 counsel's ineffectiveness, Allen's jury never heard about this family history including the brutality Allen suffered as a child and the torturous sexual abuse she repeatedly faced. Therefore, the Florida Supreme Court's findings are without a doubt an unreasonable determination of the facts. This 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. (Doc. 22 at 33).

Further, Allen's jury and trial judge were never made privy to the fact that Allen suffered from Posttraumatic Stress Disorder ("PTSD"). Worse yet, the factfinders were never informed how the effects of Allen's 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. Notwithstanding, this Court gave unjustified consideration to the fact that counsel

presented the testimony of two experts during Allen's penalty phase. (Doc. 22 at 32). However, at trial, neither expert was ever asked if he had an opinion on statutory mitigating circumstances. *See Allen*, 137 So. 3d at 965-66. Counsel was also remarkably deficient because he never had Dr. Gebel properly evaluate Allen for statutory mitigation. Counsel was aware that Allen was leery of participating in the only evaluation Dr. Gebel performed because a guard was in the room, but he never sent Dr. Gebel back for another interview or evaluation. Ex. A-21 p. 1745; Ex. M p. 2861-62. If counsel had not been ineffective, it is likely that Dr. Gebel would have been able to find statutory mitigation, as well as the presence of Allen's PTSD.

This Court also places undue emphasis on Dr. Gamache's testimony and claims that he refuted the PTSD diagnosis and did not think any significant mitigation was left out of the penalty phase. (Doc. 22 at 25, 32-33). However, this Court fails to consider that ***Dr. Gamache did not evaluate Allen and has never even spoken with her***. Ex. M p. 3247, 3273. Dr. Gamache did not speak with Allen's family or any other witnesses and improperly relied solely on self-reports within records. Ex. M p. 3174. Therefore, giving Dr. Gamache's testimony more weight than the doctors who actually met with Allen and evaluated her, is an unreasonable determination of the facts.

Although this 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. (Doc. 22 at 32); *Simmons v. State,* 105 So. 3d 475, 506 (Fla. 2012) (quoting *Rose v. State,* 675 So. 2d 567, 573 (Fla. 1996))

(the Florida Supreme Court 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"). This Court points out that Dr. Gebel opined at trial that Allen's organic brain damage might make it difficult to appreciate the criminality of her conduct or understand the consequences of her actions and could also have difficulty conforming her conduct to the requirements of the law. (Doc. 22 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. ("Dr. Russell") 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, this Court is incorrect in its findings that Dr. Russell's testimony would have been cumulative, and that Allen was not prejudiced. (Doc. 22 at 32). There is a reasonable probability, that but for 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.

This Court claims that there was substantial evidence of aggravating circumstances in Allen's case and goes on to cite *Suggs v. McNeil*, 609 F.3d 1218, 1232 (11th Cir. 2010) as support, however only ***two*** aggravators were found by the trial court in Allen's case. (Doc. 22 at 34). In contrast, *Suggs* was a highly

aggravated case with ***seven*** aggravators found by the trial court. 609 F.3d at 1232. The *Suggs* opinion actually states 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*, Allen's case only contained two aggravators, one of which she contends is unsupported based on her claims contained in the other grounds of her petition. *See id*. This Court also cites to *Sochor v. Sec'y Dept. of Corr.*, 685 F.3d 1016, 1030 (11th Cir. 2012) as a similar case. (Doc. 22 at 35). However, *Sochor* involved twice as many aggravators as in Allen's case. *Sochor*, 685 F.3d at 1022. As 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 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.

