**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*

## REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

*DEATH PENALTY CASE*

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Margaret A. Allen respectfully petitions that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit. Ms. Allen replies to the Respondent's Brief in Opposition ("BIO") as follows:

### I. Reply to Inaccuracies in the State's Facts Asserted in its Brief in Opposition

The State has portrayed an inaccurate picture regarding a multitude of facts related to Ms. Allen's case. For example, the State claims trial counsel was not deficient because he inaccurately claimed in hindsight that Ms. Allen's family was reluctant to speak with him and uncooperative. BIO at 9. The evidence shows that this sentiment is false. Ms. Allen's aunt, Myrtle Hudson, gave trial counsel a list of people to contact. Ms. Hudson even told trial counsel that Ms. Allen's other aunt, Barbara Ann Capers, wanted to testify and was available to do so. *See 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"). Without a doubt, trial counsel was deficient in failing to follow up on leads and investigate, interview, and call essential witnesses such as Ms. Capers to testify at trial. "[A]ny reasonably competent attorney would have realized that pursuing these leads was necessary to making an informed choice among possible defenses." *Wiggins*, 539 U.S. at 525.

The Court has long held that "[p]revailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what

is reasonable." *Strickland v. Washington*, 466 U.S. 668, 688 (1984). Notably, the ABA Guidelines state that counsel should seek out and interview potential witnesses including "members of the client's immediate and extended family" and "neighbors, friends and acquaintances who knew the client or h[er] family." Am. Bar Ass'n, *American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 Hofstra L. Rev. 913, 1019 (2003) ("ABA Guidelines"). Therefore, it is irrefutable that a reasonably competent attorney would have at least made an attempt to contact Ms. Allen's family members and friends.

The State also elaborates on this argument by insinuating that trial counsel was not deficient in failing to call incarcerated familial witnesses to testify at trial. BIO at 9. However, the State appears to ignore the fact that trial counsel never even spoke to the incarcerated witnesses, let alone made a reasonable decision whether to call them to testify. *See Wiggins*, 539 U.S. at 527. Not only would a reasonably competent attorney have called these key witnesses to testify at trial, but counsel would not have any problem locating them for an interview since they were incarcerated. Worse yet, not only was Ms. Capers not incarcerated, but she was present in the courtroom during Ms. Allen's trial, willing and able to testify. Further, the State's argument holds no weight because the key mitigation witnesses were not incarcerated the entire time leading up to Ms. Allen's trial. Trial counsel had ***years*** to contact these witnesses, and there is no excuse for his ineffectiveness in failing to ensure that Ms. Allen's jury heard the poignant testimony from Ms. Capers, Mr. Watkins, and Ms. Allen's children.

The Court has made clear that "the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." *Strickland*, 466 U.S. at 688. Trial counsel failed to fulfill his "duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id*. at 691. Accordingly, it is evident that Ms. Allen's trial counsel failed to exercise "reasonable professional judgment" considering the evidence supporting the lack of limitations on his investigation. *Id*. Ms. Allen's trial counsel's failure to follow prevailing standards and interview family members, including the names given to him and an aunt who was present in court, led to a "partial presentation of a mitigation case suggest[ing] that [his] incomplete investigation was the result of inattention, not reasoned strategic judgment." *Wiggins*, 539 U.S. at 534. In sum, trial counsel's performance was not reasonable, and Ms. Allen was prejudiced as a result.

The assertion that the mitigating evidence presented in postconviction was cumulative to the mitigation presented at trial is also erroneous. BIO at 10. ***None*** of the abuse Ms. Allen suffered as a child at the hands of her mother and grandfather during her formative years was heard at trial. Ms. Capers personally witnessed the abuse and would have been able to testify to the horrifying details of both the physical and sexual abuse in front of Ms. Allen's jury. Although Ms. Hudson was called to testify at trial, as a result of trial counsel's deficiencies and unreasonable lack of investigation and preparation, Ms. Hudson was never asked to testify about the torturous abuse Ms. Allen's mother subjected Ms. Allen to.

