

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*

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

DEATH PENALTY CASE

Appendix A

United States Court of Appeals for the Eleventh Circuit Opinion
denying relief, dated April 11, 2024.

[DO NOT PUBLISH]

In the
United States Court of Appeals
For the Eleventh Circuit

No. 22-12331

ANDREW R. ALLRED,

Petitioner-Appellant,

versus

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

Respondents-Appellees.

Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket No. 6:16-cv-00560-PGB-LHP

Before JORDAN, JILL PRYOR, and BRASHER, Circuit Judges.

PER CURIAM:

Florida death-row prisoner Andrew Allred appeals the district court's denial of his petition for a writ of habeas corpus under 28 U.S.C. § 2254. This appeal concerns his claim that his trial counsel was constitutionally ineffective for failing to ensure that he underwent a reasonably competent mental health evaluation for use during the penalty phase of his criminal trial. After a thorough review of the record and with the benefit of oral argument, we affirm the district court's denial of the ineffective assistance of counsel claim.

I. BACKGROUND

Allred pled guilty before a Florida court to two counts of first-degree murder as well as armed burglary, aggravated battery with a firearm, and criminal mischief. Because under Florida law his convictions made him eligible for the death penalty, he was entitled to a penalty-phase trial to determine his sentence. *See* Fla. Stat. § 921.141(1). He waived his right to a jury during the penalty phase. Thus, a judge was tasked with weighing aggravating and mitigating factors to decide whether to sentence Allred to death or life imprisonment. *See id.* § 921.141(3)(b). The trial court sentenced Allred to death for both murders. After his death sentence was upheld on direct appeal, Allred pursued postconviction relief in the Florida state courts and then in federal court. Below we describe the evidence presented at Allred's penalty-phase trial, his

sentencing, his state postconviction proceedings, and his federal habeas proceedings.

A. The Penalty Phase

After Allred pled guilty, his case proceeded directly to a penalty-phase bench trial. During the penalty phase, the State introduced evidence of the following facts.

Allred had a romantic relationship with one of the two victims in this case, Tiffany Barwick. Before her murder, Allred and Barwick were living together at Allred's parents' home. They ended their relationship with a fight on August 25, 2007. The fight and breakup happened at the Allred home during Allred's 21st birthday party, which was attended by 50 guests. In attendance was Michael Ruschak, the other murder victim, who was Allred's closest male friend at the time.

Unable to cope with the breakup, Allred began harassing Barwick. Days after the breakup, he purchased a handgun. Immediately after obtaining the weapon, he used pictures of Barwick for target practice. He emailed her a photo of the bullet-riddled pictures, which hung on the wall of his room.

After the breakup, Allred learned that Barwick and Ruschak had begun a sexual relationship. The day before the murders, he messaged his friend Michael Siler, "I pretty much just need to start killing people." *Allred v. State (Allred I)*, 55 So. 3d 1267, 1272 (Fla. 2010). Siler replied, "[Y]ou're just depressed."

The next day, Allred sent threatening messages to and about Barwick and Ruschak. In Allred’s direct appeal, the Florida Supreme Court summarized the messages as follows:

In an instant message chat with Siler in the morning, Allred stated, “I’m pretty much gonna kill him . . . Ruschak . . . and her.” In an electronic conversation with victim Ruschak on that same day, Allred told him, “If [I] see you again, [I] will kill you, and yes that is a threat.” Finally, Allred and Barwick engaged in a heated and lengthy computer exchange on the day of the murder. Allred informed Barwick that he had hacked into her computer, changed the passwords, deleted files, and sent emails to people on her contacts list. He also transferred all of the funds in her bank account to pay her credit card debt. Calling her a “whore” because of her relationship with Ruschak, Allred said he could not forgive her for that and threatened, “[I]f [] I ever see [Ruschak] again I will kill him.”

Allred I, 55 So. 3d at 1272–73 (alterations in original).

That evening, Allred told Ruschak that he was coming over to Ruschak’s house. Allred took his handgun and drove to the home of Eric Roberts, where Ruschak lived and Barwick lived temporarily. Allred expected to find both Barwick and Ruschak at the house. Several guests who were acquainted with Allred were also at the house. Ruschak warned them of Allred’s impending arrival. According to one guest, Kathryn Cochran, when Barwick learned that Allred was coming over, she went into “panic mode.”

A few minutes after Ruschak's announcement, Allred pulled up to the house. He repeatedly rammed his truck into Barwick's car, which was parked outside. Guests inside the house heard the collisions. Cochran described hearing a noise like a mortar blast.

Allred exited his truck and attempted to enter the home, but he was unable to enter because Ruschak had locked the front door in anticipation of his arrival. Allred banged loudly on the front door, yelling "[l]et me in," but no one opened it. *Allred I*, 55 So. 3d at 1273.

Allred then walked to back of the house and banged on a sliding glass door that opened to the living room, where some of the guests had gathered. Barwick ran away to hide. When no one let him in, Allred shot through the door. He walked through the broken glass into the house, gun in hand. The occupants scattered.

Allred noticed Ruschak peering from the kitchen and pursued him, shooting him four times. Ruschak was killed instantly. Allred continued to the bathroom, where he found Barwick hiding in the bathtub. He shot her six times. She, too, died instantly. As Allred moved through the house, Roberts grabbed him, trying to stop him. Allred shot Roberts in the leg and escaped his grasp.

Allred left the crime scene and drove home. He called 911 and reported that he had killed two people. He threatened to commit suicide. When law enforcement officers arrived at Allred's home, he was standing at the end of the driveway with a handgun on the ground next to him. He told his arresting officer, "I'm the guy you're looking for." *Id.* at 1274. After he was secured, Allred

asked “if the people were dead,” and in the patrol car he said, “I knew I killed someone, I shot fourteen times.” *Id.*

After his arrest, detectives interviewed Allred about the murders. In the interview, he demanded to know “what happened to . . . the people that got shot” before confessing to shooting Ruschak and Barwick. He confessed to the events of the shooting substantially as described above.¹ He also confessed to using Barwick’s pictures for target practice. He told detectives that he killed Ruschak because Ruschak was an “asshole” who sided with Barwick in the couple’s breakup. *Id.* at 1275. But Allred denied planning the murders, buying the gun to facilitate the murders, and going to Roberts’s house that night with the intent to shoot Barwick and Ruschak. He said that he drove to the scene only to ram Barwick’s car.

Contrary to Allred’s denials, the State’s evidence indicated that the murders were premeditated. The State pointed to digital evidence of the threats he sent to and about Ruschak and Barwick leading up to the murders. Cochran, who had a conversation with Barwick about the threats at Roberts’s gathering, testified that Barwick was so “freaked out” about Allred’s communications that she called the police when she heard Allred was coming to the house.

¹ Although Allred described the events of the shooting in the police interview, in postconviction proceedings, his mental health expert, Dr. Glenn Caddy, opined that Allred’s reporting of the murders was imperfect or “fragmented.” We discuss Caddy’s opinion in more detail in Section B below.

The eyewitnesses who had been at Roberts's home testified about Allred's deliberate pursuit of Ruschak at the scene. They described Allred as singularly focused when, after shooting his way through the door, he silently moved past the guests in the living room to shoot Ruschak in the kitchen. Roberts testified to Allred's cool affect during the murders, characterizing Allred's tone of voice during their struggle as "somewhat calm" or "louder than calm." Corroborating the eyewitness accounts, Allred confessed to detectives that he was "specifically looking for Michael" when he walked into Roberts's kitchen.

To prove that Barwick's murder was especially heinous, atrocious, or cruel, an aggravating factor under state law, the State played the 911 call that Barwick made while hiding from Allred in the bathroom to illustrate the fear she experienced immediately before her death. On the call, she screamed as she heard the gunshots that killed Ruschak and continued screaming as she was fatally shot moments later.

For the defense in the penalty phase, Allred's trial counsel, Timothy Caudill, called seven witnesses in mitigation, mostly Allred's family members and former teachers. Caudill had difficulty organizing a mitigation case because Allred was sometimes uncooperative and generally reluctant to participate in mitigation efforts. Allred waived his right to be present and did not attend his penalty-phase trial.

Caudill presented evidence that Allred was socially and emotionally developmentally delayed and that his family life was

difficult. He argued that Allred’s developmental delays meant that he should be considered younger than 21 for sentencing purposes.

The evidence about Allred’s developmental delays included testimony from his mother, Tora Allred, about his childhood. She noticed changes in Allred’s behavior beginning around the age of five or six, when he suddenly became hyper and emotional. Concerned about his behavior, Tora took him to a pediatrician who attributed his behavior to possible sexual abuse and referred him to a psychiatrist. The psychiatrist instead diagnosed Allred with a “well-defined tic disorder” (Allred licked his hand and rubbed his eye repetitively) and attention deficit hyperactivity disorder (“ADHD”). *Id.* The psychiatrist prescribed Allred medication to treat the ADHD.

The pediatrician’s suggestion of sexual abuse was never substantiated. Although there was alleged sexual abuse in Allred’s family—Allred’s older cousin filed a report that their grandfather and great uncle had sexually abused him—Allred never claimed to have been sexually abused. Allred’s grandfather testified that he and his grandson had a good relationship and that Allred had a good childhood.

But other testimony suggested that, in many ways, Allred had a troubled childhood, at school and home. Caudill argued that Allred’s developmental difficulties impacted his education and social growth. To illustrate, Allred’s teachers testified that he did not interact with his peers or participate in class. His third-grade teacher testified that he was “withdrawn and ‘standoffish.’” *Id.* at

1276. Tora testified that around third grade, school progress reports suggested that her son might have a learning disability. Yet subsequent school testing revealed that Allred had a high IQ. As a result, he enrolled in gifted education classes in middle school. He did not adjust well to the program, however. Both Allred’s middle school teacher and Tora testified that he became even less social—more of a “loner”—throughout his middle school years. He eventually stopped taking gifted classes.

About Allred’s home life, his parents testified that he was exposed to alcohol abuse and domestic violence throughout childhood. Allred’s father, David, and Tora agreed that David had an alcohol problem. They testified that they were physically violent toward each other. They described one violent incident involving Allred. One evening, David picked up a shotgun—Tora said he threatened to shoot himself; David said he was shooting at a tree to blow off steam—and assaulted Tora as she tried to take the weapon away. Allred, who was about 12 at the time, witnessed the assault and called the police. David was arrested. There was no testimony that Allred himself was abused.

Despite Allred’s difficult childhood and developmental deficits, Tora admitted on cross-examination that by the time of the murders, her son was self-sufficient. Although he dropped out of high school in eleventh grade, he later earned his diploma and a two-year associate’s degree in accounting. Until the day of the murders, when his employment was terminated, he worked full time, teaching the use of software. He lived independently in a large

room, an addition to the family home that only he could access. For three or four months, Barwick lived there too, and, according to Tora, the couple was happy.

Because of Allred's emotional difficulty handling his breakup with Barwick, Caudill argued that Allred was suffering from extreme emotional disturbance at the time of the murders. In support, he presented Tora's testimony that Allred became even more withdrawn after Barwick moved out. David testified that he was worried his son was suicidal after the breakup.

Caudill's arguments in the penalty phase about mitigating circumstances focused on Allred's social and emotional developmental delays, difficult childhood, and emotional distress, yet he called no mental health expert to testify. Before trial, Caudill had identified Dr. Deborah Day, a psychologist, as a testifying expert. But Caudill decided not to call Day as a witness.²

After the penalty-phase trial concluded, the trial court sentenced Allred to death. The court found three statutory aggravating factors for each murder. For Ruschak's murder, the court concluded that (1) the murder was cold, calculated, and premeditated; (2) the murder was committed while Allred was engaged in a burglary; and (3) Allred had a prior capital conviction for Barwick's contemporaneous murder. For Barwick's murder, the court

² During postconviction proceedings, Caudill testified about his decision not to call Day. We discuss his testimony in Section B below.

concluded that (1) the murder was especially heinous, atrocious, or cruel; (2) the murder was cold, calculated, and premeditated; and (3) Allred had a prior capital conviction for Ruschak's contemporaneous murder. The court assigned great weight to all these aggravators except the contemporaneous burglary.

The court found no statutory mitigating factors and four nonstatutory mitigating factors, all of which it assigned little or moderate weight. As nonstatutory mitigation, the court weighed the facts that Allred: (1) accepted responsibility by entering guilty pleas; (2) cooperated with law enforcement; (3) suffered from an emotional disturbance after his breakup with Barwick; and (4) had developmental problems at a young age that impacted his educational and social development, but not his later education.³

³ The court considered and rejected several other mitigating factors. It determined that Allred's emotional and developmental age at the time of the crime corresponded to his chronological age of 21 and therefore declined to weigh a younger emotional age as a mitigating circumstance. *See* Fla. Stat. § 921.141(7)(g) (identifying as a mitigating factor "the age of the defendant at the time of the crime"). And although the court recognized that Allred suffered from an emotional disturbance after the breakup, it did not apply the statutory mitigator for extreme emotional disturbance. *See id.* § 921.141(7)(b) (identifying as a mitigating factor that "[t]he capital felony was committed while the defendant was under the influence of extreme . . . emotional disturbance"). The court found that the "careful thought and planning of the murders" negated such application. The court also stated that it was "not convinced that [Allred] was incapable of conforming his conduct to the requirements of law." *See id.* § 921.141(7)(f) (identifying as a mitigating factor that "[t]he capacity of the defendant to appreciate the criminality of his or her

Weighing the aggravating and mitigating circumstances, the court found that the aggravating circumstances far outweighed the mitigating circumstances. The court sentenced Allred to death for the murders of both Ruschak and Barwick.

B. State Postconviction Proceedings

The Florida Supreme Court affirmed Allred's death sentence on direct appeal. *See Allred I*, 55 So. 3d at 1284. Allred then initiated state postconviction proceedings, in which, as relevant here, he claimed that Caudill, his penalty-phase trial counsel, rendered constitutionally ineffective assistance under *Strickland v. Washington*, 466 U.S. 668 (1984), by failing to ensure that he received a reasonably competent mental health evaluation.⁴ Allred alleged that Caudill performed deficiently in three respects. First, he alleged that Caudill unreasonably relied on the opinion of Day, the mental health expert Caudill retained. Allred alleged that Caudill mistakenly believed Day would testify that Allred had antisocial personality disorder, sociopathy, or psychopathy and relied on this understanding in deciding to withdraw her testimony in the penalty phase. Second, Allred alleged that Caudill failed to conduct an adequate background investigation and therefore failed to adequately prepare Day. Third, Allred alleged that Caudill failed to present the

conduct or to conform his or her conduct to the requirements of law was substantially impaired").

⁴ In postconviction proceedings, Allred raised other challenges to his convictions and sentence. We limit our discussion to Allred's ineffective assistance claim regarding the mental health evaluation, the only claim in this appeal.

testimony of a mental health expert as mitigation in the penalty phase. Allred alleged that Caudill was obligated to pursue other experts, specifically those that were “tailored to the needs of the case” and had expertise with Allred’s developmental issues.

This deficient performance, Allred alleged, prejudiced his case such that had counsel performed effectively, there was a reasonable probability that he would not have received a death sentence. *See Strickland*, 466 U.S. at 687 (explaining that, to establish ineffective assistance of counsel, the defendant “must show that counsel’s performance was deficient” and “that the deficient performance prejudiced the defense”).

1. The Postconviction Evidentiary Hearing

The postconviction trial court conducted an evidentiary hearing on several of Allred’s claims, including the claim relevant here: that Caudill rendered ineffective assistance by failing to ensure that Allred underwent a reasonably competent mental health evaluation for use in the penalty phase. At the hearing, Allred’s postconviction counsel introduced two types of mental health evidence that Allred contended supported his theories of deficient performance. First, counsel introduced evidence of possibly mitigating mental health conditions—dissociation and autism spectrum disorder—that Allred argued Caudill should have developed. Second, counsel introduced evidence to undermine Day’s purported diagnosis of antisocial personality disorder, a potentially aggravating mental health condition.

Allred’s counsel called two licensed psychologists. Both evaluated Allred in preparation for the evidentiary hearing. The first psychologist, Dr. Glenn Caddy, testified that Allred was in a dissociative state during the murders. This meant that Allred was “disconnect[ed] from a clear understanding” of his actions. Caddy opined that the dissociative state was triggered by Allred’s profound “ego disintegration”—his sense of degradation and emotional distress—following his public breakup with Barwick and the discovery that she was involved with Ruschak. Caddy opined that, because of the dissociation and Allred’s deteriorating emotional state, Allred satisfied a statutory mitigator: he had diminished capacity at the time of the crime. *See* Fla. Stat. § 921.141(7)(f) (listing as a mitigating factor that “[t]he capacity of the defendant to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired”).

Caddy testified that Allred’s postconviction reporting of the murders showed a fragmented memory of what happened inside Roberts’s house. In Caddy’s opinion, Allred’s postarrest interview indicated fragmentation. To Caddy, the disconnect between Allred’s behavior and his inability to explain it indicated dissociation. But Caddy conceded on cross-examination that a fragmented memory could also have been Allred’s response to the trauma of the shootings. He agreed it was possible that Allred’s memory fragmented under the stress of the violence he inflicted rather than because of dissociation before the shootings. Thus, Caddy could not say whether the symptoms of dissociation he observed actually “set[] the stage” for the shooting.

Allred's postconviction counsel also called Dr. Gary Geffken, an autism specialist, who opined that Allred had a high-functioning form of autism spectrum disorder or "at the very least[,] pervasive developmental disorder." Geffken based his opinion on social and emotional deficiencies he observed upon meeting Allred and assessing his background. Geffken opined that Allred was emotionally underdeveloped: he lacked sympathy, empathy, and the ability to discuss emotions like jealousy or embarrassment. Geffken also opined that Allred was socially underdeveloped. When Geffken met with Allred, he found him to be intentionally solitary, cutting himself off from human interaction. Records established that Allred had also been this way in childhood and had difficulties interacting with peers. In Geffken's opinion, Allred also exhibited other characteristics of autism spectrum disorder: Allred adapted poorly to change and had exhibited unusual repetitive behaviors and tics in childhood.

Geffken concluded that Allred's autism was a plausible explanation for why he murdered Ruschak and Barwick. Geffken posited that when Allred and Barwick broke up, Allred was unable to cope with the loss because he did not have the social and emotional skills of a normal adult his age. Allred's actions stemmed from this inability to process his emotions. Geffken opined that the formation of intense, consuming attachments—and an inability to cope with their loss—was characteristic of behavior across the autism spectrum. But Geffken acknowledged on cross-examination that the type of violence Allred carried out was "clearly" atypical of

those on the autism spectrum. Geffken unequivocally stated that Allred was not remorseful and that his actions had been deliberate.

But Caddy thought that Allred had recently demonstrated an “intellectual” remorse for what he had done. Anticipating the testimony of the State’s witnesses, including withdrawn penalty-phase mental health expert Day, Caddy unequivocally opined that Allred did not have antisocial personality disorder. Allred did not meet the diagnostic criteria for antisocial personality disorder because he had no history of a childhood conduct disorder. And Caddy observed that Allred showed no history of failing to correspond to social norms and noted that before the murders he had no history of getting into significant trouble. Caddy concluded that Allred displayed empathy that was contraindicated of antisocial personality disorder.

Postconviction counsel then called Allred’s trial counsel, Caudill, attempting to show that Caudill unreasonably relied on this contraindicated diagnosis of antisocial personality disorder to justify his decision to not present a mental health expert in the penalty phase. Caudill’s reliance on Day’s purported antisocial personality disorder diagnosis, postconviction counsel argued, prevented him from adequately investigating more favorable mental health diagnoses like dissociation and autism spectrum disorder.

Caudill testified to his understanding of Day’s evaluation of Allred, their conversations about her potential testimony as to antisocial personality disorder and other aggravators, and his decision not to call Day or another mental health expert. He testified that

he retained Day as a mental health expert before the penalty phase. After Day evaluated Allred, in the time leading up to the trial, Caudill had multiple conversations with her about her evaluation. During one of these conversations, Day relayed that she had nothing to offer in mitigation in Allred's case. Caudill understood from the conversation that if Day testified and had to offer a diagnosis, the only diagnosis she could offer would be antisocial personality disorder—or worse, that Allred was a psychopath or sociopath. Put differently, her findings were consistent with a diagnosis of antisocial personality disorder.⁵ And though Caudill understood that an antisocial personality disorder diagnosis must be premised on a childhood conduct disorder, he believed there was evidence of such a disorder in Allred's past, such that an antisocial personality disorder diagnosis was not contraindicated.

According to Caudill, in his experience, antisocial personality disorder, sociopathy, and psychopathy were not mitigating. He further believed that calling Day, or any mental health expert, would elicit damaging testimony on Allred's reporting of the murders. Caudill viewed Allred's explanation for the murders—that the victims were deserving—as aggravating. He also thought that mental health expert testimony as to Allred's animosity toward the

⁵ A contemporaneous memo written by Caudill's cocounsel stated that Day had “concluded that Mr. Allred is a sociopath or psychopath.” This statement was not accurate, however. Day never diagnosed Allred. Both the postconviction trial court and the Florida Supreme Court determined that despite the memo's overstatement of Day's conclusion, Caudill did not misunderstand her evaluation. The record does not contradict this finding of fact.

victims, expressed in Allred's own words, would be more impactful than the State's comparable evidence. For all these reasons, he decided to withdraw Day as a testifying witness.

Caudill testified that he never had cause to question Day's conclusions, nor did he consider seeking a second opinion or expert. He did not believe that another expert would have come to a different conclusion or been able to provide mental health mitigation. He was also concerned about delaying the penalty phase to pursue other experts, given Allred's hostility toward developing a mitigation case.

The State called Day at the postconviction hearing. Through Day, the State aimed to establish that Caudill had correctly concluded that Day's expert testimony would have been more aggravating than mitigating. Therefore, the State argued, Caudill made a reasonable strategic decision to forgo the presentation of mental health evidence in the penalty phase.

Day testified that, at Caudill's behest she, along with two psychologists in her employ, had conducted a comprehensive evaluation of Allred before his penalty-phase trial. Based on her evaluation, Day opined at the postconviction hearing that Allred had "features" of antisocial personality disorder: he met some, but not all, of the criteria for the disorder described in the Diagnostic and Statistical Manual of Mental Disorders. She determined that Allred displayed an inability to have empathy, had interpersonal difficulties, had difficulties obeying societal norms, and evidenced a reckless disregard for others. But she also concluded that he did not

have a childhood or adolescent conduct disorder; she saw evidence of antisocial traits emerging only past the age of 15. Because such a conduct disorder is a required criterion for a diagnosis of antisocial personality disorder, Day could not formally diagnose him.

According to Day, Allred demonstrated features of psychopathy, which she described as a “descriptor[] of behavior” rather than a separate diagnosis. She opined that many of Allred’s antisocial traits—deceptiveness, irresponsibility, poor behavioral control, lack of empathy, and disregard for others—were also characteristic of psychopathy. Allred’s clinically elevated scores on the psychopathic deviate scale of a personality test she administered, the Minnesota Multiphasic Personality Inventory 2 (“MMPI-2”), were consistent with her impressions.⁶

Day testified consistently with Caudill’s impressions of her conclusions. If she had testified at the penalty phase, she said, her testimony would have been aggravating rather than mitigating. She could offer little in the way of statutory mitigation, and her opinions would have supported aggravators, including that the murders were cold, calculated, and premeditated. She opined that Allred’s behavior leading up to the murders evidenced premeditation and observed that he displayed a lack of remorse.

⁶ Day also testified that Allred had clinically elevated scores for depression and trauma. She did not explain how those scores related to her impressions of Allred’s traits, background, or behavior, though she did report that Allred experienced situational depression in jail.

The State called a second mental health expert, psychiatrist Dr. Jeffrey Danziger, who evaluated Allred and reviewed the other experts' conclusions.⁷ Danziger refuted Caddy's diagnosis of dissociation and Geffken's diagnosis of autism spectrum disorder.

Like Caddy, Danziger opined that Allred did not have antisocial personality disorder. Aside from the murders and the surrounding events, Danziger found that Allred lacked traits that would support an antisocial personality disorder diagnosis. But he "agree[d] wholeheartedly" with Day's evaluation and postconviction testimony and opined that, accounting for the murders, Allred displayed features of the disorder. Danziger also agreed with Caddy and Day that Allred would not meet the criteria for a "full-scale diagnosis" of antisocial personality disorder, in part because he had no conduct disorder before the age of 15. Danziger saw no pervasive pattern of criminal conduct in Allred's behavior. He opined that Allred was not a sociopath or a psychopath.

Danziger disagreed entirely with Caddy's finding that Allred was in a dissociative emotional state during the murders. He opined that the evidence of Allred's actions surrounding the murders suggested premeditation rather than confusion, disorientation, or a lack of control. He characterized Allred's imperfect

⁷ Danziger had met previously with Allred, at Caudill's request, shortly after Allred's arrest in 2007. There was conflicting testimony as to whether this pre-trial evaluation was intended to evaluate Allred's competency only or also to assess the possibility of an insanity defense. Danziger met with Allred again in 2013 to evaluate him at the State's behest.

memory as “a very thin reading to base a diagnosis of dissociative disorder on.”

Danziger also disagreed with Geffken’s diagnosis of autism spectrum disorder. Although Danziger believed that Allred had social deficits, he explained that to be diagnosed with autism spectrum disorder, a person must have a restrictive repetitive pattern of behavior, interest, or activities. He did not find that Allred presented such a pattern, though he failed to consider Allred’s childhood tic disorder when making this conclusion. Danziger further opined that an autism spectrum disorder diagnosis would not be mitigating even if correct. If Allred were autistic, he still would have been able to appreciate the wrongfulness of his conduct and conform his conduct to law. And Danziger saw no evidence that Allred was experiencing extreme emotional distress.

Danziger summarized that had he testified at trial, he could not have offered any testimony in mitigation other than the evidence that had been offered in the penalty phase. He noted the evidence of Allred’s exposure to domestic violence and his historic diagnoses of ADHD and tic disorder, but the court had acknowledged those facts at sentencing.

2. The State Postconviction Trial Court’s Order

The postconviction trial court denied Allred’s claim that trial counsel rendered constitutionally ineffective assistance in failing to ensure that Allred received a reasonably competent mental health evaluation. It concluded that Allred failed to show that Caudill

performed deficiently or that any deficiency prejudiced him. *See Strickland*, 466 U.S. at 687.

The postconviction trial court assessed Caudill's performance as to each of the three deficiencies Allred alleged: that Caudill unreasonably relied on Day's antisocial personality disorder diagnosis, that Caudill failed to conduct an adequate background investigation, and that Caudill failed to seek out additional mental health experts to testify in the penalty phase.

First, the court concluded that Caudill reasonably relied on his understanding of Day's opinion. Caudill correctly understood that "Day had not diagnosed the Defendant with anti-social personality disorder, but rather, she indicated that if she was forced to give a diagnosis the only diagnosis she could offer was anti-social personality disorder." *State v. Allred*, No. 07-4890, 2013 WL 12450438, at *3 (Fla. Cir. Ct. 2013).

Second, the court concluded Allred offered no evidence that Caudill conducted an inadequate background investigation or inadequately prepared Day. Allred's argument to the contrary had no support.

Consequently, Caudill was entitled to rely on Day's opinion. Given Day's opinion that Allred had antisocial traits and her indication that she could not provide helpful testimony, the court concluded that Caudill's choice not to present Day's testimony was a "reasonable strategic decision" rather than deficient performance. *Id.* at *4. It was also a "successful" decision in that it precluded the

introduction of additional damaging evidence as to Allred's premeditation and lack of remorse. *Id.*

Because the court concluded that Caudill's reliance on Day's opinion was reasonable, it followed that he "was not required to continue searching for an expert who would give a more favorable assessment of [Allred's] mental status." *Id.* (internal quotation marks omitted). The court therefore rejected Allred's third argument, that Caudill was obligated to seek another mental health expert to testify at the penalty phase, concluding that Caudill's failure to do so did not amount to deficient performance.

Despite finding no deficient performance, the postconviction trial court proceeded to analyze whether Caudill's failure to present a mental health expert prejudiced Allred. The court looked to whether the new mental health evidence adduced in postconviction—the diagnoses provided by Caddy and Geffken—would have altered the sentencing outcome. The court found the testimony of both experts not credible.

It found that Caddy's diagnosis of dissociation at the time of the murders was unsupported, in part, because the diagnosis relied on Allred's "alleged fragmented memory" of the murders, yet Caddy "acknowledged that the Defendant's fragmented memory could be the result of a physiological reaction to the trauma of the shooting." *Id.* at *5. And the court credited Danziger's contrary opinion that there was no evidence of Allred's having been in a dissociative state.

The court also found not credible Geffken’s testimony that Allred had autism spectrum disorder. It credited Danziger’s testimony that, to be diagnosed with autism spectrum disorder, one must display a restrictive repetitive pattern of behavior. It found a “lack of evidence” that Allred had restrictive repetitive behavior patterns. *Id.*

Because it found Caddy’s and Geffken’s testimony not credible and credited Danziger’s, the court concluded that Allred failed to establish that he was in a dissociative state at the time of the murders or that he had autism spectrum disorder. But even if Allred had credibly demonstrated those diagnoses, the court found, their introduction would not have impacted the penalty phase’s outcome because his experts’ testimony failed to show that Allred’s capacity was, in fact, diminished, and that he lacked premeditated intent.

3. The Florida Supreme Court’s Decision

The Florida Supreme Court affirmed the postconviction trial court’s denial of Allred’s ineffective assistance claim. *Allred v. State (Allred II)*, 186 So. 3d 530, 539 (Fla. 2016). It ruled that Allred “demonstrated neither deficiency nor prejudice” as to Caudill’s failure to obtain a competent mental health evaluation during the penalty phase. *Id.* at 539.

Like the postconviction trial court, the Florida Supreme Court evaluated Caudill’s performance as to each of the three deficiencies that Allred alleged. First, the court concluded that Caudill reasonably relied on Day’s opinion. *Id.* at 536–37. It held that Day

had “clearly indicated,” and Caudill correctly understood, “that her testimony would be more aggravating than mitigating.” *Id.* at 537. Although Day “did not reach the [antisocial personality disorder] diagnosis, her testimony that Allred met all but one of the factors essential to the diagnosis would not have been mitigating in nature. Neither would her testimony that he had some of the traits of a sociopath and a psychopath.” *Id.* Further, by withdrawing Day’s testimony, “Caudill kept out testimony about Allred’s lack of empathy or remorse.” *Id.* His reliance on her “professional assessment” was not unreasonable, and his decision to withdraw her testimony was a reasonable strategic choice. *Id.*

Second, the court concluded that Caudill’s background investigation was not deficient. *Id.* at 537–38. It determined that Caudill conducted an adequate background investigation to prepare his mitigation case in the penalty phase; the court cited his efforts to track down records, witnesses, and evidence that Allred was possibly sexually abused by his grandfather. *Id.* at 538.

Third, the Florida Supreme Court determined that Caudill’s decision not to call Day “did not require the continued search for a more favorable mental health opinion.” *Id.* Caudill’s failure to find and present a favorable mental health expert in the penalty phase did not constitute deficient performance. *Id.* In addition, Caddy and Geffken were not credible, and the evidence presented at the post-conviction hearing “established neither that [Allred] was in a dissociative state nor that he suffered from an autism spectrum disorder.” *Id.* at 538–39. Thus, Allred failed to present evidence of a

favorable opinion. But even if he had, the court stated that “securing a more favorable expert opinion” would not “undermine the sufficiency” of Day’s opinion, on which Caudill was entitled to rely. *Id.* at 539.

C. Federal Habeas Proceedings

Allred then filed a petition for a writ of habeas corpus in federal district court, raising several claims, including a claim that trial counsel rendered ineffective assistance by failing to obtain a reasonably competent mental health evaluation. The district court denied Allred relief and then denied him a certificate of appealability. We granted Allred a certificate of appealability on his claim that trial counsel was constitutionally ineffective in two ways, for failing to (1) conduct a sufficient background investigation and (2) ensure a reasonably competent mental health evaluation for Allred’s penalty phase.

II. STANDARDS OF REVIEW

“When reviewing a district court’s grant or denial of habeas relief, we review questions of law and mixed questions of law and fact *de novo*, and findings of fact for clear error.” *Reaves v. Sec’y, Fla. Dep’t of Corr.*, 717 F.3d 886, 899 (11th Cir. 2013) (internal quotation marks omitted). An ineffective assistance of counsel claim “presents a mixed question of law and fact that we review *de novo*.” *Pope v. Sec’y, Fla. Dep’t of Corr.*, 752 F.3d 1254, 1261 (11th Cir. 2014).

The Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”) governs our review of federal habeas petitions. “AEDPA prescribes a highly deferential framework for evaluating

issues previously decided in state court.” *Sears v. Warden GDCP*, 73 F.4th 1269, 1279 (11th Cir. 2023). AEDPA bars federal courts from granting habeas relief to a petitioner on a claim that was “adjudicated on the merits in [s]tate court” unless the decision (1) “was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States,” or (2) “was based on an unreasonable determination of the facts in light of the evidence presented in the [s]tate court proceeding.” 28 U.S.C. § 2254(d).

A state-court decision is “contrary to” clearly established law if the court “applie[d] a rule that contradicts the governing law” set forth by the Supreme Court or the state court confronted facts that were “materially indistinguishable” from Supreme Court precedent but arrived at a different result. *Williams v. Taylor*, 529 U.S. 362, 405–06 (2000). To meet the “unreasonable application” standard, “a prisoner must show far more than that the state court’s decision was merely wrong or even clear error.” *Shinn v. Kayer*, 592 U.S. 111, 118 (2020) (internal quotation marks omitted). Rather, the decision must be “so obviously wrong that its error lies beyond any possibility for fair minded disagreement.” *Id.* (internal quotation marks omitted). This standard is “difficult to meet and . . . demands that state-court decisions be given the benefit of the doubt.” *Raulerson v. Warden*, 928 F.3d 987, 996 (11th Cir. 2019) (internal quotation marks omitted).

A federal habeas court must defer to a state court’s determination of the facts unless the state court decision “was based on an

unreasonable determination of the facts in light of the evidence presented in the [s]tate court proceeding.” 28 U.S.C. § 2254(d)(2). We are required to give state courts “substantial deference” under § 2254(d)(2). *Brumfield v. Cain*, 576 U.S. 305, 314 (2015). “We may not characterize . . . state-court factual determinations as unreasonable merely because we would have reached a different conclusion in the first instance.” *Id.* at 313–14 (alteration adopted) (internal quotation marks omitted). We presume a state court’s factual determinations are correct absent clear and convincing evidence to the contrary. *See Pye v. Warden, Ga. Diagnostic Prison*, 50 F.4th 1025, 1035 (11th Cir. 2022) (en banc).

On each claimed basis for relief, we review “the last state-court adjudication on the merits.” *See Greene v. Fisher*, 565 U.S. 34, 40 (2011). “When a federal claim has been presented to a state court and the state court has denied relief,” we presume “the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary.” *Harrington v. Richter*, 562 U.S. 86, 99 (2011). Allred’s relevant ineffective assistance claim was adjudicated on the merits, and thus we review it under AEDPA’s standards.

III. DISCUSSION

In this appeal, Allred argues that his trial counsel was constitutionally ineffective for failing to ensure a reasonably competent mental health evaluation during the penalty phase, as he did in

state postconviction proceedings.⁸ He argues that Caudill's failure to present mental health evidence was deficient in two ways.

First, Allred argues that Caudill unreasonably relied on a misunderstanding of Day's evaluation of Allred's mental state without adequate investigation into her opinion. This led Caudill to provide ineffective assistance of counsel by deciding not to call Day, or another mental health expert, in the penalty phase. Allred contends that Caudill erroneously understood Day's opinion to be that if "she had to diagnose Mr. Allred, she would state that he suffered from Antisocial Personality Disorder (ASPD), sociopathy, or psychopathy." Appellant's Br. 9. According to Allred, Caudill was required to second-guess this opinion and investigate the supposed diagnosis of antisocial personality disorder further. Had he done so, Allred contends, Day would have continued her work and offered the "firm conclusion" that Allred did not have antisocial personality disorder due to his lack of adolescent conduct disorder. Reply Br.

⁸ As noted above, we granted a certificate of appealability on two aspects of Allred's ineffective assistance of counsel claim: that trial counsel was ineffective for failing to (1) conduct a sufficient background investigation and (2) ensure a reasonably competent mental health evaluation for the penalty phase. Allred's argument on appeal, however, addresses only (2), counsel's failure to ensure a reasonably competent mental health evaluation. He does not argue that Caudill performed a deficient background investigation; instead, he now argues that Caudill failed to investigate the basis of Day's evaluation and opinion, which is simply another way of saying that Caudill unreasonably relied on Day's opinion in deciding not to call her as a witness. We therefore discuss only the claim that Caudill was ineffective in failing to ensure Allred underwent a reasonably competent mental health evaluation for the penalty phase.