Moreover, in its citation of *Sochor*, this Court appears to inappropriately adopt a per se rule. *Id*. at 1030. This Court seems to state a rule that in any case "where the murder involves sexual battery, torture or rape, aggravating circumstances outweigh any prejudice caused by a lawyer's failure to present mitigating evidence." (Doc. 22 at 35). This is troubling for multiple reasons. This statement adds an automatic sentence of the death penalty being the only appropriate sentence in such cases no matter how ineffectively the trial counsel performed in their mitigation presentation. *See Woodson v. North Carolina*, 428 U.S. 280, 301 (1976) (unconstitutional to "inexorably impos[e] a death sentence

upon every person convicted of a specified offense"). In those cases, it would give trial counsel immunity to be ineffective in presenting mitigation because they would not be able to be found ineffective regardless of their deficiencies. It is also problematic that if this was going to become an element of the crime that automatically resulted in a death sentence, Allen was not given any prior notice. Most importantly, this per se rule is a violation of the Eighth Amendment of the United States Constitution because it does not properly narrow the class of individuals who are eligible for the death penalty. No one with these allegations in their case would ever be able to overcome that single aggravator and would therefore always receive a death sentence. It is also a constitutional violation because this per se rule does not consider the individualized characteristics of the accused. "[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*, 428 U.S. at 304 (internal citation omitted).

However, unlike this Court's characterization of *Sochor* in its order, nothing in *Sochor* creates a per se rule that death is always appropriate in these cases. 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 her compelling mitigation. This Court need look no further than the *Dobbs v. Turpin*, 142 F.3d 1383, 1390 (11th Cir. 1998) opinion that this Court also cited. In *Dobbs*, the Eleventh Circuit found:

> This court has found capital defendants to have been prejudiced in past cases where their lawyer's failure to investigate resulted in omissions of mitigating evidence. *See, e.g., Jackson,* 42 F.3d at 1368-69 (concluding that prejudice arose where defendant's lawyer failed to discover and introduce mitigating evidence showing that the defendant suffered a "brutal and abusive childhood"); *Harris,* 874 F.2d at 763 (finding that defendant suffered prejudice when his lawyer's failure to investigate led to the omission of potentially mitigating evidence concerning his family, scholastic, military and employment background); *Blake v. Kemp,* 758 F.2d 523, 533-34 (11th Cir.) (holding that defendant demonstrated a reasonable probability that he would have received a lower sentence but for his lawyer's failure to search out mitigating character evidence), *cert. denied,* 474 U.S. 998, 106 S.Ct. 374, 88 L.Ed.2d 367 (1985).

Id. at 1390. Allen, like Dobbs, was entitled to an individual decision. The United States Supreme Court has stated:

> To be sure, *Furman* held that 'in order to minimize the risk that the death penalty would be imposed on a capriciously selected group of offenders, the decision to impose it had to be guided by standards so that the sentencing authority would focus on the particularized circumstances of the crime and the defendant.' *Gregg v. Georgia,* 428 U.S. 153, 199, 96 S.Ct. 2909, 2937, 49 L.Ed.2d 859 (1976) (joint opinion of STEWART, POWELL, and STEVENS, JJ.). But as we made clear in *Gregg,* so long as the class of murderers subject to capital punishment is narrowed, there is no constitutional infirmity in a procedure that allows a jury to recommend mercy based on the mitigating evidence introduced by a defendant. *Id.,* at 197–199, 203, 96 S.Ct., at 2936–2937, 2939.

Penry v. Lynaugh, 492 U.S. 302, 326-27 (1989), *abrogated by Atkins v. Virginia*, 536 U.S. 304 (2002), *holding modified by Boyde v. California*, 494 U.S. 370 (1990).

Accordingly, it is clearly unconstitutional if every defendant whose case was alleged to involve sexual battery, torture, or rape was unable to ever succeed on an ineffective assistance of counsel claim when trial counsel deficiently fails to present mitigating evidence, no matter if any prejudice was suffered. *Strickland* does not

carve out such an exclusion and neither should this Court. It is a requirement from the Supreme Court to "consider 'the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding' —and 'reweig[h] it against the evidence in aggravation.'" *Porter v. McCollum*, 558 U.S. 30, 41 (2009) (quoting *Williams v. Taylor*, 529 U.S. 362, 397–98 (2000)). Instead, this Court is saying that if this aggravation is present, there is no amount of mitigation that could outweigh it. This is patently unreasonable and unconstitutional. Although this Court goes on to say that "[u]pon weighing all the relevant evidence, the Court concludes that the aggravating circumstances outweigh the cumulative mitigation evidence counsel failed to present," based upon this Court's immediately preceding interpretation of *Sochor* and wording claiming that her case was similar, it is clear that Allen's claim never stood a fair chance. (Doc. 22 at 35). This Court must alter or amend its judgment to consider the individualized characteristics of Allen and her case and decide this claim on a constitutional basis free from this improper per se rule.

