CASE NO. 23-5620

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

DEATH PENALTY CASE

RESPONDENT'S BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED

(Restated)

1. Whether this court should exercise its certiorari jurisdiction to review the Eleventh Circuit Court of Appeals' denial of a certificate of appealability (COA) after the District Court identified and applied the correct law to petitioner's claims and the correct standard in denying a COA.

2. Whether certiorari review of the habeas corpus claim of ineffective assistance of penalty phase counsel challenging counsel's investigation, preparation, and presentation of a mitigation case should be denied where the circuit court determined that the state court's resolution of postconviction relief was not contrary to or an unreasonable application of *Strickland* and its progeny.

PARTIES TO THE PROCEEDINGS

Petitioner, Margaret A. Allen, was the Movant in the trial court and the Appellant in the Florida Supreme Court.

Respondent, State of Florida, was the Respondent in the trial court and the Appellee in the Florida Supreme Court.

NOTICE OF RELATED CASES

Pursuant to this Court's Rule 14. l(b)(iii), these are related cases:

Original Guilt and Penalty Phase Trial
Circuit Court of Brevard County, Florida
State of Florida v. Margaret Ann Allen; 2005-CF-048260
Judgment Entered: May 19, 2011.

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

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

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

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

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

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

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The Eleventh Circuit issued an order denying COA on April 12, 2023. Allen filed a Motion for Reconsideration, which was denied on May 19, 2023.

JURISDICTION

Petitioner, Allen, is seeking jurisdiction pursuant to 28 U.S.C. §1254(1). Respondent agrees that that statutory provision sets out the scope of this Court's certiorari jurisdiction but submits that this case is inappropriate for the exercise of this Court's discretionary jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A state prisoner may not appeal from a district court's final order in a habeas case "unless a circuit justice or judge issues a certificate of appealability. 28 U.S.C. §2253(c)(l). The statute governing appeals in habeas corpus case, 28 U.S.C. § 2253(c)(2), provides:

> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
>
> (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

Petitioner also contends that the Sixth, Eighth and Fourteenth Amendments of the United States Constitution are involved.

FACTS AND PROCEDURAL BACKGROUND

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. Allen was the leader and predominant actor in a group that tortured Wright by beating her with belts, pouring chemicals including bleach, fingernail polish remover, rubbing alcohol and hair spritz onto Wright's face, and eventually strangling her to death with one of the belts. *Allen v. State*, 137 So. 3d 946, 951-52 (Fla. 2013).

On September 21, 2010, the jury found Allen guilty of first-degree murder and kidnapping.

The penalty phase commenced on September 22, 2010. 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.

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.

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.

On September 23, 2010, the jury recommended the death penalty by a unanimous vote and the court followed their recommendation.[1] *Allen v. State*, 137 So. 3d 946, 951-55 (Fla. 2013).

The Supreme Court of Florida affirmed Allen's convictions and sentences on direct appeal. *Id.* This Court denied certiorari. *Allen v. Florida*, 574 U.S. 938 (2014).

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

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[1] 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). *Allen v. State*, 137 So. 3d 946, 955 (Fla. 2013).

one subclaim and ultimately denied the motion. The Supreme Court of Florida affirmed. *Allen v. State*, 261 So. 3d 1255 (Fla. 2019).

On February 14, 2019, Allen filed a timely federal petition for a writ of habeas corpus under 28 U.S.C. § 2254 alleging fourteen grounds for relief based on both her direct appeal and her motion for postconviction relief. Respondents filed a corrected response to the petition (Pet. App. H) and Allen filed a reply. (Pet. App. I). The district court denied the petition and denied a certificate of appealability. (Pet. App. E). Allen filed a Motion to Alter or Amend Judgment (Pet. App. J), which was denied on January 10, 2023. (Pet. App. F). A notice of appeal from the final order entered by the district court denying habeas relief was timely filed.

Allen filed an Application for a Certificate of Appealability (Pet. App. C) in the Eleventh Circuit on February 28, 2023. On April 12, 2023, the Eleventh Circuit issued an order denying a COA. (Pet. App. A). Allen timely filed a Motion to Reconsider, Vacate, or Modify Order (Pet. App. D), which the Eleventh Circuit denied on May 19, 2023. (Pet. App. B).

The instant petition for writ of certiorari to this Court followed.

REASONS FOR DENYING THE WRIT

I. Certiorari should be denied because the Eleventh Circuit Court of Appeals' denial of a COA does not present any conflict with any decision of this Court, another circuit court, or a state court of last resort worthy of certiorari review.

Petitioner Allen seeks this Court's review of the Eleventh Circuit Court of Appeals' order denying her application for a COA, following the district court's denial (at the conclusion of its detailed order) of a COA for any of Allen's claims. The denial

of the COA is ostensibly contingent on the district court's resolution of the merits of Allen's claim that she did not receive the trial she was entitled to under *Strickland*[2] and the Sixth Amendment.