Additionally, the State confuses the issue and falsely claims Ms. Allen

conceded that the physical abuse she suffered during her childhood was presented at trial. BIO at 8. However, the State's quote relates solely to domestic violence. The domestic violence perpetrated on Ms. Allen throughout her adulthood by her ex-boyfriends is an entirely different topic than the physical abuse she suffered at the hands of both her mother and grandfather. Pet. at 13. This is not a case where the postconviction "evidence largely duplicated the mitigation evidence at trial" or where the mitigation was a "two-edged sword." *Cullen v. Pinholster*, 563 U.S. 170, 200-01 (2011). Consequently, jurists of reason could disagree that Ms. Allen's compelling mitigation was cumulative.

The State also denigrates Ms. Allen's mental health mitigation in its BIO. BIO at 12-14. Noticeably absent from the State's argument is the vital fact that the State's mental health expert, Dr. Gamache, did not evaluate Ms. Allen. In fact, Dr. Gamache did not even speak with Ms. Allen or any of her family members or friends. At the postconviction evidentiary hearing, Dr. Gamache testified that he did not speak with anyone other than the prosecutor. Thus, Dr. Gamache's testimony has extremely limited value, and his opinion that Ms. Allen was not suffering from PTSD at the time of the crime should be substantially discounted. BIO at 14.

The BIO also misstated a critical fact in response to Ms. Allen's claim related to trial counsel's failure to challenge the only evidence against her. The State incorrectly asserts that Ms. Allen's jury saw the autopsy report from the original medical examiner who conducted the autopsy, Dr. Whitmore. BIO at 21-22. However, contrary to the State's assertions and trial counsel's incorrect recollection at the

postconviction evidentiary hearing, the record reflects that Ms. Allen's jury never saw the autopsy report. Consequently, the fact that Ms. Allen's jury was never privy to the complete contents of Dr. Whitmore's report rebuts the State's argument that trial counsel's actions were sufficient when he solely cross-examined Dr. Qaiser, the new medical examiner who had never seen the victim's body but testified at trial. BIO at 20-21. At the postconviction evidentiary hearing, trial counsel conceded he was aware that he alone was unable to effectively challenge Dr. Qaiser's testimony, which was "diametrically opposed to Dr. Whitmore's" report. Therefore, contrary to the State's assertions, trial counsel did not make a tactical decision and no competent counsel would have adopted the same strategy. BIO at 20.

## II. Reply to the State's Misinterpretation of Rules and Case Law in its Brief in Opposition

First, the State is incorrect in its interpretation of the rules of this Court and its decisions. The State argues that the Court does not "correct factual errors by courts below." BIO at 19. Although Rule 10 notes ***some*** of the compelling reasons this Court grants a petition for a writ of certiorari, the rule also explicitly states the listed reasons are "neither controlling nor fully measuring the Court's discretion." U.S. Sup. Ct. R. 10. The rule goes on to state: "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." *Id*. Clearly the Court anticipates granting a petition for a writ of certiorari in some of those circumstances or else it would not be explicitly mentioned in the rule. Ms. Allen submits that the gravity of her case and the injustice present warrants her petition being granted.

The State avers: "Allen's petition addresses the substantive grounds but does not articulate how the denial of COA creates a conflict for this Court to resolve." BIO at 17. The State fails to consider that this Court has the authority to determine that Ms. Allen is entitled to a certificate of appealability ("COA"). *See Ayestas v. Davis*, 138 S. Ct. 1080, 1088 n. 1 (2018) ("We may review the denial of a COA by the lower courts.") For example, in *Tennard v. Dretke*, 542 U.S. 274, 281 (2004), the district court and the Court of Appeals for the Fifth Circuit both denied a COA. However, this Court held that "[r]easonable jurists also could conclude that the Texas Court of Criminal Appeals' application of *Penry* [*v. Lynaugh*, 492 U.S. 302 (1989)] to the facts of Tennard's case was unreasonable." *Id.* at 288. The Court went on to hold that reasonable jurists would find debatable or wrong the district court's disposition of his claim and that he was entitled to a COA. *Id.* at 289. Similarly, in *Welch v. United States*, 578 U.S. 120, 126 (2016), the district court and the Court of Appeals for the Eleventh Circuit both denied Mr. Welch a COA. However, this Court held that "reasonable jurists at least could debate whether Welch is entitled to relief" and vacated the judgment of the Court of Appeals. *Id.* at 135. Ms. Allen submits that the Court should find the same here and reverse the judgment of the Court of Appeals for the Eleventh Circuit and remand for further proceedings.