Allen respectfully submits that this Court should alter or amend its judgment to find that there is a reasonable probability that a juror would find that the totality of her mitigating circumstances outweigh the 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, 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 counsel had not been deficient, very great weight would have been given to this mitigating circumstance due to actual confirmation of Allen being sexually assaulted on numerous occasions, primarily by the men in her family, as well as being abused during the formative years of her childhood. On top of all of that mitigating evidence, the additional mitigation presented in postconviction that this Court dismissed as cumulative, painted a more complete picture of Allen's background and would have served to humanize her in front of the jury. Therefore, it is improper to dismiss the importance and impact that mitigating evidence would have had on the factfinders at Allen's trial. It is unjust for this Court to find that "there is no indication that the jury would have given more weight to, or found the existence of, statutory and nonstatutory mitigating circumstances that outweighed the aggravators," because Allen's inability to prove the existence of these mitigating circumstances at trial was only due to counsel's ineffectiveness. (Doc. 22 at 34). As in *Porter*, The Florida Supreme Court's decision that 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.

Further, this Court appears to have ignored Allen's arguments regarding the violation of her rights under the Eighth and Fourteenth Amendments to the United

States Constitution. (Doc. 13 at 35-38). Allen's right to equal protection of laws under the Fourteenth Amendment was violated because the law was not applied consistently to all capital defendants. *See Gregg v. Georgia*, 428 U.S. 153, 188 (1976). As detailed in her memorandum of law, the Supreme Court and the Eleventh Circuit have granted relief to similarly situated capital defendants, including Porter whose case originated in the same county in Florida as Allen's case. (Doc. 13 at 31-33); *Porter*, 558 U.S. 30. Thus, the state court's decision was contrary to the principle that "selective application of [ ] rules violates the principle of treating similarly situated defendants the same." *See Griffith v. Kentucky,* 479 U.S. 314, 323 (1987). There is clearly an equal protection issue in Allen's case because the only difference between her and the similarly situated individuals that were granted relief by the Supreme Court, Eleventh Circuit, and Florida Supreme Court was that she is a female.

In addition, Allen's right to due process under the Eighth Amendment was violated because Allen was arbitrarily and discriminatorily denied relief although other similarly situated capital defendants were granted relief under similar or worse facts. *See Spaziano v. Florida*, 468 U.S. 447, 465-66 (1984), *overruled on other grounds by Hurst v. Florida*, 577 U.S. 92 (2016). The decision below implicates 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). Accordingly, Allen respectfully requests this Court to alter or amend the order and judgment to decide her claims under the Eighth and Fourteenth Amendments.

Finally, as mentioned above, although this Court stated that "[t]he state court's denial of this claim was not contrary to or an unreasonable application of clearly established federal law," (Doc. 22 at 36), it did not address 28 U.S.C. § 2254(d)(2), whether the Florida Supreme Court made an unreasonable determination of the facts in light of the state court record. In her pleadings relating to this ground, Allen asserted numerous explicit examples of how the Florida Supreme Court's determination of the facts were unreasonable. (Doc. 13 at 14, 19, 20-21, 24, 29, 33); (Doc. 21 at 6, 17-18). Allen respectfully requests this Court to alter or amend the order and judgment to find that there was an unreasonable determination of the facts.

Allen submits that the Florida Supreme Court's decision was contrary to, or involved an unreasonable application of, clearly established Federal law, and also resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented. 28 U.S.C. § 2254(d). No reasonable court could have concluded that counsel's failures were sound strategy and entitled to deference under *Strickland*. Accordingly, Allen requests that this Court alter or amend its order and judgment to grant relief on Ground Two.