4–6. Because Caudill did not question Day’s evaluation, Allred argues, his decision to withdraw her testimony was based on insufficient investigation and thus constituted deficient performance.

Second, Allred argues that Caudill performed deficiently by failing to seek out and present the testimony of additional mental health professionals, like Caddy and Geffken, whose testimony would have supported statutory mental health mitigators in the penalty phase. Had the trial court heard the testimony of a mental health expert, Allred says, there is a reasonable probability that it would have weighed the balance of aggravating and mitigating circumstances in his favor and sentenced him to life imprisonment instead of death.

Counsel provides ineffective assistance, warranting vacatur of a conviction or sentence, when his performance falls “below an objective standard of reasonableness,” taking into account prevailing professional norms, and “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 688, 694. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* at 694. To determine whether this reasonable probability exists, “we consider the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding—and reweigh it against the evidence in aggravation.” *Porter v. McCollum*, 558 U.S. 30, 41 (2009) (alteration adopted) (internal quotation marks omitted). When applying AEDPA to this prejudice standard, “we must decide whether

the state court’s conclusion that [counsel’s] performance . . . didn’t prejudice [the petitioner]—that there was no substantial likelihood of a different result—was so obviously wrong that its error lies beyond any possibility for fairminded disagreement.” *Pye*, 50 F.4th at 1041–42 (internal quotation marks omitted).

We conclude that the Florida Supreme Court’s determination that Allred was not prejudiced by his counsel’s failure to present the testimony of a mental health expert during the penalty phase was not unreasonable, and thus its decision is entitled to deference under AEDPA.⁹ Because Allred failed to establish prejudice under the *Strickland*-AEDPA framework, we affirm the federal district court’s denial of habeas relief. In so ruling, we need not address whether the Florida Supreme Court’s conclusions as to trial counsel’s deficient performance were reasonable. “Because a petitioner must prove both deficient performance and prejudice, a court need not address one element if it determines that the petitioner has failed to prove the other.” *Mashburn v. Comm’r, Ala. Dep’t of Corr.*, 80 F.4th 1292, 1301 (11th Cir. 2023) (internal quotation marks omitted).

⁹ The Florida Supreme Court said little regarding the prejudice prong of Allred’s claim. Nonetheless, it concluded that Allred “failed to establish either prong of *Strickland*” as to each of his ineffective assistance claims and, more particularly, ruled that Allred “demonstrated neither deficiency nor prejudice” as to the claim that Caudill rendered ineffective assistance in failing to ensure that Allred underwent a reasonably competent mental health evaluation for the penalty phase. *Allred II*, 186 So. 3d at 535, 539.

Allred resists our conclusion. In arguing that he was prejudiced by trial counsel's performance, he relies on the testimony of Caddy and Geffken. He argues that his experts' opinions on two diagnoses—dissociation and autism spectrum disorder—show that the statutory “mental health” mitigators applied to him. Appellant's Br. 20; *see* Fla. Stat. § 921.141(7)(b), (h). Therefore, he argues, his experts would have shifted the balance of aggravating and mitigating factors and created a reasonable probability of a life sentence. But at the postconviction hearing the parties introduced conflicting evidence as to whether Allred experienced dissociation and whether he met the criteria to be diagnosed with autism spectrum disorder. The State's expert, Danziger, refuted Caddy's and Geffken's diagnoses. The state postconviction trial court resolved the factual disputes by crediting Danziger's opinion over the opinions of Allred's experts, and the Florida Supreme Court affirmed that finding.

We first consider whether the credibility finding—a determination of fact, *Jones v. Sec'y, Fla. Dep't of Corr.*, 834 F.3d 1299, 1315 (11th Cir. 2016)—was unreasonable. *See Pye*, 50 F.4th at 1035–36 (stating that we cannot grant habeas relief unless the state court's “ultimate decision” was “based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding” (internal quotation marks omitted)). Allred argues that the court made “an unreasonable interpretation of the facts [and] the testimony” on its way to concluding that “neither Dr. Caddy's nor Dr. Geffken's testimony would have changed the outcome” of his penalty phase, because “[b]oth experts were able to show that

the mental health statutory mitigator applied.” Appellant’s Br. 19–20. Thus, Allred asks us to evaluate the prejudice prong of his ineffective assistance claim based on the testimony of his experts and “not based on which expert the courts found more convincing.” *Id.* at 23. In so arguing, Allred asks us to reject the finding that Caddy and Geffken were not credible and to credit their opinions over the contrary opinion of the State’s expert, Danziger. We cannot do so. We have held that it is not unreasonable for a state habeas court to discount the testimony of one expert in favor of another’s when the experts’ testimony conflicts, so long as crediting the opposing expert’s testimony is itself not unreasonable. *See Ferguson v. Sec’y, Fla. Dep’t of Corr.*, 716 F.3d 1315, 1340–41 (11th Cir. 2013); *Jones*, 834 F.3d at 1316–17; *Pye*, 50 F.4th at 1050. Allred does not argue that crediting Danziger’s testimony was unreasonable. So we cannot say that it was unreasonable for the Florida Supreme Court to affirm the state postconviction trial court’s finding that Allred’s experts were not credible.

We next consider the Florida Supreme Court’s ruling that Allred failed to establish the prejudice prong of his ineffective assistance of counsel claim. The prejudice ruling is a legal conclusion that we review under § 2254(d)(1). We conclude that the court’s determination was neither “contrary to,” nor “an unreasonable application of, clearly established federal law” under the statute. 28 U.S.C. § 2254(d)(1). In deciding whether the ruling was unreasonable, we reweigh the evidence in mitigation against the evidence in aggravation. *Porter*, 558 U.S. at 41. And so we turn back to the evidence introduced at the evidentiary hearing.

Without Caddy’s and Geffken’s opinions, the mental health evidence adduced at the hearing yielded little in mitigation. The only other testimony indicating that Allred had significant mental health conditions came from Day, who testified that Allred had features of antisocial personality disorder and psychopathy. In a case where a habeas petitioner presented with “antisocial tendencies,” this Court said that evidence of antisocial personality disorder is “not mitigating, but damaging.” *Suggs v. McNeil*, 609 F.3d 1218, 1231 (11th Cir. 2010) (internal quotation marks omitted). More recently, we have observed that high psychopathic deviate scores on the MMPI-2 and testimony to behavior consistent with that score are damaging rather than mitigating. *Puiatti v. Sec’y, Fla. Dep’t. of Corr.*, 732 F.3d 1255, 1288–89 (11th Cir. 2019). And so, here, as in *Suggs*, Day’s testimony “would have come at a steep price.” *Suggs*, 609 F.3d at 1231.

We acknowledge that at the hearing experts on both sides noted social and familial difficulties in Allred’s background, as well as his childhood mental health diagnoses of ADHD and tic disorder. But these facts were presented during the penalty-phase trial and considered at sentencing. In addition, at sentencing the trial court weighed Allred’s emotional distress following his breakup with Barwick. Thus, Geffken’s and Caddy’s testimony on the emotional trauma they believed Allred suffered post-breakup—even divorced from these experts’ discredited diagnoses—was of little additional mitigating value. Because the evidence presented in state habeas proceedings was “by no means clearly mitigating” or otherwise “largely duplicated” mitigation evidence at trial, we cannot

say that it was unreasonable for the Florida Supreme Court to conclude that Allred had failed to show a substantial likelihood of a different sentence. *See Cullen v. Pinholster*, 563 U.S. 170, 200–01 (2011).

Our conclusion that the Florida Supreme Court’s no-prejudice determination was based a reasonable application of *Strickland* is bolstered by the strength of the aggravating circumstances the sentencing court identified. Where there is “substantial evidence of aggravating circumstances,” it is more difficult for a petitioner to establish prejudice under *Strickland*. *Holsey v. Warden, Ga. Diagnostic Prison*, 694 F.3d 1230, 1269 (11th Cir. 2012). So, too, when the mitigating evidence is scant. The new mitigating evidence in this case—that Allred had antisocial traits—would likely have been damaging. Even considering the mitigating evidence presented at trial—that Allred had social difficulties, a troubled family life, and childhood developmental disorders but was a self-sufficient young adult with no prior history of violence—we cannot conclude that the Florida Supreme Court unreasonably found no prejudice, given the aggravating circumstances.

And “[t]his is not a case where the weight of the aggravating circumstances or the evidence supporting them was weak.” *Sochor v. Sec’y, Dep’t of Corr.*, 685 F.3d 1016, 1030 (11th Cir. 2012) (internal quotation marks omitted). The trial court found that both Ruschak’s and Barwick’s murders were cold, calculated, and

premeditated and that Barwick's murder was heinous, atrocious, or cruel.¹⁰

For the cold, calculated, and premeditated aggravator, the evidence of premeditation in the penalty-phase case was strong. The trial court cited the timing of Allred's purchase of the murder weapon, his threatening messages to and about the victims, and his warning to Ruschak about his arrival at the scene as evidence that the murders were preplanned. If Caddy's testimony had been credited, it is possible that his opinion of Allred's diminished capacity might have mitigated the impact of this premeditation evidence. But Caddy's testimony was not credited. And Allred introduced no other evidence at the evidentiary hearing to undercut the cold, calculated, and premeditated aggravator. To the contrary, the evidence adduced at the evidentiary hearing tended to show that the testimony of a mental health expert would have supported the cold, calculated, and premeditated aggravator. Based on her evaluation of Allred, Day opined that his behavior leading up to the

¹⁰ As we previously noted, the court found additional aggravating factors as to each murder. As to Ruschak's murder, the court found aggravating that Allred committed the murder while engaged in a burglary, and he was previously convicted of another capital felony (Barwick's contemporaneous murder). As to Barwick's murder, the court found aggravating that Allred was previously convicted of another capital felony (Ruschak's contemporaneous murder). Because the cold, calculated, and premeditated and heinous, atrocious, or cruel findings are sufficient to support our conclusion that the Florida Supreme Court's prejudice determination was not unreasonable, we do not discuss the court's findings as to the other aggravators.

murders suggested premeditation. Caddy testified that Allred had a preconceived fantasy of killing Ruschak and Barwick.

To support the heinous, atrocious, or cruel aggravator, the trial court adduced from the 911 call Barwick made while hiding from Allred that she was terror-stricken, anticipating her own death, in the minutes before Allred shot and killed her. It described the 911 call “as the most horrific piece of evidence this court has heard in a homicide case in nearly twenty-three years as a trial judge.” And the heinous, atrocious, or cruel aggravator “pertains more to the nature of the killing and the surrounding circumstances” than the petitioner’s mental state. *Hardwick v. Sec’y, Fla. Dep’t of Corr.*, 803 F.3d 541, 561 (11th Cir. 2015) (internal quotation marks omitted). Thus, postconviction testimony about Allred’s mental state was unlikely to undermine the heinous, atrocious, or cruel aggravator.

We have said that the cold, calculated, premeditated and heinous, atrocious, or cruel aggravators are “among the most serious aggravating circumstances.” *Id.* at 559. It is improbable that the evidence adduced at Allred’s postconviction evidentiary hearing would have reduced the impact of these powerful aggravators sufficiently to introduce the reasonable probability of a different outcome for Allred. *See Pye*, 50 F.4th at 1049 (“We’ve repeatedly held that even extensive mitigating evidence wouldn’t have been reasonably likely to change the outcome of sentencing in light of a particularly heinous crime and significant aggravating factors.”).

For these reasons, the Florida Supreme Court’s determination that Allred could not show prejudice from his trial counsel’s performance withstands our highly deferential review under AEDPA. The court’s ruling that there was no substantial likelihood of a life sentence in Allred’s case was not “so obviously wrong that its error lies beyond any possibility for fairminded disagreement,” so it is entitled to deference. *See id.* at 1041–42 (internal quotation marks omitted). Our reweighing of the totality of the evidence in mitigation against the evidence in aggravation shows that Allred was unable to shift the balance of the sentencing factors. Although Allred argues that evidence of his mental state should have been presented at trial, the mental health evidence adduced at the post-conviction hearing—notwithstanding the testimony found not credible—would have been of little value. The mental health expert testimony presented was either supportive of existing aggravating factors like premeditation, supportive of new and potentially aggravating mental health diagnoses like antisocial personality disorder, or cumulative of mitigating evidence the sentencing court considered. We therefore cannot say that the Florida Supreme Court’s prejudice ruling was “contrary to” or “an unreasonable application of” clearly established Federal law.” 28 U.S.C. § 2254(d)(1). The court’s decision withstands our highly deferential review under AEDPA, and we affirm the denial of relief on Allred’s penalty phase ineffective assistance of counsel claim.

IV. CONCLUSION

The district court’s denial of Allred’s petition for a writ of habeas corpus is AFFIRMED.

**UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

April 11, 2024

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 22-12331-P

Case Style: Andrew R Allred v. Secretary, Florida Department of Corrections, et al

District Court Docket No: 6:16-cv-00560-PGB-LHP

Opinion Issued

Enclosed is a copy of the Court's decision issued today in this case. Judgment has been entered today pursuant to FRAP 36. The Court's mandate will issue at a later date pursuant to FRAP 41(b).

Petitions for Rehearing

The time for filing a petition for panel rehearing is governed by 11th Cir. R. 40-3, and the time for filing a petition for rehearing en banc is governed by 11th Cir. R. 35-2. Except as otherwise provided by FRAP 25(a) for inmate filings, a petition for rehearing is timely only if received in the clerk's office within the time specified in the rules. **A petition for rehearing must include a Certificate of Interested Persons and a copy of the opinion sought to be reheard.** See 11th Cir. R. 35-5(k) and 40-1.

Costs

No costs are taxed.

Bill of Costs

If costs are taxed, please use the most recent version of the Bill of Costs form available on the Court's website at www.ca11.uscourts.gov. For more information regarding costs, see FRAP 39 and 11th Cir. R. 39-1.

Attorney's Fees

The time to file and required documentation for an application for attorney's fees and any objection to the application are governed by 11th Cir. R. 39-2 and 39-3.

Appointed Counsel

Counsel appointed under the Criminal Justice Act (CJA) must submit a voucher claiming compensation via the eVoucher system no later than 45 days after issuance of the mandate or the filing of a petition for writ of certiorari. Please contact the CJA Team at (404) 335-6167 or

cja_evoucher@ca11.uscourts.gov for questions regarding CJA vouchers or the eVoucher system.

Clerk's Office Phone Numbers

General Information:	404-335-6100	Attorney Admissions:	404-335-6122
Case Administration:	404-335-6135	Capital Cases:	404-335-6200
CM/ECF Help Desk:	404-335-6125	Cases Set for Oral Argument:	404-335-6141

OPIN-1 Ntc of Issuance of Opinion

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*

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

DEATH PENALTY CASE

Appendix B

United States Court of Appeals for the Eleventh Circuit Order Granting
Certificate of Appealability, dated January 5, 2023.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 22-12331-P

ANDREW R ALLRED,

Petitioner - Appellant,

versus

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

Respondents - Appellees.

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

ORDER:

Andrew Allred seeks a certificate of appealability to appeal the denial of his 28 U.S.C. § 2254 petition for a writ of habeas corpus. Mr. Allred's motion for a certificate of appealability is GRANTED on the following issue only:

Was trial counsel constitutionally ineffective under *Strickland v. Washington*, 466 U.S. 668 (1984), for failing to conduct a sufficient background investigation and to ensure a reasonably competent mental health evaluation during the penalty phase of trial?

/s/ Jill Pryor
UNITED STATES CIRCUIT JUDGE

**UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

January 05, 2023

Tracy Martinell Henry
Capital Collateral Regional Counsel
12973 N TELECOM PKWY
TEMPLE TERRACE, FL 33637

Appeal Number: 22-12331-P
Case Style: Andrew R Allred v. Secretary, Florida Department of Corrections, et al
District Court Docket No: 6:16-cv-00560-PGB-LHP

Electronic Filing

All counsel must file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause. Although not required, non-incarcerated pro se parties are permitted to use the ECF system by registering for an account at www.pacer.gov. Information and training materials related to electronic filing are available on the Court's website.

The enclosed order has been ENTERED.

Appellant's brief is due 40 days from the date of the enclosed order.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: David L. Thomas
Phone #: (404) 335-6171

MOT-2 Notice of Court Action

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*

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

DEATH PENALTY CASE

Appendix C

United States District Court of the Middle District of Florida Order
Denying Certificate of Appealability, dated July 25, 2022.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

ANDREW R. ALLRED,

Petitioner,

v.

Case No. 6:16-cv-560-PGB-LHP

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

Respondents.

_____ /

ORDER

Petitioner's Motion for a Certificate of Appealability ("Motion," Doc. 34) is **DENIED**. 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). After consideration of the Motion and for the reasons set forth previously, *see* Doc. Nos. 27, 32, Petitioner has failed to make a substantial showing of the denial of a constitutional right.

DONE and ORDERED in Orlando, Florida on July 18, 2022.



PAUL G. BYRON
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel of Record
Unrepresented Party

**UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

July 25, 2022

James L. Driscoll Jr.
Capital Collateral Regional Counsel
12973 N TELECOM PKWY
TEMPLE TERRACE, FL 33637

Lisa M. Fusaro
Capital Collateral Regional Counsel
12973 N TELECOM PKWY
TEMPLE TERRACE, FL 33637

Mark Stephen Gruber
Capital Collateral Regional Counsel
12973 N TELECOM PKWY
TEMPLE TERRACE, FL 33637

Appeal Number: 22-12331-P
Case Style: Andrew R Allred v. Secretary, Florida Department of Corrections, et al
District Court Docket No: 6:16-cv-00560-PGB-LHP

We have received a copy of the order of the district court declining to issue a certificate of appealability. Rule 22(b) of the Federal Rules of Appellate Procedure provides in part:

If the district court has denied the certificate, the applicant for the writ may then request issuance of the certificate by a circuit judge. If such a request is addressed to the court of appeals, it shall be deemed addressed to the judges thereof and shall be considered by a circuit judge or judges, as the court deems appropriate. If no express request for a certificate is filed, the notice of appeal shall be deemed to constitute a request addressed to the judges of the court of appeals.

The notice of appeal will be treated as a request for a certificate of appealability unless appellant **files such a request within fourteen (14) days from the date of this letter.**

Certificate of Interested Persons and Corporate Disclosure Statement ("CIP")

Every motion, petition, brief, answer, response, and reply must contain a CIP. See FRAP 26.1; 11th Cir. R. 26.1-1. In addition:

- Appellants/Petitioners must file a CIP within 14 days after this letter's date.
- Appellees/Respondents/Intervenors/Other Parties must file a CIP within 28 days after this letter's date, regardless of whether Appellants/Petitioners have filed a CIP.
- Only parties represented by counsel must complete the web-based CIP. Counsel must complete the web-based CIP, through the [Web-Based CIP](#) link on the Court's website, on the same day the CIP is first filed.

The failure to comply with 11th Cir. Rules 26.1-1 through 26.1-4 may result in dismissal of the case or appeal under 11th Cir. R. 42-1(b), no action taken on deficient documents, or other sanctions on counsel, the party, or both. See 11th Cir. R. 26.1-5(c).

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: David L. Thomas
Phone #: (404) 335-6171

HAB-3 COA Denied DC

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*

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

DEATH PENALTY CASE

Appendix D

United States District Court of the Middle District of Florida Order
Denying Motion to Alter or Amend Judgment, dated June 13, 2022.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

ANDREW R. ALLRED,

Petitioner,

v.

Case No. 6:16-cv-560-PGB-LHP

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

Respondents.

_____ /

ORDER

This case is before the Court on the following matters:

1. Petitioner, through counsel, has filed a Motion to Alter or Amend Judgment (Doc. 30) pursuant to Rule 59(e) of the Federal Rules of Civil Procedure. Petitioner argues that the Court erred in denying Grounds One through Three and Five and Six of his Petition for Writ of Habeas Corpus. (*Id.* at 3-21.)

Federal Rule of Civil Procedure 59 permits courts to alter or amend a judgment based on “newly-discovered evidence or manifest errors of law or fact.” *Anderson v. Fla. Dep’t of Env’tl. Prot.*, 567 F. App’x 679, 680 (11th Cir. 2014) (quoting *Arthur v. King*, 500 F.3d 1335, 1343 (11th Cir. 2007)) (quotation marks and alterations omitted). “[A] Rule 59(e) motion [cannot be used] to relitigate old

matters, raise argument or present evidence that could have been raised prior to the entry of judgment.’’ *Arthur*, 500 F.3d at 1343 (11th Cir. 2007) (quoting *Michael Linet, Inc. v. Village of Wellington, Fla.*, 408 F.3d 757, 763 (11th Cir. 2005)).

Here, contrary to Petitioner’s arguments otherwise, the Court is precluded from considering the merits of Ground One under *Teague v. Lane*, 489 U.S. 288, 300–01 (1989), because to do so, the Court necessarily would have to apply the new rule of constitutional law announced in *Hurst v. Florida*, 577 U.S. 92 (2016),¹ which is not retroactive on habeas review. See *Knight v. Fla. Dep’t of Corr.*, 936 F.3d 1322, 1336–37 (11th Cir. 2019). Moreover, even assuming the Court could consider the merits of Ground One, Petitioner has not demonstrated that the Florida Supreme Court’s denial of the ground is contrary to, or an unreasonable application of, clearly established federal law. Having considered Petitioner’s arguments as to each ground, the Court concludes that Petitioner has not established the existence of any manifest errors of law or fact warranting relief. Accordingly, Petitioner’s Motion to Alter or Amend Judgment (Doc. 30) is **DENIED**.

2. To appeal the denial of a Rule 59(e) motion, a certificate of appealability (“COA”) is required. *West v. United States*, 579 F. App’x 863, 865 (11th Cir. 2014) (citing *Perez v. Sec’y, Fla. Dep’t of Corr.*, 711 F.3d 1263, 1264 (11th Cir.

¹ (holding that Florida’s hybrid death penalty sentencing scheme violated the Sixth Amendment).

2013)). A COA should be granted 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).

Petitioner has not demonstrated that reasonable jurists would find the Court’s assessment of the constitutional claims debatable or wrong. Petitioner has not made a substantial showing of the denial of a constitutional right. Thus, Petitioner is denied a COA.

DONE and ORDERED in Orlando, Florida on June 13, 2022.


PAUL G. BYRON
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel of Record

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*

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

DEATH PENALTY CASE

Appendix E

Motion to Alter or Amend Judgment, dated August 31, 2021.

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION**

ANDREW ALLRED,

Petitioner,

v.

Case No: 6:16-cv-560-PGB-LRH

**SECRETARY,
DEPARTMENT OF CORRECTIONS,**

and

**ATTORNEY GENERAL,
STATE OF FLORIDA,**

Respondents.

**PETITIONER'S MOTION TO ALTER OR AMEND JUDGMENT AND
INCLUDED MEMORANDUM OF LAW**

COMES NOW the Petitioner, Andrew Allred, by and through the undersigned counsel, pursuant to Federal Rule of Civil Procedure 59(e) and Federal Rule of Appellate Procedure 4(a)4(A)(iv), and hereby moves this Court to alter or amend the Order denying his petition for a writ of habeas corpus and judgment against him. (Doc. 27) and (Doc 29). Mr. Allred does not abandon his request for relief on any ground raised in his Petition but limits his argument as follows:

INTRODUCTION

The Petitioner, Andrew Allred (Mr. Allred) moves this Court to alter or amend the judgment and invokes Federal Rule of Civil Procedure 59(e) and Federal Rule of Appellate Procedure 4(a)4(A)(iv).

Mr. Allred is sentenced to death for capital murder in the State of Florida. He pled guilty to two counts of first-degree murder, one count of armed burglary of a dwelling, one count of aggravated battery, and one count of criminal mischief. Mr. Allred waived the right to an advisory panel for penalty phase and the trial court sentenced him to death following a sentencing hearing.

Mr. Allred appealed his death sentence to the Florida Supreme Court, which affirmed the sentence. *Allred v. State*, 55 So. 3d 1276 (Fla. 2010). The United States Supreme Court denied certiorari. *Allred v. Florida*, 132 S. Ct. 181 (2011).

Mr. Allred then sought postconviction relief in the Florida courts. He filed a motion for postconviction relief under Florida Rule of Criminal Procedure 3.851. This motion was denied, and appealed to the Florida Supreme Court, which affirmed the denial of relief, and reaffirmed Mr. Allred's conviction and death sentence. *Allred v. State*, 186 So. 3d 530 (Fla. 2016). The Florida Supreme Court denied rehearing and a motion for supplemental briefing based on *Hurst v. Florida*, 136 S. Ct 616 (2016).

Mr. Allred filed the petition at issue on April 4, 2016. (Doc. 1). This Court stayed the proceedings. (Doc. 7 and Doc. 13). Mr. Allred's successive postconviction motion, following *Hurst*, was denied by the circuit court and Mr.

Allred again appealed to the Florida Supreme Court, which affirmed the denial. *Allred v. State*, 230 So. 3d 412 (Fla. 2017).

The Respondents (“the State”) filed a response to the petition on October 8, 2018. (Doc. 21). On June 28, 2019, Mr. Allred filed his reply. (Doc. 26). This Court denied the petition by written order on August 3, 2021 (Doc. 27) and issued a judgment on August 4, 2021 (Doc. 29). Mr. Allred moves this Court to alter or amend the judgment.

GROUND ONE

The relevant portion of the opinion that was the basis for the state court decision regarding Ground One states:

In January 2017, Allred filed his current first successive postconviction motion in which he raised numerous claims in light of *Hurst v. Florida*[], and *Hurst v. State*[]. In April 2017, the circuit court entered an order summarily denying Allred’s successive postconviction motion. This appeal followed. While Allred’s postconviction case was pending in this Court, we directed the parties to file briefs addressing why the circuit court’s order should not be affirmed based on this Court’s precedent in *Mullens v. State*[].

In *Mullens*, this Court held that a defendant “cannot subvert the right to jury factfinding by waiving that right and then suggesting that a subsequent development in the law has fundamentally undermined his sentence.” *Mullens* []. This Court has consistently relied on *Mullens* to deny *Hurst* relief to defendants that have waived the right to a penalty phase jury. [] Allred is among those defendants who validly waived the right to a penalty phase jury, and his arguments do not compel departing from our precedent.

Accordingly, we affirm the circuit court’s order summarily denying Allred’s first successive motion for postconviction relief.

Allred v. State, 230 So. 3d 412, 413 (Fla. 2017) (internal citations omitted).

This Court denied this ground solely on the non-retroactivity of *Hurst v. Florida*, 577 U.S. 92 (2016), finding that, “[t]herefore *Hurst* is not retroactive to Petitioner’s case, and this Court is precluded from considering the merits of Ground One because it is predicated on *Hurst*. (Doc. 27 at 14). However, while Mr. Allred contests this finding, he respectfully submits that there was more at stake in this Ground than “application of new law.” Mr. Allred pled a much broader and complex ground that raised more issues than merely *Hurst*. Moreover, Mr. Allred was not denied by the State court based on non-retroactivity of *Hurst*, but rather because “Allred [wa]s among those defendants who validly waived the right to a penalty phase jury, and his arguments do not compel departing from our precedent.” *Allred v. State*, 230 So. 3d 412, 413 (Fla. 2017). This Court should alter or amend the judgment to decide all of Mr. Allred’s issues in this ground.

To deny relief, this Court relied on *Knight v. Florida Dep’t of Corr.*, 936 F.3d 1322 (11th Cir. 2019), *cert. denied*, 141 S. Ct. 274 (2020). (Doc. 27 at 12-13). *Knight*, however, is distinguishable. In *Knight*, the appellant’s case became final after *Ring v. Arizona*, 536 U.S. 584 (2002), thus, like in Mr. Allred’s case there was no retroactivity problem preventing the state court from deciding the issue. This was because the Florida Supreme Court held in *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016) that:

Defendants who were sentenced to death under Florida’s former, unconstitutional capital sentencing scheme after *Ring* should not suffer due to the United States Supreme Court’s fourteen-year delay in applying *Ring* to Florida. In other words, defendants who were sentenced to death based on a statute that was actually rendered

unconstitutional by *Ring* should not be penalized for the United States Supreme Court's delay in explicitly making this determination. Considerations of fairness and uniformity make it very "difficult to justify depriving a person of his liberty or his life, under process no longer considered acceptable and no longer applied to indistinguishable cases." []

Id. at 1283. The Florida Supreme Court applied "harmless error" analysis to cases like Mr. Knight's, which was specifically left to the Florida courts to decide whether the error was "harmless." *Hurst*, 577 U.S. at 102. In Mr. Knight's case the Florida Supreme Court held that it was harmless because, as in *Davis v. State*, 207 So. 3d 142 (Fla. 2016):

Here, the jury unanimously found all of the necessary facts for the imposition of death sentences by virtue of its unanimous recommendations. In fact, although the jury was informed that it was not required to recommend death unanimously, and despite the mitigation presented, the jury still unanimously recommended that [the defendant] be sentenced to death. . . . The unanimous recommendations here are precisely what we determined in *Hurst [v. State]* to be constitutionally necessary to impose a sentence of death.

Knight v. State, 225 So. 3d at 683 (Fla. 2017) (citing *Davis*, 207 So.3d at 175). Mr. Knight had two things weighing against him that Mr. Allred does not: Mr. Knight had a unanimous 12-0 recommendation from a jury and a jury trial of sorts. Mr. Allred unknowingly, unintelligently, and involuntarily waived his right to a jury based on the mistake that he had no right to a jury verdict and no right to a unanimous recommendation which Mr. Knight unfortunately received.

1. Mr. Allred's claim does not rely on "a new rule" because Mr. Allred specifically raised that his death sentence violated *Ring* and *Apprendi* in state court and in this Court.

Mr. Allred submits that *Teague* does not bar relief; *Teague* does not apply

to this ground because *Hurst* was dictated by *Ring*. Additionally, Mr. Allred premised this ground on *Ring* which offered an unencumbered basis for relief and was issued well before his case was final.

Teague v. Lane, 489 U.S. 288, 301 (1989), held that a new constitutional rule occurs when a Supreme Court decision is not dictated by existing precedent; applying existing legal principles to a different set of facts does not create a new rule. *Id.* at 307. While Mr. Allred acknowledges that the Eleventh Circuit rejected this argument, he submits that this portion of *Knight* was based on Justice Alito’s dissent in *Hurst v. Florida*. *See Knight*, 936 F.3d at 1336 (citing *Hurst v. Florida*, 577 at 104 (Alito, J., dissenting)). Even Justice Alito’s dissent acknowledged that the majority opinion found the Court’s decision in *Hurst* “follows ineluctably from *Ring*” *Id.*

The issue decided by the majority in *Hurst v. Florida* was “whether Florida’s capital sentencing scheme violates the Sixth Amendment in light of *Ring*.” *Id.* at 97. The Court held “that it does, and reverse[d].” *Id.* The authority that the Eleventh Circuit’s opinion has does not overcome the clear statements in the prevailing majority opinion in *Hurst*. Mr. Allred insists on asserting the clear nature of the United States Supreme Court opinion in *Hurst*, which overcomes the *Teague* objections of the State.

Mr. Allred asserted that his death sentence violated *Ring*, amongst other opinions before and after *Hurst* issued. The fact that he raised what can be considered such a claim was not overcome by his arguments based on *Hurst*. The

newness of *Hurst* allowed Mr. Allred to raise a claim based not solely on *Hurst*, but also *Ring* since *Hurst* was decided in light of *Ring*. Because of the Florida Supreme Court's decision in *Mosley, supra*, Mr. Allred faced no time bar in State court. Thus, his *Ring/Hurst* claim was properly exhausted and not determined based on a state procedural rule. Mr. Allred raised the authority of *Ring* in postconviction. In his initial brief Mr. Allred argued as part of an ineffective assistance of counsel claim in part:

The Sixth Amendment provides that a defendant has a fundamental right to a jury trial during the penalty phase of a capital proceeding. *Ring v. Arizona*, 536 U.S. 584 [] (2002); *Apprendi v. New Jersey*, 530 U.S. 466 []; *Duncan v. Louisiana*, 391 U.S. 145 [] (1968). [] Fundamental constitutional rights can be waived, *Boykin v. Alabama*, 395 U.S. 238 [] (1969), but an effective waiver of a constitutional right must be knowing and intelligent. *Brady v. United States, supra*, 397 U.S. at 748 to determine whether the defendant's waiver is made freely and intelligently.

(Ex. H at 65). As will become relevant below, Mr. Allred also continued to argue the involuntary nature of his plea. He did not go further with *Ring* before *Hurst* because of the Florida Supreme Court's unwillingness to consider such claims. Since *Ring* had issued, the Florida Supreme Court, and indeed the Florida Legislature, failed to conform the Florida death penalty scheme to the mandates of *Ring*.

The Florida Supreme Court's and the legislature's reluctance to apply *Ring* ended with *Hurst*. Whatever obstacles there were, they no longer existed. The Florida Supreme Court applied a retroactivity obstacle to cases final before *Ring* following *Hurst*, see *Asay v. State*, 210 So. 3d 1 (Fla. 2016), but Mr. Allred's case

postdated *Ring*. Mr. Allred filed a timely federal habeas petition that was stayed by this Court so that he could exhaust his claims based on *Ring/Hurst*. (Doc. 7). Because the Florida Supreme Court found that his motion was not barred because of timeliness, the Court decided the issue based on the merits. Mr. Allred was not barred in state court on an independent and adequate procedural rule, therefore he did not need to show cause and prejudice to overcome a timeliness issue. Based on the stay issued by this Court and Mr. Allred's petition, he pled in this Court a timely, exhausted, and fairly-presented claim that the Florida Supreme Court erred in deciding. Accordingly, Mr. Allred did not require retroactive application of *Hurst* to overcome any procedural obstacles.

Mr. Allred submits that to the extent that he was not barred from review in state court, review in federal court was not controlled by *Teague*. At some point retroactivity fades away and the claim simply is decided by the current law. While traditionally, that point came with finality on direct appeal, as far as *Ring* is concerned, and the voluntariness of Mr. Allred's plea, that point came long before the Florida Supreme Court's decision on what was much more than a *Hurst* claim. The Florida Supreme Court's decision was contrary to and/or based on an unreasonable application of United States Supreme Court precedent and/or an unreasonable finding of fact beyond just *Hurst*. This Court should alter or amend and reach the issue.

2. Mr. Allred’s case is further distinguishable from *Knight* because his ground presented a discrete and severable issue on the voluntariness of his plea which is independent of *Hurst*.

Certainly Mr. Allred has based a number of arguments on *Hurst* throughout his appeals and postconviction processes. He continues to raise the involuntary nature of his jury waiver and the arbitrary and capricious nature of his death sentence. This Court need not rely on any “new law” to grant federal habeas relief. The United States Supreme Court has long held that these other constitutional violations require relief. The Florida Supreme Court found that Mr. Allred was not entitled to relief based on the allegedly voluntary nature of his waiver, not because of non-retroactivity of *Hurst*. Mr. Allred’s brief to the Florida Supreme Court stated:

The colloquy conducted below made it quite clear that Mr. Allred was waiving a jury “recommendation” – not a jury determination of any aggravating circumstance – and certainly not a unanimous jury recommendation as to the existence of one aggravating circumstance. In *Hurst*, which was decided in January 2016, the United States Supreme Court held that *Ring* did apply to Florida, and that Florida’s death penalty scheme, which provided only for a jury “recommendation,” was inadequate and unconstitutional. Therefore, at the time of Mr. Allred’s waiver of an advisory jury, Florida’s death penalty scheme was unconstitutional and in violation of *Ring v. Arizona*.

A defendant cannot waive a right not yet recognized by the courts. *Halbert v. Michigan*, 545 U.S. 605, 623 (2005) [] cf. *Menna v. New York*, 423 U.S. 61 (1975) (guilty pleas do not “inevitably waive all antecedent constitutional violations” and a defendant can still raise claims that “stand in the way of conviction [even] if factual guilt is validly established”).

(Ex. O at 4-5). Mr. Allred’s brief raised a number of federal constitutional

arguments that were severable from *Hurst* that were well supported by United States Supreme Court precedent. In his reply, following the lifting of the stay, Mr. Allred argued in detail:

1. Mr. Allred Cannot Validly Waive a Federal Constitutional Right that Was Unknown to Him and Not Recognized by the State Courts at the Time of the Purported Waiver.

Doc. 26 at 6-7.

2. The Florida Supreme Court's Rule Ignores the Default Presumption Against Waiver, Precludes Individualized Review of the Record, and Relieves the State of its Burden.