On habeas review, the district 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 state court's factual determinations are unreasonable. The district court, after reviewing the record, including the mitigating evidence produced at both trial and the post-conviction evidentiary hearing, concluded the state court properly found that trial counsel adequately investigated, prepared, and presented the mitigation that was available at trial.

As Respondents discuss below, none of Allen's claims present issues that are debatable among jurists of reason. The district court correctly applied the properly stated law to the particular facts of this case. The Circuit Court did not err in failing to grant a COA and this Court should not grant the petition.

A. Whether trial counsel rendered ineffective assistance of counsel with regard to the mitigation presented at the penalty phase of Allen's trial.

Allen claims that she did not receive the trial she was entitled to under *Strickland* and the Sixth Amendment. Pet at 8. Specifically, Allen points to the 1) the alleged failure to conduct a sufficient investigation into Allen's background, including failure to interview and present mitigation witnesses; 2) the alleged failure to present evidence of Allen's sexual abuse and childhood physical abuse; 3) the alleged failure

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[2] *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

to conduct a reasonable mental health investigation and present evidence that Allen suffers from posttraumatic stress disorder ("PTSD"); and 4) the alleged failure to acquire records such as police reports.

While Allen devotes much of her argument to disparaging trial counsel, on habeas review, the district 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 state court's factual determinations are unreasonable. 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).

To prevail on such a claim, a defendant must prove both that her counsel's performance was objectively deficient, and that the deficient performance prejudiced the defense. *Strickland* at 687.

The Supreme Court of Florida 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.

Given the pleadings in this case and the parties' reliance on *Miller-El* in their respective arguments, there is no indication that the Eleventh Circuit failed to apply the proper standard in consideration of whether a COA should issue.

a. Childhood sexual and physical abuse

The lower courts properly found that the mitigation presented at the evidentiary hearing was cumulative to the evidence presented at the penalty phase. Trial 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. Contrary to the allegations made by Allen in her petition, the abuse Allen suffered as a child at the hands of her mother and grandfather during her formative years were heard at trial. Pet. at 11. In fact, Allen concedes this point when she argues that "the testimony at Ms. Allen's trial only scratched the surface of the available mitigation regarding all the domestic violence Ms. Allen suffered, with only a couple of short references". Pet at 13. What it boils down to is Allen's discord with the specifics presented at trial.

The question is not whether postconviction counsel would have done something differently. The question is whether trial counsel's performance was reasonable under the circumstances at the time of the Petitioner's trial. A lawyer cannot be ineffective for failing to present evidence as a result of a reasonable decision to

investigate no further. *Rogers v. Zant,* 13 F.3d 384, 388 (11th Cir. 1994), *cert. denied,* 513 U.S. 899 (1994). Counsel is permitted to rely on information received from the defendant in forming trial strategy. If Allen provided information to her attorney, her lawyer need not set out on a quest to investigate whether there is evidence that contradicts the information Allen provided. *Strickland v. Washington*, 466 U.S. 668, 691 (1984). In *Strickland*, this Court stated:

> The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information. For example, when the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether.

Id.

The district court properly determined that Allen was not entitled to habeas relief under the deference afforded to state-court merits decision. Despite Petitioner's and her family's lack of cooperation, and Petitioner's lack of desire to present mitigation at all, the district court agreed that trial counsel's investigation could not be described as anything less than thorough. The court found that the record was 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. (Pet. App. E at 19-21, 33).

The district court found that 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. (Pet. App. E at 34).

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 postconviction "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). Accordingly, jurists of reason could agree with the district court's characterization of this evidence as cumulative.

Additionally, the district court agreed with the Florida Supreme Court that Allen had not shown prejudice. *Allen II*, 261 So. 3d at 1272. 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)); *Sears 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.").

Contrary to Allen's claims, Allen was afforded an individual consideration of whether there was a reasonable probability that the factfinders would have found that the balance of the aggravating factors did not outweigh the totality of her

mitigation. Pet at 23. Although the evidence presented at the post-conviction evidentiary hearing was relevant, even after consideration of the witnesses who testified about Allen's background and childhood there was 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. (Pet. App E. at 34).

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. Therefore, reasonable jurists would agree the district court's resolution was correct, and the Eleventh Circuit properly denied a COA.

b. Mental health investigation/Allen's PTSD.

The district court determined that Allen was not entitled to habeas relief under the deference afforded to state-court merits decisions regarding the presentation of mental health mitigation. Again, the court found the record to reflect that Bankowitz presented extensive testimony on Petitioner's mental health, brain damage, and her ability to appreciate the criminality of her conduct or conform her conduct to the requirements of the law. Aside from Dr. Russell's testimony regarding the diagnosis of PTSD, which was refuted by Dr. Gamache, the jury and judge heard similar testimony as to what was presented during the evidentiary hearing. (Pet. App. E at 32) Reasonable jurists would not find the district court's ruling debatable.

