No. _____

IN THE

Supreme Court of the United States

ANDREW R. ALLRED,

Petitioner,

v.

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

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

DEATH PENALTY CASE

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CAPITAL CASE

QUESTION PRESENTED

Whether Mr. Allred's convictions and death sentences are unconstitutional due to receiving ineffective assistance of counsel at his trial in violation of his rights under the Sixth Amendment when his counsel failed to ensure that Mr. Allred received a reasonably competent mental health evaluation and mental health mitigation testimony.

LIST OF PARTIES

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

LIST OF RELATED CASES

Trial
Circuit Court of the Eighteenth Judicial Circuit, in and for Seminole County, Florida
State of Florida v. Andrew R. Allred, Case number: 2007-CF-4890A
Judgment entered: Guilty as charged, on all counts. Death sentence imposed by court on November 19, 2008.

Direct Appeal
Supreme Court of Florida
Allred v. State, 55 So. 3d 1267 (Fla. 2010); Case Number: SC08-2354
Judgment entered: December 16, 2010; Rehearing denied: March 2, 2011.

Certiorari
Supreme Court of the United States
Allred v. Florida, 565 U.S. 853 (2011); Case Number: 10-10859
Judgment entered: October 3, 2011; *cert. denied*.

Postconviction Motion
Circuit Court of the Eighteenth Judicial Circuit, in and for Seminole County, Florida
State of Florida v. Andrew R. Allred; Case Number: 2007-CF-4890A
Judgment entered: October 9, 2013; order denying postconviction relief (unpublished).

Appeal of denial of postconviction
Supreme Court of Florida
Allred v. State, 186 So. 3d 530 (Fla. 2016); Case Number: SC13-2170
Judgment entered: January 14, 2016; Rehearing denied: March 14, 2016.

Federal habeas petition
United States District Court, Middle District of Florida, Orlando Division
Allred v. Sec'y, Fl. Dep't of Corr., et al.; Case Number: 6:16-cv-560-PGB-LRH
Judgment signed: August 3, 2021; Judgment entered: August 4, 2021; Rehearing denied: June 13, 2022.

Appeal from the denial of federal habeas petition
United States Court of Appeals, Eleventh Circuit
Allred v. Sec'y, Fl. Dep't of Corr., et al.; Case Number: 22-12331
Judgment entered: April 11, 2024; Judgment entered: May 10, 2024.

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IN THE SUPREME COURT OF THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI

Andrew R. Allred respectfully petitions for a writ of certiorari to review the errors in the opinion of the United States Circuit Court of Appeals for the Eleventh Circuit ("Eleventh Circuit").

OPINIONS BELOW

This is a petition regarding the errors of the Eleventh Circuit in denying Mr. Allred's appeal of the denial of his petition for a writ of habeas corpus. The opinion at issue is reproduced at Appendix A. The United States District Court for the Middle District of Florida's Order Denying Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus is reproduced at Appendix C.

JURISDICTION

The opinion of the Eleventh Circuit was entered on April 11, 2024. On July 2, 2024, Mr. Allred filed an Application for a Sixty-Day Extension of Time to File Petition for a Writ of Certiorari. On July 9, 2024, Justice Thomas extended the time to file to August 9, 2024. The Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. amend. VI.

The Eighth Amendment provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const. amend. VIII.

The Fourteenth Amendment provides, in relevant part:

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

U.S. Const. amend XIV.

STATEMENT OF THE CASE

I. Procedural History

Andrew Allred is currently incarcerated under a sentence of death at the Union Correctional Institution in Raiford, Florida. On October 23, 2007, Mr. Allred was charged by indictment with two counts of first-degree premeditated murder, one count of armed burglary of a dwelling while inflicting great bodily harm or death, one count of aggravated battery with a firearm while inflicting great bodily harm or death, and one count of criminal mischief. Mr. Allred entered written and oral guilty pleas to all charges on April 30, 2008. On May 15, 2008, Allred waived his right to a penalty phase jury. The penalty phase trial was held on September 22-24, 2008. A *Spencer*[1] hearing was held on October 2, 2008.