Doc. 26 at 7-8.

3. The Florida Supreme Court's Rule Violates *Halbert* and Other Federal Court Decisions Prohibiting State Courts From Finding a Waiver of a Federal Constitutional Right that was Unknown to the Defendant and Not Recognized by the State Courts at the Time of the Purported Waiver.

Doc. 26 at 7-8

Mr. Allred predicated this ground on *Hurst* in the state courts, and in some respects to this Court. This was not the end of the matter because the Florida Supreme Court decided the voluntariness claim that Mr. Allred presented to this Court, contrary to, and unreasonably based on Supreme Court precedent and based on an unreasonable finding of fact. This was a merits determination that was ultimately ripe for federal review. Mr. Allred respectfully asks this Court to alter or amend the judgment to decide these claims.

Conclusion

Based on the higher authority of the United States Supreme Court's opinion

in *Hurst*, the *Teague* finding in *Knight* should be overcome based on *Hurst* being dictated based on the precedent of *Ring*. Mr. Allred also made a severable *Ring* argument in his petition and reply that should be decided. Beyond that, the Florida Supreme Court's finding of a valid waiver when Mr. Allred could not have waived what the Florida courts and legislature had denied everyone, presents a non-*Teague* barred claim that is ripe for review. Based upon manifest errors of law and fact, this Court should alter or amend the judgment.

GROUND TWO

In order to prevail on an ineffective assistance of counsel claim in postconviction, a defendant must show that his trial counsel's performance was deficient and that he was prejudiced as a result. *Strickland v. Washington*, 466 U.S. 668 (1984); U.S. Const. Amend. 6. In this case, the postconviction court and Florida Supreme Court correctly identified *Strickland* as the standard by which this claim must be judged. However, those courts not only unreasonably applied *Strickland*, but also, those decisions are based on an unreasonable determination of the facts in light of the evidence presented at the evidentiary hearing. *See Lynch v. Sec'y, Dept. of Corr.*, 897 F.Supp.2d 1277, 1289 (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).

Prior to the penalty phase, trial counsel Caudill hired Dr. Deborah Day to assist in the preparation of the defense. However, in contravention of prevailing professional norms and his own standard practice, Mr. Caudill decided to not call Dr. Day to provide mental health mitigation based on a statement that she made

to him when they ran into each other at the jail that if she had to diagnose Mr. Allred, she would state that he suffered from Antisocial Personality Disorder (ASPD), sociopathy, or psychopathy. (Ex. G-13 at 209-11, 219, 235-36).

In its Order, this Court noted that Mr. Caudill had tried approximately twenty-five death penalty cases since 1997. (Doc. 27 at 20). In Florida, lead trial counsel in a death penalty case should be, *inter alia*:

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, must 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.

This Court pointed to Dr. Caddy's testimony regarding his disagreement with Dr. Day's opinion that Mr. Allred met some of the criteria for Antisocial Personality Disorder (ASPD). (Doc. 27 at 23). In fact, Dr. Caddy specifically testified that Mr. Allred met *none* of the criteria for ASPD. (Ex. G-12 at 40). The State's expert, Dr. Danziger, agreed that Mr. Allred did not exhibit the "cluster of symptoms," both before *and after* age fifteen, that could lead to a diagnosis of

ASPD. (Ex. G-13 at 386-87, 389). Dr. Day also testified that Mr. Allred did not meet the criteria for ASPD. (Ex. G-13 at 356-57). Regardless of disagreement regarding any possible diagnoses that could apply to Mr. Allred, each expert, including the one whose preliminary assessment drove trial counsel to completely abandon mental health mitigation, testified that ASPD was not a possible diagnosis.

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. (Ex. G-12 at 189-90). 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*.

At the evidentiary hearing, Mr. Caudill acknowledged that of those twenty-five capital defendants he represented at trial, eight were sentenced to death. (Ex. G-12 at 161). 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. *Lynch, supra*, at 1309 (M.D. Fla. 2012). While *Lynch* was reversed in the Eleventh Circuit, that court based its decision on the

prejudice prong of *Strickland*, and did not consider the issue of trial counsel's performance. *Lynch*, 776 F.3d 1209, 1229 n. 14 (11th Cir. 2015). As such, the district court's decision regarding Mr. Caudill's deficient performance stands. 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. See Exhibit A, attached hereto.

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 v. Beard*, 545 U.S. 374, 395-96 (2005) (citing *Wiggins v. Smith*, 539 U.S. 510, 534 (2003)). Also, *Rompilla* established that even though a client is "actively obstructive" and uninvolved in developing mitigation, counsel is not absolved from investigating and developing mitigation. See *id.* at 381. Deference must be earned, not bestowed by courts labeling poor decisions as strategy, thus immunizing those poor decisions from constitutional scrutiny. As such, all of the preceding court decisions in this matter – the postconviction court, the Florida Supreme Court, and this Court – have not only unreasonably applied *Strickland* but based those decisions on unreasonable

determinations of the facts presented at the evidentiary hearing.

As the United States Supreme Court found in *Porter v. McCollum*, 558 U.S. 30 (2009):

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 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 Florida courts and should have led to relief being granted by this Court.

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 were more convinced by. 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 evidentiary hearing, including Dr. Day herself, testified that Mr. Allred could not ever have been diagnosed with ASPD.

Accordingly, Mr. Allred requests that this Court amend its judgment to grant relief on Ground Two.

GROUND THREE

This Court's denial of Ground Three is based upon manifest errors of law and fact.

In addition to his inattention to mental health mitigation, Mr. Caudill failed to develop a trusting relationship with Mr. Allred, failed to fully investigate Mr. Allred's mental health, and failed to present any mental health mitigation that would have mitigated the punishment for the crimes to which Mr. Allred had already confessed and pled guilty to; this fell well below established professional norms and resulted in prejudice to Mr. Allred. The postconviction court and Florida Supreme Court's denials of this claim were contrary to and an unreasonable application of clearly established federal law and an unreasonable determination of the facts.

At the evidentiary hearing, Mr. Caudill admitted that he had no defense prepared to support Mr. Allred's statement to the police that he had not intended to kill the victims. (Ex. G-13 at 217-18). As a result, the trial court rejected his statement that he did not preplan the murders, found that Mr. Allred met the criteria for the cold, calculated, and premeditated ("CCP") aggravator, and gave that aggravator great weight. (Ex. G-2 at 205). The Florida Supreme Court rejected Mr. Allred's claim on direct appeal that CCP should not have been found; this was based in part on the fact that "Allred presented no mental health testimony

establishing that he was mentally impaired.” *Allred v. State*, 55 So.3d 1267, 1279 (Fla. 2017). Normally, those decisions would be entitled to deference from all future reviewing courts. However, those decisions were all contrary to or based on an unreasonable application of *Boykin v. Alabama*, 395 U.S. 238 (1969), because when Mr. Allred pled guilty to the murders, he did so without being fully informed of the implications of his actions, and therefore his plea was not voluntary and knowing. As such, none of the state court decisions on this claim are entitled to deference from this Court.

As noted in Ground Two, this claim must be viewed in light of *Strickland*. When an attorney fails to inform his client of the relevant law in relation to a guilty plea, the deficiency prong of *Strickland* is satisfied. *Hill v. Lockhart*, 474 U.S. 52, 62 (1985) (White, J., with Stevens, J., concurring). Regardless of Mr. Allred’s intention to plead guilty, his trial counsel should have explained in detail the aggravators that could have been used against him at penalty phase. This failure to do so is clearly deficient performance. Mr. Allred was prejudiced by this deficient performance because not only did he plead guilty with no guarantees, leaving himself open to a death sentence, he did so without a complete understanding of the implications of doing so. Mr. Caudill’s inattention and failure to fully investigate defenses, witnesses, and claims prior to the penalty phase trial, as noted above in Ground Two, led to his failure to function as the counsel guaranteed by the Sixth Amendment.

No reasonable court could have concluded that Mr. Caudill’s failures were

sound strategy and entitled to deference under *Strickland*. Accordingly, Mr. Allred requests that this Court alter or amend its judgment to grant relief on Ground Three.

GROUND FOUR

Mr. Allred understands that this claim does not become ripe until an execution warrant is signed. As was stated in Mr. Allred's Petition, this issue was raised in an abundance of caution, and Mr. Allred will continue to raise this issue in order to preserve it for future litigation.

GROUND FIVE

This Court's denial of Ground Five is based upon manifest errors of law and fact. Mr. Allred's acts did not rise to the level of heightened premeditation required to establish the aggravating circumstance of cold, calculated, and premeditated. As a result, his death sentences violated federal law by being imposed in an arbitrary and capricious manner.

Mr. Allred disputes that "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Lewis v. Jeffers*, 497 U.S. 764, 781 (1990) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). The elements of the CCP aggravating circumstance cannot be found beyond a reasonable doubt because Mr. Allred committed the crimes in a panicked, emotional frenzy, and in a fit of rage. *See Jackson v. State*, 648 So. 2d 85, 89 (Fla. 1994). This is further evidenced by the trial court giving moderate weight to the

fact that Mr. Allred was suffering from an emotional disturbance, as well as the mental health mitigation introduced in postconviction. *Allred v. State*, 55 So. 3d at 1277; *see also supra* Ground Two. In addition, there was no heightened premeditation, and he did not have a careful prearranged plan to commit murder. *See Jackson*, 648 So. 2d at 89. Mr. Allred only went over to the house because he was antagonized and humiliated to his breaking point into an emotional fit of rage. Even when he arrived at the house, his only plan was to ram his ex-girlfriend's vehicle. (Ex. A-3 at 158). Although Mr. Allred was quite candid with the police, the state courts have improperly rejected Mr. Allred's statement that he did not plan the murders. This Court should resolve this injustice.

No reasonable sentencer could have concluded that CCP was present in Mr. Allred's case, therefore the state court's finding was arbitrary and capricious. *See Jeffers*, 497 U.S. at 783. Accordingly, Mr. Allred respectfully requests that this Court amend its judgment to grant relief on Ground Five.

GROUND SIX

This Court's denial of Ground Six is based upon manifest errors of law and fact. "The Eighth Amendment to the United States Constitution . . . require[s] that the death penalty 'be reserved only for those cases that are the most aggravated and least mitigated.'" *Williams v. State*, 37 So. 3d 187, 205 (Fla. 2010) (quoting *Crook v. State*, 908 So. 2d 350, 357 (Fla. 2005)). Mr. Allred's crimes are not among the most aggravated and least mitigated. As detailed in Ground Five, the aggravating circumstance of CCP should not have been found, which would have

only left two other minor aggravating circumstances related to Mr. Ruschak's death: murder committed while engaged in a burglary (which was only given little weight) and prior capital or violent felony conviction, which was not due to the existence of another violent felony, but only due to the contemporaneous murder. *Allred*, 55 So. 3d at 1277. Further, if CCP was omitted, then at most, two aggravating circumstances would apply to Ms. Barwick's death: the murder was especially heinous, atrocious, or cruel ("HAC") and again, the prior capital or violent felony conviction due to the contemporaneous murder. *Id.* However, HAC was also challenged throughout Mr. Allred's appeals. *Id.* at 1279-81. As the prior violent felony was an automatic aggravator based solely upon the fact that two deaths occurred, there was barely any aggravation present in this case, let alone enough to make this case one of the most aggravated.

On the other hand, based upon the evidence introduced at trial and in postconviction, Mr. Allred presented a significant amount of mitigation. *See supra* Ground Two. This case was a crime of passion committed by an emotionally disturbed young man who was barely twenty-one years of age. Mr. Allred also suffered from developmental disabilities. If Mr. Allred had not lost his girlfriend to his best friend, had he not lost his job not long after, and if he was not antagonized and humiliated to the point of an emotional frenzy, Mr. Allred would not have snapped and this crime of passion would not have happened. This case is not the worst of the worst; the narrowing function has failed here. As a result, Mr. Allred's

death sentences violate the Eighth Amendment's prohibition on excessive, arbitrary, and capricious punishment.

Not only is Mr. Allred's case not the most aggravated and least mitigated, but the substantial mitigation that was elicited at the evidentiary hearing should have been found to outweigh the aggravation. Mr. Allred's death sentences run afoul of the Eighth Amendment, Fourteenth Amendment, *Furman v. Georgia*, 408 U.S. 238 (1972), and *Spaziano v. Florida*, 468 U.S. 447 (1984). Accordingly, Mr. Allred respectfully requests that this Court amend its judgment to grant relief on Ground Six.

Respectfully submitted,

/s/ Tracy Martinell Henry

Tracy Martinell Henry
Assistant CCRC
Fla. Bar No.: 73865
E-mail: henry@ccmr.state.fl.us
support@ccmr.state.fl.us

/s/ James L. Driscoll, Jr.

James L. Driscoll, Jr.
Assistant CCRC
Fla. Bar No.: 78840
E-mail: driscoll@ccmr.state.fl.us

/s/ Lisa M. Fusaro

Lisa M. Fusaro
Assistant CCRC
Fla. Bar No.: 119074
E-mail: bort@ccmr.state.fl.us

Law Office of the Capital Collateral Counsel – Middle Region
12973 Telecom Parkway
Temple Terrace, FL 33637
(813) 558-1600

LOCAL RULE 3.01(g) CERTIFICATION

WE HEREBY CERTIFY that the movant has attempted to confer with the opposing party via electronic mail on August 30, 2021 and telephone on August 31, 2021, and that the opposing party has not been available as of the filing of this motion.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 31st day of August, 2021, I electronically filed the foregoing Motion with the Clerk of Court using the CM/ECF system, which will send a notice of electronic filing to Patrick A. Bobek, Assistant Attorney General, at Patrick.Bobek@myfloridalegal.com and cappapp@myfloridalegal.com, and by United States Mail, first class postage, to Andrew Allred, DOC #130930, Union Correctional Institution, P.O. Box 1000, Raiford, Florida 32803.

/s/ Tracy Martinell Henry
Tracy Martinell Henry
Assistant CCRC
Fla. Bar No.: 73865
Law Office of the Capital Collateral
Counsel – Middle Region
12973 Telecom Parkway
Temple Terrace, FL 33637
(813) 558-1600
E-mail: henry@ccmr.state.fl.us
support@ccmr.state.fl.us

IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT,
IN AND FOR BREVARD COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v.

TERENCE TOBIAS OLIVER,

Defendant.

CASE NO: 05-2009-CF-043923-AXXX-XX

SCOTT ELLIS
18 OCT 23 P 1:20
FILED IN VIERA
CLERK OF CIR. CT.
BREVARD CO. FL.

ORDER UPON DEFENDANT'S MOTION FOR POSTCONVICTION RELIEF

This cause came on before the Court upon the Defendant's Motion to Vacate Judgments of Conviction and Sentences of Death Pursuant to Florida Rule of Criminal Procedure 3.851, filed on September 26, 2018. The State filed its Response on November 26, 2018. The Court held an evidentiary hearing on Claims One through Nine on July 22, 23, and 24, 2019. Claims Ten and Eleven did not require an evidentiary hearing. Mr. Oliver was represented by Capital Collateral Regional Counsel, Lisa Marie Bort, Esquire, Adrienne Joy Shepherd, Esquire and Ann Marie Mirialakis Esquire. The State was represented by Assistant Attorney General Doris Meacham and Assistant State Attorney Susan Stewart. The transcript of the hearing was filed with the Court on September 5, 2019. Written Closing Arguments were filed by counsel on October 7, 2019. Having considered the file, pleadings, evidence presented, argument of counsel and being otherwise fully advised in the premises, the Court makes the following findings of fact and conclusions of law:

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PROCEDURAL BACKGROUND

On August 19, 2009, the Defendant was indicted for First Degree Premeditated Murder with a Firearm of Andrea Richardson; First Degree Premeditated Murder with a Firearm of Krystal Pinson; Armed Burglary of a Dwelling While Inflicting Death; and Possession of a Firearm by a Convicted Felon. The Office of the Public Defender filed a notice of appearance in this case on August 3, 2009. Initially, the Defendant was represented by George McCarthy, Esquire and J. Randall Moore, Esquire (Certification of Competence 11/16/09). Sometime between December 20, 2010 and January 12, 2011, Timothy Caudill, Esquire took over the Defendant's representation. Mr. Caudill was also an Assistant Public Defender but normally worked in the Sanford (Seminole County) office (Evidentiary Hearing Transcript p. 23). However, in this instance, he volunteered to help in Brevard County (Evidentiary Hearing Transcript p. 23). The Defendant proceeded to trial on the murder and burglary charges on March 5, 2012. As to the murder and burglary charges, the jury found the Defendant guilty as charged on March 16, 2012. Thereafter, the jury returned death penalty recommendation on March 19, 2012. The jury's recommendation was unanimous. The jury also found the Defendant guilty of Possession of a Firearm by a Convicted Felon on March 19, 2012.

"In this case, the trial court found four aggravators applicable to the killings of both victims: (1) the defendant was previously convicted of another capital felony or a felony involving the use or threat of violence to a person, which included a 1995 robbery with a firearm or deadly weapon, a 2002 conviction for resisting arrest with violence, and the contemporaneous first-degree murders of Pinson and Richardson (great weight); (2) the capital felony was committed while the defendant was engaged in a burglary (great weight); (3) the capital felony was committed

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for the purpose of avoiding or preventing a lawful arrest (great weight); and (4) the murders were committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification (great weight).

The trial court found that five nonstatutory mitigators were proven: (1) the defendant completed high school (no weight); (2) the defendant attempted to further his education by attending Le Cordon Bleu Culinary Academy (little weight); (3) the defendant attempted to further his education by attending Daytona Beach State College (little weight); (4) the defendant grew up in a household with both parents present (some weight); and (5) the existence of any other factors in the defendant's background that would mitigate against imposition of the death penalty (Oliver's church activity) (some weight).” *Oliver v. State*, 214 So. 3d 606, 620 (Fla. 2017), *cert. denied sub nom. Truehill v. Fla.*, 138 S. Ct. 3, 199 L. Ed. 2d 272 (2017).

On June 15, 2012, the Defendant was sentenced to death for the premeditated murders. The Defendant was sentenced to incarceration for a term of natural life for the burglary. The Defendant was sentenced to a five year term of incarceration for possession of a firearm by a convicted felon. The Florida Supreme Court affirmed the death sentences and found that the Defendant was not entitled to relief pursuant to *Hurst v. Florida*, 136 S. Ct. 616 (2016). *Oliver* at 618. The United States Supreme Court denied the Defendant's Petition for Writ of Certiorari on October 16, 2017. The Defendant timely filed his Motion for Postconviction Relief pursuant to Fla. R. Crim. P. 3.851 on September 26, 2018.

FACTS

The facts have been summarized by the Florida Supreme Court as follows:

Oliver and Pinson had been dating since approximately December 2006. Although Oliver described his relationship with Pinson as a “side” relationship, the two lived together off and on during the span of their

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relationship. Sometime between late May and July 22, 2009, Oliver called Leander Watkins, his mechanic and a mutual friend of the couple, trying to get in touch with Pinson. Oliver was concerned Pinson was cooperating with the police regarding an outstanding warrant for his arrest for a prior crime in Volusia County. Oliver asked Watkins if he had seen Pinson, stating, "She's going to make me do something to her."

Oliver and Richardson had attended school together in Titusville. Growing up, Oliver would walk from school on the path next to Richardson's house. More recently, in 2009, Oliver purchased marijuana at Richardson's home, which was at the end of W.C. Stafford Street, near a cul de sac.

During the early morning hours of July 22, 2009, David Pouncey and Eric Edwards stood near the road on W.C. Stafford Street. Richardson's house was on the opposite side of the street, approximately six or seven houses down the street from Pouncey's house. Pouncey remembered seeing a person crossing the cul de sac at the end of the street, but he was not alarmed. Then, coming from the cul de sac at the end of the street, he heard dogs barking and banging noises as if someone were banging a stick against a metal trashcan or knocking something against the door of Richardson's doghouse. Richardson was known to have numerous dogs in his yard, and at least one inside the house. The banging noises continued for approximately twenty to thirty seconds.

Two or three minutes later, Pouncey and Edwards noticed a person running from the direction of the cul de sac. A few seconds later, they noticed a second person walking in the same direction. The only physical characteristic Edwards could see was what appeared to be a pair of Timberland boots, worn by the second person. Pouncey recalls one of the individuals having dread-styled hair. Neither Pouncey nor Edwards could identify the individuals seen fleeing the area that night.

At approximately 2:25 a.m., as Edwards prepared to depart W.C. Stafford Street, Pouncey walked down to Richardson's home to check on him. Pouncey followed Edwards in calling out for Richardson, but he received no answer. Inside the house, Pouncey and Edwards discovered Richardson's body in a fetal position near the side door of the house. Pouncey nudged Richardson's body a few times before pushing him over and finding him covered in blood. Pouncey walked away from Richardson's body and called out for Pinson, whose car was parked outside.

Pinson had been staying with Richardson. As Pouncey walked out of the dark master bedroom, he tripped over Pinson's body, which was positioned as if she had tried to get under the bed. Both men ran from the house. Pouncey and Edwards ran back to Pouncey's house and told a family member to call the police. Pouncey called Richardson's brother,

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William Davis, who also had been living at the residence where the victims were discovered. Davis arrived and entered the home approximately three to four minutes before the police arrived.

On the night of July 22, and the morning of July 23, 2009, Oliver visited Felicia Whaley—his former roommate—and her boyfriend in Satellite Beach. Oliver slept in Whaley's guest bedroom. The next afternoon, Whaley was notified of the murders of Richardson and Pinson. Whaley woke Oliver and told him to get ready to leave because she had to go to work and needed time to take Oliver wherever he needed to go. When Whaley woke Oliver, he seemed "normal." After Oliver finished a phone call, Whaley noticed that Oliver was crying. Oliver asked Whaley to drop him off at a Walgreens store in Melbourne so he could meet with some friends. Whaley noticed a vehicle containing two women who were there to meet Oliver.

The two women were Sheena Camiscioli and Chelsea Wilson, who arrived in Camiscioli's Ford Explorer. Oliver got into the back seat of the vehicle. He did not have any items with him at the time. Camiscioli drove and Oliver instructed her where to go. After dropping Wilson off at a friend's house, Camiscioli drove Oliver to a duplex where Oliver's mother's truck was backed into the yard. At the duplex, Camiscioli stayed in the Explorer while Oliver went into the house. Oliver returned with baskets of clothes and shoes, which he put into the back of the Explorer. Oliver got into the passenger seat and the two then went back to pick up Wilson.

Camiscioli then drove to a house in Cocoa. When they arrived, Oliver retrieved a shotgun from the back of Camiscioli's Explorer and entered the house. Thereafter, he exited the house with a handgun that he put into the backseat with Wilson. When Wilson appeared to be afraid of the weapon, Oliver wrapped it in a bag. While at the house in Cocoa, Oliver asked Camiscioli if he could drive. With Camiscioli in the passenger seat and Wilson in the back seat, Oliver drove to a lake inside of an apartment complex, slowed the car down, and threw the gun out of the driver's side window into the lake. Camiscioli asked him why he threw the gun out of the window but Oliver did not respond.

They then drove to a Motel 6 in Cocoa, where Camiscioli rented a motel room for Oliver for the weekend because Oliver did not have identification. Camiscioli and Wilson returned to Titusville for the evening. The police contacted Camiscioli that night looking for Oliver, but she told them she did not know where he was. The next afternoon, Camiscioli and Wilson returned to the Motel 6. When Camiscioli saw Oliver that day, he was wearing a braided wig. Oliver barely spoke to them.

Camiscioli was curious as to why Oliver was being distant so she walked up to his room, alone. Oliver was sitting on the bed in the hotel room.

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When Camiscioli asked him if he was okay, considering Pinson's recent death, Oliver began to cry. Oliver told Camiscioli that Pinson "was on a lot of his paperwork and he was tired." Camiscioli recalled that Oliver began to cry even more when he "mentioned that he was tired of the domestic violence and [Pinson] always calling the police on him." While crying, Oliver told Camiscioli that he killed Pinson in Richardson's bed, and he shot Richardson because Richardson was there and was running out of the back door. Oliver told Camiscioli that law enforcement was looking for him about the murders, but he was not concerned because Richardson sold drugs at the house so the murders would look like the result of a robbery. Oliver also told Camiscioli he did not know why the police thought he did it and that there was no evidence that he did it. The conversation ended when Camiscioli turned and left the room. She did not contact the police because, based on what Oliver had just told her, she was afraid. However, she did tell Wilson.

The next day, the police came to the Motel 6 looking for Oliver. Camiscioli and Wilson drove to the police station to give a statement. At the police station, Camiscioli contacted Tyrrell Oliver—her boyfriend and Oliver's brother—and notified him that Oliver confessed to her and she was a witness in the case.

On July 28, 2009, Oliver contacted Watkins stating he needed some money. Watkins contacted law enforcement to report Oliver's whereabouts. While still in contact with law enforcement, Watkins agreed to wire the money to a supermarket in Cocoa and when Oliver arrived, he was arrested. He was wearing a dread-styled wig at the time.

The next day, Camiscioli directed law enforcement to the lake where Oliver had disposed of the murder weapon. The Brevard County Sheriff's Office Dive Team retrieved a .40 caliber firearm and magazine, wrapped in the same packaging that Wilson and Camiscioli had previously observed. On July 30, 2009, police went to the residence in Cocoa and recovered the shotgun that Oliver had taken there. Oliver admitted to having possessed the shotgun.

Oliver at 609-612.

ANALYSIS

The Defendant's Motion contains 11 Claims, the majority of which assert that trial counsel was ineffective. To establish a colorable claim of ineffective assistance of counsel, a defendant must show that (1) counsel's performance was deficient (the

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defendant must do this by alleging specific acts or omissions) and (2) that the deficient performance prejudiced the outcome of the proceedings. *Strickland v. Washington*, 466 U.S. 668 (1984); *Cherry v. State*, 659 So. 2d 1069, 1072 (Fla. 1995). "To establish the first prong under *Strickland*, the defendant must demonstrate that "counsel's representation fell below an objective standard of reasonableness" under "prevailing professional norms." *Morris v. State*, 931 So. 2d 821, 828 (Fla. 2006). A court considering a claim of ineffective assistance of counsel need not make a specific ruling on the performance component of the test if the prejudice component clearly is not satisfied. *Kennedy v. State*, 547 So. 2d 912 (Fla. 1989). In order to satisfy the prejudice component, the defendant must show that there is reasonable probability that but for counsel's errors, the result of the proceedings would have been different. *Strickland*, 466 U.S. 698. "A reasonable probability is a probability sufficient to undermine the confidence in the outcome." *Id.*

CLAIM 1

TRIAL COUNSEL PROVIDED PREJUDICIAL INEFFECTIVE ASSISTANCE BY FAILING TO IMPEACH STATE WITNESSES WITH THEIR FELONY CONVICTIONS AND CONVICTIONS FOR CRIMES INVOLVING DISHONESTY

According to counsel, at the time he took over representation of the Defendant, depositions had been taken and the death penalty motions had been addressed (Evidentiary Hearing Transcript p. 29). He felt that his primary responsibility was to work on the penalty phase (Evidentiary Hearing Transcript pp. 29, 30, 59). When asked about his trial preparations, trial counsel indicated that he made "some efforts" to

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contact guilt phase witnesses (Evidentiary Hearing Transcript p. 30). He had seen requests for background checks and prior convictions on certain witnesses in the file (Evidentiary Hearing Transcript pp. 39-40). However, there was no follow up documentation present. Counsel explained, "my assumption was at that time that if they didn't have them they did not exist and I did not try to go back behind then and try to do those things" (Evidentiary Hearing Transcript p. 48). He also stated "I again assumed that any of the background checks or request for records, previous investigation that had been attempted or asked for was completed, and the reason that I did not have these records was that for whatever reason they were not there" (Evidentiary Hearing Transcript p. 52). Counsel acknowledged that the cross-examination of these witnesses was his responsibility (Evidentiary Hearing Transcript p. 60) and that he generally requested criminal background checks on witnesses (Evidentiary Hearing Transcript p. 41). Trial counsel testified that, as part of his strategy, he would have used a witness's prior felony records for impeachment purposes (Evidentiary Hearing Transcript p. 43). Based upon a lack of documentation, counsel did not attempt to impeach any of the listed witnesses with their prior convictions even though they each had a criminal history. Clearly this was contrary to counsel's stated normal trial strategy. Counsel represented the Defendant for approximately 15 months prior to the commencement of trial. During that time, counsel had a duty to adequately prepare for trial, which included preparing to cross-examine the State's witnesses. Simply assuming that there were no criminal histories based

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upon a lack of response to a request for each of the State's witnesses was unreasonable. Counsel was ineffective for failing to either follow up on the initial investigative requests or resubmit his own requests.

Having found that counsel was ineffective, the Court must determine whether the Defendant was prejudiced by counsel's failure to investigate the criminal history of the State's witnesses. Although the State argues that the evidence in this case was overwhelming to the extent that the Defendant could not be prejudiced, the Court finds that there was a lack of direct physical evidence linking the Defendant to the crimes and that the State's case depended upon the credibility of its witnesses. While both Ms. Camiscioli and Ms. Wilson testified that the Defendant threw the murder weapon into a lake (Trial Transcript pp. 1593, 1642), Ms. Camiscioli also testified that the Defendant did not have the firearm in his possession when she picked him up, but rather obtained possession of the firearm from an unknown man in Cocoa immediately prior to disposing of it (Trial Transcript pp. 1633, 1639-40, 1642). The evidence was not sufficiently overwhelming to outweigh possible prejudice.

Leander Watkins

Through Mr. Watkin's testimony, the State established that the Defendant reached out to him to warn Ms. Pinson that she was going to make him "do something" to her (Trial Transcript pp. 1569, 2117). This supported the State's argument that, because Ms. Pinson was not acting in a way acceptable to the Defendant, he had a motive to murder her. It also supported the State's argument that the murder of Ms.

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Pinson was premeditated. Mr. Watkins also, albeit unwillingly, testified that the Defendant could be abusive, degrading and controlling toward Ms. Pinson (Trial Transcript pp. 2109-12, 2119). This supported the State's argument that the Defendant perpetrated domestic violence upon Ms. Pinson.

Prior to cross-examination, a bench conference was held and Mr. Caudill indicated that, based upon Mr. Watkins's deposition, he had at least one prior felony conviction (Trial Transcript p. 1571). The State asked if Mr. Caudill had "them" and he indicated that he had a good faith basis to ask the question, based upon Mr. Watkins's deposition testimony (Trial Transcript p. 1571). At the beginning of cross-examination, Mr. Caudill asked Mr. Watkins if he had ever been convicted of a felony. He responded yes, about four or five times (Trial Transcript p. 1573). At the time Mr. Watkins testified, he had, in fact, been convicted of seventeen felonies along with a misdemeanor involving dishonesty (Evidentiary Hearing, Exhibit 1, attached hereto as Exhibit A). Based upon Mr. Watkins's inaccurate response, counsel would have been able to inquire regarding the nature of the felonies which included but were not limited to firearms, cocaine and evidence tampering charges and impeach Mr. Watkins. Given that Mr. Watkins provided the basis for the State's motive and premeditation arguments, there is a reasonable probability that the outcome of the proceedings may have been different if his credibility had been properly impeached. The Defendant is entitled to relief as to this subpart of Claim 1.

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William Davis

Mr. Davis is the brother of the victim Andrea Richardson (Trial Transcript p. 1178). At trial, he simply testified that the Defendant did not have permission to enter his home (the location of the murders) (Trial Transcript p. 1196). His testimony did not implicate the Defendant in any way. Counsel did not cross-examine Mr. Davis even though he had eight prior felony convictions (Evidentiary Hearing Exhibit 2). The Defendant assumes that Mr. Davis would not have been forthcoming if asked about his prior felony convictions. If Mr. Davis chose to lie under oath, counsel would then have been able to ask him about the nature of those prior felonies, thereby letting the jury know that he had prior drug convictions. It would have been the Defendant's hope that the discussion of Mr. Davis's prior drug convictions would give the jury the idea that drugs were being dealt from the home and provide inferential support for the Defendant's position that someone else, perhaps someone involved in the drug trade, was responsible for the deaths of the victims. This claim is purely speculative. It is just as likely that Mr. Davis would have been honest about his prior felony convictions. "Relief on ineffective assistance of counsel claims must be based on more than speculation and conjecture." *Connor v. State*, 979 So. 2d 852, 863 (Fla. 2007), as clarified (Apr. 10, 2008). The Defendant is not entitled to relief as to this subpart of Claim 1.

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Felicia Whaley

Ms. Whaley testified that Mr. Oliver had spent a couple of nights in the spare bedroom of her home in June, 2009 as well as the night of July 22, 2009 (Trial Transcript pp. 1374-76). She became aware of the murders about 4:00 or 5:00 p.m. on July 23, 2009 (Trial Transcript p. 1376). Ms. Whaley testified that when she woke Mr. Oliver on that day, he seemed normal (Trial Transcript pp. 1376-77). When she went back into his room later, she noticed that he was on the phone and upset. She observed him crying after the phone call (Trial Transcript p. 1377). She also testified, in agreement with Mr. Oliver's testimony, that she took him to a Walgreens where he met with two girls (Trial Transcript p. 1378). Ms. Whaley's testimony did not implicate the Defendant but rather corroborated his testimony (Trial Transcript pp. 1968-69) and could be interpreted to show that the Defendant was upset by the news of the victims' deaths. There is no reasonable probability that the outcome of the proceedings would have been different if counsel had impeached Ms. Whaley. The Defendant is not entitled to relief as to this subpart of Claim 1.

Rhea Ray

Ms. Ray testified that she observed Mr. Oliver in Titusville during the afternoon preceding the murders and that, while normally bald, he was wearing dreads (Trial Transcript pp. 1356-57). As counsel accurately pointed out, this would have been about 9 hours before the murders occurred (Trial Transcript p. 1361). Ms. Ray's testimony did not implicate the Defendant but rather corroborated the Defendant's testimony that he

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had been in Titusville on the day that the murders occurred (Trial Transcript p. 1966).

There is no reasonable probability that the outcome of the proceedings would have been different if counsel had impeached Ms. Ray. The Defendant is not entitled to relief as to this subpart of Claim 1.

CLAIM 2

TRIAL COUNSEL PROVIDED PREJUDICIAL INEFFECTIVE ASSISTANCE BY FAILING TO IMPEACH THE TESTIMONY OF KEY STATE WITNESSES WITH THEIR PRIOR INCONSISTENT STATEMENTS

Sheena Camiscioli

Ms. Camiscioli, as acknowledged by the State during closing arguments, was a critical witness in this case (Trial Transcript pp. 2252-53). She was the one individual to whom the Defendant chose to confess. Defendant argues that counsel was ineffective when he failed to impeach Ms. Camiscioli with multiple prior inconsistent statements. While Ms. Camiscioli could not be pinned down on exactly when she spoke to law enforcement or whether the Defendant placed a basket or baskets in the back of her vehicle or exactly how the alleged rifle for handgun exchange occurred, her statements about the Defendant's confession were consistent. At the evidentiary hearing counsel testified that he did not impeach Ms. Camiscioli with her inconsistent statements because they were not material inconsistencies and that they would not impact the jury's assessment of her credibility or their ultimate determination (Evidentiary Hearing Transcript pp. 91-103). Counsel had considered impeaching Ms. Camiscioli but determined that it would not be helpful. Counsel's decision was reasonable and within

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“the broad range of discretion afforded to counsel actually responsible for the defense.”

Occhicone v. State, 768 So. 2d 1037, 1049 (Fla. 2000). Therefore, he was not ineffective. *Peterson v. State*, 154 So. 3d. 275, 280 (Fla. 2014). The Defendant is not entitled to relief as to this subpart of Claim 2.

David Pouncey

Although Mr. Pouncey discovered the victims and likely witnessed the murderer(s) either before or after he or they entered the home (Trial Transcript pp. 1254-59, 1268-69, and 1274), his testimony did not implicate Mr. Oliver. Rather, Mr. Pouncey acknowledged that he knew the Defendant (Trial Transcript pp. 1283-84) and stated that could not identify anyone that he saw in the cul de sac on the night of the murders (Trial Transcript pp. 1322-24). Notwithstanding the largely neutral, if not favorable, testimony of Mr. Pouncey, the Defendant argues that counsel was ineffective for failing to impeach him with prior inconsistent statements about what he had done earlier that evening; who was on the street with him when he realized that something was afoot at Mr. Richardson’s house; and exactly how far away he was standing from Mr. Richardson’s house when he made his initial observations. Counsel testified that these inconsistencies were not material and therefore, he decided not to pursue them as they would not impact the jury (Evidentiary Hearing Transcript pp. 106-09, 125-132, and 141). As with Ms. Camiscioli, counsel was not ineffective for failing to impeach Mr. Pouncey with immaterial prior inconsistent statements. *Occhicone v. State*, 768 So. 2d 1037, 1049 (Fla. 2000), *Peterson v. State*, 154 So. 3d. 275, 280 (Fla. 2014). To the

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extent that counsel could not recall his rationale for failing to impeach Mr. Pouncey on other matters, there is no reasonable probability that the outcome of the proceedings would have been different if counsel had impeached Mr. Pouncey. The Defendant is not entitled to relief as to this subpart of Claim 2.