GROUNDS FOUR AND THIRTEEN

This Court's denial of Grounds Four and Thirteen are based upon manifest

errors of law and fact.

1. Petitioner's Prior Drug Convictions

This Court failed to give proper consideration to the fact that counsel ineffectively failed to object or move for a mistrial when the prosecutor knowingly elicited false testimony that Allen had been convicted several times for selling drugs, and again failed to object or move for a mistrial when the prosecutor argued to the jury that they had "heard about the Defendant's time in prison for previous drug sale convictions." Ex. A-22 p. 1891-92, 1930. Allen only had ***one*** prior conviction for the sale of drugs almost fourteen years prior to trial, and it should not have even been disclosed to the jury. Ex. A-5 p. 881-82; *see also Poole v. State*, 997 So. 2d 382, 392 (Fla. 2008). These incidents were not isolated as the Florida Supreme Court claimed. (Doc. 22 at 42-43).

In addition, this Court noted that counsel testified that "he strategically presented evidence regarding drug use and the culture of the neighborhood and how it affected her negatively." (Doc. 22 at 43, citing Ex. M p. 2828-29). This is an improper *post hoc* rationalization because it is clear that, at the time of trial, counsel did not intend to present such information to the jury as a mitigator because that was not one of the two mitigators counsel requested in his sentencing memorandum. *Harrington v. Richter*, 562 U.S. 86, 109 (2011) (citing *Wiggins v. Smith*, 539 U.S. 510, 526–27 (2003)) ("courts may not indulge '*post hoc* rationalization' for counsel's decisionmaking that contradicts the available evidence of counsel's actions"); Ex. A-6 p. 906-24. Further, it cannot be a

reasonable strategy for counsel to allow the prosecutor to present false testimony that painted Allen in a worse light. Allen submits that this Court should alter or amend its judgment to find that counsel did not have any reasonable strategy for allowing the prosecutor to present false testimony that placed a nonstatutory aggravator before the jury and find that Allen was prejudiced under *Strickland*.

7. Use of the Term Waterboarding Torture

This Court found that Allen did not show prejudice because "The Court cannot say that but for the prosecutor's use of the term 'waterboarding torture' the result of the penalty phase would have been different." (Doc. 22 at 53). The standard that this Court used is erroneous. Under clearly established Federal law, Allen must only establish 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. Accordingly, Allen submits that under the proper standard, if counsel had not failed to object to the prosecutor's improper comments, there is a reasonable probability that she would not have received a death sentence.

GROUND FIVE

This Court's denial of Ground Five is based upon manifest errors of law and fact. This Court found that counsel made a strategic decision to solely cross-examine Sajid Qaiser, M.D. ("Dr. Qaiser") regarding the autopsy. (Doc. 22 at 61). However, Allen submits that counsel's strategy was not reasonable. The jury never saw Dr. Whitmore's actual autopsy report or received any proper explanation

regarding the fact that the victim may not have even been strangled. Especially when taken together with the improper testimony and arguments detailed in Grounds Three and Eight, Allen was prejudiced by counsel's unreasonable decisions because there is a reasonable probability that the jury would have found her not guilty or guilty of a lesser charged offense. At the very least, there is a reasonable probability that the jury would not have sentenced her to death.

Further, this Court agreed that there was no prejudice because "Petitioner has not shown that Dr. Spitz's testimony would have resulted in a different outcome at trial." (Doc. 22 at 62). Not only is the standard reflected here erroneous, but this Court is holding Allen to a higher standard and placing a greater burden upon her than that of the clearly established Federal law. Allen does not have to show that Daniel J. Spitz, M.D.'s ("Dr. Spitz") 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. Allen submits that if counsel had called a 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 Allen's guilt phase trial would have been different, but at the very least, there is a reasonable probability that Allen would not have received a death sentence. Under the correct Federal standard, Allen's claims should be granted.