Although Allen continues to argue that she suffered from PTSD, the testimony presented at trial evidenced that although Allen had been exposed to traumatic stressors, there was no psychometric evidence and no clinical evidence that she met the diagnostic criteria for PTSD. 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.

Likewise, Allen's argument that the extreme emotional disturbance was directly related to her PTSD, holds no water. There was zero support for the conclusion that at the time of the murder, Allen was suffering from extreme mental or emotional disturbance or that Allen was unable to conform her behavior to the requirements of the law at the time. There was no evidence that Allen had the signs and symptoms at the time of the offense. If PTSD was going to be argued as a mitigator, Allen would have needed to present some logical connection between the events that occurred at the time of the crime with traumatic experiences that Allen suffered in her life. Allen failed to show there was some nexus to the criminal behavior.

Further, 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 had experienced. 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. In Dr. Gamache's opinion, there were no marked alterations of arousal or reactivity associated with Allen's

traumatic events. 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. Gamache explained that anger in and of itself is not definitive as a symptom of PTSD. "People can get aroused and angry, but they don't have post-traumatic stress disorder (PTSD)." There must be a nexus with the traumatic stressors that result in the angry reaction. It is a far stretch for Allen to associate the anger of losing her money with PTSD. He also noted that Allen did not exhibit signs of "depersonalization" at the time of the murder. Dr. Gamache rightfully concluded that Allen was not suffering from PTSD at the time of the crime.

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. 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.

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 find the Eleventh Circuit properly denied a COA.

c. Rights under the Eighth and Fourteenth amendments.

Allen also asserts that the Supreme Court of Florida's denial of relief on this claim violated her rights under the Eighth and Fourteenth amendments. A proportionality review is purely a matter of state law. While the Florida Supreme Court conducted a comparative proportionality analysis in this case, it was not constitutionally required to do so, and no longer does.[3] *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.

Allen argues that "the only difference between her and similarly situated individuals [who] were granted relief . . . [is] that [she] is a female." She compares

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[3] In *Lawrence v. State*, 308 So. 3d 544 (Fla. 2020) the Florida Supreme Court held that State constitutional conformity clause precludes constitutional comparative proportionality review of death sentences. *Profitt* and *Gregg v. Georgia,* 428 U.S. 153, 206 (1976) 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." To the extent this claim is based on state law, this Court must defer to the state court's conclusions.

herself to several other capital defendants who were granted relief on claims that counsel prejudiced them by unreasonably failing to present mitigating evidence. Those cases are inapplicable. 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.

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.

As the Eleventh Circuit stated, "no reasonable jurist would think that Allen's sex was the only difference between her and the other defendants". (Pet. App. A at 12).

d. The requirements for issuance of a COA are not satisfied.

Petitioner does not identify the correct issue before the Court—whether the denial of COA below creates a basis for this Court's certiorari review. Allen's petition addresses the substantive grounds but does not articulate how the denial of COA creates a conflict for this Court to resolve.

As this Court has explained, Congress has mandated that a prisoner seeking relief under 28 U.S.C. § 2254 has no automatic right to appeal a district court's denial or dismissal of his federal habeas petition. Instead, the petitioner must first seek and obtain a COA. *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003); 28 U.S.C. § 2253(c)(1). In *Miller-El*, 537 U.S. at 326, this Court held that to meet the requirement of 28 U.S.C. § 2253(c)(2), a defendant must show "jurists of reason could disagree with the district court's resolution of his constitutional claim or that jurists could conclude that issues presented are adequate to deserve encouragement to proceed further." The standard was not intended to cause the issuance of a COA in a *pro forma* manner or as a matter of course. *Id.* at 336-337. *Miller-El* instructed that the COA determination under § 2253(c) requires an overview of the claims in the habeas petition and a general assessment of their merits. *Miller-El,* 537 U.S. 322, 327.

At the conclusion of its 87- page order denying relief, the district court stated, in pertinent part:

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 **DENIED** a certificate of appealability.

(Pet. App. E at 86-87).

The district court denied the petition on the merits when it gave the indicative ruling required by the Eleventh Circuit. Prior to denying a COA, the district court went to great lengths analyzing the merits of Allen's various claims in her federal habeas petition, finding that they all lacked merit. Petitioner's argument amounts to nothing more than a disagreement with the district court's application of a properly stated rule of law and the Eleventh Circuit's subsequent denial. U.S. Sup. Ct. R. 10. The issue is not whether a charitable grant of COA might have been bestowed elsewhere, but whether "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.

i. ***Strickland* standard for prejudice.**

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

Strickland as argued above. Thus, the Eleventh Circuit properly denied a COA, and this Court should deny the petition.

ii. **Determination of facts in the State court proceedings.**

Allen 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). 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). 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).