Cumulative

Counsel's decision to refrain from impeaching witnesses with immaterial prior inconsistent statements was a reasonable trial strategy. The Defendant is not entitled to relief as to this subpart of Claim 2.

CLAIM 3

TRIAL COUNSEL PROVIDED PREJUDICIAL INEFFECTIVE ASSISTANCE BY FAILING TO INVESTIGATE AND INTRODUCE WITNESS TESTIMONY TO DISCREDIT CAMISCIOLI AND SHOW HER BIAS AND MOTIVE TO LIE

Jimmy Kimbrough

Defendant argues that counsel was ineffective for failing to locate, interview and call Jimmy Kimbrough as a witness. Based upon the Defendant's trial testimony, it is apparent that counsel was aware that Ms. Camiscioli was associating with Mr. Kimbrough at the motel during the time frame during which the Defendant is alleged to have confessed (Trial Transcript p. 1974). However, Mr. Kimbrough was not called as a witness. According to his testimony at the evidentiary hearing, counsel spent some time in Titusville looking for Mr. Kimbrough based upon an address he had but was unsuccessful (Evidentiary Hearing p. 143). Counsel believed that a background check

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on Mr. Kimbrough had been requested but did not recall getting any results (Evidentiary Hearing Transcript p. 143). Mr. Kimbrough was incarcerated with the Florida Department of Corrections at the time of the trial and had been in its custody since 2010 (Evidentiary Hearing Transcript p. 375). If counsel had been aware of Mr. Kimbrough's incarceration, which a simple Department of Corrections search would have revealed, counsel could have made an appointment with the Department of Corrections, Classification and visited him (Evidentiary Hearing Transcript p. 146). This, obviously, did not occur and there was no reasonable explanation provided for the failure to locate Mr. Kimbrough. Mr. Kimbrough testified at the evidentiary hearing and stated that he had met up with Ms. Camiscioli during the relevant time frame (Evidentiary Hearing Transcript pp. 366-67) and that while they were together she took some phone calls during which he heard a male screaming and yelling at her (Evidentiary Hearing Transcript p. 369). After the phone calls Ms. Camiscioli seemed upset and scared (Evidentiary Hearing Transcript pp. 369-70). After switching hotels, Ms. Camiscioli told Mr. Kimbrough that she had been threatened; that she lied to the police; and that Terence Oliver did not commit the crime (Evidentiary Hearing Transcript pp. 371-72). The Court finds that, although Mr. Kimbrough has nine prior felony convictions, his testimony was credible. Mr. Kimbrough was unapologetically frank when he stated that he was not really concerned with this issue and that he "was not concerned about anybody else other than Mr. Kimbrough." (Evidentiary Hearing Transcript pp. 376-78). He did not have any apparent reason to testify for the State or the Defendant in this

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matter as he did not know anyone associated with this case other than Ms. Camiscioli. Counsel was ineffective for failing to locate Mr. Kimbrough within the Florida Department of Corrections and, at the very least, interview him.

Had counsel called Mr. Kimbrough to testify at trial, calling Ms. Camiscioli's statement about the Defendant's into question, there is a reasonable probability that the outcome of the proceedings would have been different. The Defendant is entitled to relief as to this subpart of Claim 3.

The Defendant's family members

The Defendant argues that counsel was ineffective by failing to call his family members, **Tyrrell Oliver**, **Annie Oliver** and **Tyrone Oliver**, during the guilt phase of the trial because they would have testified that the Defendant did not like Ms. Camiscioli and that he did not want his brother to date her. Each of the witnesses testified regarding this issue at the evidentiary hearing (Evidentiary Hearing Transcript pp. 317, 328, 336-37, 341, 351, 354). Defendant argues that this testimony would have supported his position that it was unlikely that he would choose to confess to Ms. Camiscioli. In fact, Mr. Oliver testified at trial that he did not think that Ms. Camiscioli was right for his brother; that he did not care for her much; and that he never spoke to her like that (Trial Transcript pp. 1960-61). When discussing this claim at the evidentiary hearing, counsel did not address this issue head on, but explained that he had a difficult time communicating with the Defendant's family, especially because they had to address the possibility of the death penalty (Evidentiary Hearing Transcript pp.

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148-158). Therefore, the Court cannot determine whether not calling family members to testify on this issue was a strategic or logistic decision. Nonetheless, failure to present his family's cumulative testimony does not constitute ineffective assistance of counsel. *Valle v. State*, 705 So. 2d 1331, 35-35 (Fla. 1998). The Defendant is not entitled to relief as to this subpart of Claim 3.

CLAIM 4

**IN VIOLATION OF BRADY, THE STATE WITHHELD EVIDENCE OF FAVORABLE
TREATMENT GIVEN IN EXCHANGE FOR WITNESS TESTIMONY, IN THE
ALTERNATIVE, TRIAL COUNSEL PROVIDED PREJUDICIAL INEFFECTIVE
ASSISTANCE BY FAILING TO ELICIT TESTIMONY REGARDING FAVORABLE
TREATMENT IN EXCHANGE FOR TESTIMONY**

"To demonstrate a *Brady* violation, the defendant has the burden to show (1) that favorable evidence, either exculpatory or impeaching, (2) was willfully or inadvertently suppressed by the State, and (3) because the evidence was material, the defendant was prejudiced." *Franqui v. State*, 59 So. 3d 82, 101 (Fla. 2011). It is the Defendant's position that the State withheld information that it had negotiated plea agreements with Mr. Watkins and Mr. Pouncey in exchange for their testimony in this case. Alternatively, the Defendant argues that counsel was ineffective for failing to impeach the witnesses with their pending charges.

Leander Watkins

At the time of trial, Mr. Watkins had a pending felony fleeing and eluding case in Volusia County which was ultimately resolved as a misdemeanor resisting arrest without violence, a condition of his probation was that he testify truthfully in Brevard's case

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(Composite Exhibit B, Defendant's Evidentiary Hearing Exhibits 9, 13, 14). The Defendant was unable to show that the Eighteenth Judicial Circuit's Assistant State Attorneys participated in the resolution of Mr. Watkins's case. Further, the State directly denied participation (Evidentiary Hearing Transcript p. 164). Thus, if the State was unaware of ongoing plea negotiations, it could not have suppressed evidence thereof either intentionally or inadvertently. There was no *Brady* violation. In the absence of a *Brady* violation, the defendant argues that counsel should have discovered Mr. Watkins's pending charge and impeached him with it.

As indicated by the State in its Written Closing Argument, this portion of the claim falls under the umbrella of counsel's failure to investigate the State's witnesses. The Court has already found that counsel was ineffective based upon his lack of investigation into Mr. Watkins's criminal status. This claim provides another example and cumulatively adds to the prejudice found in relation to Claim 1. Standing alone, counsel's failure to impeach Mr. Watkins with a pending third degree felony, given that he had admitted to "four or five" prior felony convictions, did not prejudice the Defendant. The Defendant is not entitled to relief as to this subpart of Claim 4.

David Pouncey

At the time of trial Mr. Pouncey was facing charges in the Eighteenth Judicial Circuit. Both the lead Assistant State Attorney on this case and Mr. Pouncey's counsel testified that they did not negotiate for Mr. Pouncey's testimony in this case (Evidentiary Hearing Transcript pp. 406-11, 444-45). Thus, there was no *Brady* violation. Further,

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counsel asked Mr. Pouncey about his pending trafficking charges and he admitted that he did, indeed, have pending charges (Trial Transcript pp. 1281-82). Upon redirect examination, the State inquired further about his prosecution and established that the resolution of his pending charges was not dependent upon his cooperation in this case (Trial Transcript pp. 1327-28). Finally, during closing argument, counsel explained that the jury could consider Mr. Pouncey's pending felony charges when assessing his credibility (Trial Transcript p. 2280). While counsel did not spell out the possibility of favorable treatment in Mr. Pouncey's pending case in exchange for his testimony in this case, the pending charges were raised. As the Court has previously stated, Mr. Pouncey's testimony was largely neutral. Counsel wanted the jury to believe Mr. Pouncey's testimony that he could not identify Mr. Oliver as one of the people he saw in the cul de sac that night as well as his testimony that he saw two people approaching and leaving Mr. Richardson's home (Trial Transcript pp. 2277, 2280-81). Counsel was not ineffective in the manner in which he addressed Mr. Pouncey's pending criminal charges. Even if counsel had been ineffective, the Defendant was not prejudiced as part of the Defendant's defense hinged upon the fact that Mr. Pouncey knew him and did not place him at the scene of the murders. The Defendant is not entitled to relief as to this subpart of Claim 4.

CLAIM 5

TRIAL COUNSEL PROVIDED PREJUDICIAL INEFFECTIVE ASSISTANCE BY FAILING TO IMPEACH STATE WITNESS, WILLIAM DAVIS, WITH HIS PENDING FELONY CHARGES

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At the time of trial Mr. Davis had three pending felony charges. The Defendant argues that counsel was ineffective for failing to impeach Mr. Davis with these pending charges. "When charges are pending against a prosecution witness at the time he testifies, the defense is entitled to bring this fact to the jury's attention to show bias, motive or self-interest." *Torres-Arboledo v. State*, 524 So. 2d 403, 408 (Fla. 1988). At trial Mr. Davis primarily testified about being summoned home by Mr. Pouncey and what he observed upon his return to his home that he shared with his brother, Andrea Richardson. The only testimony he gave that was pertinent to the Defendant was that the Defendant did not have permission be in Davis's home. Given that Mr. Davis's testimony did not provide any insight into the murderer's identity, there was no real reason to impeach his testimony based upon bias, motive or self-interest. The only reason to raise his pending charges was to make the jury aware that Mr. Davis was facing a possession of cannabis charge (Exhibit C, Davis Information, Defendant's Evidentiary Hearing Exhibit 10). While claiming that the defense's theory of the case was not that the murders were part of a drug rip off, counsel reminded the jury that there was evidence supporting that theory (Trial Transcript p. 2274). Counsel's passive suggestion that the murders may have been drug related could possibly have been bolstered by a showing that Mr. Davis was alleged to have possessed cannabis. Even if counsel's failure to impeach Mr. Davis with his pending charges constituted ineffective assistance of counsel, the Defendant was not prejudiced. Adding one more inference of drug activity taking place at the murder scene would not produce a reasonable

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probability that the outcome of the proceedings would have been different. The

Defendant is not entitled to relief as to Claim 5.

CLAIM 6

TRIAL COUNSEL PROVIDED PREJUDICIAL INEFFECTIVE ASSISTANCE BY FAILING TO PREVENT JUROR SIRP FROM SITTING ON THE JURY AFTER SHE INDICATED MULTIPLE TIMES THAT SHE WAS NOT COMPETENT TO SERVE AS A JUROR

The Defendant argues that counsel was ineffective for failing to either strike or remove Juror Sirp at various stages of the trial. During jury selection, Juror Sirp indicated that although she favored the death penalty she could consider both aggravation and mitigation (Trial Transcript pp. 666-69). As the trial unfolded, Juror Sirp approached the Court because she recognized witnesses from Ms. Pinson's family as well as from the Defendant's family. After each revelation she assured the Court that she could continue to be fair and impartial even though she really did not want to "partake" (Trial Transcript pp. 1106-07, 2536). Ultimately, the Court offered to strike her and replace her with an alternate juror. Counsel conferred with the Defendant and the Defendant made the ultimate call to keep Juror Sirp (Trial Transcript p. 2538). Whether or not to strike a juror is not one of the "fundamental rights that belong solely to the defendant for decision." *Puglisi v. State*, 112 So. 3d 1196, 1205 (Fla. 2013). However, counsel testified that he deferred to his client's wishes during jury selection because it was, after all, his life (Evidentiary Hearing Transcript pp. 179-80). Counsel was not ineffective for deferring to his client's wishes. *Peterson v. State*, 154 So. 3d 275, 282 (Fla. 2014) citing *Gamble v. State*, 877 So.2d 706, 714 (Fla.2004) ("[I]f the defendant

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consents to counsel's strategy, there is no merit to a claim of ineffective assistance of counsel."). Further, there is no record evidence that Juror Sirp was actually biased against the Defendant. The Defendant is not entitled to relief as to Claim 6.

CLAIM 7

TRIAL COUNSEL PROVIDED PREJUDICIAL INEFFECTIVE ASSISTANCE BY FAILING TO RAISE A CAUSE CHALLENGE TO JUROR GRUNDMEYER-MARCY OR PEREMPTORILY STRIKE HER BASED ON HER TESTIMONY THAT SHE WOULD AUTOMATICALLY VOTE FOR THE DEATH PENALTY UPON A GUILTY VERDICT

The Defendant argues that counsel was ineffective for failing to raise a cause challenge for Juror Grundmeyer-Marcy or striking her peremptorily. During jury selection, Juror Grundmeyer-Marcy stated "Yeah, if it's proven and there's the death penalty and someone has, I mean, murdered someone without a shadow of a doubt and it's the death penalty, the death penalty I think why are you going to put somebody in jail for life" (Trial Transcript p. 482). After further discussions with counsel, Juror Grundmeyer-Marcy stated "Okay. But yeah, I believe in the death penalty, but all the evidence has to be shown. Just because I believe in it doesn't mean that I'm going to say yes to it or, you know, all the evidence has to be weighed" (Trial Transcript p. 485). The trial transcript does not indicate that Juror Grundmeyer-Marcy made any statements that would subject her to a cause challenge. When explaining why he did not strike her peremptorily, counsel stated that "ultimately she indicated, which was the best we could hope for, is that she would consider life" (Evidentiary Hearing Transcript p. 203-04).

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A valid claim of ineffective assistance of counsel for failure to raise or preserve a for-cause challenge against the juror must establish that the juror “was actually biased against the defendant,” such that he or she had a “bias-in-fact that would prevent service as an impartial juror.” *Carratelli v. State*, 961 So.2d at 323-24. The evidence of the juror's actual bias must “be plain on the face of the record,” *id.* at 324, and amount to “something more than mere doubt about that juror's impartiality,” *Mosley v. State*, 209 So.3d 1248, 1265 (Fla. 2016). We have described the standard as follows: Where reasonable people could disagree about a juror's fitness to serve, the showing of prejudice required for postconviction relief is lacking. *Carratelli*, 961 So.2d at 323-24 (quoting *Carratelli v. State*, 915 So.2d 1256, 1261 (Fla. 4th DCA 2005)). When a juror makes statements suggesting bias but later makes clear his or her ability to be impartial, actual bias will not be found. See *id.* at 327. The analysis of this issue begins with the *Strickland* prejudice prong, “as it is necessary to establish that the juror was actually biased before proving that counsel performed deficiently by failing to challenge that juror due to bias.” *Patrick v. State*, 246 So.3d 253, 263 (Fla. 2018). *Allen v. State*, 261 So. 3d 1255, 1285–86 (Fla. 2019)

Juror Grundmeyer-Marcy clearly stated that she would weigh the evidence before making a decision regarding a death penalty recommendation. Therefore, the Defendant's claim is refuted on the face of the record. The Defendant is not entitled to relief as to Claim 7.

CLAIM 8

TRIAL COUNSEL PROVIDED PREJUDICIAL INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO OBJECT TO MULTIPLE MISSTATEMENTS IN THE STATE'S GUILT PHASE CLOSING ARGUMENTS AND BY FAILING TO MOVE FOR A MISTRIAL

The Defendant argues that the State made several misrepresentations of fact during its closing arguments of the guilt phase. It is his position that counsel was ineffective for failing to object and then failing to move for a mistrial. Mr. Oliver argues that he was prejudiced in both the guilt and penalty phases. The State made the

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following assertions during closing and Mr. Oliver argues that they were inaccurate: (1) that two people disappeared through the cut through that ran along Mr. Richardson's property; (2) the timing of Mr. Oliver's confession to Ms. Camiscioli and when she informed the police; (3) the fact that Ms. Camiscioli could only have learned about the details of the shooting from Mr. Oliver; and (4) comments about Mr. Oliver's demeanor during his confession to Ms. Camiscioli. During the evidentiary hearing, counsel testified that he did not object to the majority of the comments because they were not material. The State did, however, supply its own opinion of Mr. Oliver's possible demeanor while confessing, indicating that he chuckled (Trial Transcript p. 2263). Counsel could have objected and the objection would likely have been sustained. According to Ms. Camiscioli's testimony, Mr. Oliver was crying as he confessed (Trial Transcript pp. 1675-1676). However, the Defendant cannot establish prejudice. The fact that the State misstated the manner in which Mr. Oliver confessed does not take away from the fact that, based upon the evidence that it had before it, the jury must have believed that he confessed to Ms. Camiscioli. Further, when relying upon their own recollections, the jury would have known Ms. Camiscioli testified that Mr. Oliver cried as he confessed. There is no reasonable likelihood that the results of the proceeding would have been different if counsel had objected to the State's mischaracterization.

The Defendant also argues that, although the statement was made during guilt phase closing arguments, he was prejudiced in his penalty phase as the statement was

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impermissible as an implication of lack of remorse. During penalty phase closings, the State raised the issue of Mr. Oliver's apparent lack of remorse by commenting "I caution you to recall that he testified in this case and there's not been demonstration of remorse in this case by him." Counsel objected and moved for a mistrial. The Court's denial of the Motion was affirmed on appeal. Given that the Defendant denied having murdered the victims, remorse could not have been an issue. Counsel was not ineffective for failing to highlight an irrelevant consideration. Further, even if counsel was ineffective, given the aggravators found by the jury, there is no reasonable probability that the outcome of the proceedings would have been different if counsel had objected to the State's mischaracterization of the Defendant's alleged confession. The Defendant is not entitled to relief as to Claim 8.

CLAIM 9

TRIAL COUNSEL PROVIDED PREJUDICIAL INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO OBJECT TO STATE'S MISSTATEMENT OF THE LAW IN THE STATE'S PENALTY PHASE CLOSING ARGUMENT AND BY FAILING TO MOVE FOR A MISTRIAL

The Defendant argues that counsel was ineffective for failing to object to the State's misstatement of the law during closing arguments when it told jury that "there is no requirement that you recommend a death sentence, but there has to be some internal honesty with yourself when you're doing this process and it has to be a real decision based on real facts in evidence that you've heard in this trial ..." (Trial Transcript p. 2561). As an initial matter, the Court finds that this is not a misstatement of the law and any objection to the State's argument would have been overruled. Even

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if the statement could be construed to be objectionable, the Defendant was not prejudiced. During his closing argument, counsel stated “and again Mr. Respass reminded you of this and I’ll remind you. If you heard anything at this trial, either the first part of it today, that in your mind you consider to be mitigating, then you get to consider it. You’re not limited. And I remember we told you all this in different ways – in the same way actually in jury selection, mitigation is limitless. So, don’t feel like if I didn’t argue it or the Judge didn’t specifically say to you, it’s not like some of these other things that the Judge tells you like things about credibility of witnesses that you’re limited to, that’s what the Judge tells you, those are the things you can consider. Elements of aggravating circumstances they have to prove, you’re limited to those. Mitigation isn’t that way. So, if there’s anything else that you think mitigates or makes you believe that the sufficient lawful sentence in this case is one of life in prison without the possibility of parole, then you can do that no matter what I said and no matter about these – and that’s the individual circumstances that I told you about because that – there’s that law that says any other factors in the defendant’s background mitigating against the death penalty and that’s where you all get to decide what’s important to you” (Trial Transcript pp. 2580-81). Counsel made it abundantly clear that the jury could recommend life imprisonment based upon any factors it deemed appropriate. This was further underscored by the jury instructions. The Court instructed the jury that “a mitigating circumstance is not limited to the facts surrounding the crime. It can be anything in the life of the defendant which might indicate that the death penalty is not

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appropriate for the defendant. In other words, a mitigating circumstance may include any aspect of the defendant's character, background or life, or any circumstance of the offense that reasonably may indicate that the death penalty is not an appropriate sentence in this case. A mitigating circumstance need not be proved beyond a reasonable doubt by the defendant. A mitigating circumstance need only be proved by a greater weight of the evidence, which means evidence that more likely than not tends to prove the existence of a mitigating circumstance. If you find by the greater weight of the evidence that a mitigating circumstance exists, you may consider it established and give that evidence such weight as you determine it should receive in reaching your conclusion as to the sentence to be imposed"(Trial Transcript pp. 2593-94). The Court further instructed the jury that "the sentence that you recommend to the Court must be based upon the facts as you find them from the evidence and the law" (Trial Transcript p. 2595). After addressing the jury's duty to weigh the aggravating and mitigating circumstances, the Court stated, "regardless of your finding in this respect, however, you are neither compelled nor required to recommend a sentence of death" (Trial Transcript p. 2595). The jury was made aware of the fact that it could consider anything, including mercy, as a factor in recommending a sentence of life imprisonment. The Defendant is not entitled to relief as to Claim 9.

CLAIM 10

OLIVER WAS DEPRIVED OF A FAIR TRIAL DUE TO CUMULATIVE ERROR

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The Court has determined that the Defendant is entitled to relief based upon Claims One and Three. Therefore, an assessment of the cumulative effect of other alleged errors is unnecessary. The Defendant is not entitled to relief as to Claim 10.

CLAIM 11

OLIVER MAY BE INCOMPETENT AT THE TIME OF EXECUTION, IN WHICH CASE HIS EIGHTH AMENDMENT RIGHT TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENTS WILL BE VIOLATED

"This claim is not ripe ...until a death warrant has been issued, which has not occurred in this case." *Rogers v. State*, 957 So. 2d 538, 556 (Fla. 2007) *citing Griffin v. State*, 866 So.2d 1, 21–22 (Fla.2003). The Defendant is not entitled to relief as to Claim 11.

CONCLUSION

The State's case was dependent upon the credibility of two witnesses. The testimony of Leander Watkins supported the State's argument regarding motive and premeditation. Sheena Camiscioli testified that the Defendant confessed to her. Given the critical nature of their testimony, it was incumbent upon counsel to investigate the possibility of impeaching these witnesses.

As to Leander Watkins, counsel stated that, had he known about Mr. Watkins's prior criminal history, he would have used it. Clearly, it was not trial strategy to leave Mr. Watkins's testimony unchallenged. Counsel should not have assumed that the background checks had been completed, absent any support for that assumption.

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Counsel should have made an effort to explore Mr. Watkins's criminal history.

Counsel's failure to do so prejudiced the Defendant.

As to Sheena Camiscioli, although the Court has found that counsel was not ineffective for failing to impeach her with prior inconsistent statements, counsel failed to locate an individual she was associating with at the time she was alleged to have received the Defendant's confession. As previously stated, Mr. Kimbrough was clearly a known individual. However, no one investigated what, if any, light he could shed on this case. As Mr. Kimbrough was in the custody of the Florida Department of Corrections at the time of trial, determination of his whereabouts would have been a straightforward task. Counsel was ineffective for failing to locate and interview Mr. Kimbrough. If Mr. Kimbrough's trial testimony had been consistent with his testimony at the evidentiary hearing, the jury would have been able to consider the unbiased challenge to Ms. Camiscioli's credibility.

Each of counsel's failures to investigate witnesses undermines the Court's confidence in the outcome of the proceedings.

Accordingly, it is

ORDERED AND ADJUDGED:

1. The Defendant's Motion for Postconviction Relief is DENIED as to Claims 2, 4, 5, 6, 7, 8, 9, 10, and 11, as well as Claim 1 with the exception of the portion of the claim regarding Leander Watkins and Claim 3 with the exception of the portion regarding Jimmy Kimbrough.

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2. The Defendant's Motion for Postconviction Relief is GRANTED as to Claims 1 regarding Leander Watkins and Claim 3 regarding Jimmy Kimbrough.

3. The Judgment and Sentence in this case are hereby VACATED and this case shall be returned to the trial docket.

DONE AND ORDERED in Chambers at Viera, Brevard County, Florida on this 23 day of October, 2019.



LISA DAVIDSON
CIRCUIT JUDGE

CLERK'S CERTIFICATE OF SERVICE
STATE OF FLORIDA, COUNTY OF BREVARD

I, SCOTT ELLIS, Clerk of the Circuit Court do hereby certify that a copy of the foregoing was furnished to:

Lisa Marie Bort, Adrienne Joy Shepherd and Ali Shakoor
Assistant CCRCs
Law Office of the Capital Collateral Regional Counsel - Middle Region
12973 North Telecom Parkway
Temple Terrace, Florida 33637-0907
bort@ccmr.state.fl.us
shepherd@ccmr.state.fl.us
shakoor@ccmr.state.fl.us
support@ccmr.state.fl.us

William G. Respass
Susan Stewart
Assistant State Attorneys
Office of the State Attorney
2725 Judge Fran Jamieson Way, Bldg D
Viera, Florida 32940
BrevFelony@sa18.org

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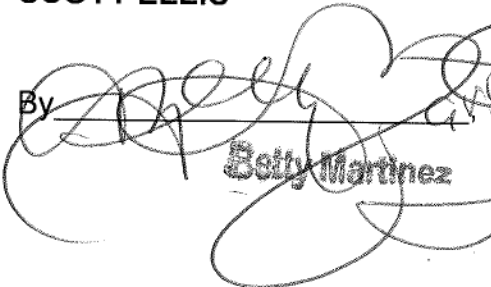
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Doris Meacham

Assistant Attorney General,
Office of the Attorney General,
444 Seabreeze Blvd, 5th Floor,
Daytona Beach, Florida 32118.
Doris.Meacham@myfloridalegal.com
CapApp@myfloridalegal.com

this ____ day of OCT 23 2019, 2019.

SCOTT ELLIS

By  Deputy Clerk

Betty Martinez

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*

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

DEATH PENALTY CASE

Appendix F

United States District Court of the Middle District of Florida Judgment
Denying Petition for Writ of Habeas Corpus, dated August 4, 2021.

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION**

ANDREW R. ALLRED,

Petitioner,

v.

Case No: 6:16-cv-560-PGB-LRH

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

Respondents.

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came before the Court and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

the Petition for Writ of Habeas Corpus is DENIED and this case is DISMISSED WITH
PREJUDICE.

Date: August 4, 2021

ELIZABETH M. WARREN,
CLERK

s/RO, Deputy Clerk

1. **Appealable Orders:** Courts of Appeals have jurisdiction conferred and strictly limited by statute:
 - (a) **Appeals from final orders pursuant to 28 U.S.C. Section 1291:** Only final orders and judgments of district courts, or final orders of bankruptcy courts which have been appealed to and fully resolved by a district court under 28 U.S.C. Section 158, generally are appealable. A final decision is one that “ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.” Pitney Bowes, Inc. v. Mestre, 701 F.2d 1365, 1368 (11th Cir. 1983). A magistrate judge’s report and recommendation is not final and appealable until judgment thereon is entered by a district court judge. 28 U.S.C. Section 636(c).
 - (b) **In cases involving multiple parties or multiple claims,** a judgment as to fewer than all parties or all claims is not a final, appealable decision unless the district court has certified the judgment for immediate review under Fed.R.Civ.P. 54(b), Williams v. Bishop, 732 F.2d 885, 885-86 (11th Cir. 1984). A judgment which resolves all issues except matters, such as attorneys’ fees and costs, that are collateral to the merits, is immediately appealable. Budinich v. Becton Dickinson & Co., 486 U.S. 196, 201, 108 S. Ct. 1717, 1721-22, 100 L.Ed.2d 178 (1988); LaChance v. Duffy’s Draft House, Inc., 146 F.3d 832, 837 (11th Cir. 1998).
 - (c) **Appeals pursuant to 28 U.S.C. Section 1292(a):** Appeals are permitted from orders “granting, continuing, modifying, refusing or dissolving injunctions or refusing to dissolve or modify injunctions...” and from “[i]nterlocutory decrees...determining the rights and liabilities of parties to admiralty cases in which appeals from final decrees are allowed.” Interlocutory appeals from orders denying temporary restraining orders are not permitted.
 - (d) **Appeals pursuant to 28 U.S.C. Section 1292(b) and Fed.R.App.P.5:** The certification specified in 28 U.S.C. Section 1292(b) must be obtained before a petition for permission to appeal is filed in the Court of Appeals. The district court’s denial of a motion for certification is not itself appealable.
 - (e) **Appeals pursuant to judicially created exceptions to the finality rule:** Limited exceptions are discussed in cases including, but not limited to: Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546, 69 S.Ct. 1221, 1225-26, 93 L.Ed. 1528 (1949); Atlantic Fed. Sav. & Loan Ass’n v. Blythe Eastman Paine Webber, Inc., 890 F. 2d 371, 376 (11th Cir. 1989); Gillespie v. United States Steel Corp., 379 U.S. 148, 157, 85 S. Ct. 308, 312, 13 L.Ed.2d 199 (1964).
2. **Time for Filing:** The timely filing of a notice of appeal is mandatory and jurisdictional. Rinaldo v. Corbett, 256 F.3d 1276, 1278 (11th Cir. 2001). In civil cases, Fed.R.App.P.4(a) and (c) set the following time limits:
 - (a) **Fed.R.App.P. 4(a)(1):** A notice of appeal in compliance with the requirements set forth in Fed.R.App.P. 3 must be filed in the district court within 30 days after the entry of the order or judgment appealed from. However, if the United States or an officer or agency thereof is a party, the notice of appeal must be filed in the district court within 60 days after such entry. **THE NOTICE MUST BE RECEIVED AND FILED IN THE DISTRICT COURT NO LATER THAN THE LAST DAY OF THE APPEAL PERIOD - no additional days are provided for mailing.** Special filing provisions for inmates are discussed below.
 - (b) **Fed.R.App.P. 4(a)(3):** “If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period ends later.”
 - (c) **Fed.R.App.P.4(a)(4):** If any party makes a timely motion in the district court under the Federal Rules of Civil Procedure of a type specified in this rule, the time for appeal for all parties runs from the date of entry of the order disposing of the last such timely filed motion.
 - (d) **Fed.R.App.P.4(a)(5) and 4(a)(6):** Under certain limited circumstances, the district court may extend the time to file a notice of appeal. Under Rule 4(a)(5), the time may be extended if a motion for an extension is filed within 30 days after expiration of the time otherwise provided to file a notice of appeal, upon a showing of excusable neglect or good cause. Under Rule 4(a)(6), the time may be extended if the district court finds upon motion that a party did not timely receive notice of the entry of the judgment or order, and that no party would be prejudiced by an extension.
 - (e) **Fed.R.App.P.4(c):** If an inmate confined to an institution files a notice of appeal in either a civil case or a criminal case, the notice of appeal is timely if it is deposited in the institution’s internal mail system on or before the last day for filing. Timely filing may be shown by a declaration in compliance with 28 U.S.C. Section 1746 or a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.
3. **Format of the notice of appeal:** Form 1, Appendix of Forms to the Federal Rules of Appellate Procedure, is a suitable format. See also Fed.R.App.P. 3(c). A pro se notice of appeal must be signed by the appellant.
4. **Effect of a notice of appeal:** A district court loses jurisdiction (authority) to act after the filing of a timely notice of appeal, except for actions in aid of appellate jurisdiction or to rule on a timely motion of the type specified in Fed.R.App.P. 4(a)(4).

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*

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

DEATH PENALTY CASE

Appendix G

United States District Court of the Middle District of Florida Order
Denying Petition for Writ of Habeas Corpus, dated August 3, 2021.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

ANDREW R. ALLRED,

Petitioner,

v.

Case No: 6:16-cv-560-PGB-LRH

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

Respondents.

_____ /

ORDER

This case is before the Court on Andrew R. Allred's Petition for Writ of Habeas Corpus ("Petition," Doc. 1) filed by counsel pursuant to 28 U.S.C. § 2254. Respondents filed a Response to the Petition for Writ of Habeas Corpus ("Response," Doc. 21). Petitioner filed a Reply to the Response ("Reply," Doc. 26). For the reasons set forth below, the Petition is denied.

I. PROCEDURAL HISTORY

The State charged Petitioner by indictment with the first-degree murder of Michael Ruschak ("Ruschak") (Count One), the first-degree murder of Tiffany Barwick ("Barwick") (Count Two), armed burglary of a dwelling while inflicting great bodily harm or death (Count Three), the aggravated battery of Eric Roberts

("Roberts") with a firearm while inflicting great bodily harm or death (Count Four), and criminal mischief of a motor vehicle (Count Five). (Ex. A-1 at 35-37.)¹ On October 25, 2007, the State filed a notice of intent to seek the death penalty. (*Id.* at 38.) On April 30, 2008, Petitioner, against counsel's advice, pled guilty to all charges with no promises regarding the sentences that would be imposed. *See* Ex. A-1 at 45-49; Ex. A-5 at 473-; Ex. G-12 at 173.

On May 15, 2008, against the advice of counsel, Petitioner waived his right to a penalty phase jury. (Ex. A-1 at 52-53; Ex. G-12 at 180.) The parties presented aggravating and mitigating evidence at the penalty-phase proceeding and *Spencer*² hearing. As to Ruschak's murder, the trial court found three aggravating factors and assigned the following weight to each one: (1) the murder was cold, calculated, and premeditated ("CCP") (great weight); (2) the murder was committed while engaged in a burglary (little weight); and (3) prior capital or violent felony conviction (Barwick's contemporaneous murder) (great weight). (Ex. A-2 at 205-06.) With respect to Barwick's murder, the trial court found three aggravators and ascribed the following weight: (1) the murder was especially

¹ References to the record will be made by citing to the particular volume and page of the advanced appendix. For example, "Ex. A-1 at 1" refers to page one of the volume labeled Exhibit A-1.

² *Spencer v. State*, 615 So. 2d 688, 691 (Fla. 1993) (holding that the trial court should conduct a hearing to allow the parties to be heard and to allow presentation of additional evidence before sentencing).

heinous, atrocious, or cruel (“HAC”) (great weight); (2) CCP (great weight); and (3) prior capital or violent felony conviction (Ruschak’s contemporaneous murder) (great weight). (*Id.* at 206-07.) The trial court considered various mitigating circumstances, which it gave the following weight: (1) Petitioner accepted responsibility by pleading guilty (little weight); (2) Petitioner cooperated with law enforcement (moderate weight); (3) Petitioner suffered from an emotional disturbance at the time of the murders (moderate weight); (4) Petitioner’s emotional and developmental age was less than his chronological age (not established); (5) background factors such as whether Petitioner was likely sexually abused (not established); and (6) Petitioner’s developmental problems as a child impacted his educational and social development (little weight). (*Id.* at 208-10.) The trial court concluded that the “aggravating circumstances far outweigh the mitigating circumstances” for both murders. (*Id.* at 211.) The trial court sentenced Petitioner to death for both murders, to life for both counts of armed burglary of a dwelling while inflicting great bodily harm or death and aggravated battery with a firearm while inflicting great bodily harm, and to five-years imprisonment for criminal mischief with all sentences to run concurrently. (*Id.*)

The Supreme Court of Florida affirmed Petitioner’s convictions and sentences. (Ex. D); *see also Allred v. State*, 55 So. 3d 1267 (Fla. 2010) (“*Allred I*”). Petitioner filed a petition for writ of certiorari with the Supreme Court of the

United States, which was denied on October 3, 2011. (Ex. F-3); *see also Allred v. Fla.*, 565 U.S. 853 (2011).

Petitioner filed a motion for post-conviction relief pursuant to Rule 3.851 of the Florida Rules of Criminal Procedure, which he twice amended. (Ex. G-1 at 1-38; Ex. G-4 at 576-623, 710-63.) The circuit court denied the motion after an evidentiary hearing. (Ex. G-11 at 1856-77.) The Supreme Court of Florida affirmed. (Ex. K); *see also Allred v. State*, 186 So. 3d 530 (Fla. 2016) (“*Allred II*”).

After Petitioner filed his federal habeas petition, this Court stayed the proceeding based on *Hurst v. Florida*, 136 S. Ct. 616 (2016)³ (“*Hurst I*”). (Doc. Nos. 7, 13.) Petitioner filed a successive state post-conviction motion raising a *Hurst* claim, which the circuit court denied. (Ex. M-1 at 150-52.) The Supreme Court of Florida affirmed. (Ex. Q); *see also Allred v. State*, 230 So. 3d 412 (Fla. 2017) (“*Allred III*”).