The BIO incorrectly stated: "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." BIO at

13. On the following page, the State reiterated its false notion by asserting that "[t]here must be a nexus with the traumatic stressors that result in the angry reaction." BIO at 14. However, the law of this Court, as well as in all jurisdictions relevant to Ms. Allen, is well settled that there is no requirement for Ms. Allen to establish a nexus to the crime in order for her mitigation to be considered.

This concept is not novel, the Court rejected the Fifth Circuit's "nexus" requirement in *Tennard,* 542 U.S. at 287, back in 2004. *See Smith v. Texas*, 543 U.S. 37, 45 (2004) ("noting [in *Tennard*] that none of our prior opinions 'suggested that a [intellectually disabled] individual must establish a nexus between her mental capacity and her crime before the Eighth Amendment prohibition on executing her is triggered' and holding that the jury must be allowed the opportunity to consider *Penry* evidence even if the defendant cannot establish 'a nexus to the crime'"). The Court reiterated that the relevant question is whether the mitigation evidence serves as "a reason to impose a sentence more lenient than death." *Id*. at 44. Clearly, Ms. Allen's posttraumatic stress disorder and traumatic stressors are appropriate mitigating circumstances to consider when making the decision whether to recommend a sentence of either life or death.[1]

The Eleventh Circuit has also properly followed this Court's precedent. In *Barwick v. Sec'y, Florida Dept. of Corr.*, 794 F.3d 1239, 1256 (11th Cir. 2015), the Eleventh Circuit held that the failure to give any consideration to the defendant's

[1] Ms. Allen received a recommendation for a death sentence by an advisory jury panel and was sentenced prior to the issuance of *Hurst v. Florida*, 577 U.S. 92 (2016) and its progeny.

child abuse due to the abuse not resulting in or contributing to his criminal behavior would be contrary to clearly established federal law. The Eleventh Circuit went on to note that *Smith,* 543 U.S. at 45, "reject[ed] the notion that there must be a specific nexus between [a] defendant's troubled childhood or limited mental capabilities and capital murder before allowing a jury to consider such evidence for mitigation purposes." Lastly, even "Florida law does not require that a proffered mitigating circumstance have any specific nexus to a defendant's actions for the mitigator to be given weight." *Cox v. State*, 819 So. 2d 705, 723 (Fla. 2002).

Notably, the State's entire argument and citations in the second paragraph of page 16 of the BIO was copied verbatim from the order of the District Court for the Middle District of Florida. BIO at 16; App. E at 35. Consequently, the State appears to be asking the Court to adopt an unconstitutional per se rule in its response to Ms. Allen's claims under the Eighth and Fourteenth Amendments, just as the district court alluded in its order. Based on the incorrect paraphrasing of *Sochor v. Sec'y Dept. of Corr.*, 685 F.3d 1016, 1030 (11th Cir. 2012), both the State and the district court seem 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." BIO at 16; App. E at 35. This is troubling for multiple reasons.