GROUNDS SIX AND SEVEN

This Court's denial of Grounds Six and Seven are based upon manifest errors

of law. This Court found that "even taking Petitioner's allegation that counsel acted deficiently as true, Petitioner had not shown prejudice." (Doc. 22 at 66). Then goes on to say that "Petitioner has not shown that but for counsel's actions, the result of the proceeding would have been different." *Id*. at 67. However, this Court is again holding Allen to a higher standard and placing a greater burden upon her than that of the clearly established Federal law. 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.

GROUND TEN

This Court's denial of Ground Ten is based upon manifest errors of law and fact. This Court erroneously found that counsel was not deficient because he made a strategic decision to question Hudson regarding the violent drug culture in the neighborhood. (Doc. 22 at 72-73, citing Ex. M p. 2828-30). Again, this is an improper *post hoc* rationalization because it is clear that, at the time of trial, counsel did not intend to present such information to the jury as a mitigator because that was not one of the two mitigators that counsel requested in his sentencing memorandum. *See Richter*, 562 U.S. at 109 (citing *Wiggins*, 539 U.S. at 526–27); Ex. A-6 p. 906-24. Further, the trial court found the similar mitigating circumstance almost solely from evidence presented at the *Spencer*[1] hearing, which is a proceeding held outside the presence of the jury. Ex. A-6 p. 960-61. Not only was Allen's jury never privy to this evidence, but it is evident that whatever

[1] *Spencer v. State*, 615 So. 2d 688 (Fla. 1993).

evidence counsel did inadvertently present during the *Spencer* hearing was so deficient that the trial court was only able to accord it "some weight". Moreover, just because the trial court, with the added benefit of the *Spencer* hearing, was able to find the mitigator, does not mean that the jury considered the inflammatory information they received as mitigating. There is a reasonable probability that the jurors instead found it to be a nonstatutory aggravator that encouraged a vote for the death penalty. Allen submits that this Court should alter or amend its judgment to find that counsel was ineffective under *Strickland* because he did not have any reasonable strategy at the time of trial and as a result, Allen was prejudiced.

GROUND ELEVEN

This Court's denial of Ground Eleven is based upon manifest errors of law and fact. This Court again incorrectly accepted counsel's *post hoc* rationalization by pointing out that counsel claims to consider who is next in line and thought he had to keep Juror Carll in light of the remaining potential jurors. (Doc. 22 at 74); *see also Richter*, 562 U.S. at 109 (citing *Wiggins*, 539 U.S. at 526–27). Counsel could not have been looking down the line, because the trial court had to bring in another panel in order to select alternates, making it impossible for counsel to look down the line to a panel that would be arriving the next day. Ex. A-12 p. 473. Further, this Court claims that Juror Carll was willing to follow the law, but she was never specifically asked if she could render her verdict solely upon the evidence presented and the instructions on the law given to her by the court. (Doc. 22 at 75); *see Barnhill v. State*, 834 So. 2d 836, 845 (Fla. 2002). Accordingly, this Court

should alter or amend its judgment to find that as a result of counsel's deficiencies, Allen was prejudiced because an actually biased juror sat on her jury.

CONCLUSION

In conclusion, Allen respectfully requests that this Court alter its Order denying relief. Allen also requests that this Court amend its judgment in favor of Respondents and instead enter judgment in favor of Allen.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of April, 2022, I electronically filed the foregoing PETITIONER'S MOTION TO ALTER OR AMEND JUDGMENT AND INCLUDED MEMORANDUM OF LAW, with the Clerk of the Court by using the CM/ECF system, which will send notice of electronic filing to Doris Meacham, Assistant Attorney General, Office of the Attorney General, 444 Seabreeze Blvd, 5th Floor, Daytona Beach, Florida 32118, at Doris.Meacham@myfloridalegal.com and capapp@myfloridalegal.com on this 26th day of April, 2022. I further certify that a true copy of the foregoing was mailed to the following non-CM/ECF participant: Margaret A. Allen, DOC# 699575, Lowell Correctional Institution, 11120 Northwest Gainesville Road, Ocala, Florida 34482-1479.

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