II. STATEMENT OF FACTS

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

On August 25, 2007, Allred celebrated his twenty-first birthday with a party at his family’s home in Oviedo. A number of people attended, including his best friend Michael Ruschak and Allred’s live-in girlfriend, Tiffany Barwick. Allred and Barwick had dated for about a year and lived together for the last several months. The relationship with Barwick, however, came

³ (holding that Florida’s hybrid death penalty sentencing scheme violated the Sixth Amendment of the Constitution).

to an abrupt and public end at the birthday party. When Barwick told Allred she “wanted her stuff back,” Allred went to the room they shared, gathered her belongings, and began throwing them over the property’s fence. Someone called the police, who upon arrival ordered Allred to stop but did not arrest him.

A few days later, Allred bought a Springfield XP .45 caliber handgun. Because of the legal waiting period, however, he did not take possession of it until September 7. On that day, he used pictures of Barwick for target practice and subsequently emailed Barwick a photo of the bullet-riddled pictures that were hanging on the wall of his room.

Witness testimony and digital messaging indicated that in the days shortly before the murders, Allred discovered that—subsequent to the breakup—Ruschak and Barwick had sexual intercourse. Allred became angry and sent threatening messages to his “ex-best friend” and his ex-girlfriend. He also discussed his feelings with friend Michael Siler. In an instant message exchange with Siler on September 23, Allred stated, “I pretty much just need to start killing people.” The next day, September 24, 2007, the day of the murders, Allred specifically threatened the lives of Barwick and Ruschak. In an instant message chat with Siler in the morning, Allred stated, “I’m pretty much gonna kill him . . . Ruschak . . . and her.” In an electronic conversation with victim Ruschak on that same day, Allred told him, “If [I] see you again, [I] will kill you, and yes that is a threat.” Finally, Allred and Barwick engaged in a heated and lengthy computer exchange on the day of the murder. Allred informed Barwick that he had hacked into her computer, changed the passwords, deleted files, and sent emails to people on her contacts list. He also transferred all of the funds in her bank account to pay her credit card debt. Calling her a “whore” because of her relationship with Ruschak, Allred said he could not forgive her for that and threatened, “[I]f, I ever see [Ruschak] again I will kill him.”

Allred was fired from his job instructing on the use of computer software on the day of the murders. That evening, he and Siler went to dinner at a local restaurant. They talked about work and other subjects, but Allred seemed not to care about anything and often shrugged in response to questions. Allred drove Siler home about an hour later. Siler testified that as Allred left, the thought that Allred might be suicidal crossed his mind. After dropping Siler off, Allred drove first to a grocery store and bought beer. Then he went home for a while, but he did not drink any of the beer. Later, knowing that Barwick would be with Ruschak, Allred contacted Ruschak, stating that he was coming to Ruschak’s house. Allred then picked up the .45 he bought for his birthday and went out to his truck.

At the time of the murders, Ruschak was living in the home of friend Eric Roberts at 100 Shady Oak Lane. A neighbor, Steve McCavour, testified that at approximately 10 p.m. on September 24, 2007, he saw a large black truck repeatedly crashing into a white car. He called 911 and observed the driver go to the front door of Roberts' house, kick and bang on it, and then head around the house.

Roberts and roommate Ruschak had invited friends over that night for dinner and to watch a popular television program. Tiffany Barwick was living there temporarily, and the other guests present were Justin Kovacich, Philip Cammarata, Kathryn Cochran, and Charles Bateman. Soon after all the guests arrived, Ruschak told the group that he had just received a message from Allred stating that he was coming over. Ruschak suggested calling Allred's mother to see if Allred had left home and someone suggested calling the police, but neither call was made. The message that Allred was coming over, however, put Barwick "in full panic mode."

Soon thereafter, witnesses sitting in the living room heard a loud noise outside the house, which Cochran testified sounded "like a mortar going off." Ruschak, who was in the kitchen at the front of the house, looked out the window and announced that Allred had arrived. Ruschak then quickly locked the front door just before Allred banged loudly on it, yelling, "[L]et me in."

When no one opened the door, Allred went to the back of the house, where the guests had assembled in the living room. He banged on the sliding glass door, and Barwick ran up the hall to a bathroom near the front of the house. The glass door suddenly shattered when Allred fired a shot into it. He walked into the house, holding his gun. He recognized all of the people standing before him, but he said nothing. The people present began to scream and look for an escape route. Together, Cammarata and Kovacich ran up the hallway to the front door, unlocked it, and fled as they heard gunshots. Kovacich then called 911.

Allred saw Ruschak peer around the corner from the kitchen, and Allred fired a shot up the hallway in his direction. Allred walked past Roberts, who had just come down the hallway from the front door, and went directly to the kitchen, where he shot Ruschak several times. At this point, Roberts grabbed Allred from behind and asked Allred what he was doing. Allred struggled with Roberts, telling him to let go. When Roberts did not release him, Allred pointed the gun downward and fired a shot that hit Roberts' right leg. During this struggle, Bateman ran out the shattered back door and

into the woods, where he called 911. Realizing he could escape the same way, Roberts let go of Allred and ran to a neighbor's house. When his neighbors opened their door, Roberts asked them to call 911 and soon heard Allred drive off in his truck. Roberts realized he had been shot when his neighbors pointed to the blood on his pants.

At this point, only Barwick and Cochran remained alive in the house with Allred. Barwick was in the hall bathroom at the front of the house, where she fled when Allred first entered. Standing in the bathtub, Barwick called 911. At the beginning of the call, Barwick tried to provide the 911 dispatcher with the necessary information. However, as the gunshots sounded in the background, she began to scream and hyperventilate. Finally, the line went dead. In his confession, Allred recounted that after he gained his release from Roberts, he entered the bathroom. Then, without saying a word, he fired multiple shots into Barwick. She collapsed in the tub and died.

While hidden in the master bathroom, Cochran heard the others yelling and running, and she heard the gunshots. Finally, she heard Barwick's screaming, followed by more gunshots and then silence. Soon, Roberts returned to the house. He saw Ruschak lying face down in the front doorway and then found Cochran still hiding in the bathroom at the back of the house. Roberts told her that Allred was gone. The police arrived shortly thereafter.

After leaving the crime scene, appellant called 911. He reported that he had killed two people and threatened to commit suicide. When Deputy Sheriff David Kohn arrived at Allred's home, Allred was standing at the end of his driveway near the road, with a cell phone in his hand and his gun on the ground. Upon initial contact, Allred told the officer, "I'm the guy you're looking for." After the officer secured him, Allred asked "if the people were dead," but the officer told him he could not provide that information. Then, in the patrol car, Allred stated, "I knew I killed someone, I shot fourteen times."

Allred was turned over to the Oviedo Police Department, and he was interviewed by two detectives after he was advised of his *Miranda* rights. In his confession, Allred largely admitted the above factual description as to the actual murders. He admitted firing fourteen shots during the incident, emptying the clip, but he denied sending any threatening messages. He stated that he bought the .45 pistol only because he "could" after he turned twenty-one. Although he usually left his gun at home unless he was going to target practice, he gave no reason for taking it with him that night. He acknowledged using Barwick's picture for target practice earlier in the

month, but he claimed that he did not think of killing her until the night of the murders. He denied, however, that he went to the house that night with the intent to shoot Barwick and Ruschak and stated that he went there solely to ram her car. He explained that he killed Ruschak because his “ex-best friend” was “an asshole” who sided with Barwick in their breakup, but he gave no reason for the murder of Barwick. Allred did not speak to either victim before he shot them.

The medical examiner, Dr. Predrag Bulic, performed the autopsies on the victims. He testified that Ruschak had four gunshot wounds but there was no way to determine the order in which the shots were fired. Two wounds were nonlethal. One wound was potentially lethal if not treated within an hour. That bullet passed through the vertebral column, nicked the vena cava, and exited through the upper abdomen. Finally, the cause of death was a shot that entered the middle chest and travelled through the sternum, heart, and left lung.

Barwick had six gunshot wounds, and again the medical examiner was unable to determine the order in which the rapid shots were fired. Four of the wounds were nonlethal. The fifth gunshot wound would have been lethal if not treated quickly; the bullet collapsed a lung. The sixth wound, however, was immediately lethal. That bullet traveled diagonally through her left lung, heart, diaphragm, abdomen, and liver.

Allred I, 55 So. 3d at 1272–75 (footnotes omitted).

II. GOVERNING LEGAL PRINCIPLES

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

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

- (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
- (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). The phrase “clearly established Federal law,” encompasses only the holdings of the Supreme Court of the United States “as of the time of the relevant state-court decision.” *Williams v. Taylor*, 529 U.S. 362, 412 (2000).

A federal habeas court must identify the last state court decision, if any, that adjudicated the claim on the merits. *See Marshall v. Sec’y, Fla. Dep’t of Corr.*, 828 F.3d 1277, 1285 (11th Cir. 2016). Where the state court’s adjudication on the merits is unaccompanied by an explanation, the habeas court should “look through” any unexplained decision “to the last related state-court decision that does provide a relevant rationale. It should then presume that the unexplained decision adopted the same reasoning.” *Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018). The presumption may be rebutted by showing that the higher state court’s adjudication most likely relied on different grounds than the lower state court’s reasoned decision, such as persuasive alternative grounds briefed or argued to the higher court or obvious in the record it reviewed. *Id.* at 1192–93, 1195–96.

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

Under the “contrary to” clause, a federal court may grant the writ if the

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

Parker v. Head, 244 F.3d 831, 835 (11th Cir. 2001). “For a state-court decision to be an ‘unreasonable application’ of Supreme Court precedent, it must be more than incorrect—it must be ‘objectively unreasonable.’” *Thomas v. Sec’y, Dep’t of Corr.*, 770 F. App’x 533, 536 (11th Cir. 2019) (quoting *Lockyer v. Andrade*, 538 U.S. 63, 75, (2003)).

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

Where the state court applied the correct Supreme Court precedent, the federal court must consider whether the state court unreasonably applied that precedent or made an unreasonable determination of the facts. *Whatley v. Warden*, 927 F.3d 1150, 1181 (11th Cir. 2019). “[A] state court’s determination that a claim lacks merit precludes federal habeas relief so long as ‘fairminded jurists could

disagree’ on the correctness of the state court’s decision.” *Id.* at 1175 (quoting *Harrington v. Richter*, 562 U.S. 86, 103 (2011)). Federal courts may review a claim *de novo* only if the state court’s decision was based on an unreasonable application of Supreme Court precedent or an unreasonable determination of the facts. *Id.*

B. Standard For Ineffective Assistance Of Counsel

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

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

III. ANALYSIS

A. Ground One

Relying on *Hurst*, Petitioner asserts that his death sentences violate the Sixth,

Eighth, and Fourteenth Amendments because they were imposed without a jury trial. (Doc. 1 at 27.) According to Petitioner, he did not knowingly and voluntarily waive his right to a penalty-phase jury but only waived the jury recommendation and judicial factfinding under Florida's then existing capital sentencing scheme. (*Id.* at 27-28.) Petitioner argues that he could not have knowingly waived the right to factfinding by a jury as recognized by *Hurst* because *Hurst* had not been decided when he waived his right to a penalty-phase jury. (*Id.* at 27.)

Petitioner raised this ground in his second motion for post-conviction relief, which the circuit court denied. In affirming the denial, the Supreme Court of Florida concluded that Petitioner validly waived his right to a penalty-phase jury and therefore was not entitled to relief under *Hurst*. *Allred III*, 230 So. 3d at 413.

Respondents argue *inter alia* that *Hurst* is not retroactive under federal law, and thus, this ground must be denied. (Doc. 21 at 46-49.) Petitioner maintains that *Hurst* is retroactive because it is an application of the constitutional rule set forth in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) or alternatively represents a new rule of criminal procedure that is a watershed rule. (Doc. 1 at 28-31.)

Pursuant to *Teague v. Lane*, 489 U.S. 288, 300-01 (1989) (plurality opinion), "in any federal habeas proceeding—including collateral proceedings in capital cases—where the petitioner seeks the benefit of a 'new' rule of constitutional law, [federal courts] must first determine whether the rule actually qualifies as new,

and then whether that rule applies retroactively to the case.” *Knight v. Fla. Dep’t of Corr.*, 936 F.3d 1322, 1331 (11th Cir. 2019), *cert. denied*, 141 S. Ct. 274 (2020). In only two instances may a federal court retroactively apply a new constitutional rule issued after a state conviction became final – (1) if the new rule “is ‘substantive rather than procedural,’” and (2) if the rule is a “‘watershed rule[] of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding.’” *Id.* (quoting *Schriro v. Summerlin*, 542 U.S. 348, 352–53 (2004)). “[A] federal court considering a habeas petition must conduct a threshold *Teague* analysis when the issue is properly raised by the state.” *Id.* (quoting *Horn v. Banks*, 536 U.S. 266, 272 (2002)).

In *Knight*, the Eleventh Circuit Court of Appeals addressed whether *Hurst* is retroactive in federal habeas actions under *Teague*. 936 F.3d at 1334–37. The Court determined that *Hurst* announced a new rule of constitutional law that did not fall into either of the two exceptions to nonretroactivity because it was procedural and was not a watershed rule of criminal procedure. *Id.* The Court held that *Hurst* is not retroactive on federal habeas review, and therefore, consideration of the petitioner’s *Hurst* claim on the merits was precluded. *Id.* at 1337.

In this case, Respondents properly raised the nonretroactivity issue. Likewise, Petitioner’s conviction became final on October 3, 2011, *see Allred v. Fla.*, 565 U.S. 853 (2011) (denying petition for a writ of certiorari); *see also Clay v. United*

States, 537 U.S. 522, 527 (2003) (a conviction is final when the United States Supreme Court “affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari, or when the time for filing a certiorari petition expires.”), more than four years before *Hurst* was decided in 2016. Therefore, *Hurst* is not retroactive to Petitioner’s case, and this Court is precluded from considering the merits of Ground One because it is predicated on *Hurst*. Accordingly, Ground One is denied.

B. Ground Two

Petitioner asserts counsel rendered ineffective assistance by failing to obtain a reasonably competent mental health evaluation. (Doc. 1 at 34.) According to Petitioner, counsel misinterpreted and unreasonably relied on Dr. Deborah Day’s opinion that Petitioner had features of antisocial personality disorder (“ASPD”) and failed to adequately investigate Petitioner’s background and mental health. (*Id.* at 35-37.) Specifically, Petitioner complains that counsel did not obtain additional mental health evaluations, and had counsel done so, the defense could have presented mitigation evidence supporting the statutory mitigator that Petitioner’s capacity to appreciate the criminality of his conduct or conform his conduct to the law was substantially impaired. (*Id.* at 38-40.)

To support his argument, Petitioner relies on the opinions of Dr. Glenn Caddy and Dr. Gary Geffken who testified at the post-conviction proceeding

respectively that Petitioner was in a dissociative state at the time of the offenses and he falls into the autistic spectrum disorder or has a pervasive developmental disorder.⁴ (*Id.*)

Petitioner raised this ground in his Rule 3.851 motion. The circuit court denied relief after an evidentiary hearing. (Ex. G-11 at 1859-67.) The Supreme Court of Florida affirmed, concluding that trial counsel was not deficient, and prejudice did not result from counsels' performance. *Allred II*, 186 So. 3d at 536-39. The Court determined that (1) trial counsel made a reasonable strategic decision not to call Dr. Day, the mental health expert retained by the defense, as a witness, (2) trial counsel sufficiently investigated and presented evidence regarding Petitioner's history and background, (3) trial counsel was not required to seek other more favorable mental health experts, and (4) the evidence did not establish that Petitioner was in a dissociative state at the time of the offenses or that he suffered from autism spectrum disorder. *Id.* In doing so, the Court reasoned:

1. Reliance on Expert Opinion

Allred contends the postconviction court erred in denying his ineffective assistance of counsel claim, because defense counsel misinterpreted Dr. Deborah Day's diagnosis and unreasonably relied on Dr. Day's expertise as a mental health expert. The evidence presented at the hearing showed that defense counsel Timothy Caudill retained Dr. Day, a forensic clinical psychologist and director of Psychological Affiliates, to evaluate Allred.

⁴ Dr. Gary Geffken indicated that "[a]utism spectrum disorder is sometimes also called pervasive developmental disorders. . . ." (Ex. G-12 at 119.)

Caudill had previously employed Dr. Day's services for evaluations of defendants in capital cases and expert mental health testimony. Her practice employs a team approach, with each professional in the practice on a particular client's team participating in the evaluation and the lead expert making the final diagnosis. Dr. Day and two other psychologists, Dr. Robert Janner and Dr. Amanda Janner, interviewed Appellant, obtained and examined Appellant's school and medical records, police and other reports pertaining to the crime, including Allred's text messages, the tape of Allred's police interview, and Barwick's 911 call, and conducted and reviewed psychological testing of Appellant. The testing included the WAIS-III (Wechsler Adult Intelligence Scale), MMPI-2 (Minnesota Multiphasic Personality Inventory, Second Edition), VIP (Validity Indicator Profile), and an IQ test. As lead, Dr. Day was responsible for any diagnosis in the case.

The evidence presented at the evidentiary hearing showed that as the penalty phase proceeding approached, Attorney Caudill encountered Dr. Day at the jail and inquired whether she had any mitigation to help Allred's case. According to Caudill, she responded that she did not have anything helpful, explaining that if she had to testify to a diagnosis it would be antisocial personality disorder (ASPD) or possibly that Allred is a psychopath or sociopath. Although defense counsel understood that Dr. Day had not made a final diagnosis, he deemed such testimony would be harmful to the case and—after consultation with co-counsel—made the strategic decision not to use the mental health expert's testimony. Co-counsel Sinclair memorialized their tactical decision in a research memorandum that stated in part that Dr. Day had "concluded" that Allred was a psychopath or sociopath.

Dr. Day testified at the postconviction hearing that she never reached a formal diagnosis of Allred. If she had testified at trial, however, she would have opined that Allred's personality evidenced all but one of the elements of ASPD: he lacked a conduct disorder extending from childhood or adolescence into adulthood. In addition, he evidenced traits of sociopathy and psychopathy. Allred was deceptive and had poor impulse control, anger issues, and a history of manipulations and antisocial beliefs, among others. In addition, Allred's MMPI-2 results showed elevated scores on the psychopathic deviate scale. Moreover, Dr. Day reported to Caudill that Allred recounted the murders to her in vivid detail, reflecting cold, calculated, and premeditated acts. And Allred felt justified in the murders and demonstrated a lack of remorse, empathy, and understanding of what Barwick's family was experiencing. For example, while awaiting trial, Allred wrote several letters to Barwick's family. When he learned that they

tried to block receipt of his letters, he wrote a letter excoriating them and wishing them lives of misery.

The postconviction court found that trial counsel's memorandum overstated Dr. Day's "conclusion" because Dr. Day never made a formal diagnosis. However, the court deemed trial counsel's reliance on Dr. Day's representations in making the strategic decision not to use her testimony was not unreasonable. She had clearly indicated to Caudill that her testimony would be more aggravating than mitigating. In addition, by not using her expert testimony, Caudill kept out testimony about Allred's lack of empathy or remorse.

As evidenced by the foregoing discussion, Caudill did not misunderstand Dr. Day; she had little in the way of mitigation to help Allred's case. Although testimony of such mental health disorders or traits of disorders, such as ASPD, may be viewed as mitigating in certain circumstances, the mental health factors in this case are generally deemed aggravating. In *Looney v. State*, 941 So. 2d 1017, 1028 (Fla. 2006), for example, the defendant, like Allred, raised a postconviction claim that counsel was ineffective for failing to present the testimony of a mental health expert during the penalty phase. Defense counsel, like counsel in the instant case, had retained a mental health expert but chose not to have him testify because it would be too prejudicial. The expert's diagnosis was that Looney

was a psychopath who typically display[ed] social maladjustments or socially unacceptable behavior traits such as lack of remorse, criminal behavior, superficial charm, grandiose sense of self worth, the need for stimulation, pathological lying, manipulateness, shallow emotions, difficulty with lasting relationships, impulsivity, poor behavior control, lack of empathy, *etc.*

Id. In *Looney*, this Court recognized the prior approval of such a strategic decision and reiterated that "a diagnosis as a psychopath is a mental health factor viewed negatively by jurors and is not really considered mitigation." *Id.* at 1028–29. Accordingly, we held that "defense counsel [was] not ineffective for deciding not to seek an additional mental health evaluation after receiving an extremely unfavorable evaluation." *Id.* at 1029. *See Floyd v. State*, 18 So. 3d 432, 453–54 (Fla. 2009) (holding defense counsel made a strategic – not a deficient – decision not to present doctor's ASPD diagnosis of defendant because evidence was harmful, not mitigating).

In this case, Appellant's trial counsel was not deficient for choosing not to present Dr. Day's testimony. Although she did not reach the ASPD

diagnosis, her testimony that Allred met all but one of the factors essential to the diagnosis would not have been mitigating in nature. Neither would her testimony that he had some of the traits of a sociopath and a psychopath. As the postconviction court found, Dr. Day is a well-qualified expert who has testified in other death penalty proceedings, and trial counsel's reliance on her professional assessment—albeit not a formal diagnosis—was not unreasonable. Accordingly, we affirm the postconviction court's determination that trial counsel's decision not to use a mental health professional was strategic in nature, not evidence of deficient performance.

2. Background Investigation and Expert Mental Health Witness

Appellant next argues that counsel was ineffective for failing to conduct a sufficient background investigation and to present a mental health expert in the penalty phase. We disagree. First, as recounted in the opinion affirming Appellant's conviction and sentence, trial counsel conducted a background investigation. Defense counsel interviewed and presented a number of witnesses in mitigation during the penalty phase, including Appellant's mother, father, paternal grandfather, and three of Allred's teachers (one each from elementary, middle, and high school). The defense also obtained school, medical, and police records. *Allred*, 55 So. 3d at 1275–77. The defense presented evidence in the penalty phase showing that Allred has a high IQ and left school after eleventh grade, but obtained his high school diploma at a community college and earned a two-year degree in accounting at another. Until the day of the murders, “[h]e was employed full time teaching the use of software, and he paid for his own car and cell phone.” *Id.* at 1275. In his youth, however, Allred was diagnosed by a psychiatrist as having a “tic disorder” that he subsequently outgrew and ADHD. In addition, he had difficulty with social relationships and witnessed an instance of his father's domestic violence on his mother. The evidence also showed that defense counsel investigated the possible sexual abuse of Appellant by his grandfather. Counsel, however, was unable to obtain any supporting testimony, and Appellant denied such abuse occurred and specifically forbade presentation of any such testimony.

Defense counsel's decision not to present Dr. Day's mental health testimony did not require the continued search for a more favorable mental health opinion. See *Anderson v. State*, 18 So. 3d 501, 511–12 (Fla. 2009) (“The fact that [the defendant] has subsequently found experts whose opinions conflict with [the mental health expert's] opinion does not render the earlier evaluation inadequate.”); *Sexton v. State*, 997 So. 2d 1073, 1085 (Fla. 2008) (stating subsequent finding of an expert who disagrees with “the extent or

type of testing performed, or the type of mitigation presented, does not mean that trial counsel was deficient at trial"). Nevertheless, Appellant urges that counsel should have gone expert shopping, citing the opinions of Dr. Caddy and Dr. Geffken offered at the postconviction evidentiary hearing.

Dr. Caddy concluded, based on Appellant's fragmented memory of the events some years after the murders, that during the crimes Appellant was in a dissociative state and thus lacked a rational understanding of the consequences of his actions at that time. Dr. Geffken, on the other hand, testified that Allred suffered from an autism spectrum disorder but was high functioning. He stated that Allred had a high IQ but lacked empathy and sympathy and was unable to cope with the breakup from Barwick. Dr. Geffken admitted, however, that Appellant's actions in the murders were deliberate, albeit atypical of someone with such a disorder, and that Allred felt no remorse.

The postconviction court rejected both experts' diagnoses as not credible based largely on the testimony of Dr. Jeffrey Danziger, who previously examined Appellant as to the viability of an insanity defense and found Appellant competent. Danziger again examined Appellant before the postconviction hearing as the State's mental health expert. Dr. Danziger testified that, contrary to Dr. Caddy's testimony, the evidence showed that Allred was aware of his actions during the murders. He explained that Appellant threatened to kill the victims, including on the day of the murders; warned Ruschak prior to his arrival; and when he arrived, searched out and killed them. Dr. Danziger also disputed Dr. Geffken's diagnosis of autism spectrum disorder, noting the individual must have restrictive or repetitive patterns of behavior, and Dr. Geffken acknowledged that Appellant had none.

In light of the foregoing, we affirm the postconviction court's rejection of Appellant's claim that trial counsel provided ineffective assistance of counsel regarding the presentation of mental health evidence in the penalty phase. As the circuit court found, the evidence presented established neither that Appellant was in a dissociative state nor that he suffered from an autism spectrum disorder. Moreover, securing a more favorable expert opinion does not undermine the sufficiency of the original expert's opinion. *See Floyd*, 18 So.3d at 453 ("[W]here counsel did conduct a reasonable investigation of mental health mitigation prior to trial and then made a strategic decision not to present this information, we have affirmed the trial court's findings that counsel's performance was not deficient.") Accordingly, Appellant has demonstrated neither deficiency nor prejudice.

Allred II, 186 So. 3d at 536–39.

To establish counsel was deficient, the petitioner must show that “‘counsel’s representation fell below an objective standard of reasonableness.’” *Porter v. McCollum*, 558 U.S. 30, 38 (quoting *Strickland*, 466 U.S. at 688). Prejudice in the context of a capital penalty phase requires the petitioner to demonstrate that, “but for his counsel’s deficiency, there is a reasonable probability he would have received a different sentence.” *Porter*, 558 U.S. at 41. “A ‘reasonable probability’ is one ‘sufficient to undermine confidence in [the sentence].’” *Peede v. Att’y Gen., Fla.*, 715 F. App’x 923, 926–27 (11th Cir. 2017) (quoting *Strickland*, 466 U.S. at 694). In assessing this probability, federal courts 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*, 558 U.S. at 41 (quoting *Williams v. Taylor*, 529 U.S. 362, 397–98 (2000)).

At the post-conviction evidentiary hearing, Tim Caudill (“Caudill”), who began defending capital cases in 1997 and had tried approximately twenty-five death cases, testified that he was Petitioner’s lead defense counsel and Rebecca Sinclair (“Sinclair”) served as co-counsel. (Ex. G-12 at 160–61, 164; Ex. G-13 at 225.) Caudill indicated that his strategy for the penalty phase was to present background evidence regarding Petitioner’s life and to try to present mitigating mental health evidence. (Ex. G-12 at 189–90.) To that end, he retained Dr. Deborah

Day, a psychologist with whom he had worked before, and her office of mental health specialists to evaluate Petitioner. (*Id.* at 180, 194; Ex. G-13 at 335-36.) Caudill and Dr. Day met with Petitioner several times. (Ex. G-13 at 172.) Caudill noted, however, that Petitioner was not fully cooperative with Dr. Day and at times refused to meet with her. (*Id.* at 186, 188-89.)

Ultimately, Dr. Day told Caudill that she did not believe she could offer anything helpful to the defense. (Ex. G-13 at 209-10.) Caudill testified that although Dr. Day did not reach a formal diagnosis, she indicated that if she had to give a diagnosis, it would be that Petitioner suffers from ASPD or worse may be a sociopath or psychopath. (Ex. G-13 at 209-10, 235-36.) Caudill and Dr. Day discussed why she believed Petitioner met most of the criteria for ASPD. (*Id.* at 212-13.) Given Dr. Day's opinion, Caudill decided not to call her as a witness because he thought her testimony would be harmful to the defense. (*Id.* at 210-11, 219.) Caudill noted that in his experience, judges did not find ASPD, sociopathy, or psychopathy to be mitigating. (Ex. G-13 at 238.)

Because he had no questions about her qualifications as a mental health expert and had no reason to distrust her conclusions based on his previous experience with her, Caudill did not question Dr. Day's diagnosis, nor did he consider seeking a second opinion. (*Id.* at 214, 237.) As further explained by Caudill, he did not think that Dr. Danziger, who evaluated Petitioner shortly after

he was arrested, would reach a conclusion different from Dr. Day's and he did not want to delay the penalty phase by seeking Dr. Danziger's opinion because he feared that if he did so, Petitioner would limit his ability to present mitigation evidence. (*Id.* at 220-21.)

Concerning the decision not to call Dr. Day as a witness, Sinclair testified that she, Caudill, and another capital defense attorney had discussions about it. (Ex. G-13 at 316.) Consistent with Caudill's testimony, Sinclair recalled Dr. Day opining that her testimony would be more damning than helpful to Petitioner. (*Id.* at 317-18.) Like Caudill, she was concerned that calling Dr. Day as a witness would be harmful to the defense. (*Id.* at 317.)

Dr. Day testified that she and other psychologists who worked in her office interviewed, tested, and evaluated Petitioner, meeting with him a total of five times. (Ex. G-13 at 339-46.) During her six-month involvement in the case, Dr. Day also reviewed Petitioner's school and medical records, the State's evidence related to the offenses, and Petitioner's correspondence while in jail. (*Id.* at 344-45, 354.) Dr. Day did not reach a final official diagnosis. However, consistent with Caudill and Sinclair's testimony, she advised Petitioner's attorneys that he had antisocial and psychopathy features and told Caudill that she was concerned that her testimony would be more aggravating than helpful. (*Id.* at 346-47, 354.) Dr. Day acknowledged that Petitioner did not meet all the criteria for ASPD because there

was no clear indication of a childhood conduct disorder. (*Id.* at 356-57.) Nevertheless, she opined that he met some of the criteria for ASPD and demonstrated some indicators of psychopathy. (*Id.* at 357, 360.)

Petitioner called Dr. Glenn Caddy, a clinical forensic psychologist, to testify at the post-conviction hearing. (Ex. G-12 at 7.) Dr. Caddy evaluated Petitioner and opined that he does not suffer from ASPD, disagreeing with Dr. Day's opinion that Petitioner met some of the criteria for the disorder. (*Id.* at 34, 40.) Instead, Dr. Caddy believed Petitioner was in a dissociative state at the time of the offenses, whereby he disconnected from a clear understanding of the circumstances and had a reduced awareness. (*Id.* at 47-54.) Dr. Caddy said that Petitioner's dissociative state supported the statutory mitigator of diminished capacity. (*Id.* at 63-64.) Dr. Caddy, however, admitted that a traumatic event such as a shooting could cause a fragmented memory and that he could not say whether Petitioner's dissociative state set the stage for the shootings or whether the shootings themselves caused Petitioner's dissociative state. (*Id.* at 75, 79-80.)

Dr. Gary Geffken, a clinical psychologist, also testified on Petitioner's behalf. (*Id.* at 109.) After evaluating Petitioner, Dr. Geffken opined that Petitioner met the criteria for autism spectrum disorder, which is a "group of conditions. . . that at the very least have pervasive developmental disorder. . . ." (*Id.* at 126.) Dr. Geffken indicated that Petitioner was high functioning on the autism spectrum, the same

diagnosis as Asperger's, which was eliminated from the DSM-V. (*Id.* at 134-35.) Dr. Geffken, however, acknowledged that there was no evidence that Petitioner had a delay prior to age three in social interaction, language, or imaginary play nor did he exhibit any restrictive or repetitive behavior patterns, both of which are criteria for autism spectrum disorder. (*Id.* at 138, 140, 143.) He further agreed that the violence displayed by Petitioner was not typical of someone with autism spectrum disorder and that Petitioner was not remorseful. (*Id.* at 145, 148-49.) According to Dr. Geffken, Petitioner's act of writing letters to Barwick's family members in which he expressed a lack of remorse was consistent with ASPD and sociopathy or it could be reflective of a lack of empathy exhibited by individuals with autism spectrum disorder. (*Id.* at 148-50.)

The State retained Dr. Danziger, a psychiatrist, to evaluate Petitioner for the post-conviction proceedings. (Ex. G-13 at 376-83.) Dr. Danziger testified that he agreed with Dr. Day's findings that Petitioner displayed features of ASPD but did not meet all the criteria for a diagnosis. (*Id.* at 391.) Dr. Danziger opined that Petitioner suffers from an adjustment disorder with a depressed mood due to his present circumstances and that there was no evidence supporting any other diagnosis. (*Id.* at 383-85.)

When asked if he agreed with Dr. Caddy's assessments, Dr. Danziger said that he agreed with his determination that Petitioner did not meet the criteria for

ASPD, but totally disagreed that Petitioner was in a dissociative state at the time of the offenses. (*Id.* at 386-95.) He noted that Dr. Caddy indicated in his deposition that he could not definitively diagnose a dissociative disorder and admitted that he could not say whether the dissociative state came before or after the shootings. (*Id.* at 394.)

Likewise, Dr. Danziger disagreed with Dr. Geffken's diagnosis that Petitioner suffers from high-functioning autism spectrum disorder. (*Id.* at 398-99.) Although Dr. Danziger agreed that Petitioner had some features of autism spectrum disorder, such as deficits in social skills or being socially introverted, he explained that this was not enough for the diagnosis. (*Id.* at 399.) Dr. Danziger pointed to the absence of a restrictive repetitive pattern of behavior interest or activities in Petitioner. (*Id.*) Dr. Danziger further concluded that even assuming Petitioner had autism spectrum disorder, it would not have established that Petitioner suffered from extreme emotional distress or was substantially impaired in his ability to understand the wrongfulness of his conduct or conform his conduct to the law so as to justify a finding of the statutory mental health mitigators. (Ex. G-14 at 405-07.) Finally, Dr. Danziger testified that there was nothing he could offer in mitigation that was not already presented at the penalty phase proceeding and he would have been unable to add anything helpful had he been called as a witness at the penalty phase. (*Id.* at 407-08.)

The Florida Supreme Court concluded that counsel made a reasonable strategic decision not to call Dr. Day as a witness. “The question of whether an attorney’s actions were actually the product of a tactical or strategic decision is an issue of fact, and a state court’s decision concerning that issue is presumptively correct.” *Ferrell v. Hall*, 640 F.3d 1199, 1223 (11th Cir. 2011) (quoting *Provenzano v. Singletary*, 148 F.3d 1327, 1330 (11th Cir. 1998)). Conversely, “whether the strategic or tactical decision is reasonable enough to fall within the wide range of professional competence is an issue of law not one of fact.” *Id.* (quoting *Provenzano*, 148 F.3d at 1330). Counsel’s strategic choices made after thorough investigation of the law and facts “are virtually unchallengeable.” *Strickland*, 466 U.S. at 690. “Which witnesses, if any, to call, and when to call them, is the epitome of a strategic decision, and it is one that [federal courts] will seldom, if ever, second guess.” *Ledford v. Warden, Georgia Diagnostic & Classification Prison*, 818 F.3d 600, 647 (11th Cir. 2016) (quoting *Waters v. Thomas*, 46 F.3d 1506, 1512 (11th Cir. 1995)). To demonstrate that counsel’s decision was not reasonable, “the petitioner must show that no competent counsel would have taken the course of action that his attorney took.” *Small v. Fla. Dep’t of Corr.*, 470 F. App’x 808, 812 (11th Cir. 2012) (citing *Blankenship v. Hall*, 542 F.3d 1253, 1273 (11th Cir. 2008)).

Here, the record establishes that trial counsel thoroughly investigated Petitioner’s background and mental health in order to present mitigation evidence

at the penalty phase. Nevertheless, Dr. Day, a qualified mental health expert, concluded after a thorough evaluation of Petitioner, Petitioner's background, the State's evidence, and Petitioner's post-arrest letters that she could not offer any evidence helpful to the defense. Although Dr. Day did not reach a final diagnosis, she advised counsel that if she had to do so, it would be that Petitioner suffers from ASPD or possibly sociopathy or psychopathy. Considering Dr. Day's representation that her testimony would be more aggravating than helpful to the defense, counsel, after numerous discussions, made a strategic decision not to call her as a witness.

Petitioner has not established that no competent counsel would have chosen not to call Dr. Day as a witness, given that she would have testified that Petitioner met all but one of the ASPD criteria and/or had features of sociopathy or psychopathy. In light of Dr. Day's unequivocal representation that her testimony would have been more aggravating to the defense than helpful, the Florida Supreme Court's decision that counsel made a reasonable strategic decision not to call Dr. Day to testify is not unreasonable.

Petitioner was able to present some arguably favorable mental health evidence in the post-conviction proceeding. However, "[a] thorough post-conviction mental health investigation does not render trial counsel's less thorough investigation ineffective." *Harvey v. Warden, Union Corr. Inst.*, 629 F.3d

1228, 1262 (11th Cir. 2011) (citing *Johnson v. Upton*, 615 F.3d 1318, 1337 n. 17 (11th Cir. 2010)). Rather, the relevant inquiry is whether the “known evidence would lead a reasonable attorney to investigate further.” *Id.* (quoting *Powell v. Allen*, 602 F.3d 1263, 1273 (11th Cir. 2010)).