On November 19, 2008, the trial court sentenced Mr. Allred to death on the two counts of first-degree murder; life imprisonment as to the counts of burglary and aggravated battery with a firearm; and five years' imprisonment for the count of criminal mischief. Mr. Allred filed an appeal of his convictions and sentences on November 24, 2008. The judgments and sentences were affirmed on December 16, 2010, and

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

rehearing was denied on March 2, 2011. *Allred v. State*, 55 So. 3d 1267 (Fla. 2010). This Court denied certiorari on October 3, 2011. *Allred v. Florida*, 565 U.S. 853 (2011).

Mr. Allred filed a motion for postconviction relief on September 28, 2012. The postconviction court granted an evidentiary hearing, which was held on August 1, 2, and 5, 2013. The order denying the motion to vacate judgment and sentence was entered on October 9, 2013.

Mr. Allred appealed the denial on November 6, 2013. The Florida Supreme Court denied relief on all claims on January 14, 2016. *Allred v. State*, 186 So. 3d 530 (Fla. 2016). Mr. Allred filed a timely motion for rehearing in light of this Court's decision in *Hurst v. Florida*, 577 U.S. 92 (2016); rehearing was denied. *Allred v. State*, 2016 WL 966682 (Fla. March 14, 2016).

Mr. Allred filed a successive motion for postconviction relief, raising further claims in light of *Hurst*, on January 11, 2017. The circuit court summarily denied the motion on April 6, 2017. Mr. Allred appealed the denial of the motion on May 3, 2017; the Florida Supreme Court denied the appeal. *Allred v. State*, 230 So. 3d 412 (Fla. 2017).

Mr. Allred filed a Petition for Writ of Habeas Corpus by a Person in State Custody and accompanying memorandum of law on April 14, 2016. Appendix H. The district court issued an order denying the petition on August 3, 2021. Appendix G. Judgment was entered on August 4, 2021. Appendix F. Mr. Allred filed a Motion to Alter or Amend Judgment with an accompanying memorandum of law on August 31, 2021. Appendix E. The motion was denied on June 13, 2022. Appendix D. A notice of appeal from the district court's order denying relief was timely filed on July 12, 2022. The district court declined to issue a certificate of appealability ("COA") on July 19, 2022. Appendix C. Mr. Allred filed an application requesting a COA with the Eleventh Circuit on August 18, 2022. The Eleventh Circuit granted a COA on the issue of ineffective assistance of counsel during the penalty phase in a January 5, 2023, order. Appendix B.

Oral argument was held on November 15, 2023, and the Eleventh Circuit issued its opinion on April 11, 2024. Appendix A. This petition follows.

II. Summary of Relevant Facts

Trial counsel Timothy Caudill hired Deborah Day, Psy. D.,[2] as a confidential mental health expert to conduct a psychological evaluation of Mr. Allred and perform any necessary and appropriate testing. As lead attorney, all ultimate strategic decisions regarding Mr. Allred's case were made by Mr. Caudill, who did not annotate his case files regarding mental health evidence or discussions. Dr. Day did not personally conduct Mr. Allred's assessment, rather one of her associates performed testing and Dr. Day reviewed the tests.

After a brief conversation with Dr. Day, Mr. Caudill decided to not call her as a witness or to provide any mental health mitigation. This decision was based on a single statement Mr. Caudill believed Dr. Day made that if she had to diagnose Mr. Allred, she would state that he suffered from Antisocial Personality Disorder (ASPD), sociopathy, or psychopathy. Despite the lack of record keeping by Mr. Caudill, an internal defense memorandum was found in the trial attorney files which was prepared by another member of the defense team; this memorandum stated that Dr. Day found Mr. Allred was a "sociopath or psychopath" and

[2] Dr. Day is a licensed clinical psychologist, licensed mental health counselor, and certified family mediator currently working in her private practice called Psychological Affiliates.

therefore concluded that failure to call Dr. Day as a witness "is not, per se, acting ineffectively." As a result of this one, contextless and unsupported statement, Mr. Allred did not have the benefit of any mental health mitigation despite the fact that he was on trial for his life. Further, that memorandum has all the earmarks of a *post hoc* rationalization for an unreasonable strategy.