This Court does not take a case to review and correct factual errors by courts below. The federal review of state court adjudications in habeas proceedings is not a paper grading exercise. *See Wright v. Sec'y, Florida Dep't of Corr.*, 278 F.3d 1245, 1255 (11th Cir. 2002). When a state court and district court below applied well settled law and the resolution of the case by this Court would not have any implications beyond this specific case, certiorari review is inappropriate. *See Chevron U.S.A., Inc. v. Sheffield*, 471 U.S. 1140 (1985); *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70 (1955). Regardless, the Florida Supreme Court's findings are without a doubt a reasonable determination of the facts.

B. **Whether trial counsel rendered ineffective assistance of counsel with regard to challenging the state's evidence.**

Allen argues that her counsel was ineffective in challenging the State's evidence by 1) allegedly failing to challenge Dr. Qaiser's testimony regarding the presence of ligature marks on the victim's body, 2) allegedly failing to challenge Dr. Qaiser's inaccurate testimony that unconscious people can feel pain, and 3) allegedly failing to impeach Quintin with his prior inconsistent statements.

Contrary to Allen's assertions, the lower 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.*

a. Ligature Marks

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). "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 (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).

From the onset, trial counsel made the existence of Dr. Whitmore and his initial report known. Bankowitz referred to the report consistently during cross-examination and showed it to Dr. Qaiser. The jury saw it as well. 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. 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 the trial to review the autopsy. They were aware that Dr. Qaiser neither saw the victim's body, nor performed the autopsy. Trial counsel used those distinctions to imply 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.

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. During the evidentiary hearing, he testified that although the body did not show the indicia on the ligature strangulation, that did not mean that it was completely and entirely off the table. He testified that a medical examiner could miss something patent, especially in a decomposed body. Dr. Spitz did not

completely discredit Dr. Qaiser's findings as scientific impossibilities, but instead agreed they were possible.

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.

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. 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.

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 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.

Therefore, reasonable jurists would agree the district court's resolution was correct, and the Eleventh Circuit properly denied a COA.

b. Pain

Allen also argues she was prejudiced by trial counsel's failure to challenge Dr. Qaiser's testimony that unconscious people could feel pain. The district court found that trial counsel made a strategic decision to challenge Dr. Qaiser's testimony on cross-examination and that Allen did not show that this strategy was unreasonable. (Pet. App. E at 68-69). The district court also found that trial counsel thoroughly cross-examined Dr. Qaiser and that he could not definitively say for sure whether the victim felt pain while unconscious. (Pet. App. E at 68-69).

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. 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. 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.*

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. 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.

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. The Florida Supreme 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. Even if it were impossible for Wright to experience pain while unconscious, the Florida Supreme Court 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.

Allen argues that at the evidentiary hearing Dr. Spitz would have testified that once a person is unconscious, they do not experience any more pain. He also testified that a person having a belt pulled around their neck would experience anxiety. Surprisingly, Dr. Spitz also referred to the case as being an altercation between two people, saying the injuries did not indicate that the victim was beaten.

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. Therefore, reasonable jurists would agree the district court's resolution was correct, and the Eleventh Circuit properly denied a COA.

c. Quintin's testimony

Allen next argues that she was also prejudiced as a result of trial counsel's cross-examination of Quintin. The district court agreed with the Florida Supreme Court that trial counsel presented a competent and effective cross-examination and that there was sufficient evidence of the HAC aggravator regardless of whether trial counsel impeached Quinten based on the victim being bound, beaten, and strangled. Pet. App. E at 67. 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 totality of Quintin's testimony about the kind of substances poured on the victim wavered 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 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.

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. 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. 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 prevent the liquids getting into her eyes or mouth. 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. Significantly, by soliciting that information, trial counsel was able to later highlight the impossibility of that statement during closing argument.

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 agreed, and ultimately committed to the statement he made to police. This is contrary to his direct testimony.

On direct examination, Quintin testified that he had stopped to get a dolly on the way back to Allen's house. 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.

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 Allen's home while she begged for her life. Allen tortured the victim, beating her and pouring liquids over her face, and then strangled her to death.

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. Accordingly, the Eleventh Circuit properly denied the COA.

d. Conclusion

Allen identifies nothing from the district or circuit court to suggest that an incorrect principle of law was applied or that the adjudication of her claims below conflicts with this Court's precedent, or any other court for that matter. Allen's petition for certiorari review should be denied.

Ultimately, and most importantly in this case, Allen has failed to show 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." There is no compelling basis for certiorari review of the Circuit Court's decision denying a COA in this case. Accordingly, Allen's petition should be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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