The evidence known by Caudill and co-counsel, which they obtained from a qualified mental health expert with whom Caudill had worked with on prior cases, was that Petitioner had features of ASPD and sociopathy or psychopathy. As noted by Caudill, he had no reason to question Dr. Day’s expert opinion. Caudill’s reliance on Dr. Day’s opinion was not unreasonable, particularly when, at least one other expert, Dr. Danziger, agreed with Dr. Day’s conclusions and opined that he, like Dr. Day, would have been unable to offer any helpful testimony in mitigation had he been called to testify at the penalty phase. In other words, at least two mental health experts did not believe they could provide favorable mental health mitigation evidence for Petitioner. Counsel is permitted to rely on the opinion of a qualified mental health expert, like Dr. Day, unless counsel is aware of a valid reason not to do so. *See, e.g., Harvey*, 629 F.3d at 1263 (reasoning that “[r]ather than obtain a second opinion, [counsel] chose to rely on his expert, who gave him no reason to doubt that he was competent. We cannot say that [counsel’s] performance was deficient.).

Drs. Caddy and Geffken provided more favorable mitigation testimony

than Drs. Day and Danziger. Nonetheless, “the mere fact [that] a defendant can find, years after the fact, a mental health expert who will testify favorably for him does not demonstrate that trial counsel was ineffective for failing to produce that expert at trial.” *Harvey*, 629 F.3d at 1262 (quoting *Reed v. Sec’y, Fla. Dep’t of Corr.*, 593 F.3d 1217, 1242 (11th Cir. 2010)). Even if Caudill had sought a second mental evaluation of Petitioner, there is no guarantee that the expert that he retained would have provided testimony favorable to the defense, like that of Drs. Caddy and Geffken, as compared to that of Drs. Day and Danziger. Consequently, Petitioner has not demonstrated that the Florida Supreme Court’s determination that counsel’s investigation was objectively reasonable is an unreasonable determination of fact.

Likewise, the Florida Supreme Court affirmed the post-conviction court’s rejection of Dr. Caddy’s and Dr. Geffken’s diagnoses as not credible, a finding that is entitled to deference. *See Bottoson v. Moore*, 234 F.3d 526, 534 (11th Cir. 2000) (“When there is conflicting testimony by expert witnesses, as here, discounting the testimony of one expert constitutes a credibility determination, a finding of fact.”) (citation omitted). At the post-conviction hearing, the State and defense presented opposing expert opinions. The State’s expert opined that Petitioner did not suffer from a dissociative state or autism spectrum disorder, and even if Petitioner did, he knew right from wrong and could control whether he committed murders so

as to preclude statutory mitigation. The state courts found the opinion of the State's expert, Dr. Danziger, credible and provided sound reasons for its findings. Petitioner has not rebutted these findings with clear and convincing evidence as required by § 2254(d). *See Peede v. Att'y Gen., Fla.*, 715 F. App'x 923, 929–30 (11th Cir. 2017). Therefore, the Florida Supreme Court's conclusion that Petitioner failed to show deficient performance or prejudice is not contrary to, or an unreasonable determination of, Supreme Court precedent nor is it an unreasonable determination of the facts in light of the evidence presented. Accordingly, Ground Two is denied pursuant to § 2254(d).

C. Ground Three

Petitioner contends counsel was ineffective for failing to investigate and advise Petitioner of all circumstances bearing on his decision to plead guilty. (Doc. 1 at 41.) To support this ground, Petitioner complains that before he entered his plea, counsel failed to (1) develop a trusting relationship with him, (2) properly investigate his mental status leading up to the offenses, (3) consult with and present a mental health expert to explain how Petitioner's ability to function and form the requisite intent was impaired, and (4) investigate and present evidence to rebut the CCP aggravator. (*Id.* at 41-42.)

Petitioner raised this ground in his Rule 3.851 motion. The circuit court denied relief after an evidentiary hearing. (Ex. G-11 at 1867-68.) The Supreme

Court of Florida affirmed, concluding that Petitioner failed to demonstrate prejudice. *Allred II*, 186 So. 3d at 539. The Court reasoned:

Appellant did not testify at the evidentiary hearing, and as the postconviction court found, no evidence was offered to support his claims. Regarding the first claim, the testimony that was presented by various witnesses shows that Caudill or one of his associates regularly met with Appellant. Caudill discussed the process and plans with Appellant, cautiously determining what Appellant would and would not allow. Appellant, however, never wavered in his desire to waive trial and plead guilty, despite counsel's efforts to persuade him otherwise. In fact, the record shows that Appellant's decisions were made against the advice of counsel and there was nothing counsel could have done to change Appellant's mind.

Regarding the second contention that counsel did not investigate evidence of Appellant's mental status to negate the element of premeditation, the evidence is to the contrary. Defense counsel had Appellant evaluated for competency and for mitigation. Dr. Danziger found Appellant competent, and although Dr. Day did not reach a diagnosis, she found that Appellant did not lack the ability to form the requisite intent for the murders and that she could not provide any mitigation. Appellant's claim that he lacked the heightened intent is based on his own self-serving statement to police at the time of his arrest that he went to the house that evening only to bash Barwick's car. *Allred*, 55 So.3d at 1274-75. The evidence shows that Appellant threatened to kill the victims earlier on the day of the murders. *Id.* at 1278. Then, knowing Ruschak and Barwick would be at a friend's house, he contacted Ruschak and announced that he was coming over. Taking his loaded gun, he went out to his truck. As previously stated, when he arrived, he smashed Barwick's car, but he did not leave. Without provocation from anyone in the house, he picked up his gun, went to the front door, and demanded entry. Failing that, he went to the back of the house and fired his gun into the glass door, shattering it. He went directly to the kitchen and fired four shots into Ruschak's chest, killing him, and then to the bathroom where he fired six bullets into Barwick's body, killing her. *Id.* at 1280. Allred shot at only one other person in the house. He fired one bullet into the leg of someone attempting to stop him from killing Ruschak. After leaving the house, Appellant called and surrendered to the police, stating that he had killed two people. *Id.* at 1274.

Appellant's contention that counsel should have presented evidence rebutting both premeditation and CCP is unsupported by any evidence.

Moreover, Appellant's self-serving, after-the-fact claim that he did not have a premeditated design does not negate the clear evidence of premeditated murder. We have previously affirmed Appellant's guilty pleas to the charges of first-degree, premeditated murder and the finding of the CCP aggravator as to each murder. *Id.* at 1277-79. Accordingly, we affirm the postconviction court's denial of this claim.

Allred II, 186 So. 3d at 539-40.

Petitioner has not established that the state court's denial of this ground is contrary to, or an unreasonable application of, clearly established federal law or an unreasonable determination of the facts. During Petitioner's plea hearing, Caudill advised the trial court that Petitioner wanted to enter a plea of guilty to all charges despite the absence of an agreement with the State regarding the sentence that would be imposed. (Ex. A-5 at 473.) The trial court advised Petitioner that the indictment charged him *inter alia* with killing Ruschak and Barwick from a "premeditated design to effect" their deaths. (Ex. A-5 at 477-78.) Petitioner affirmed that he understood the charges against him and indicated that he was guilty of the offenses. (*Id.* at 479-80.) Petitioner further told the trial court that he was in good mental health, was satisfied with counsel's representation, and understood the rights he would be waiving by entering the plea. (*Id.* at 475-76.) Petitioner's representations to the state court are presumed true, and he has not demonstrated that his statements should be overlooked. *See Blackledge v. Allison*, 431 U.S. 63, 73-74 (1977) (A defendant's representations constitute "a formidable barrier in any subsequent collateral proceedings. Solemn declarations in open

court carry a strong presumption of verity.”).

Moreover, at the plea hearing, Caudill told the trial court that he had gone over the facts and evidence with Petitioner and was satisfied that Petitioner understood them. (Ex. A-5 at 477.) Caudill subsequently testified in the Rule 3.851 hearing that Petitioner expressed his desire to plead guilty soon after his arrest. (Ex. G-12 at 175.) According to Caudill, despite being advised about the elements of first-degree murder and the lesser included offenses of first-degree murder, Petitioner was never open to going to trial and he pled guilty against Caudill’s advice. (*Id.* at 173, 179.)

Further, Caudill had Dr. Danziger evaluate Petitioner to determine whether he was sane at the time of the offenses, contrary to Petitioner’s contention that counsel did not investigate his mental status leading up to the offenses. Caudill also presented mitigation evidence at that penalty phase, but he was unable to present any favorable mental health evidence to support mitigating factors although he conducted a reasonable investigation.

In addition, as discussed *supra*, the Florida Supreme Court discounted the opinions of Petitioner’s post-conviction experts that he was in a dissociative state at the time of the offenses and suffers from autism spectrum disorder. Deference must be given to the state courts’ decision to credit Dr. Danziger’s contravening testimony that Petitioner did not suffer from these conditions. Finally, as discussed

in Ground Five, the evidence supporting the CCP aggravator was overwhelming, and nothing presented in the post-conviction proceeding rebutted the state courts' finding of the aggravator. Petitioner, therefore, has not shown deficient performance or that a reasonable probability exists that but for counsel's performance, he would not have pled guilty and would have gone to trial or been able to rebut the CCP aggravator. Accordingly, Ground Three is denied pursuant to § 2254(d).

D. Ground Four

Petitioner contends he may be incompetent at the time he is scheduled to be executed, and therefore, his execution would violate the Eighth Amendment. (Doc. 1 at 47-48.). Petitioner raised this ground in his Rule 3.851 motion, and the circuit court determined it was prematurely raised. The Supreme Court of Florida affirmed, noting that claims of incompetence to be executed are not properly raised until a death warrant is issued. *Allred II*, 186 So. 3d at 542.

The Supreme Court of the United States had held that a *Ford*⁵ claim does not become ripe until the prisoner's execution is imminent. See *Panetti v. Quarterman*, 551 U.S. 930, 946-47 (2007). Thus, Ground Four is dismissed without prejudice to Petitioner's right to raise the issue when it becomes ripe for adjudication.

⁵ *Ford v. Wainwright*, 477 U.S. 399 (1986) (holding that "the Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane.").

E. Ground Five

Petitioner asserts that the trial court erred in finding that the murders were cold, calculated, and premeditated, resulting in the death sentences being imposed in an arbitrary and capricious manner. (Doc. 1 at 48-50.) According to Petitioner, the murders were “prompted by emotional frenzy, panic, or a fit of rage” and were not the result of a careful plan or prearranged design. (*Id.* at 49.) Petitioner argues that he had access to guns other than the one he used to commit the murders and he purchased that gun a few weeks before the murders, not several days before as stated by the trial court. Petitioner contends, therefore, that the trial court’s reliance on his purchase of the gun to find the CCP aggravator was error. (*Id.* at 49-50.)

Petitioner raised this ground on direct appeal. The Supreme Court of Florida affirmed the trial court’s finding of the CCP aggravator as to both murders:

On the day of the murders—a month after the breakup with Barwick—appellant told his friend Michael Siler in an instant message exchange that he intended to kill both Barwick and Ruschak. In similar messages to his victims that day, appellant said that he would kill Ruschak the next time he saw him and that he could not forgive Barwick for having sex with Ruschak. This anger, however, was not evident when he had dinner with Siler that evening. Instead, Allred was quiet and passive. After dinner, Allred went home to his room, and he did not drink the beer he had just bought. He knew that both Ruschak and Barwick would be at Roberts’ house, and after a time, he sent a message telling Ruschak that he was coming to the house. Allred had purchased a gun after he turned twenty-one, but he always left it in his room unless he went to target practice. That evening, after sending his warning, he took his loaded gun with him. Upon arriving at the house, he repeatedly rammed Barwick’s car, and then he again picked up his gun and walked to the front door. Upon being denied

entry at both the front and back doors, Allred did not leave. Instead, he fired his pistol to gain entry by shattering the glass door. He spoke to no one and did not threaten or shoot at any of the people present in the room. Instead, he went directly to the kitchen and gunned Ruschak down. When Roberts tried to stop Allred, appellant was “somewhat calm” when he told Roberts to release him and then fired a single, nonfatal shot into Roberts’ leg. Allred then went to the bathroom where Barwick stood in the bathtub calling 911 and shot her six times. Thus, Allred only murdered the two people that he went to the house prepared to kill.

Appellant contends that the trial court erred in finding that he purchased a gun “several days before the murders,” because appellant purchased the gun on September 1, took possession on September 7, and committed the murders on September 24. Regardless of whether “several days” can mean about two weeks, the fact remains that appellant purchased the gun soon after the breakup and practiced with it by using a picture of Barwick for a target. That Allred purposely took this gun with him to the crime scene is evidenced by his own admission that he never took it from his room unless he intended to use it. Thus, the court’s finding that Allred procured the weapon in advance is relevant to the CCP finding and supported by competent, substantial evidence.

Citing our decision in *Santos v. State*, 591 So. 2d 160 (Fla. 1991), appellant also argues that his actions on that day resulted from an ongoing domestic dispute and therefore were not “cold” and “calculated.” In that case, we stated that a murder arising from a domestic dispute tended to negate the CCP aggravator. *Id.* at 162. Then, upon finding, based on a mental health expert’s testimony, that the “ongoing, highly emotional domestic dispute” had “severely deranged” Santos and that he was under extreme emotional distress and unable to appreciate the criminality of his conduct, we struck the aggravator. *Id.* at 163.

Appellant’s argument fails for two reasons. First, Allred presented no mental health testimony establishing that he was mentally impaired. Further, the record supports the trial court’s determinations that Allred was “suffering from an emotional disturbance” but that it was not severe or extreme and that appellant was able to conform his actions to the requirements of law. *See Carter v. State*, 980 So. 2d 473, 481–82 (Fla. 2008) (affirming CCP where defendant was jealous that his longtime girlfriend was seeing someone else, drove to her house, carried his rifle with him to the door, confronted his victims, and then shot and killed both). Second, any reliance on a so-called “domestic disturbance exception” to CCP is unavailing. As this Court recently stated in *Turner v. State*, 37 So. 3d 212,

224 (Fla. 2010), *cert. denied*, --- U.S. ----, 131 S. Ct. 426, 178 L. Ed. 2d 332 (2010):

Twelve years after the *Santos* decision, this Court made it clear in *Lynch* [*v. State*, 841 So. 2d 362, 377 (Fla. 2003)] that it “does not recognize a domestic dispute exception in connection with death penalty analysis.” Therefore, even if [a] murder did, in fact, “arise from a domestic disturbance,” such a defense would not preclude a finding of CCP.

Allred I, 55 So. 3d at 1278–79.

To determine “whether a state court’s application of its constitutionally adequate aggravating circumstances was so erroneous as to raise an independent due process or Eighth Amendment violation,” federal courts apply the “rationale factfinder” standard of review set forth in *Jackson v. Virginia*, 443 U.S. 307 (1979). *Lewis v. Jeffers*, 497 U.S. 764, 781 (1990). Pursuant to *Jackson*, when reviewing an insufficiency of the evidence claim, the federal court must determine “whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” 443 U.S. at 319; *see also Owen v. Sec’y for Dep’t of Corr.*, 568 F.3d 894, 918 (11th Cir. 2009). Under this standard, “[a] state court’s finding of an aggravating circumstance in a particular case . . . is arbitrary or capricious if and only if no reasonable sentencer could have so concluded.” *Lewis*, 497 U.S. at 783.

Under Florida law, the CCP aggravator is applicable if the evidence shows beyond a reasonable doubt that

[(1)] the killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage (cold); [(2)] the defendant had a careful plan or prearranged design to commit murder before the fatal incident (calculated); [(3)] the defendant exhibited heightened premeditation (premeditated); and [(4)] the defendant had no pretense of moral or legal justification.

Franklin v. State, 965 So. 2d 79, 98 (Fla. 2007) (citing *Jackson v. State*, 648 So. 2d 85, 89 (Fla. 1994)). In numerous cases, the Supreme Court of Florida has found “the defendant’s procurement of a weapon in advance of the crime as indicative of preparation and heightened premeditated design.” *Id.* (collecting cases where CCP aggravator was applied and facts showed that the defendants procured a weapon in advance of the murder or brought a weapon to the scene of the offenses). Other relevant factors for consideration include “lack of resistance or provocation[] and the appearance of a killing carried out as a matter of course.” *Id.* (citing *Swafford v. State*, 533 So. 2d 270, 277 (Fla. 1988)).

The state court’s denial of this ground is not contrary to, or an unreasonable application of, *Jackson* or *Lewis*, nor is it an unreasonable determination of the facts in light of the evidence presented. The record establishes that a few weeks preceding the murders, after his break-up with Barwick, Petitioner purchased a handgun, which he took possession of on September 7, 2007. Prior to the murders, Petitioner used the gun to shoot target practice on photographs of Barwick. (Ex. A-1 at 128, 144.) On September 23, 2007, the day before the murders, Petitioner messaged his friend, Michael Siler (“Siler”), that he needed to start killing people.

(*Id.* at 147.) The following day, several hours before the murders, Petitioner told Siler that he was going to kill Ruschak and Barwick. (*Id.* at 145-46.) Petitioner similarly sent Barwick messages that morning in which he told her that he would kill Ruschak if he saw him again and indicated that he would never forgive her. (*Id.* at 30-33.) Continuing his threats, he sent Ruschak a message that afternoon threatening to kill him if he saw him again and expressing his inability to ever forgive Barwick for sleeping with Ruschak. (*Id.* at 129.)

Later that evening, after having dinner with Siler, Petitioner sent Ruschak a message that he was coming to his house. Following through on his numerous threats, Petitioner proceeded to Ruschak's home with his loaded firearm where he knew Ruschak and Barwick would be. He rammed Barwick's vehicle several times, after which he approached Ruschak's front door with his gun and attempted to gain entrance to the home. (Ex. A-3 at 30.) Unsuccessful, Petitioner went to the rear of the house to the sliding glass backdoor which he shot out when the occupants of the home refused to let him in. (*Id.* at 75-77.)

Petitioner then entered the home, walked past three or four people, and shot Ruschak without speaking. (*Id.* at 76-77.) At that time, Roberts attempted to restrain Petitioner, who responded in a semi-calm voice by repeatedly telling Roberts to let him go and then shooting Roberts in the right leg when Roberts did not release him. (*Id.* at 51-52.) After Roberts released Petitioner, he proceeded to

hunt Barwick down in her hiding space in the bathroom where he shot her multiple times.

Ample evidence supports each of the CCP elements. Specifically, Petitioner purchased a firearm weeks before the murders, used that gun for target practice on Barwick's photographs, made threats to kill Ruschak and Barwick several hours before their murders, and took his loaded gun to their home, despite his representation that he only went there to ram Barwick's car. From these facts, a rational trier of fact could conclude that the murders were the product of cool and calm reflection and were not prompted by emotional frenzy, panic, or a fit of rage. Likewise, Petitioner's prearranged design to commit the murders and heightened premeditation are further evidenced by his entry into the home with the loaded gun, his shooting of Ruschak multiple times without speaking, his effort to free himself from Roberts' restraint by shooting him so he could continue his rampage, and his shooting of Barwick multiple times after hunting her down in a bathroom where she was cowering in the bathtub.

Although Petitioner told law enforcement that he did not plan to kill the victims when he went to their home, the trial court was justified in discounting Petitioner's representation given the overwhelming evidence belying his statement. It is of no consequence that Petitioner had access to other guns before he purchased the handgun that he used to kill the victims. Nor does the trial

court's characterization of the timing of Petitioner's purchase of the gun before the murder as "several days" versus a "few weeks" constitute error. In sum, under Florida law, a rational trier of fact could conclude that the CCP aggravator was established beyond a reasonable doubt. Accordingly, Ground Five is denied pursuant to § 2254(d).

F. Ground Six

Petitioner contends that his death sentences are disproportionate. (Doc. 1 at 50-52.) Petitioner argues that the death sentences were imposed in an arbitrary and capricious manner in violation of *Furman v. Georgia*, 408 U.S. 238 (1972) and *Spaziano v. Florida*, 468 U.S. 447 (1984). (*Id.* at 51.) According to Petitioner, the record establishes that he suffered from a developmental disability for which he did not receive adequate treatment, he was an immature social misfit, and the murders were crimes of passion. (*Id.*) Finally, he notes that the Supreme Court of Florida has previously concluded that killing that results from an ongoing and heated domestic dispute may render a death sentence disproportionate. (*Id.* at 51-52.)

Petitioner raised this ground on direct appeal. In denying relief, the Supreme Court of Florida reasoned:

In this double homicide case, the court found three of the most serious aggravating factors—CCP, prior capital felony conviction, and HAC—applicable to Barwick's murder and that the first two applied to Ruschak's murder as well. *See Jackson v. State*, 18 So. 3d 1016, 1035 (Fla. 2009) (stating

HAC and CCP are “two of the most serious aggravators”), *cert. denied*, --- U.S. ---, 130 S. Ct. 1144, 175 L. Ed. 2d 979 (2010); *Chamberlain v. State*, 881 So. 2d 1087, 1109 (Fla. 2004) (“CCP and prior violent felony conviction are considered among the more serious aggravating circumstances.”). As explained previously, we reject Allred’s challenges to two of the aggravators. With regard to mitigation, the sentencing court gave moderate to little weight to the nonstatutory mitigating circumstances established and found the aggravators “far outweigh[ed]” the mitigation.

We reject appellant’s argument that the sentences are disproportionate because they resulted from a domestic dispute. “This Court does not recognize a domestic dispute exception in connection with death penalty analysis.” *Lynch*, 841 So.2d at 377. Under the totality of the circumstances and after comparison of this case with similar cases, we conclude that the death sentences in this double homicide case are proportionate. *See Frances v. State*, 970 So. 2d 806, 820–21 (Fla. 2007) (affirming death sentences where two aggravators—prior capital felony conviction and committed in the course of a robbery—applied to both murders, HAC also applied to one victim, and one statutory mitigator and several nonstatutory mitigators were found); *Lynch*, 841 So. 2d at 368 (affirming death sentences for murders of girlfriend and her daughter where two aggravators—prior violent felony conviction and commission during a felony—applied to both murders; a third aggravator—HAC in one and CCP in the other—applied in each; and one statutory and eight nonstatutory mitigators were found); *Francis v. State*, 808 So. 2d 110, 141 & n. 12 (Fla. 2002) (affirming death sentences where four aggravators—prior capital felony conviction, committed while engaged in a robbery, HAC, and victim vulnerability due to advanced age—were found as to each; two statutory mitigators—defendant’s age and under extreme mental or emotional disturbance—were established; and nonstatutory mitigators including mental illness or emotional disturbance, no significant prior violent criminal activity, and ability to conform to the law may have been impaired were found).

Allred I, 55 So. 3d at 1284.

As explained by the Eleventh Circuit,

[a] federal habeas court should not undertake a review of the state supreme court’s proportionality review and, in effect, “get out the record” to see if the state court’s findings of fact, their conclusion based on a review of similar cases, was supported by the “evidence” in the similar cases. To do so would thrust the federal judiciary into the substantive policy making area of the state. It is the state’s responsibility to determine the procedure

to be used, if any, in sentencing a criminal to death. *See California v. Ramos*, 103 S. Ct. at 3451-53.

Moore v. Balkcom, 716 F.2d 1511, 1518 (11th Cir. 1983). Only if a petitioner shows that “the facts and circumstance of his case are so clearly undeserving of capital punishment that to impose it would be patently unjust and would shock the conscience” may habeas relief be warranted. *Id.* (quoting *Spinkellink v. Wainwright*, 578 F.2d 582, 606 n.28 (5th Cir. 1978)).

Here, the record does not show “the freakish imposition of capital punishment,” and the Florida Supreme Court’s proportionality review does not “shock the conscience.” *See Moore*, 716 F.2d at 1518. As discussed above, the CCP aggravator was overwhelmingly supported by the evidence. Further, the aggravating circumstances outweigh the mitigating circumstances. Finally, the Florida Supreme Court has affirmed the imposition of the death penalty in analogous cases in which the murders were motivated by jealousy or after the perpetrator was spurned by the victim and where the aggravating and mitigating circumstances largely mirror those found in this case. *See, e.g., Carter v. State*, 980 So. 2d 473 (Fla. 2008); *Lynch v. State*, 841 So. 2d 362 (Fla. 2003).

There is apparent good faith in the state court’s proportionality review. The Court, therefore, declines to inject itself into a state sentencing procedure and concludes that the Florida Supreme Court’s determination that Petitioner’s death sentences are not disproportionate is not contrary to, or an unreasonable

application of, clearly established federal law nor is it based upon an unreasonable determination of the facts. Accordingly, Ground Six is denied pursuant to § 2254(d).

Any allegations not specifically addressed are without merit.

IV. CERTIFICATE OF APPEALABILITY

This Court should grant an application for certificate of appealability only if the Petitioner makes “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). To make such a showing “the petitioner must demonstrate that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also Lamarca v. Sec’y, Dep’t of Corr.*, 568 F.3d 929, 934 (11th Cir. 2009). When a district court dismisses a federal habeas petition on procedural grounds without reaching the underlying constitutional claim, a certificate of appealability should issue only when a petitioner shows “that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Id.*; *Lamarca*, 568 F.3d at 934. However, a prisoner need not show that the appeal will succeed. *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003).

Petitioner has not demonstrated that reasonable jurists would find the

district court's assessment of the constitutional claims debatable or wrong. Moreover, Petitioner cannot show that jurists of reason would find this Court's procedural rulings debatable. Petitioner has failed to make a substantial showing of the denial of a constitutional right. Thus, the Court will deny Petitioner a certificate of appealability.

Accordingly, it is hereby **ORDERED** and **ADJUDGED**:

1. The Petition (Doc. 1) is **DENIED**, and this case is **DISMISSED WITH PREJUDICE**.
2. Petitioner is **DENIED** a Certificate of Appealability.
3. The Clerk of the Court shall enter judgment accordingly and is directed to close this case.

DONE and **ORDERED** in Orlando, Florida on August 3, 2021.


PAUL G. BYRON
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel of Record

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*

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

DEATH PENALTY CASE

Appendix H

Petition for Writ of Habeas Corpus, dated April 4, 2016.

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

Capital Postconviction Death Penalty Case

Prisoner's name: ANDREW R. ALLRED
Prisoner's DOC number: 130930
Place of Confinement: Union Correctional Institution
7819 NW 228th Street
Raiford, Florida 32026

2016 APR -4 PM 12:27
MIDDLE DISTRICT OF FLORIDA
ORLANDO, FL

FILED

ANDREW R. ALLRED,
Petitioner

CASE NO. 16-16-cv-50021-40KRS

v.

JULIE L. JONES,
Secretary of the Florida Department of Corrections

and

PAMELA JO BONDI,
Attorney General of the State of Florida,
Respondents.

PETITION FOR WRIT OF HABEAS CORPUS BY A
PERSON IN STATE CUSTODY UNDER 28 U.S.C. 2254

MARK S. GRUBER
Florida Bar Number 0330541
JULIE A. MORLEY
Florida Bar Number 0085158
Law Office of the Capital Collateral Regional
Counsel - Middle Region
12973 N. Telecom Parkway
Temple Terrace, Florida 33637
Tel: (813) 558-1600
Fax: (813) 558-1601
Email: gruber@ccmr.state.fl.us
Email: morley@ccmr.state.fl.us
Secondary Email: support@ccmr.state.fl.us
Attorneys for Petitioner

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**PETITION FOR WRIT OF HABEAS CORPUS BY A
PERSON IN STATE CUSTODY UNDER 28 U.S.C. 2254**

Information Required by Sup. Ct. R. 2(d)

1. (a) Name and location of court which entered the judgment of conviction under attack:
Seminole County, Eighteenth Judicial Circuit

(b) Criminal docket or case number:
Florida Circuit Court Case Number 2004-CF-4890-A
Florida Supreme Court Case Numbers SC08-2354 and SC13-2170
2. (a) Date of the judgment of conviction:
April 30, 2008 (plea date)

(b) Date of sentencing:
November 19, 2008
3. Length of sentence:
Death Sentence as to the two counts of first-degree murder; life imprisonment as to the counts of burglary to a dwelling and aggravated battery with a firearm while inflicting great bodily harm or death; and five years imprisonment for the count of criminal mischief.
4. In this case, was Petitioner convicted of more than one count or of more than one crime?
Yes
5. Identify all crimes of which the Petitioner was convicted and sentenced in this case:

Victims: Tiffany Barwick and Michael Ruschak
Date of Offense: September 24, 2007
Date of Arrest: September 24, 2007
Indictment: October 30, 2007

COUNT 1: FIRST DEGREE PREMEDITATED MURDER (CF)
Florida Statute 782.04(1)(a)
COUNT 2: FIRST DEGREE PREMEDITATED MURDER (CF)
Florida Statute 782.04(1)(a)
COUNT 3: ARMED BURGLARY OF A DWELLING WHILE INFLECTING
GREAT BODILY HARM OR DEATH (F1 PBL)
Florida Statutes 810.02(2)(b)
COUNT 4: AGGRAVATED BATTERY WITH FIREARM WHILE
INFLECTING GREAT BODILY HARM OR DEATH (F2)

COUNT 5: Florida Statutes 784.045(1)(a)2
CRIMINAL MISCHIEF (F3)
Florida Statutes 806.13

6. (a) What was the Petitioner's plea?
Guilty
- (b) If the Petitioner entered a guilty plea to one count or charge and a not guilty plea to another count or charge, what did he plead guilty to and what did he plead not guilty to?
The Petitioner pled guilty to all charges.
- (c) If the Petitioner went to trial, what kind of trial did he have?
N/A
7. Did the Petitioner testify at a pretrial hearing, trial, or post-trial hearing?
No.
8. Did the Petitioner appeal from the judgment of conviction?
Yes.
9. If the Petitioner did appeal, answer the following?
 - (a) Name of Court:
Direct appeal was taken to the Supreme Court of Florida.
 - (b) Docket or Case Number:
SC08-2354
 - (c) Result:
Judgment and sentence affirmed.
 - (d) Date of Result:
December 16, 2010.
 - (e) Citation to the case:
Allred v. State, 55 So. 3d 1267 (Fla. 2010).
 - (f) Grounds Raised:
Issue One: The trial court erred in finding that the murders of Tiffany Barwick and Michael Ruschak were committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

Issue Two: The trial court erred in finding that the murder of Tiffany Barwick was especially heinous, atrocious, or cruel.

Issue Three: The Appellant's death sentence was impermissibly imposed, rendering the death sentence unconstitutional under the Federal and Florida Constitutions.

- (g) Did the Petitioner seek review by a higher state court?
No. The Florida Supreme Court is the highest state court and has original appellate jurisdiction.
- (h) Did the Petitioner file a petition for certiorari in the United States Supreme Court?
Yes. A Petition for Writ of Certiorari was denied by the U.S. Supreme Court on October 3, 2011 in *Allred v. Florida*, 2011 U.S. LEXIS 6406 (U.S., Oct. 3, 2011).
- 10. Other than the direct appeals listed above, has the Petitioner previously filed any other petitions, applications, or motions concerning the judgment of conviction in any state court?
Yes.
- 11. If your answer to Question 10 was "Yes," give the following information:
 - (a) (1) Name of court:
Eighteenth Judicial Circuit, Seminole County, Florida
 - (2) Criminal docket or case number:
2004-CF-4890-A
 - (3) Date of filing:
Motion to Vacate Judgment and Sentence filed September 28, 2012.
Amended Motion to Vacate Judgment and Sentence filed March 28, 2013.
Second Amended Motion to Vacate Judgment and Sentence filed July 3, 2013.
 - (4) Nature of the Proceeding:
Fla. R. Crim. P. 3.851 Motion to Vacate Judgment and Sentence
 - (5) Grounds Raised
SECOND AMENDED MOTION TO VACATE JUDGMENT OF CONVICTION AND SENTENCE (Filed on July 3, 2013):

CLAIM I: Mr. Allred received ineffective assistance of counsel at the penalty phase of his capital trial for failure to ensure a reasonably competent mental health evaluation.

CLAIM II: Counsel rendered ineffective assistance of counsel by failing to independently investigate and present to Mr. Allred all circumstances that would bear on his decision to plead guilty. Counsel's failure prejudiced Mr. Allred to the extent that there is a reasonable probability that Mr. Allred would have exercised his right to a jury trial.

CLAIM III: Counsel's performance in failing to investigate and prepare for potential jury selection fell below prevailing professional norms. Counsel's failure prejudiced Mr. Allred and violated his Sixth Amendment right to effective assistance of counsel. But for counsel's deficient performance, Mr. Allred would have exercised his right to a sentencing phase jury. Confidence in the outcome is undermined.

CLAIM IV: Counsel provided ineffective assistance by failing to employ a mitigation expert.

CLAIM V: Mr. Allred received ineffective assistance of counsel at the penalty phase of his capital trial for failure to present and investigate testimony about his ability to adapt to prison.

CLAIM VI: Cumulatively, the combination of procedural and substantive errors deprived Mr. Allred of a fundamentally fair trial guaranteed under the Sixth, Eighth, and Fourteenth Amendments.

CLAIM VII: Florida's capital sentencing statute is unconstitutional on its face and as applied for failing to prevent the arbitrary and capricious imposition of the death penalty and for violating the guarantee against Cruel and Unusual Punishment in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. To the extent this issue was not properly litigated at trial or on appeal, Mr. Allred received prejudicial ineffective assistance of counsel.

CLAIM VIII: Mr. Allred's Eighth Amendment right against Cruel and Unusual Punishment will be violated as he may be incompetent at the time of execution.

CLAIM IX: Florida's lethal injection method of execution is cruel and unusual punishment and would deprive Mr. Allred of Due Process and Equal Protection of the law in violation of the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and corresponding portions of the Florida Constitution.

CLAIM X: Fla. Stat. 945.10 prohibits Mr. Allred from knowing the identity

of the execution team members, denying him his constitutional rights under the Sixth, Eighth, and Fourteenth Amendments and corresponding provisions of the Florida Constitution.

CLAIM XI: Trial Counsel provided ineffective assistance by undermining the constitutional protections mandated by *Koon v. Duggar* and progeny.

(6) Did the Petitioner receive a hearing where evidence was given on your petition, application or motion?

Yes. An evidentiary hearing was held on August 1, 2, and 5, 2013.

(7) Result:

The circuit court denied Mr. Allred's Second Amended Motion to Vacate Judgment and Sentence.

(8) Date of Result:

October 9, 2013.

(b) If the Petitioner filed any second petition, application, or motion, give the same information:

N/A

(c) Did the Petitioner appeal to the highest state court having jurisdiction over the action taken on his petition, application, or motion?

Yes. The claims asserted in that appeal were:

ARGUMENT I: The circuit court erred in denying Mr. Allred's claim that he received prejudicial ineffective assistance of counsel at the penalty phase of his capital trial for failure to ensure a reasonably competent mental health evaluation.

ARGUMENT II: The circuit court erred in denying Mr. Allred's claim that trial counsel rendered ineffective assistance of counsel by failing to independently investigate and present to Mr. Allred all circumstances that would bear on his decision to plead guilty.

ARGUMENT III: The circuit court erred in denying Mr. Allred's claim that trial counsel's performance in failing to investigate and prepare for potential jury selection fell below prevailing professional norms as counsel was deficient for failing to move for a change of venue, failing to investigate and advise of all mitigation, and failing to consult with an expert on jury selection.

ARGUMENT IV: The circuit court erred in denying Mr. Allred's claim that cumulative error deprived him of the fundamentally fair trial guaranteed under the Sixth, Eighth,

and Fourteenth Amendments.

ARGUMENT V: Florida's capital sentencing statute is unconstitutional for failing to prevent the arbitrary and capricious imposition of the death penalty and for violating the guarantee against Cruel and Unusual Punishment in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

ARGUMENT VI: The Eighth Amendment right against Cruel and Unusual Punishment will be violated as Mr. Allred may be incompetent at the time of execution.

ARGUMENT VII: Florida's lethal injection method of execution is cruel and unusual punishment and would deprive Mr. Allred of Due Process and Equal Protection of the law in violation of the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and corresponding portions of the Florida Constitution.

ARGUMENT VIII: Fla. Stat. 945.10 prohibits Mr. Allred from knowing the identity of the execution team members, denying him his constitutional rights under the Sixth, Eighth, and Fourteenth Amendments and corresponding provisions of the Florida Constitution.