REASONS FOR GRANTING THE PETITION

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

Mr. Allred's trial counsel was so constitutionally deficient that he did not receive the trial he was entitled to under the Sixth Amendment and this Court's ruling in *Strickland*.[3] Trial counsel Timothy Caudill was ineffective in an abundance of ways, but most importantly when it came to mental health mitigation, or the lack thereof.

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

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

Trial counsel was constitutionally ineffective for failing to ensure a reasonably competent mental health evaluation during the penalty phase of the trial.

Mr. Allred did not receive the level of representation guaranteed to him under *Strickland* and the Sixth Amendment because trial counsel failed to adequately investigate, prepare, and present the mental health mitigation that was available at the time of trial. The main area where trial counsel was ineffective was his failure to follow his training and experience and ensure that he understood what his mental health expert was expressing with regard to Mr. Allred's mental health. Trial counsel's deficient mitigation presentation fell below prevailing norms and disregarded the American Bar Association Guidelines. *See Wiggins v. Smith*, 539 U.S. 510, 524 (2003); *Rompilla v. Beard*, 545 U.S. 374, 328-83, 387 (2005); see also AM. BAR ASS'N, GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES, 31 Hofstra L. Rev. 913 (rev. ed. 2003) ("ABA Guidelines"). The mitigation that trial counsel presented at trial was abhorrently incomplete. Mr. Allred was prejudiced by these deficiencies and sentenced to death as a result.

When considering Mr. Caudill's experience, the district court noted

that he had tried approximately twenty-five death penalty cases since 1997. Appendix G. In Florida, lead trial counsel in a death penalty case should, *inter alia*, be:

> familiar with and experienced in the utilization of expert witnesses and evidence, including but not limited to psychiatric and forensic evidence; and have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases, including but not limited to the investigation and presentation of evidence in mitigation of the death penalty; and have attended within the last two years a continuing legal education program of at least twelve hours' duration devoted specifically to the defense of capital cases.

Fla. R. Crim. Pro. 3.112(f). An attorney who has tried approximately twenty-five capital cases over the course of eleven years and attended the required continuing legal education in order to remain death qualified, would have been exposed to ASPD and other personality disorders, and whether such a diagnosis is valid based on what that attorney knows about his client's history. Mr. Caudill had sufficient knowledge and information about Mr. Allred to know that an ASPD diagnosis was wholly incorrect. There is a complete absence in Mr. Allred's school records and other history to show conduct disorder with onset before age fifteen years, which is essential to a diagnosis of ASPD. *See* Antisocial Personality Disorder – Diagnostic and Statistical Manual of Mental Disorders Fourth

edition Text Revision (DSM-IV-TR), American Psychiatric Association (2000) pp. 645–650. Mr. Caudill knew that a conduct disorder prior to age fifteen is required to support an ASPD diagnosis. As such, he should have known that regardless of what he thought Dr. Day said, an ASPD diagnosis would not apply to his client.

Mr. Caudill testified in postconviction that it was his understanding that Dr. Day determined Mr. Allred was a sociopath or psychopath, stating that "[i]t was my understanding that she had come to a conclusion that if she were to offer a diagnosis in court, that would be the diagnosis." Mr. Caudill never questioned this diagnosis and never sought a second opinion. Mr. Caudill also failed to provide a substantive answer to the trial court when announcing that no mental health evidence would be provided at the penalty phase. Rather, Mr. Caudill informed the court:

> Judge, the only thing I would say now is that we had a discussion in our office, we considered all aspects of this case and this hearing as we were approaching it, and we also consulted outside of the office, and based upon all of the information that we had and all the conversations that we had, we made a decision not to present any expert testimony at this hearing.