First and foremost, the wording of *Sochor* does not appear to create a per se rule that death is always appropriate in these cases. *Id*. at 1030-31. In fact, the State notes that the Eleventh Circuit cites *Jackson v. Herring*, 42 F.3d 1350, 1369 (11th

Cir. 1995). In *Jackson*, the court held that Ms. "Jackson suffered prejudice from her counsels' errors" and "affirm[ed] the district court's grant of habeas relief as to the sentence imposed." *Id*. As the State goes on to note, *Sochor* also cites *Dobbs v. Turpin*, 142 F.3d 1383, 1390 (11th Cir. 1998). In *Dobbs*, the Eleventh Circuit 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. The Eleventh Circuit found that Mr. Dobbs "satisfied the test for ineffective assistance of counsel as enunciated in *Strickland*" and remanded his case for resentencing. *Id*. at 1391. Accordingly, since both cases quoted in that portion of *Sochor* resulted in a finding of prejudice, it appears that the Eleventh Circuit was solely commenting on how the court had ruled previously in other cases with similar fact patterns. However, to the extent that the Eleventh Circuit is actually creating a per se rule, this Court should find it unconstitutional.

Further, Ms. Allen's case is easily distinguishable. *Sochor* involved twice as many aggravators as in Ms. Allen's case. *Sochor*, 685 F.3d at 1022. As Ms. Allen needed one aggravator in order to even be eligible for the death penalty, by the trial court only finding two aggravators (one of which Ms. Allen maintains is unsupported,

or at the very least, undermined), it is apparent that her case is clearly not the most aggravated and least mitigated.

Most importantly, this per se rule submitted by the State and the district court 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. This Court has repeatedly stated that the death penalty requires the individual characteristics of the offender to be taken into consideration. "[T]he Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (internal citation omitted).

Ms. Allen was entitled to an individual consideration of whether there is a reasonable probability that the factfinders would have found that the balance of the aggravating factors did not outweigh her compelling mitigation. The Court has previously 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).

Conversely, the statement put forth by the State and district court 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*, 428 U.S. at 301 (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.

Hence, 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 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, the State and the district court are

saying that if this aggravation is present, there is no amount of mitigation that could outweigh it. This is patently unreasonable and unconstitutional.

Notably, when the district court suggested the same unconstitutional idea, Ms. Allen brought it to the district court's attention in her Motion to Reconsider, Vacate, or Modify Order pursuant to Federal Rule of Civil Procedure 59(e). App. D at 11-14. Ms. Allen moved for the district court to alter or amend its judgment to consider the individualized characteristics of Ms. Allen and her case and decide her claim on a constitutional basis free from this improper per se rule. However, the district court denied Ms. Allen's motion without explicitly addressing the issue.

Further, the State asserts that Ms. Allen is undeserving of a COA and submits that the other similarly situated defendants who were granted a COA were bestowed "a charitable grant of a COA." BIO at 18. Even if that is true, the fact that some similarly situated death sentenced individuals with claims related to their trial counsel's ineffectiveness in investigating and presenting mitigation received "a charitable grant of a COA," while others like Ms. Allen, did not, is arbitrary, capricious, and discriminatory. *See Spaziano v. Florida*, 468 U.S. 447, 465-66 (1984), *overruled on other grounds by Hurst*, 577 U.S. 92. "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).

Ms. Allen's case is also distinguishable from cases cited by the State. For one such example, the State cited *Rogers v. Zant*, 13 F.3d 384, 388 (11th Cir. 1994) to

argue counsel "cannot be ineffective for failing to present evidence as a result of a reasonable decision to investigate no further." BIO at 8-9. Unlike in *Rogers*, Ms. Allen's trial counsel was not making a reasoned strategic decision to avoid presenting evidence that the jury could view as damaging. *Id.* Ms. Allen's trial counsel did not make any such reasoned decision, he was just negligent and ineffective. In addition, Mr. Rogers' counsel actually did present evidence from various family members related to his difficult upbringing at trial, just as Ms. Allen's trial counsel should have presented. *Id.* at 385.

## CONCLUSION

For all of these reasons above, along with the reasons detailed in Ms. Allen's petition, the Court should grant the petition for a writ of certiorari; order further briefing; and/or vacate and remand this case to the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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