In addition Petitioner argued a claim predicated on the decision in *Hurst v. Florida*, No. 14-7505, 2016 WL 112683 (Jan. 12, 2016) on a motion for rehearing after the Florida Supreme Court denied relief in *Allred v. State*, 2016 WL 156966, --- So.3d ---- (Jan. 14, 2016).

- (d) If the Petitioner did not appeal to the highest state court having jurisdiction over the action taken on the petition, explain why not:

N/A

12. For this petition, state every ground on which the Petitioner claims that he is being held in violation of the Constitution, laws, or treaties of the United States.
Grounds for relief are stated below.

13. Please answer these additional questions about the petition you are filing:

- (a) Have all grounds for relief that you have raised in this petition been presented to the highest court having jurisdiction?

Yes.

- (b) Is there any ground in this petition that has not been presented in some state or federal court?

No.

14. Have you previously filed any type of petition application, or motion in a federal court regarding the conviction that you challenge in this petition?
No.
15. Do you have any petition or appeal now pending (filed and not decided yet) in any court, state or federal, for the judgment you are challenging?
No.
16. Give the name and addresses of each attorney who represented the Petitioner in the following stages of the judgment he is challenging:

Trial counsel (present at arraignment, pre-trial, plea hearing, trial, and sentencing):

Rebecca S. Sinclair
Law Offices of Rebecca Sinclair
1911 South Florida Avenue
Lakeland, Florida 33803-2655
Phone: 863-213-9520
Email: rsinclairesq@yahoo.com

Timothy D. Caudill
Assistant Public Defender
Public Defender's Officer, 18th Judicial Circuit
P.O. Box 8004
Sanford, Florida 32772-8004
Phone: 407-665-4524
E-Mail: tcaudill@pd18.net

Direct appeal counsel:

Christopher S. Quarles
Assistant Public Defender
Public Defender's Officer, 7th Judicial Circuit
444 Seabreeze Boulevard
Suite 210
Daytona Beach, Florida 32118-3941
Phone: 386-254-3758
Email: quarles.chris@pd7.org

Post-conviction counsel

Julie A. Morley
Capital Collateral Regional Counsel - Middle Region

3801 Corporex Park Drive, Suite 210
Tampa, Florida 33619-1136
Phone: (813)-740-3544
Fax: (813)-740-3554
E-Mail: morley@ccmr.state.fl.us

Maria Perinetti
Capital Collateral Regional Counsel - Middle Region
3801 Corporex Park Drive, Suite 210
Tampa, Florida 33619-1136
Phone: (813)-740-3544
Fax: (813)-740-3554
E-Mail: perinetti@ccmr.state.fl.us

Mark S. Gruber
Capital Collateral Regional Counsel - Middle Region
3801 Corporex Park Drive, Suite 210
Tampa, Florida 33619-1136
Phone: (813)-740-3544
Fax: (813)-740-3554
E-Mail: gruber@ccmr.state.fl.us

17. Does the Petitioner have any future sentence to serve after he completes the sentence for the judgment that he is challenging?
No.
18. **TIMELINESS OF PETITION:** If the Petitioner's judgment of conviction became final over one year ago, he must explain the one-year statute of limitations as contained in 28 U.S.C. §2244(d) does not bar his petition.

The Antiterrorism and Effective Death Penalty Act's (AEDPA) one year period of limitations commences when the petitioner's judgment of conviction and sentence becomes final and is tolled for the time "during which a properly filed application for State postconviction or other collateral review . . . is pending." 28 U.S.C. §2244(d)(2). In Florida, the state postconviction relief proceedings are pending until the mandate issues from the appeals court, in this case the Florida Supreme Court, affirming the lower court's denial of postconviction relief. *Nyland v. Moore*, 216 F.3d 1264 (11th

Cir. 2000).

The judgment and sentence were affirmed at *Allred v. State*, 55 So. 3d 1267 (Fla. 2010), *rehearing* denied March 2, 2011. The U.S. Supreme Court certiorari petition was denied by *Allred v. Florida*, 132 S. Ct. 181 (Oct. 3, 2011). Thus, the judgment and sentence in this case became final on Oct. 3, 2011, when the United States Supreme Court entered its order denying certiorari. The running of §2244(d)(1)'s one year period of limitation is tolled during the time "a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending." 28 U.S.C. § 2244(d)(2). Mr. Allred's original state motion for postconviction relief pursuant to Fla. R. Crim. P. was timely filed on September 28, 2012, thus "stopping the clock" with five days left of the federal limitations period. After the state motion was litigated in the trial court and review on appeal, the Florida Supreme Court denied postconviction relief by an order dated January 14, 2016. *Allred v. State*, 2016 WL 156966, --- So.3d ----. Allred filed a timely motion for rehearing which was denied on March 14, 2016. The mandate is dated March 30, 2016. This petition is timely filed.

STATEMENT OF THE CASE AND OF THE FACTS

Facts of the case

On October 23, 2007, Andrew Allred was charged by indictment with two counts of first-degree premeditated murder, one count armed burglary of a dwelling while inflicting great bodily harm or death, one count aggravated battery with a firearm while inflicting great bodily harm or death, and one count criminal mischief. The facts of this case were recited in the direct appeal decision at *Allred v. State*, 55 So. 3d 1267 (Fla. 2010) as follows:

The penalty phase was held September 22–24, 2008. Because Allred pleaded guilty, the State presented evidence regarding the murders to establish a basis for aggravating factors, after which the defense presented mitigation testimony.

On August 25, 2007, Allred celebrated his twenty-first birthday with a party at his family's home in Oviedo. A number of people attended, including his best friend Michael Ruschak and Allred's live-in girlfriend, Tiffany Barwick. Allred and Barwick had dated for about a year and lived together for the last several months. The relationship with Barwick, however, came to an abrupt and public end at the birthday party. When Barwick told Allred she "wanted her stuff back," Allred went to the room they shared, gathered her belongings, and began throwing them over the property's fence. Someone called the police, who upon arrival ordered Allred to stop but did not arrest him.

A few days later, Allred bought a Springfield XP .45 caliber handgun. Because of the legal waiting period, however, he did not take possession of it until September 7. On that day, he used pictures of Barwick for target practice and subsequently emailed Barwick a photo of the bullet-riddled pictures that were hanging on the wall of his room.

Witness testimony and digital messaging indicated that in the days shortly before the murders, Allred discovered that—subsequent to the breakup—Ruschak and Barwick had sexual intercourse. Allred became angry and sent threatening messages to his "ex-best friend" and his ex-girlfriend. He also discussed his feelings with friend

Michael Siler. In an instant message exchange with Siler on September 23, Allred stated, "I pretty much just need to start killing people." The next day, September 24, 2007, the day of the murders, Allred specifically threatened the lives of Barwick and Ruschak. In an instant message chat with Siler in the morning, Allred stated, "I'm pretty much gonna kill him ... Ruschak ... and her." In an electronic conversation with victim Ruschak on that same day, Allred told him, "If [I] see you again, [I] will kill you, and yes that is a threat." Finally, Allred and Barwick engaged in a heated and lengthy computer exchange on the day of the murder. Allred informed Barwick that he had hacked into her computer, changed the passwords, deleted files, and sent emails to people on her contacts list. He also transferred all of the funds in her bank account to pay her credit card debt. Calling her a "whore" because of her relationship with Ruschak, Allred said he could not forgive her for that and threatened, "[I]f I ever see [Ruschak] again I will kill him."

Allred was fired from his job instructing on the use of computer software on the day of the murders. That evening, he and Siler went to dinner at a local restaurant. They talked about work and other subjects, but Allred seemed not to care about anything and often shrugged in response to questions. Allred drove Siler home about an hour later. Siler testified that as Allred left, the thought that Allred might be suicidal crossed his mind.

After dropping Siler off, Allred drove first to a grocery store and bought beer. Then he went home for a while, but he did not drink any of the beer. Later, knowing that Barwick would be with Ruschak, Allred contacted Ruschak, stating that he was coming to Ruschak's house. Allred then picked up the .45 he bought for his birthday and went out to his truck.

At the time of the murders, Ruschak was living in the home of friend Eric Roberts at 100 Shady Oak Lane. A neighbor, Steve McCavour, testified that at approximately 10 p.m. on September 24, 2007, he saw a large black truck repeatedly crashing into a white car. He called 911 and observed the driver go to the front door of Roberts' house, kick and bang on it, and then head around the house.

Roberts and roommate Ruschak had invited friends over that night for dinner and to watch a popular television program. Tiffany Barwick was living there temporarily, and the other guests present were Justin Kovacich, Philip Cammarata, Kathryn Cochran, and Charles

Bateman. Soon after all the guests arrived, Ruschak told the group that he had just received a message from Allred stating that he was coming over. Ruschak suggested calling Allred's mother to see if Allred had left home and someone suggested calling the police, but neither call was made. The message that Allred was coming over, however, put Barwick "in full panic mode."

Soon thereafter, witnesses sitting in the living room heard a loud noise outside the house, which Cochran testified sounded "like a mortar going off." Ruschak, who was in the kitchen at the front of the house, looked out the window and announced that Allred had arrived. Ruschak then quickly locked the front door just before Allred banged loudly on it, yelling, "[L]et me in."

When no one opened the door, Allred went to the back of the house, where the guests had assembled in the living room. He banged on the sliding glass door, and Barwick ran up the hall to a bathroom near the front of the house. The glass door suddenly shattered when Allred fired a shot into it. He walked into the house, holding his gun. He recognized all of the people standing before him, but he said nothing. The people present began to scream and look for an escape route. Together, Cammarata and Kovacich ran up the hallway to the front door, unlocked it, and fled as they heard gunshots. Kovacich then called 911.

Allred saw Ruschak peer around the corner from the kitchen, and Allred fired a shot up the hallway in his direction. Allred walked past Roberts, who had just come down the hallway from the front door, and went directly to the kitchen, where he shot Ruschak several times. At this point, Roberts grabbed Allred from behind and asked Allred what he was doing. Allred struggled with Roberts, telling him to let go. When Roberts did not release him, Allred pointed the gun downward and fired a shot that hit Roberts' right leg. During this struggle, Bateman ran out the shattered back door and into the woods, where he called 911. Realizing he could escape the same way, Roberts let go of Allred and ran to a neighbor's house. When his neighbors opened their door, Roberts asked them to call 911 and soon heard Allred drive off in his truck. Roberts realized he had been shot when his neighbors pointed to the blood on his pants.

At this point, only Barwick and Cochran remained alive in the house with Allred. Barwick was in the hall bathroom at the front of the house, where she fled when Allred first entered. Standing in the

bathtub, Barwick called 911. At the beginning of the call, Barwick tried to provide the 911 dispatcher with the necessary information. However, as the gunshots sounded in the background, she began to scream and hyperventilate. Finally, the line went dead. In his confession, Allred recounted that after he gained his release from Roberts, he entered the bathroom. Then, without saying a word, he fired multiple shots into Barwick. She collapsed in the tub and died.

While hidden in the master bathroom, Cochran heard the others yelling and running, and she heard the gunshots. Finally, she heard Barwick's screaming, followed by more gunshots and then silence. Soon, Roberts returned to the house. He saw Ruschak lying face down in the front doorway and then found Cochran still hiding in the bathroom at the back of the house. Roberts told her that Allred was gone. The police arrived shortly thereafter.

After leaving the crime scene, appellant called 911. He reported that he had killed two people and threatened to commit suicide. When Deputy Sheriff David Kohn arrived at Allred's home, Allred was standing at the end of his driveway near the road, with a cell phone in his hand and his gun on the ground. Upon initial contact, Allred told the officer, "I'm the guy you're looking for." After the officer secured him, Allred asked "if the people were dead," but the officer told him he could not provide that information. Then, in the patrol car, Allred stated, "I knew I killed someone, I shot fourteen times."

Allred was turned over to the Oviedo Police Department, and he was interviewed by two detectives after he was advised of his Miranda⁴ rights. In his confession, Allred largely admitted the above factual description as to the actual murders. He admitted firing fourteen shots during the incident, emptying the clip, but he denied sending any threatening messages. He stated that he bought the .45 pistol only because he "could" after he turned twenty-one. Although he usually left his gun at home unless he was going to target practice, he gave no reason for taking it with him that night. He acknowledged using Barwick's picture for target practice earlier in the month, but he claimed that he did not think of killing her until the night of the murders. He denied, however, that he went to the house that night with the intent to shoot Barwick and Ruschak and stated that he went there solely to ram her car. He explained that he killed Ruschak because his "ex-best friend" was "an asshole" who sided with Barwick in their breakup, but he gave no reason for the murder of Barwick. Allred did not speak to either victim before he shot them.

The medical examiner, Dr. Predrag Bulic, performed the autopsies on the victims. He testified that Ruschak had four gunshot wounds but there was no way to determine the order in which the shots were fired. Two wounds were nonlethal. One wound was potentially lethal if not treated within an hour. That bullet passed through the vertebral column, nicked the vena cava, and exited through the upper abdomen. Finally, the cause of death was a shot that entered the middle chest and traveled through the sternum, heart, and left lung.

Barwick had six gunshot wounds, and again the medical examiner was unable to determine the order in which the rapid shots were fired. Four of the wounds were nonlethal. The fifth gunshot wound would have been lethal if not treated quickly; the bullet collapsed a lung. The sixth wound, however, was immediately lethal. That bullet traveled diagonally through her left lung, heart, diaphragm, abdomen, and liver.

Allred v. State, 55 So. 3d 1267, 1272-75 (Fla. 2010).

Proceedings in the Trial Court and on Direct Appeal

Mr. Allred was found indigent and the Public Defender's Office, 18th Judicial Circuit, was appointed on November 6, 2007. R1/39¹. Assistant Public Defenders Timothy Caudill and Rebecca Sinclair represented Mr. Allred. PC12/164. On April 30, 2008, Mr. Allred entered written and oral guilt pleas to all charges. R5/472-82. On May 15, 2008, Mr. Allred waived his right to a penalty phase jury. R5/490-99. The penalty phase hearing was held on September 22-24, 2008 before the Honorable O. H. Eaton, Jr. R3/1-200, R4/201-400, R5/401-463. A *Spencer*² hearing was held on October 2, 2008. R5/530-42. The Florida Supreme Court summarized the penalty phase portion of Mr. Allred's trial as follows:

¹Citation to the record on direct appeal in this case will be cited in the form R [volume number]/[page number]. Citations to the post-conviction record will be cited in the form PC [volume number]/[page number].

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

In mitigation, the defense presented the testimony of family members and teachers regarding Allred's academic and social development. Allred's mother, Tora Allred, testified that her son was a happy child until about age five or six, when he became "a different child," "hyper," and "emotional." She took him to a pediatrician, who she said found no physical problems but suggested Allred had been sexually abused; he referred her to a psychiatrist. The psychiatrist, however, found Allred had a "well-defined tic disorder" (licking his hand and rubbing his eye) and diagnosed attention deficit hyperactivity disorder (ADHD); he prescribed medication. Allred's mother said that his personality showed in many of his school pictures in which he did not smile. Tora Allred also testified that appellant's paternal grandparents lived either in their home or next door for most of his life. She stated that once—she did not specify when—appellant's much older cousin filed a police report accusing this same grandfather of sexually molesting him, but she admitted that appellant had never made such an allegation.

Regarding Allred's progress in school, Tora Allred testified that in grade school, progress reports indicated that Allred was inattentive and did not do his work. Although it was suggested that Allred might have a learning disability, subsequent school testing revealed that he had a high IQ and qualified for gifted classes. Allred was less social than his brothers and quieter. He left school after eleventh grade and attended a community college to earn his high school diploma. Then, at another nearby college, he obtained a two-year degree in accounting.

After graduating from high school, Allred lived alone in a large room that had been added downstairs in the family home. Only Allred had access to the room after he installed a deadbolt lock on the door. Appellant painted the walls and ceiling black and covered the windows with black curtains. At the time of the murders, Allred was essentially self-sufficient. He was employed full time teaching the use of software, and he paid for his own car and cell phone.

Allred and Tiffany Barwick had a good relationship and were happy until the birthday breakup. In fact, on the day he turned twenty-one, Tiffany gave him a card that read, "Andrew, happy birthday. I am so happy I've spent the last year with you. I love you, hope you like your gift." Tora Allred, however, also testified that after the breakup, Tiffany gave Allred a T-shirt that had "Failed" written on it. A rebuttal witness, however, subsequently testified at the *Spencer*

hearing that Tiffany gave Allred the T-shirt at his twentieth birthday party, a year before the murders. The word “failed” was Allred’s catchphrase, and the gift was “meant to be funny” because it was the word he used all the time. In fact, Allred laughed when he saw the shirt.

Both of Allred’s parents testified that the family kept guns in the house for hunting and skeet and target shooting. Further, when Allred was younger, his father experienced a period in which he had a drinking problem that resulted in multiple DUIs and incidents of domestic violence. On one occasion, Allred’s drunken father threatened to shoot himself, and his mother struggled with her husband. The then twelve-year-old Allred observed this and called the police. As a result, his father was arrested. Finally, both parents were concerned about appellant after the breakup with Tiffany, and the weekend after the breakup, his father considered that appellant might commit suicide. Allred’s parents tried to encourage appellant, telling him that he would “get over” Tiffany.

Allred’s paternal grandfather testified that he and his wife had lived with Allred’s family for ten years from the time Allred was a baby. Both grandparents then moved with their son’s family from Winter Park to Oviedo, where they lived on adjacent property. According to his grandfather, Allred studied, was good with his hands, and was a “computer nut.” Although he no longer lived next door, Allred visited him at his new home and brought Tiffany with him sometimes. He was not asked any questions about familial sexual abuse allegations.

Three of Allred’s teachers testified regarding his school life. A grade school teacher stated that he made good grades but was frequently tired and slept in class. He was generally withdrawn and “standoffish,” preferring not to participate, and he had trouble making friends. A middle school teacher testified that he had an IQ of at least 130 and qualified for gifted classes. The school was a mix of rural students, such as Allred, and more cosmopolitan students who had computers and academically advanced parents. As a result, the second group often picked on Allred because he did not have a computer at home and he often wore the same clothes two days in a row. Allred was quiet and a loner; he had friends but none in the gifted program. He took fewer gifted classes in seventh grade and then dropped out of the program in the eighth grade. Allred’s high school web design teacher agreed that Allred was a loner but said he nevertheless made Bs and Cs in school.

At the end of the hearing, victim impact statements from the victims' families were read to the trial court. Afterwards, the prosecutor asked the trial court to inquire whether the defense intended to present mental health mitigation, noting that the defense had listed an expert to testify. The defense responded that after discussion and consultations, they determined not to present such testimony.

Allred v. State, 55 So. 3d 1267, 1275-77.

On November 19, 2008, the court sentenced the defendant to death as to the two counts of first-degree murder; life imprisonment as to the counts of burglary to a dwelling and aggravated battery with a firearm while inflicting great bodily harm or death; and five year imprisonment for the count of criminal mischief. R5/543-48. The aggravating and mitigating circumstances found by the trial court were as follows:

In sentencing Allred to death for the murders, the court found the following three aggravating factors and ascribed the weight indicated as to Allred's murder of Michael Ruschak: (1) cold, calculated, and premeditated (CCP)—great weight; (2) murder committed while engaged in a burglary—little weight; and (3) prior capital or violent felony conviction (Barwick's contemporaneous murder)—great weight. As to Barwick's murder, the court found the following three aggravators and ascribed the weight indicated: (1) the murder was especially heinous, atrocious, or cruel (HAC)—great weight; (2) CCP—great weight; and (3) prior capital or violent felony conviction (Ruschak's contemporaneous murder)—great weight. The court also considered the following mitigating circumstances and ascribed the weight indicated: (1) defendant accepted responsibility by entering guilty pleas—little weight; (2) defendant cooperated with law enforcement—moderate weight; (3) defendant suffered from an emotional disturbance—moderate weight; (4) defendant's emotional and developmental age was less than his chronological age—not established; (5) other factors including that defendant was likely sexually abused—not established; and (6) defendant's developmental problems at a young age impacted his educational and social development—little weight.

Allred v. State, 55 So. 3d 1267, 1277. n appeal was filed on November 24, 2008. 2/221-31. The

judgment and sentence were affirmed at *Allred v. State*, 55 So. 3d 1267 (Fla. 2010), in an opinion dated December 16, 2010. A motion for rehearing was denied in *Allred v. State*, 2011 Fla. LEXIS 547 (Fla., March 2, 2011). A petition for writ of certiorari was denied by the U.S. Supreme Court on October 3, 2011, in *Allred v. Florida*, 132 S. Ct. 181 (U.S., Oct. 3, 2011).

Post-Conviction Proceedings

Mr. Allred filed motion for postconviction relief in the trial court on September 28, 2012. PC1/1-40. After some amendments and other preliminary matters the court conducted an evidentiary hearing on some of the claims on August 1, 2 and 5, 2013. PC12/1-200, PC13/201-400, PC14/401-461. The Florida Supreme Court described the proceedings this way:

Postconviction Proceedings

In 2012 Appellant, through counsel, filed a motion for postconviction relief under Florida Rule of Criminal Procedure 3.851 and amended the motion in 2013. In the motion, Appellant raised the following claims: Trial counsel provided constitutionally ineffective assistance by (1) failing to ensure Appellant received a reasonably competent mental health evaluation; (2) failing to investigate all circumstances bearing on Appellant's decision to plead guilty and advise Appellant accordingly; (3) causing Appellant to involuntarily waive a penalty phase jury; (4) failing to employ a mitigation expert; and (5) failing to investigate and present mitigation regarding Appellant's ability to adapt to prison life. In addition, Appellant argued that (6) the cumulative errors of counsel deprived him of a fair trial; (7) Florida's capital sentencing statute is unconstitutional on its face and as applied; (8) the Eighth Amendment prohibition of the United States Constitution on cruel and unusual punishment will be violated if he is incompetent at the time of his execution; (9) Florida's lethal injection method constitutes cruel and unusual punishment under the Eighth Amendment; and (10) section 945.10, Florida Statutes, which prohibits Appellant from knowing the identities of his execution team, violates his rights under provisions of the federal and Florida Constitutions. The circuit court denied Appellant's later request to amend his postconviction motion with a claim that counsel was ineffective for failing to ensure the procedures of *Koon v. Dugger*, 619 So.2d 246 (Fla.1993), and *Muhammad v. State*, 782 So.2d 343

(Fla.2001), were followed. The postconviction court pointed out that Appellant failed to show the cases applied in light of defense counsel having presented mitigation in the case. Moreover, Appellant did not allege that the facts supporting the claim were unknown at the time the postconviction motion was filed.

The trial court held an evidentiary hearing on the first three claims. Trial defense counsel Timothy Caudill and Rebecca Sinclair testified, as did Dr. Deborah Day, Ph.D., clinical director of Psychological Affiliates, who was engaged by defense counsel to conduct mental health interviews and testing of Appellant in preparation for the penalty phase. Dr. Jeffrey Danziger, M.D., a forensic psychologist, who examined Appellant before the penalty phase and found him competent, also offered testimony for the State. Appellant presented the testimony of two clinical psychologists, Dr. Glenn Caddy, Ph.D., who testified Appellant was in a dissociative state at the time of the murders, and Dr. Gary Geffken, Ph.D., who opined that Appellant suffers from an autism spectrum disorder (ASD) but is high functioning. Finally, Dr. Harvey Moore, Ph.D., of Trial Practices, Inc., who advises attorneys on trial issues, such as jury selection and trial strategy, testified for Appellant regarding the considerations involved in making venue decisions and other consulting services his company provides to trial counsel. Subsequently, the circuit judge issued an order denying all claims in Appellant's postconviction motion. Trial defense counsel Timothy Caudill and Rebecca Sinclair testified, as did Dr. Deborah Day, Ph.D., clinical director of Psychological Affiliates, who was engaged by defense counsel to conduct mental health interviews and testing of Appellant in preparation for the penalty phase. Dr. Jeffrey Danziger, M.D., a forensic psychologist, who examined Appellant before the penalty phase and found him competent, also offered testimony for the State. Appellant presented the testimony of two clinical psychologists, Dr. Glenn Caddy, Ph.D., who testified Appellant was in a dissociative state at the time of the murders, and Dr. Gary Geffken, Ph.D., who opined that Appellant suffers from an autism spectrum disorder (ASD) but is high functioning. Finally, Dr. Harvey Moore, Ph.D., of Trial Practices, Inc., who advises attorneys on trial issues, such as jury selection and trial strategy, testified for Appellant regarding the considerations involved in making venue decisions and other consulting services his company provides to trial counsel. Subsequently, the circuit judge issued an order denying all claims in Appellant's postconviction motion.

Allred v. State, supra.

A notice of appeal was timely filed on November 6, 2013. PC11/1878-83. As described by the Florida Supreme Court, Allred argued that the postconviction court erred in denying his claims that trial counsel provided constitutionally ineffective assistance by (A) failing to obtain a competent mental health evaluation; (B) failing to conduct an adequate investigation and advise him regarding the guilty plea; and (C) failing to move for change of venue and hire a trial consultant. In addition, the postconviction court erred in (D) denying his contention that cumulative error denied him a fair trial. He also argued that (E) Florida's capital sentencing statute is unconstitutional; (F) his execution would violate the Eighth Amendment of the United States Constitution; (G) Florida's lethal injection method is unconstitutional; and (H) the Florida statute that protects the identities of his executioners is unconstitutional. The court denied relief on all of these claims on the merits in an order released on January 14, 2016. *Allred v. State*, 2016 WL 156966, *supra*. Allred filed a timely motion for rehearing in light of the Supreme Court's determination two days earlier in *Hurst v. Florida*, No. 14-7505, 2016 WL 112683 (Jan. 12, 2016) that Florida's death penalty scheme was unconstitutional. The court denied that claim as well.

GROUND FOR RELIEF

The Petitioner is a person in custody under a state court judgment and sentence of death. He seeks a determination that the custody violates the Constitution, laws, or treaties of the United States. The Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996 precludes federal courts from granting habeas relief on a claim already adjudicated on the merits in state court unless the state court's decision was: (1) contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court, or (2) based on an unreasonable determination

of the facts in light of the evidence presented in the State court proceeding. 28 U.S.C. § 2254(d). A state court decision violates § 2254(d)(1) if it applies a rule that contradicts the governing law set forth by the United States Supreme Court or arrives at a result that differs from Supreme Court precedent when faced with materially indistinguishable facts. See, e.g., *Bell v. Cone*, 535 U.S. 685, 694, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002). On the other hand, “[w]hen a state court unreasonably determines the facts relevant to a claim, ‘we do not owe the state court’s findings deference under AEDPA,’ and we ‘apply the pre-AEDPA de novo standard of review’ to the habeas claim.” *Cooper v. Sec’y, Dep’t of Corr.*, 646 F.3d 1328, 1353 (11th Cir. 2011), quoting *Jones v. Walker*, 540 F.3d 1277, 1288 (11th Cir. 2008) (en banc); *Williams v. Taylor*, 529 U.S. 362 (2000).

Under the AEDPA, a state court decision is contrary to clearly established federal law “if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts.” *Williams v. Taylor*, 529 U.S. 362, 413 (2000). A decision is an unreasonable application of clearly established federal law “if the state court identifies the correct governing legal principle from [the Supreme] Court’s decisions but unreasonably applies that principle to the facts of the prisoner’s case.” *Id.* A state court acts unreasonably if it either unreasonably extends a legal principle from our precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply. A habeas petition may also be granted if the state court’s decision “was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” 28 U.S.C. § 2254(d)(2).

The threshold question under AEDPA is whether the Petitioner seeks to apply a rule of law that was clearly established at the time his state court conviction became final. As to claims of

ineffective assistance of counsel, *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed2d 674 (1984) and progeny constitutes clearly established federal law. To establish ineffective assistance of counsel, the defendant must prove: (1) that counsel's performance fell below an objective standard of reasonableness, 466 U.S., at 688, 104 S.Ct. 2052; and (2) that the deficient performance prejudiced the defense, which requires a showing that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different, *id.*, at 694, 104 S.Ct. 2052. Because the *Strickland* test qualifies as "clearly established Federal law, as determined by the Supreme Court," the Supreme Court precedent dictates that the state court, and in turn the federal habeas court, apply that test in entertaining a petitioner's ineffective-assistance claim.

If a state court were to reject a prisoner's claim of ineffective assistance of counsel on the grounds that the prisoner had not established by a preponderance of the evidence that the result of his criminal proceeding would have been different, that decision would be "diametrically different," "opposite in character or nature," and "mutually opposed" to our clearly established precedent because we held in *Strickland* that the prisoner need only demonstrate a "reasonable probability that . . . the result of the proceeding would have been different." *Williams v. Taylor*, 529 U.S. 362, 405-06, 120 S. Ct. 1495, 1519 (2000). "[A] state-court decision involves an unreasonable application of this Court's precedent if the state court identifies the correct governing legal rule from this Court's cases but unreasonably applies it to the facts of the particular state prisoner's case.

In *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527 (2003), the United States Supreme Court held that "*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 v. Smith*, 539 U.S. 510, 527 (2003). “[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness.” *Id.* at 521 (quoting *Strickland*, 466 U.S. at 690-91).

Prejudice, in the context of claims of penalty phase ineffective assistance of counsel, is shown where, absent the deficient performance, there is a reasonable probability that the balance of aggravating and mitigating circumstances would have been different or the deficiencies substantially impair confidence in the outcome of the proceedings. *Lynch v. State*, 2 So.3d 47, 70 (Fla. 2008); *Floyd v. State*, 18 So. 3d 432, 453 (Fla. 2009).

Under *Brecht v. Abrahamson*, 507 U.S. 619, 623, 629-30 (1993) habeas relief is automatically granted for “structural defects,” while habeas relief for constitutionally significant trial errors is granted only when the error “had substantial and injurious effect or influence in determining the jury’s verdict” or when a “deliberate and especially egregious error” warrants habeas relief absent substantial influence. *Id.* at 623, 638 n.9 (quoting *Kotteakos v. U.S.*, 328 U.S. 750, 756 (1946)). Here, for the reasons stated below, where the state courts purported to reach the merits of a claim for relief, they acted contrary to or unreasonably applied federal law as established by Supreme Court jurisprudence, or reached an unreasonable determination of the facts in light of the record. Trial errors identified in this petition had a substantial and injurious effect or influence in determining the outcome of the proceedings.

GROUND I

MR. ALLRED WAS SENTENCED TO DEATH WITHOUT A JURY TRIAL IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Mr. Allred entered a guilty plea to two counts of first-degree murder and other related offenses, and waived jury trial for the penalty phase. He did not waive the penalty phase itself. He was sentenced to death by the judge on both murder counts after a penalty phase trial conducted by the judge. He had essentially no prior record. Thus, there was no jury participation of any kind, past or present, in the judicial process that led to his death sentence.

On January 12, 2016, the United States Supreme Court in *Hurst v. Florida*, No. 14-7505, 2016 WL 112683 (Jan. 12, 2016) held that Florida's capital sentencing scheme violated the Sixth Amendment right to a jury trial in light of *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed. 2d 556 (2002). Applying *Ring* and *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed. 2d 435 (2000), the Court held that "[t]he Sixth Amendment requires a jury, not a judge, to impose a sentence of death." *Hurst*, 2016 WL at 3. It is argued elsewhere in this petition as it was in the state postconviction proceedings that Allred's waiver of a jury trial penalty phase was invalid because it was predicated on ineffective assistance of counsel among other things. It is argued here that, regardless of an accused's wishes, a death sentence cannot be imposed without some jury input under *Hurst*. In this case there was none. In the alternative, even if a jury penalty phase trial could be waived under *Hurst*, Allred's waiver was invalid because it was not made knowingly. It could not have been, because *Hurst* had not yet been decided.

The *Hurst* decision confirmed what has been clear since the 2000 decision in *Apprendi*: The

Sixth and Fourteenth Amendments require that a jury, rather than a judge, find every fact necessary to impose a death sentence. Accordingly, Mr. Allred's death sentences under Florida's capital sentencing scheme are unconstitutional and must be vacated.

Florida's capital sentencing scheme requires that in any capital case the judge makes his own factual findings – independent of a jury's findings, and frequently based on evidence not considered by a jury – that an aggravating circumstance has been proved beyond a reasonable doubt and that the aggravating circumstances outweigh any mitigating circumstances. This violates *Apprendi*'s dictate, as confirmed in *Hurst*, that the jury make the necessary factual findings, and therefore, Florida's capital sentencing scheme is unconstitutional. Florida's capital sentencing scheme is further unconstitutional because it permits the judge to override a jury's verdict of life without parole, and instead impose a sentence of death.

This Court is not procedurally barred from applying *Hurst* to Mr. Allred's claims that his death sentences are unconstitutional. First, the Supreme Court's retroactivity analysis under *Teague v. Lane*, 489 U.S. 288 (1989), compels that *Hurst* be applied to this claim. That is because *Hurst* is an application of the constitutional rule of criminal procedure set forth in *Apprendi*. see also *Hurst*, 136 S. Ct. at 621-22 (discussing *Apprendi*'s application in *Ring*, and observing that “*Ring* required a jury to find every fact” necessary to impose a death sentence (emphasis added)). In *Ring*, that fact was “find[ing] an aggravating circumstance necessary for imposition of the death penalty.” 536 U.S. at 609. “Because Arizona's enumerated aggravating factors operate[d] as ‘the functional equivalent of an element of a greater offense,’ the Sixth Amendment require[d] that they be found by a jury.” *Id.* (quoting *Apprendi*, 530 U.S. at 494 n.19). That is, as the Supreme Court subsequently explained, “[h]ad *Ring*'s judge not engaged in any fact-finding, *Ring* would have received a life sentence,” and

“Ring’s death sentence therefore violated his right to have a jury find the facts behind his punishment.” *Hurst*, 136 S. Ct. at 621. Because *Apprendi* was decided before Mr. Allred’s convictions became final, the subsequent applications of that rule – including in *Hurst* – are applications of an old rule that must be applied to Mr. Allred’s claim.

Alternatively, if this Court instead concludes that *Hurst* represents a new rule of criminal procedure, that rule nevertheless must be applied to Mr. Allred’s claims because the rule constitutes a watershed rule of criminal procedure. To fall under *Teague*’s exception for watershed rules, a procedural ruling must “implicate the fundamental fairness of the trial” and “significantly improve . . . preexisting fact-finding procedures.” *Id.* at 312-13. *Hurst* satisfies this exception.

Hurst implicates the fundamental fairness of the defendant’s trial because it relies on the Sixth Amendment right to a jury trial under the U.S. Constitution. *See, e.g., Duncan v. Louisiana*, 391 U.S. 145, 155 (1968) (“The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government.”). This right is “no mere procedural formality, but a fundamental reservation of power in our constitutional structure.” *Blakely v. Washington*, 542 U.S. 296, 306 (2004). “*Apprendi* carries out this design by ensuring that the judge’s authority to sentence derives wholly from the jury’s verdict. Without that restriction, the jury would not exercise the control that the Framers intended.” *Id.*

Hurst’s holding, reaffirming that the Sixth Amendment requires that the jury find all facts necessary to impose a defendant’s punishment, thus protects the fundamental reservation of power in the Constitution and the fundamental fairness of a capital defendant’s trial. *See Hurst*, 136 S. Ct.

at 621-22; *Ring*, 536 U.S. at 610 (Scalia, J., concurring) (“I believe that the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives – whether the statute calls them elements of the offense, sentencing factors, or Mary Jane – must be found by the jury beyond a reasonable doubt.”). This holding is all the more critical given the life and death stakes. *Gregg v. Georgia*, 428 U.S. 153 (1976) at 187 (“When a defendant’s life is at stake, the Court has been particularly sensitive to insure that every safeguard is observed.”)

Hurst also constitutes a procedural rule that “significantly improve[s] . . . pre-existing fact-finding procedures.” *Teague*, 489 U.S. at 312. See, e.g., *Ring*, 536 U.S. at 618 (Breyer, J., concurring) (“[T]he danger of unwarranted imposition of the [death] penalty cannot be avoided unless the decision to impose the death penalty is made by a jury rather than by a single government official.” (internal quotations and citation omitted)); *Gregg*, 428 U.S. at 181 (“The Court has said that ‘one of the most important functions any jury can perform in making . . . a selection (between life imprisonment and death for a defendant convicted in a capital case) is to maintain a link between contemporary community values and the penal system.’” (citation omitted)). Stephen Gillers, *Deciding Who Dies*, 129 U. Pa. L. Rev. 1, 60-69 (1980) (“The jury is substantially more likely than the judge to reliably reflect community feelings on the need for a retributive response to the offender and the offense.”).