Mr. Caudill's flawed conception of Dr. Day's *potential* testimony

was directly contradicted by Dr. Day's *actual* testimony at the postconviction evidentiary hearing. Dr. Day testified at the postconviction evidentiary hearing that she never reached a final diagnosis for Mr. Allred. The words in the memorandum authored by a member of the defense team were not conclusions reached by Dr. Day. Mr. Allred did not meet the criteria for ASPD because Dr. Day never saw clear indications of childhood or adolescent conduct disorder. Dr. Day noted there was no "pervasive pattern from fifteen forward," rather there "were more recent of the last couple of years difficulties of societal norms, some deceitfulness, the impulsivity or failure to plan ahead." "[S]o the problem with this diagnosis was the pervasiveness of those traits. They were relatively short lived, and only some of them could be demonstrated over the last couple of years of his adulthood."

Adequate investigation into mental health issues for *Wiggins* purposes required going beyond merely accepting at face value what appeared to be an oral representation asserting an opinion which fails to meet the diagnostic criteria established by accepted scientific authority. Trial counsel not only failed to recognize that his interpretation of Dr. Day's statements regarding Mr. Allred was clearly incorrect, and he also

failed to pursue the matter further with Dr. Day to ensure he understood what she was saying and failed to consult with any additional mental health experts to ensure that Dr. Day's statements were supported.

Unlike trial counsel, collateral counsel retained two mental health experts in postconviction who were tailored to the Mr. Allred's specific diagnoses, available at the time of trial, and who would have been able to link the lay testimony presented at the penalty phase to the statutory mental health mitigators that should have been applied to Mr. Allred and given great weight.

During postconviction, Dr. Glen Ross Caddy, Ph. D.,[4] conducted a mental health examination and records review regarding Mr. Allred. Dr. Caddy reviewed school records, employment records, trial counsel's files, discovery materials, as well as the psychological records, reports, and test data generated by Dr. Day's office. Dr. Caddy interviewed Mr. Allred on two separate occasions (totaling 13 hours of examination time), and interviewed Mr. Allred's parents. It was Dr. Caddy's expert opinion that Mr. Allred does not have ASPD. Specifically, there was a complete lack

[4] Glenn Ross Caddy, Ph.D. was a licensed clinical forensic psychologist since 1977, and had been qualified as an expert over 2,000 times in the areas of clinical psychology, forensic psychology, and neuropsychology.

of a conduct disorder in childhood; all the evidence reviewed showed that Mr. Allred had no history of getting into any significant trouble either before or after the age of fifteen. While Mr. Allred had some unique intellectual talent, he performed poorly in school, likely due to a lack of interest. He also lacked normal social skills, having only a few friends but none unduly close. Mr. Allred was shy and untrusting with others. "He tended to stick to himself and not join study groups." But Mr. Allred was not a violent person; he was reserved, but not aggressive.

Dr. Caddy testified that while the obvious lack of a conduct disorder led to the inability to diagnose ASPD, Mr. Allred did not meet *any* of the criteria for the diagnosis. Dr. Caddy stated:

> Because a person who's going to develop a personality disorder does so in their childhood and adolescence, that's why the criteria for all the personality disorders requires the emergence of these phenomena by a certain age . . . In addition . . . there's a precursor requirement, and that is conduct disorder in childhood because people don't just get to fourteen and a half years of age and flip off into antisocial personality disorder, that's an evolutionary process.