Further, because many of the statutory aggravating circumstances under Florida’s capital sentencing scheme involve communal moral judgments - for example, the aggravating circumstance found in Mr. Allred’s case that the capital offense was “especially heinous, atrocious, or cruel” – the factual determination as to how any such aggravating circumstances should be weighed against any

potential mitigating circumstances is best made by the jury, which by design, represents a cross-section of the community. *See, e.g., Woodward v. Alabama*, 134 S. Ct. 405 (2013) at 407 n.2 (Sotomayor, J., dissenting from denial of certiorari) (“Because capital punishment is an expression of society’s moral outrage at particularly offensive conduct, jurors, who express the conscience of the community on the ultimate question of life or death seem best-positioned to decide whether the need for retribution in a particular case mandates imposition of the death penalty.” (internal quotations and citations omitted).) As Justice Sotomayor recently concluded after surveying the death sentences imposed under Alabama’s capital sentencing scheme:

There is no evidence that criminal activity is more heinous in Alabama than in other States, or that Alabama juries are particularly lenient in weighing aggravating and mitigating circumstances. The only answer that is supported by empirical evidence is one that, in my view, casts a cloud of illegitimacy over the criminal justice system: Alabama judges, who are elected in partisan proceedings, appear to have succumbed to electoral pressures. . . . By permitting a single trial judge’s view to displace that of a jury representing a cross-section of the community, Alabama’s sentencing scheme has led to curious and potentially arbitrary outcomes.

Woodward, 134 S. Ct. at 408-09 (Sotomayor, J., dissenting from denial of certiorari).

Even if this Court finds that *Hurst* is neither an application of *Apprendi* nor a watershed rule of criminal procedure, this Court must apply *Hurst* to Mr. Allred’s claims because failing to do so would violate his rights under the Eighth Amendment. In *Furman v. Georgia*, 408 U.S. 238 (1972), and *Gregg v. Georgia*, 428 U.S. 153 (1976), the Supreme Court prohibited imposition of the death penalty under “procedures that create[] a substantial risk that it would be inflicted in an arbitrary and capricious manner.” *Gregg*, 428 U.S. at 188 (citing *Furman*). As Justice Stewart observed in *Furman*, “[t]he 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.” 408 U.S. at 310 (Stewart, J., concurring). But that would be exactly the result if courts refuse to apply *Hurst* to petitioners - like Mr. Allred - sentenced to death before the Supreme Court applied *Apprendi* and *Ring* to expressly hold that the Sixth Amendment requires a jury, rather than a judge, to find each fact necessary to impose a sentence of death. *See, e.g., Brooks v. Alabama*, 136 S. Ct. 708 (2016) (Breyer, J., dissenting from denial of application for stay of execution and denial of certiorari) (recognizing that Alabama’s sentencing scheme is ‘much like’ and ‘based on Florida’s sentencing scheme’).

Justice Breyer illustrated the arbitrariness and capriciousness that results under *Teague*’s retroactivity analysis:

Is treatment “uniform” when two offenders each have been sentenced to death through the use of procedures that we now know violate the Constitution – but one is allowed to go to his death while the other receives a new, constitutionally proper sentencing proceeding? Outside the capital sentencing context, one might understand the nature of the difference that the word “finality” implies: One prisoner is already serving a final sentence, the other’s has not yet begun. But a death sentence is different in that it seems to be, and it is, an entirely future event – an event not yet undergone by either prisoner. And in respect to that event, both prisoners are, in every important respect, in the same position. I understand there is a “finality-based” difference. But given the dramatically different nature of death, that difference diminishes in importance.

Schiro v. Summerlin, 542 U.S. 348, 363 (2004) (Breyer, J., dissenting). That is, in the capital sentencing context, proscribing retroactive application of recent procedural developments not only results in death sentences that are arbitrary and capricious, but undermines the principles underlying *Teague*’s analysis that favor prohibiting retroactive application.

In fact, the principles underlying *Teague*’s analysis counsel in favor of retroactivity in capital

cases. As Justice Breyer explained, where, as in *Hurst*, “death-sentence related fact-finding is at issue,” the considerations favoring retroactivity - such as assuring the accuracy of punishments and fundamentally fair procedures that include uniformity among prisoners – “have unusually strong force.” *See id.* at 362. In contrast, as Justice Breyer concluded, the interests in not retroactively applying new procedural developments – including interests regarding finality, the expenditure of state resources, and the prisoner’s ability to be restored to the community – “are unusually weak where capital sentencing proceedings are at issue.” *Id.* at 364-65 (“[T]he impact on resources is likely to be much less than if a rule affecting the ordinary criminal process were made retroactive. Further, where the issue is ‘life or death,’ the concern that ‘attention . . . ultimately’ should be focused ‘on whether the prisoner can be restored to a useful place in the community’ is barely relevant. Finally, I believe we should discount ordinary finality interests in a death case, for those interests are comparative in nature and death-related collateral proceedings, in any event, may stretch on for many years regardless.” (internal citations omitted)). Applying *Teague* to bar the retroactive application of *Hurst* to Mr. Allred’s claims would render his sentences cruel and unusual in violation of the Eighth Amendment, without even furthering the principles that *Teague* intended to accomplish.

Finally, the *Apprendi/Hurst* error in Mr. Allred’s case was not harmless. In *Hurst*, the Court did not reach the issue of whether the error was harmless, and instead left that analysis to the Florida state courts. *See Hurst*, 136 S. Ct. at 624. But this Court need not reach that question, because the *Apprendi/Hurst* error is not even subject to harmless error review. *See Arizona v. Fulminante*, 499 U.S. 279, 310 (1991) (structural errors are not subject to harmless error review because they contain “a defect affecting the framework within which the trial proceeds, rather than simply an error in the

trial process itself,” and deny defendants protections without which “no criminal punishment may be regarded as fundamentally fair”) (internal quotations omitted); *Sullivan v. Louisiana*, 508 U.S. 275, 280-82 (1993) (finding an erroneous jury instruction concerning proof of guilt beyond a reasonable doubt not subject to harmless error analysis). In *Sullivan*, Justice Scalia distinguished between errors subject to harmless error review and those structural errors that “defy analysis by ‘harmless-error’ standards,” and found the denial of a defendant’s Sixth Amendment right to a jury to be the type of error that is not subject to such review. 508 U.S. at 281. “[T]he illogic of harmless-error review” is even greater in Mr. Allred’s case than it was in *Sullivan*. *Id.* at 280. In *Sullivan*, Justice Scalia explained that the proper question in harmless error review is what effect the error had upon the jury’s verdict. However, when “there has been no jury verdict within the meaning of the Sixth Amendment, the entire premise of [harmless error] review is simply absent” because a court cannot analyze the effect of an error upon a jury’s verdict that does not exist. *Id.* In *Sullivan*, the Court found that in such a situation, a “reviewing court can only engage in pure speculation - its view of what a reasonable jury would have done. And when it does that, the wrong entity judge[s] the defendant.” *Id.* (internal quotations omitted).

Because Mr. Allred’s death sentences are unconstitutional, and this Court must apply *Hurst* to Mr. Allred’s claims challenging the constitutionality of his death sentences, Mr. Allred’s death sentences must be vacated.

GROUND II

MR. ALLRED RECEIVED PREJUDICIAL INEFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE OF HIS CAPITAL TRIAL WHEN TRIAL COUNSEL FAILED TO ENSURE A REASONABLY COMPETENT MENTAL HEALTH EVALUATION.

Trial counsel hired Dr. Deborah Day, a psychologist, to assist them with the preparation of the defense, but they opted not to call her as a witness in the penalty phase. The contention here is that trial counsel (1) misinterpreted and unreasonably relied on Dr. Deborah Day's opinion, and (2) failed to adequately investigate Allred's background and to present a mental health expert., which would have led trial counsel to act differently.

Trial counsel hired Dr. Day as a confidential mental health expert to conduct a psychological evaluation of Mr. Allred and perform any necessary and appropriate testing. PC13/339. After Dr. Day's assessment, she was never called to testify at Mr. Allred's penalty phase trial, although she was listed as a defense witness. PC13/339. That decision apparently came as a surprise to the trial court:

[PROSECUTOR]: Judge, there's one other quick thing I do want to address with the Court, and I spoke with Mr. Caudill about this before. The Defense has chosen not to present mental expert mitigation evidence, they actually have an expert listed, Dr. Deborah Day on their witness list and they withdrew her. And I -- If the Court ultimately does impose the death penalty in this case, I am concerned that somewhere down the road Mr. Allred may raise that as an issue, why it was not done, and I would like the Court, and I gave Mr. Caudill a heads up on this, I would like for the Court to inquire of Mr. Caudill why mental health expert testimony and evidence was not presented in this case.

THE COURT: Well, you know, if he wants to tell me, I'll ask him, but, you know, what comes up in post conviction relief is gonna come up whether he'd called the witness or didn't call the witnesses, the complaints are gonna be the same. We're gonna have to deal with it at that time. Perhaps it would -- If you think that it would help refresh your recollection about things two or three years down the road, why you might want to put it on the record now, but it's up to you. You're the lawyer.

[DEFENSE COUNSEL]: 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.

R5, 460-61.

Dr. Day's testimony at the evidentiary hearing was that she never reached any firm conclusion regarding a diagnosis; rather, she stated that Mr. Allred merely had features of ASPD. PC13/347. However, trial counsel had sufficient background information to know that an ASPD diagnosis was not accurate for Mr. Allred. 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 such 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. Trial counsel testified that he was aware that a conduct disorder is needed to make an ASPD diagnosis. PC13/263-64. In fact, every expert who testified at the evidentiary hearing (Drs. Day, Caddy, Geffken, and Danziger) all agreed that ASPD could not be diagnosed because of the clear lack of a conduct disorder prior to age fifteen. PC12/33-34, PC13/356, 386.

Trial counsel's intended strategy for Mr. Allred's penalty phase trial relied heavily on mental health evidence:

My strategy was to hope to, just because the only thing that I saw that would possibly have a potential of saving Petitioner 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.

PC12/189-90. Trial counsel testified that "It certainly would have been helpful . . . 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."

PC12/194. Trial counsel testified that he had "never previously conducted a penalty phase . . . where we didn't present a mental health expert." PC13/212. Trial counsel confirmed there was no benefit or quid pro quo for choosing to proceed without mental health expert testimony. PC12/166. Trial counsel never considered or consulted with another expert. PC12/196. He never considered seeking an expert with qualifications specific to Petitioner's previous psychiatric diagnosis (i.e. tic disorder and ADHD). PC12/196-97.

Further, any "double edged sword" argument is blunted because Petitioner waived a penalty phase jury. One of the purposes of hearing pursuant to *Spencer v. State*, 615 So. 2d 688 (Fla. 1993) under Florida's scheme is to present such testimony to the court outside the presence of the jury, and in effect the entire penalty phase here was a *Spencer* hearing. In this case, adequate investigation into mental health issues for *Wiggins* purposes would have required going beyond merely accepting at face value an oral representation that asserts an expert opinion which does not meet the diagnostic criteria established by accepted scientific authority.

Trial counsel simply misinterpreted Dr. Day's statements regarding Petitioner. Further, trial

counsel failed to retain experts who were tailored to the needs of the case and rather relied on an “all-purpose expert.” *See* American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, 10.11. (Commentary at p.112-13) (2003) (“Counsel should choose experts who are tailored to the needs of the case, rather than relying on an “all-purpose” expert who may have insufficient knowledge to testify persuasively about a particular fact/field of expertise.”).

Prejudice

Unlike trial counsel, collateral counsel provided two experts in post-conviction who were tailored to the particular needs of Petitioner’s case and who would have been able to tie together all the lay mitigation previously presented at the penalty phase. Dr. Caddy described Petitioner as having a disassociation phenomenon during the time of the murders. PC12/48. This was evidenced on Petitioner’s fragmented memory as seen in his mental health evaluation and police interviews; providing a full confession after the murders; calling 911 personally to report the crime; and still having the murder weapon in his possession when police arrived. PC12/48-49, 55, 60. None of these actions on Petitioner’s part are self-serving and no benefit can be taken from him lying about these actions.

Dr. Caddy’s testimony supports the statutory mitigator 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 Petitioner’s “ego impairment was so extreme . . . he was not able to take rational perspective on the consequences of his behavior.” PC12/63-64, 91. The disassociated state was the result of traumatic events that were previously presented as evidence during the original penalty phase through lay testimony. These

events included: the very public, demoralizing, and embarrassing break-up from Tiffany Barwick during his twenty-first birthday party; the obsessive and irrational behavior that Petitioner exhibited towards Tiffany after the break-up (setting the stage for the disassociation); and finally discovering that Tiffany and Michael had sex after their break-up. PC12/52-54, 86. These events cannot be discussed in a vacuum; expert testimony was necessary to explain the emotional consequences of these events for someone like the Petitioner who always had underlying limitations to his strength and mental stability. PC12/52. 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.” PC12/49-50. Dr. Caddy described Petitioner as “having an emotional breakdown for several weeks” which eventually triggered this disassociation. PC12/86. Dr. Caddy’s testimony could only have been provided through a mental health expert.

Likewise, Dr. Geffken provided testimony during the evidentiary hearing that could only have been presented by a mental health expert. Dr. Geffken opined that Petitioner 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. PC12/126. Specifically, Petitioner’s emotional and social development is extremely delayed compared to other peers his age. PC12/126-27. Dr. Geffken testified that 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.” PC12/128. Someone like Petitioner who has a pervasive developmental disorder “is more at a loss than your average individual 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.” PC12/128. It is not uncommon for individuals with a pervasive developmental disorder

to have an intense attachment to specific individuals. PC12/129-30. Petitioner's social and emotional deficits did give a plausible explanation for why he reacted the way he did in this case.

In *Williams v. Taylor*, the United States Supreme Court noted that the trial court's prejudice determination, when reweighing it against the evidence in aggravation, was unreasonable because it failed to evaluate the *totality* of the available mitigation evidence, both that adduced at trial and during the habeas proceedings. *Williams v. Taylor*, 529 U.S. 362, 397-98 (2000), citing *Clemons v. Mississippi*, 494 U.S. 738, 751-52, 108 L.Ed. 2d 725, 110 S.Ct. 1441 (1990). In this case, the circuit court failed to consider the totality of mitigation evidence presented during Petitioner's penalty phase trial and post-conviction proceedings. Had Petitioner's attorneys presented a comprehensive picture of Petitioner's background as seen through the prism of mental health experts, the balance of aggravating and mitigating circumstances would be different and there exists a reasonable probability Petitioner would have received a life sentence.

Trial counsel testified that he needed mental health expert testimony to be successful during penalty phase. Thus, the evidence he presented at penalty phase was lacking because there was no mental health expert testimony, the result of which was based upon his own misinterpretation of Dr. Day's opinions. The lack of a mental health expert who could help tie together all the lay testimony which was presented caused trial counsel's strategy to fail. The additional mental health expert testimony provided by Dr. Caddy and Dr. Geffken can support the finding of substantial impairment and would have tied together the previously presented lay testimony from the penalty phase. But for trial counsel's deficient performance at the penalty phase, that information would have been presented during to the court, and there is a reasonable probability that the trial court would have sentenced Petitioner to life rather than death based on the additional mitigation.

The Florida Supreme Court's treatment of this claim was both an unreasonable application of these principles and factually inaccurate. The court compared this case to its decision in *Looney v. State*, 941 So.2d 1017, 1028 (Fla.2006) and concluded:

In *Looney*, this Court . . . reiterated that "a diagnosis as a psychopath is a mental health factor viewed negatively by jurors and is not really considered mitigation." *Id.* at 1028–29. Accordingly, we held that "defense counsel [was] not ineffective for deciding not to seek an additional mental health evaluation after receiving an extremely unfavorable evaluation." *Id.* at 1029.

This analysis ignores the fact that trial counsel misinterpreted his expert's opinion in a negative light, and that an adequate investigation would have overwhelmingly shown that Allred did not fit the criteria for "a diagnosis as a psychopath," as *Looney* clearly did. This was an unreasonable factual finding in light of the entire state court record, including the expert testimony presented at the evidentiary hearing. *Williams v. Taylor, supra*. Because the denial of this claim was an unreasonable application of clearly established federal law by the state courts and/or is based on an unreasonable determination of facts in light of the state court record, this Court should grant the Writ.

GROUND III

TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO INDEPENDENTLY INVESTIGATE AND PRESENT TO PETITIONER ALL CIRCUMSTANCES THAT WOULD BEAR ON HIS DECISION TO PLEAD GUILTY

Trial counsel's representation of Petitioner fell below acceptable professional standards in several respects. Each of these failures, discussed below, severely prejudiced Petitioner. Trial counsel provided ineffective assistance when he failed to do the following: develop a relationship of trust and close contact with Petitioner; properly investigate Petitioner's mental status leading up

to the day of the crime; consult with and present mental health expert testimony explaining how Petitioner's ability to function and form the prerequisite intent was substantially impaired; and investigate and present evidence in opposition to both the element of premeditation in the guilt phase and the cold, calculated, premeditated (CCP) aggravator based on heightened premeditation in the penalty phase.

Petitioner has never denied that he was the one who shot the victims, however he denied having the specific intent to murder either one of them. The night of his arrest he gave a full confession, but stated he had gone to the victims' location intending only to ram Tiffany Barwick's car, not to shoot them. R3/158-99. Allred told the detectives that after the shootings, he thought about suicide. R3/192. Everything seemed to catch up with him at one time; he had no girlfriend, no friends, and had lost his job. R3/192. The interview concluded with him again asking for information about the condition of the victims. R3/196-97.

Allred purchased the gun used in these shootings on September 1, 2007, more than three weeks before the murders and just a few days after his twenty-first birthday. R1/127-128 (State Exhibit 44). Because of the three day waiting period he was not able to take possession of the gun until September 7, 2007. Allred told police that he bought the gun at that time because "he could." R3/176, 181. In other words, the purchase was timed to the fact that he became old enough to make it, not to any criminal intent. He grew up in a gun owning environment and had used firearms all of his life. In the days and weeks after the break-up with Ms. Barwick, he had access to at least two shotguns and a rifle which had been owned by his family for years. R4/305-06; R5/404, 412. "Both of Allred's parents testified that the family kept guns in the house for hunting and skeet and target shooting." *Allred v State*, 55 So. 3d at 1276.

During the plea colloquy the court read the indictment, which included allegations that the defendant acted from a premeditated design. Consistently with his prior acknowledgments of guilt, Petitioner acknowledged that he was guilty of the crimes charged. There was no further elaboration of the factual basis for the plea. The plea was accepted without further attention to the apparent inconsistency between Allred's denial of intent to kill in his confession and the formal allegations that he acted from a premeditated design in the indictment.

The State urged and the trial court eventually found the existence of CCP. In its *Spencer* memorandum, the defense argued that at the time of the shootings Allred "lost it," and the fact that he did not enter the house where the shootings took place in a stealthy manner weighed against finding the CCP aggravator. R1/189. The memorandum did not address Allred's earlier denial of an intent to kill. The sentencing order contains the finding: "The court rejects the defendant's statement that he did not preplan the murders." R2/205. The trial court then gave this aggravator great weight.

The Florida Supreme Court considered and ultimately rejected Allred's claim that the CCP aggravator should not have been found in either case at length. In doing so, the court observed:

Citing our decision in *Santos v. State*, 591 So. 2d 160 (Fla. 1991), appellant also argues that his actions on that day resulted from an ongoing domestic dispute and therefore were not "cold" and "calculated." In that case, we stated that a murder arising from a domestic dispute tended to negate the CCP aggravator. *Id.* at 162. Then, upon finding, based on a mental health expert's testimony, that the "ongoing, highly emotional domestic dispute" had "severely deranged" Santos and that he was under extreme emotional distress and unable to appreciate the criminality of his conduct, we struck the aggravator. *Id.* at 163.

Appellant's argument fails for two reasons. First, Allred presented no mental health testimony establishing that he was mentally impaired. Further, the record supports the trial court's determinations that Allred was "suffering from an emotional

disturbance” but that it was not severe or extreme and that appellant was able to conform his actions to the requirements of law.

Allred v State, 55 So. 3d 1267, 1279. As claimed in Ground II of this petition the stated rationale for the court’s decision, that “Allred presented no mental health testimony establishing that he was mentally impaired,” was itself the result of ineffective assistance.

During the evidentiary hearing, trial counsel testified that the defense strategy if the case went to a guilt phase trial would have been to argue for a lesser included offense. PC12/178. However, trial counsel stated that this strategy was discussed “very little” with Petitioner because “in this particular case, we were never going to trial, so those discussions were cut off.” PC12/178. Petitioner told the police that he did not go over to the house with the intent to kill the victims, but rather only the intent to destroy Tiffany’s vehicle. PC13/216. Trial counsel stated that he had no defense prepared to support this contention. PC13/217-18.

When a defendant enters a guilty plea to an offense, he is waiving several fundamental constitutional rights; a guilty plea is more than just an admission of conduct, it is a conviction.

Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709 (1969).

Consequently, if a defendant’s guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void. Moreover, because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts.

Id at 243 (citing *McCarthy v. United States*, 394 U.S. 459, 466, 89 S.Ct. 1166, 1171 (1969)(emphasis added)). The *Boykin* court recognized that “a number of important federal rights are implicated in the plea process,” including “his privilege against compulsory self-incrimination, his right to trial by jury, and his right to confront his accusers.” *Id* at 243.

When a defendant challenges a guilty plea under an ineffective assistance of counsel claim, the two part *Strickland* standard applies. *Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366 (1985). “The failure of an attorney to inform his client of the relevant law clearly satisfies the first prong of the *Strickland* analysis adopted by the majority, as such an omission cannot be said to fall within ‘the wide range of professionally competent assistance’ demanded by the Sixth Amendment.” *Hill v. Lockhart*, 474 U.S. 52, 62 (1985) (White, J., with Stevens, J., concurring) (*quoting Strickland*, 466 U.S. at 690 (1984)).

“If no written guarantee can be obtained that death will not be imposed following a plea of guilty, counsel should be extremely reluctant to participate in a waiver of a client’s trial rights. [Prevailing norms] may require counsel to do everything possible to prevent a depressed or suicidal client from pleading guilty where such a plea could result in an avoidable death sentence.” *See American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*, 10.9.2-Entry of Plea of Guilty (Commentary) (2003).

In this case, Petitioner pled guilty to two counts of premeditated murder. R5/472-82. Trial counsel’s representation of Petitioner fell below acceptable professional standards in several respects and severely prejudiced Petitioner. First, trial counsel failed to investigate and present evidence in opposition to both the element of premeditation in the guilt phase and the cold, calculated, premeditated (CCP) aggravator based on heightened premeditation in the penalty phase. Trial counsel testified that the defense “strategy” at guilt phase would have been to argue for a lesser included offense, but this strategy was discussed “very little” with Petitioner because “in this particular case, we were never going to trial.” PC12/178. Although Petitioner wanted to plead guilty to the charges, counsel was still obligated to investigate and present to Petitioner evidence to help

rebut the premeditation and CCP aggravator so that Petitioner could make a fully informed decision regarding his plea.

Secondly, trial counsel provided ineffective assistance when he failed to properly investigate Petitioner's mental status leading up to the day of the crime. Specifically, trial counsel failed to present mental health expert testimony explaining how Petitioner's ability to function and form the prerequisite intent was substantially impaired. What appears from the record on direct appeal is that a defendant who was fully cooperative and forthcoming – he called 911, gave police his location, had the murder weapon at his feet, told them he “was the one they were looking for,” and gave a confession – nevertheless denied acting from a premeditated design. Aside from his *pro forma* acquiescence to the reading of the indictment at the plea colloquy, there is nothing on the record explaining the discrepancy between what Allred told the police about his mental state and the essential legal requirement of premeditated design. The credibility of his statement about mental state to the police was not argued by the defense. The trial judge “rejected” an argument that had not even been offered in the *Spencer* memorandum. The lack of mental health expert input was cited by the appellate court as a decisive reason for denying Petitioner's argument against application of CCP. Because the denial of this claim was an unreasonable application of clearly established federal law by the state courts and/or is based on an unreasonable determination of facts in light of the state court record, this Court should grant the Writ.

GROUND IV

THE EIGHT AMENDMENT RIGHT AGAINST CRUEL AND UNUSUAL PUNISHMENT WILL BE VIOLATED AS PETITIONER MAY BE INCOMPETENT AT THE TIME OF EXECUTION

A prisoner cannot be executed if “the person lacks the mental capacity to understand the fact of the impending death and the reason for it.” *Ford v. Wainwright*, 477 U.S. 399, 106 S.Ct. 2595 (1986). The undersigned acknowledges that under Florida law, a claim of incompetency to be executed cannot be asserted until a death warrant has been issued. The state courts denied this claim. For that reason. However, in *In Re: Provenzano*, No. 00-13193 (11th Cir. June 21, 2000), the Eleventh Circuit Court of Appeals suggested that a claim of incompetence to be executed is waived if not raised in the initial state post-conviction proceeding.

The Eleventh Circuit appears to have receded from *Provenzano*, but is predisposed to interpret the exception very narrowly:

The Supreme Court held in *Panetti* that the statutory bar on filing second or successive habeas petitions does not apply to the “unusual” claim of incompetency to be executed because such a claim is not ripe until the execution date has been established. FN6 551 U.S. at 945-47 (2007). Subsequent to *Panetti*, the Eleventh Circuit decided *Tomiki v. Secretary of the Department of Corrections*, 557 F.3d 1257 (11th Cir. 2009). In *Tomiki*, the Eleventh Circuit stated that the “*Panetti* case only involved a *Ford* [incompetency] claim, and the Court was careful to limit its holding to *Ford* [incompetency] claims.” *Id.* at 1259. Although the Eleventh Circuit suggested in *Tomiki* that *Panetti*’s holding may extend further to encompass other claims that become ripe only after the first petition is filed, it did not ultimately hold as much and later emphasized in an unpublished decision that the *Panetti* exception is a “narrow” one. *Jeremiah v. Terry*, 322 Fed. Appx. 842, 844 (11th Cir.2009) (unpublished decision).

Marek v. McNeil, 2009 WL 2488296 (S.D. Fla. Aug. 13, 2009). Given the noted tendency of the Eleventh Circuit to interpret *Panetti* narrowly, the defendant raises this issue in an abundance of caution. Statistics have shown that many inmates incarcerated over a long period of time incur diminished mental capacity. See *Panetti*, 127 S.Ct. 2842 at 2852: “All prisoners are at risk of deteriorations in their mental state.” Because the defendant may well be incompetent at time of

execution, his Eighth Amendment right against cruel and unusual punishment will be violated.

GROUND V

THE TRIAL COURT'S FINDING THAT THE MURDER WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER WAS NOT SUPPORTED BY THE EVIDENCE. THE FLORIDA SUPREME COURT'S FINDING UPHOLDING THE TRIAL COURT'S FINDING OF THIS AGGRAVATOR RESULTED IN AN ARBITRARY AND CAPRICIOUS APPLICATION OF THE DEATH PENALTY IN VIOLATION OF CLEARLY ESTABLISHED FEDERAL LAW. *PROFFITT V. FLORIDA*, 428 U.S. 242 (1976). THE STATE COURTS' FINDINGS WERE AN UNREASONABLE DETERMINATION OF THE FACTS IN LIGHT OF THE STATE COURT RECORD.

Under Florida law, to establish CCP, the State must show that the murder was (1) the product of a careful plan or prearranged design; (2) the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage; (3) the result of heightened premeditation; and (4) committed with no pretense of moral or legal justification. *Rodriguez v. State*, 753 So.2d 29, 46 (Fla. 2000). An accurate reading of the testimony at trial was that this was not a preplanned act, and certainly did not rise to the level of heightened premeditation required to establish CCP. In finding this aggravating factor applicable to both murders the trial court wrote:

The evidence, including the written messages from the defendant to the victim, to Michael Ruschak, and to Michael Siler, the fact that the defendant purchased the .45 caliber pistol several days before the murders, and the fact that the defendant warned Michael Ruschak that he was coming to his location, establishes this aggravating factor beyond a reasonable doubt. The court rejects the defendant's statement that he did not preplan the murders. He stated that he knew Tiffany Barwick would be there because she did not have anywhere else to be. The court assigns great weight to this aggravating circumstance.

R2, 205-08.

Neither murder qualifies for this aggravating circumstance. The murders of Tiffany Barwick and Michael Ruschak were tragic without a doubt. However, neither murder qualifies for this aggravator. To find this aggravator applicable to these murders would call into question the constitutionality of Florida's death penalty scheme. The purpose of aggravating factors is to narrow the class of first-degree murders to ones justifying the ultimate sanction. Andrew Allred had been publicly humiliated by Tiffany Barwick's rejection. She then committed the ultimate insult by commencing a sexual relationship with Michael Ruschak, Andrew's best friend. This Court can read the internet chat sessions between Andrew and Tiffany. R1, 130-43. These conversations began that morning, built with rage throughout the day, and culminated with the murders.

Andrew's actions that day in killing Barwick and Ruschak were classic "hot blooded" murder. Andrew's pent-up rage exploded that day. His rage was exacerbated by the fact that he was fired from his job that day. Andrew had no friends, no girlfriend, no best friend, and no job. These murders were clearly not the product of "cool and calm reflection". In fact, the murders were clearly "prompted by emotional frenzy, panic, or a fit of rage." As such, neither murder can be calculated as "cold."

Andrew clearly had no "careful plan or prearranged design to commit murder before the fatal incident." The trial court seems to place much stock in the fact that Allred purchased the murder weapon "several days" before the murders. (II 205, 207) The trial court's finding is a misstatement of the evidence. Allred purchased the gun on September 1, 2007, more than three weeks before the murders, not "several days." R1127-28; State Exhibit 44. The record clearly documents that he purchased the hand gun on September 1, 2007, a few days after his twenty-first birthday. Because of the three day waiting period he was not able to take possession of the gun until September 7,

2007, more than two weeks before the murders. R1, 127-28; R3, 176, 181; R5, 411; State Exhibit 44.

Andrew told the police that he bought the gun at that time, because “he could”. R3, 176, 181.

More importantly, the testimony of Appellant’s parents made it abundantly clear that Andrew had access to at least two shotguns and a rifle which had been owned by the family for years. R4, 305-06; R5, 404, 412. The trial court’s misplaced reliance on the wrong purchase date of the gun cannot support this aggravating circumstance.

Additionally, the trial court, without explanation rejected Allred’s statement to police that he did not plan the murders. R2, 205. In so doing, the trial court “cherry picked” from Allred’s voluntary, detailed and candid confession. Allred called the authorities shortly after the murders and, for all intents and purposes, turned himself in. He waived his constitutional rights and gave a detailed confession. He candidly told the detectives that he went to the house specifically to ram Tiffany’s automobile with his truck. R3, 158. He could not explain why nor exactly when he decided to go into the house to shoot Barwick and Ruschak. R3, 159. The trial court had absolutely no basis to reject this one, minute part of Allred’s voluntary, full confession given immediately following the murders.

Because the denial of this claim was an unreasonable application of clearly established federal law by the state courts and/or is based on an unreasonable determination of facts in light of the state court record, this Court should grant the Writ.

GROUND VI

MR. ALLRED’S DEATH SENTENCE IS DISPROPORTIONATE. THE FLORIDA SUPREME COURT’S PROPORTIONALITY ANALYSIS IS UNCONSTITUTIONAL AS APPLIED IN MR. ALLRED’S CASE AND VIOLATES CLEARLY ESTABLISHED FEDERAL LAW.

The law of Florida establishes that the death penalty is reserved for the most aggravated and

the least mitigated of crimes. The Florida Supreme Court unreasonably applied clearly established federal law when it upheld Mr. Allred's death sentence. The Supreme Court has repeatedly held that a death sentence may not be imposed in an arbitrary and capricious manner. *Furman v. Georgia*, 408 U.S. 238 (1972); *Godfrey v. Georgia*, 446 U.S. 420 (1980). The Constitution prohibits the arbitrary and irrational imposition of the death penalty. *Spaziano v. Florida*, 468 U.S. 447, 460 (1984). The Supreme Court has emphasized the crucial nature of meaningful appellate review in ensuring that the death penalty is not imposed arbitrarily or irrationally. *Gregg v. Georgia*, 428 U.S. 153, 197 (1976).

The record reflects that Andrew suffered from a developmental disability and did not receive adequate treatment. His social abilities were severely limited. His very actions on the day of the murders demonstrate his immaturity. Andrew's chat sessions with Tiffany during the month following their break-up clearly demonstrate Andrew's immaturity.

Andrew Allred is a social misfit. For one year of his short twenty-year-old life, he was happy. He had a girlfriend who loved him and he loved her. Tiffany Barwick publicly humiliated Andrew when she ended their relationship at his twenty-first birthday party. The humiliation became even more severe when she began a sexual relationship with his best friend, Michael Ruschak. Andrew's rage built up over the thirty days following Tiffany's rejection of him. On that fateful day, Andrew snapped, drove the few minutes to the Shady Oak Lane house, and shot Barwick and Ruschak in a matter of minutes in front of a slew of witnesses.

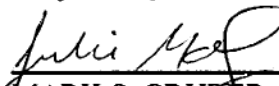
This case is not the most aggravated, least mitigated of first- degree murders in this state. This was a hot-blooded crime of passion. The Florida Supreme Court had previously taken the position that a killing under circumstances resulting from an ongoing and heated domestic dispute

may render a death sentence not proportionate, provided the defendant had not been convicted of a prior similar violent crime, which was the case here. *See Blakely v. State*, 561 So.2d 560, 561 (Fla. 1990); *Garron v. State*, 528 So.2d 353, 361 (Fla. 1988) (“[W]hen the murder is a result of a heated domestic confrontation, the penalty of death is not proportionally warranted.”). The court later clarified that it “does not recognize a domestic dispute exception in connection with death penalty analysis,” *Lynch v. State*, 841 So.2d 362, 377 (Fla.2003). The Florida Supreme Court’s failure to set aside Mr. Allred’s death sentence results in an arbitrary and capricious imposition of the death penalty. The proportionality review conducted by the Florida Supreme Court in Mr. Allred’s case violated his Due Process and Eighth Amendment Rights. Because the State court’s decision resulted in the arbitrary and capricious imposition of the death penalty in violation of clearly established federal law and was and was an unreasonable determination of the facts in light of the state court record, this Court should grant the Writ.

CONCLUSION AND RELIEF SOUGHT

Wherefore, the Petitioner asks that the Court issue a Writ of Habeas Corpus requiring that the judgment and sentence be vacated and that he be afforded a new trial or for such other relief as this Court may deem proper.

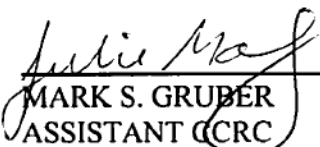
Respectfully Submitted,



fe MARK S. GRUBER
JULIE A. MORLEY
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition For Writ of Habeas Corpus by a Person in State Custody under 28 U.S.C. 2254 has been furnished by Hand Delivery, and/or United States Mail, first class postage prepaid, and/or electronic service to all counsel of record on this 4th day of April, 2016.


MARK S. GRUBER
ASSISTANT CCRC
FLORIDA BAR NO. 0330541
CAPITAL COLLATERAL REGIONAL
COUNSEL - MIDDLE
12973 N. TELECOM PARKWAY
TEMPLE TERRACE, FLORIDA 33637
(813) 558-1600

Copies furnished via e-service to:

STACEY E. KIRCHER
Assistant Attorney General
444 Seabreeze Blvd. 5th FL
Daytona Beach, FL 32118
(386) 238-4990
Fax- (386) 226-0457
stacey.kircher@myfloridalegal.com
CapApp@myfloridalegal.com

By U.S. Mail to:
ANDREW R. ALLRED
DOC# 130930
Union Correctional Institution
7819 NW 228th Street
Raiford, FL 32026

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

Case No. _____

CAPITAL CASE

ANDREW R. ALLRED,
Petitioner

CASE NO. _____

v.

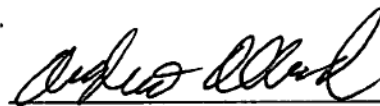
JULIE L. JONES,
Secretary of the Florida
Department of Corrections et al.
Respondents.

VERIFICATION

STATE OF FLORIDA
COUNTY OF UNION

BEFORE ME, the undersigned authority, this day personally appeared Andrew R. Allred, who being first duly sworn, says that he is the Petitioner in the above styled cause, and under penalty of perjury declares that the Petition for Writ of Habeas Corpus filed for him by CCRC-Middle Region is true and correct.

FURTHER AFFIANT SAYETH NAUGHT.



Andrew R. Allred

SWORN TO AND SUBSCRIBED TO before me this 30th day of March, 2016 by Andrew R. Allred, who is personally known to me or who provided the following identification:



NOTARY PUBLIC, STATE OF FLORIDA

My Commission Expires: 22 DECEMBER 2019