Rather than as a result of any kind of personality disorder, as unreasonably believed by trial counsel, Dr. Caddy described Mr. Allred as experiencing a disassociation phenomenon during the time of the murders. A disassociation is a period of time where "a patient disconnects

from a clear understanding of the circumstances of their present-day functioning," brought upon by extreme stress or traumatic events. Dr. Caddy described Mr. Allred as "having an emotional breakdown for several weeks" which eventually triggered this disassociation. The emotional breakdown and disassociated state was the result of traumatic events that were presented through lay witness testimony during the penalty phase, including: the very public, demoralizing, and embarrassing break-up initiated by Tiffany Barwick during Mr. Allred's twenty-first birthday party; the obsessive and irrational behavior that he exhibited towards Tiffany after the break-up (setting the stage for the disassociation); and finally discovering that Tiffany and Michael Ruschack were intimate after Tiffany broke up with Mr. Allred, given that Mr. Allred believed Michael was his best friend. These events cannot be discussed or interpreted in a vacuum. Expert testimony was necessary to explain the emotional consequences of these events for someone like Mr. Allred who had underlying limitations to his mental strength and stability. The trauma of these events was such "that it made it difficult for him to process into memory details of the event and the whole sequence of the event." Dr. Caddy noted that even during Mr. Allred's

evaluation in August 2012, traces of disassociation still existed.

The dissociation was evidenced by Mr. Allred's fragmented memory as seen in his mental health evaluation and police interviews; calling 911 to essentially turn himself in; providing a full confession after the murders; and turning the murder weapon over to the police when they arrived. Dr. Caddy's testimony supported the statutory mitigator found in Fla. Stat. § 921.141(6)(f), that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. Dr. Caddy stated that Mr. Allred's "ego impairment was so extreme . . . he was not able to take rational perspective on the consequences of his behavior." This testimony could only have been provided through a mental health expert; nothing prevented the presentation of this testimony other than Mr. Caudill's unreasonable decision to cease pursuit of mental health mitigation based on one unsupported statement made by the lone retained expert.

Gary Roy Geffken, Ph.D. was also retained in postconviction; he has a great deal of experience with the diagnosis and treatment of individuals

with autism spectrum disorder ("ASD").[5] Dr. Geffken performed a mental health evaluation on Andrew Allred. He also reviewed records and interviewed Mr. Allred on April 8, 2013, for approximately six hours. Dr. Geffken used several different testing measures as a basis for his evaluation with Mr. Allred, including a social communication measure related to autism, a repetitive behavior measure related to autism, a language communication measure, and an adaptive behavior questionnaire. Dr. Geffken's primary focus was on the adaptive behavior questionnaire, which is used to measure standards of social and personal responsibility to assess social and emotional development compared to normally developing adolescents.

Dr. Geffken opined that Mr. Allred falls into the broad class of high-functioning autism spectrum disorder, or at the very least, he can be diagnosed with a pervasive developmental disorder. Specifically, Mr. Allred's emotional and social development was extremely delayed compared to his peers. Someone like Mr. Allred who has a pervasive developmental disorder "is more at a loss than your average individual

[5] Dr. Geffken has been a licensed clinical psychologist since 1987 and has been practicing clinical psychology at the University of Florida, Department of Psychiatry for twenty-six years.

who would have more social skills and more emotional skills from, and have learned from their prior experience . . . he had this intense attachment and just had no way to cope with it." After the traumatic experiences of his girlfriend breaking up with him and learning his best friend had sex with her, "[Allred] was just at a loss, and had no ability to cope after." It is not uncommon for individuals with a pervasive developmental disorder to have an intense attachment to specific individuals, such as Mr. Allred had to Tiffany and Michael.

All of this information was available at the time of trial; both Dr. Caddy and Dr. Geffken were available and would have testified to their diagnoses at that time, as well as contradicted any indication of ASPD, sociopathy, or psychopathy. Trial counsel's avowed strategy for Mr. Allred's penalty phase relied heavily on mental health mitigation; thus, it was deficient for trial counsel to not have pursued additional mental health experts for trial. Mr. Caudill described the penalty phase defense strategy thus:

> My strategy was to hope to, just because the only thing that I saw that would possibly have a potential of saving Mr. Allred from the death penalty given the facts of the case, was strong mental health mitigation that we could tie to the events themselves, because as I'm sure you know, merely having indication that your client suffers from mental illness or

> personality disorders or anything else when there's brain damage, if you can't tie it to the offense, and your client – you know what the statutory mental health mitigators are as well, you have to tie it to the offense to the kill them. So that was the strategy to try to develop that information to present on his behalf, but to go along with that because we don't want a situation where our doctors are claiming, our client suffers from some serious mental health issue in a vacuum, as if there's no background to support it. So we also investigate background issues, childhood issues, issues surrounding our client, so the plan the strategy unlimitedly what's presented anything and everything that we could about his background, his life, his childhood, his family, his relationships, but ultimately, the real strategy was to try and present mental health mitigators.

Based on Mr. Caudill's own words, the evidence he presented at penalty phase was lacking because there was no mental health expert testimony, which was his own unreasonable decision based upon his failure to pursue a full and robust mental health mitigation case. The lack of a mental health expert who would link the lay testimony to the statutory mental health mitigators was in direct contravention of trial counsel's declared strategy, and therefore cannot be considered reasonable.

Mr. Caudill knew he needed a mental health expert to pull all the elements of mitigation together: "[i]t certainly would have been helpful, and, again to try to tie all of those elements of his childhood and background into again, what he did at the time of the killings and for

purposes of mental health mitigation, yes, I couldn't tie them together as well myself." Mr. Caudill had "never previously conducted a penalty phase . . . where we didn't present a mental health expert." In previous cases, Mr. Caudill consulted other experts for a second opinion if he was uncomfortable with the first expert's opinions. However, in this case, Dr. Day was the lone expert Mr. Caudill consulted, and after the consultation, he believed she gave him the worst possible diagnosis that a capital defendant could receive. Mr. Caudill never considered or consulted with another expert, despite the fact that it was his stated practice to do so. He never considered seeking an expert with qualifications specific to Mr. Allred's previous psychiatric diagnoses. Neither Mr. Allred nor his family attempted to prevent the defense team from pursuing another mental health expert; Mr. Allred and his family cooperated with the attorneys as well as the retained experts; Mr. Caudill was in no way limited from presenting mitigation.

The postconviction court ruled that trial counsel made a strategic decision not to call Dr. Day at the penalty phase because her testimony would have been more aggravating than mitigating, and the Florida Supreme Court and district court agreed with this ruling. This ruling was

unreasonable because it is clear from both the defense mental health expert testimony as well as Dr. Day's testimony itself in postconviction that Mr. Caudill's strategy was inherently flawed because he was unreasonably relying on a misinterpretation of Dr. Day's conclusions regarding her mental health findings regarding Mr. Allred, as well as counsel's failure to pursue meaningful mental health mitigation based on that unreasonable misinterpretation.

Although the lower courts, including the Eleventh Circuit, found that neither Dr. Caddy's nor Dr. Geffken's testimony would have changed the outcome of the defendant's penalty phase. This is an unreasonable interpretation of the facts, the testimony, and of *Strickland* and *Wiggins*. Both experts were able to show that the mental health statutory mitigator applied to Mr. Allred. Both postconviction mental health experts testified to opinions that could only be presented through expert testimony that could and should have been presented at penalty phase, had Mr. Caudell followed his own practice and avowed strategy. This error in this case is not a matter of whether Mr. Caudell was reasonable in failing to call Dr. Day as a witness, and whether no reasonable counsel would have done the same. The error in this case is the utter failure to

provide Mr. Allred with any mental health mitigation based on faulty understanding of a diagnosis that had not been rendered. Had Mr. Allred's attorneys presented a comprehensive picture of Mr. Allred's background and mental health, the balance of aggravating and mitigating circumstances would be different and there exists a reasonable probability Mr. Allred would have received a life sentence.

Merely being familiar with Dr. Day, speaking to her at the jail and hearing the term "ASPD" was insufficient basis for Mr. Caudill to completely abandon the "strong mental health mitigation" that he had deemed as important to the penalty phase. Mr. Caudill's incorrect assumptions about whether Dr. Day had reached a diagnosis, whether that diagnosis was supported by the facts, and using those incorrect assumptions to abandon the mental health mitigation was not strategy, it was deficient performance. In making the decision to not further pursue mental health mitigation, or to even question Dr. Day further regarding the basis of her opinion, Mr. Caudill failed to function as the counsel guaranteed to Mr. Allred by the Sixth Amendment. This performance is deficient under any reasonable application of *Strickland* and *Wiggins*.

At the postconviction evidentiary hearing, Mr. Caudill acknowledged that of those twenty-five capital defendants he represented at trial, eight were sentenced to death. In the time between Mr. Allred's penalty phase trial and the filing of Mr. Allred's petition, Mr. Caudill was found to have been ineffective in his representation of Richard Lynch. *See Lynch v. Sec'y, Dept. of Corr.*, 897 F.Supp.2d 1277, 1309 (2012); *aff'd in part, rev'd in part sub nom. Lynch v. Sec'y, Fla. Dept. of Corr.*, 776 F.3d 1209 (11th Cir. 2015). Another client of Mr. Caudill's received a new trial and was eventually exonerated based on evidence that was not discovered prior to trial. *Aguirre-Jarquin v. State*, 202 So.3d 785 (Fla. 2016). He was also recently found to have been ineffective in his representation of yet another death row inmate, Terence Oliver, based upon his failure to locate, interview, and investigate witnesses.

Mr. Caudill's inattention has affected far too many capital defendants negatively to afford him the deference contemplated by *Strickland*. For the deference to apply, the decision must be strategic, and not poorly informed. Decisions based on inattention rather than reasoned strategic decisions are not entitled to the presumption of reasonableness. *Rompilla*, at 395-96 (citing *Wiggins*, at 534). *Rompilla*

also held that even when the defendant and his family are "actively obstructive" and uninvolved in developing mitigation, counsel is not absolved from investigating and developing mitigation, which was not an issue in this case because Mr. Allred and his family were cooperative with counsel regarding mitigation. *Rompilla* at 381. Deference must be earned, not bestowed by courts labeling unreasonable decisions as strategy, thus immunizing those unreasonable decisions from constitutional scrutiny. As such, all of the preceding court decisions in this matter – the postconviction court, the Florida Supreme Court, the district court, and the Eleventh Circuit – have not only unreasonably applied *Strickland* and *Wiggins* but based those decisions on an unreasonable interpretation of the facts in light of the evidence presented in state court.

In order to prevail on an ineffective assistance of counsel claim, a defendant must show that his trial counsel's performance was deficient and that he was prejudiced as a result. *Strickland*; U.S. Const. Amend. 6. Counsel has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process. *Strickland*, at 688. Specifically, counsel has a duty to investigate his client's life and mental

health so that the adversarial testing process works in the particular case. *Id.* at 690. There are two prongs to an ineffective assistance of counsel claim:

> First, a petitioner 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, whose result is unreliable.

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. It is not necessary to establish that counsel's deficient conduct more likely than not altered the outcome in the case to show prejudice *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.

"*Strickland* does not establish that a cursory investigation automatically justifies a tactical decision with respect to sentencing strategy. Rather a reviewing court must consider the reasonableness of

the investigation said to support that strategy." *Wiggins*, *supra*.

> 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. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness.

Wiggins at 520. Counsel has a duty to "discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." *Id.*[6] *See also Penry v. Lynaugh*, 492 U.S. 302 (1989); *California v. Brown*, 479 U.S. 538 (1987). Where counsel does not fulfill that duty, the defendant is denied a fair adversarial testing process and the proceedings' results are rendered unreliable. A reasonable strategic decision must be based on informed judgment. "[T]he principal concern . . . is not whether counsel should have presented a mitigation case. Rather, [the] focus [should be] on whether the investigation supporting counsel's decision not to introduce mitigating evidence . . . was itself reasonable." *Wiggins* at 523. In making this assessment, the reviewing court "must consider not only the quantum of

[6] The prevailing norms of capital defense require the case in mitigation to include any evidence that would tend "to lessen the defendant's moral culpability for the offense or otherwise support a sentence less than death." ABA Guidelines, §10.10.1 (commentary).

evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Id*. at 527.

Counsel's duty to investigate and prepare applies to both phases of a capital trial. *See, e.g., Williams v. Taylor*, 529 U.S. 362 (2000); *Porter v. McCollum*, 558 U.S. 30 (2009); *Sears v. Upton*, 561 U.S. 945 (2010). Counsel renders deficient performance which fall below prevailing norms when counsel fails to investigate his client's past in a thorough and meaningful manner. *Rompilla, supra*. A reviewing court must consider the reasonableness of the investigation said to support the strategy." *Wiggins* at 527 (2003).[7] *See also Sears*.[8]

As this Court found in *Porter*:

> The Florida Supreme Court's decision that [Mr. Allred] was not prejudiced by his 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. Under Florida law, mental health evidence that does not rise to the level of establishing a statutory mitigating circumstance may nonetheless be

[7] "When viewed in this light, the 'strategic decision' the state courts and respondents all invoke to justify counsel's limited pursuit of mitigating evidence resembles more a post hoc rationalization of counsel's conduct than an accurate description of their deliberations prior to sentencing." *Wiggins*, at 526-27.

[8] "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. To the contrary, we have consistently explained that the *Strickland* inquiry requires precisely the type of probing and fact-specific analysis that the state trial court failed to undertake below." *Sears*, at 955-56.

> considered by the sentencing judge and jury as mitigating. See, *e.g., Hoskins v. State,* 965 So.2d 1, 17–18 (Fla.2007) *(per curiam)*. Indeed, the Constitution requires that "the sentencer in capital cases must be permitted to consider any relevant mitigating factor." *Eddings v. Oklahoma,* 455 U.S. 104, 112[ ] (1982).

Id. at 42. The same error found in *Porter* was committed by the lower courts here.

No reasonable court could have concluded that Mr. Caudill's decisions were sound strategy and entitled to deference under *Strickland*, and certainly could not have concluded that Mr. Allred was not prejudiced by Mr. Caudill's deficient performance. The prejudice in a *Strickland* claim is from the perspective of the relevant decision maker and not based on which expert the courts found more convincing. Mr. Caudill was poorly informed and based his decisions on a complete misunderstanding of Dr. Day's opinion, and as such his decisions cannot be considered strategic. Further, the prejudice of this deficiency is patent given the fact that the mental health experts at the postconviction evidentiary hearing, including Dr. Day herself, testified that Mr. Allred could not ever have been diagnosed with ASPD.

The lower courts' resolution of this claim was contrary to, or involved an unreasonable application of, clearly established federal law,

including, *inter alia, Strickland* and *Wiggins*, and the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. Further, in many respects the lower courts made an unreasonable determination of the facts in light of the state court record. Because of counsel's ineffectiveness, the proceedings in this case were inadequate to determine whether Mr. Allred belongs to the class of individuals who are subject to the death penalty.

Trial counsel's failure to present this evidence fell below professional norms. This failure prejudiced Mr. Allred because the sentencing court cannot consider mitigation that has not been presented, which means that the trial court did not have all of the information it needed to determine whether this is one of the most aggravated and least mitigated crimes. A reasonable sentencer would have taken all of the mitigation that should have been presented, weighed it against the aggravation, and sentenced Mr. Allred to life. As such, this Court should grant the petition so that Mr. Allred has the benefit of a penalty phase that comports with the Constitution.

CONCLUSION

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