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IN THE SUPREME COURT OF FLORIDA

Case No. SC23-1662
Lower Court Case No. 2018-CF-203

SCOTTIE D. ALLEN,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE SECOND JUDICIAL CIRCUIT,
IN AND FOR WAKULLA COUNTY, FLORIDA

APPELLANT'S INITIAL BRIEF

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PRELIMINARY STATEMENT

This is Mr. Allen's appeal of the circuit court's order summarily denying his motion for postconviction relief under Fla. R. Crim. P. 3.851. The following symbols are used to designate references to the record: "T. __" refers to the transcript of the trial proceedings; "R. __" refers to the record on direct appeal; "PCR. __" refers to the postconviction record on appeal. All other references are self-explanatory.

REQUEST FOR ORAL ARGUMENT

Mr. Allen has been sentenced to death. The resolution of this appeal will determine whether he lives or dies. This Court has allowed oral argument in other capital cases in a similar posture. A full opportunity to air the issues through oral argument would be appropriate in this case, given the seriousness of the claims and the stakes involved. Mr. Allen respectfully requests this Court grant oral argument.

STANDARD OF REVIEW

"An evidentiary hearing on a rule 3.851 motion should be held whenever the movant makes a facially sufficient claim that requires a factual determination." *Pardo v. State*, 108 So. 3d 558, 560 (Fla. 2012) (quoting *Parker v. State*, 89 So. 3d 844, 855 (Fla. 2011) and *Gore v. State*, 24 So. 3d 1, 11 (Fla. 2009)) (internal quotations omitted).

Because the circuit court summarily denied Mr. Allen's initial rule 3.851 motion without holding an evidentiary hearing, this Court should review the circuit court's decision de novo, accepting Mr. Allen's factual allegations as true to the extent they are not refuted by the record. *Walton v. State*, 3 So. 3d 1000 (Fla. 2009).

Additionally, in summarily denying all of Mr. Allen's claims, the circuit court ruled that it was procedurally barred and "should have been raised on direct appeal." (PCR. 1229). However, appellate counsel is unable to raise a claim when the claim relies on facts that are extrinsic to the record. (PCR. 1231-32). *See Rutherford v. Moore*, 774 So. 2d 637, 646 (Fla. 2000). Because these claims require facts extrinsic to the record prior to a ruling, an evidentiary hearing is proper. *Walker v. State*, 88 So. 3d 128, 135 (Fla. 2012) (when there is "any question as to whether a rule 3.851 movant has made a facially sufficient claim requiring a factual determination, the Court will presume that an evidentiary hearing is required"); *Hojan v. State*, 212 So. 3d 982 (Fla. 2017) (claims for relief raised in an initial postconviction motion under Fla. R. Crim. P. 3.851 are "presumptively entitled" to an evidentiary hearing). "[B]ecause a court's decision whether to grant an evidentiary hearing on a rule 3.851 motion is ultimately based on written materials before the court, its ruling is tantamount to a pure question of law,

subject to de novo review." *Dennis v. State*, 109 So. 3d 680, 690–91 (Fla. 2012).

STATEMENT OF THE CASE

The Circuit Court for the Second Judicial Circuit in and for Wakulla County, Florida, entered the judgments of conviction and sentence at issue. On June 25, 2018, Mr. Allen was indicted on one count of premeditated first-degree murder. (R. 20). The guilt phase of his capital trial began on February 19, 2019. (T. 1). On February 20, 2019, the jury found him guilty of first-degree murder. (T. 288-89). The penalty phase began later that same day. (T. 315). Just hours later, the jury returned a unanimous verdict that Mr. Allen should be sentenced to death. (T. 396-400). A *Spencer* hearing was held on June 7, 2019, and June 21, 2019. (R. 976-1117; 1169-1247). On July 23, Mr. Allen was sentenced to death.[1] (R. 813-21; 961-75).

[1] The trial court found the following aggravating circumstances: (1) the capital felony was committed by a person previously convicted of a felony and under sentence of imprisonment (great weight); (2) the defendant was previously convicted of a felony involving the use or threat of violence to another person (great weight); (3) the capital felony was especially heinous, atrocious, or cruel (great weight); and (4) the capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification (great weight). (R. 814-17). The trial court found the following statutory mitigating circumstances: (1) the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance (not established); and (2) the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired

The Florida Supreme Court affirmed Mr. Allen's convictions and sentence on direct appeal.[2] *Allen v. State*, 322 So. 3d 589 (Fla. 2021). The United States Supreme Court denied his petition for writ of certiorari on January 24, 2022. *Allen v. Florida*, 142 S. Ct. 904 (2022).

(moderate weight). (R. 817-18). The trial court found the following non-statutory mitigating circumstances: (1) the defendant has been diagnosed with alcohol abuse and drug dependency (some weight); (2) the defendant was diagnosed with major depression (moderate weight); (3) the defendant's brain was not developed properly due to early drug abuse (not established); (4) the defendant was raised in a dysfunctional family setting (great weight); (5) the defendant was courteous, respectful, and considerate to this Court during every court appearance (some weight); and (6) the defendant did not want his family contacted for mitigation purposes (some weight). (R. 818-20).

[2] The following issues were raised in Mr. Allen's direct appeal: (1) reversible error occurred when the court failed to renew the offer of counsel prior to the penalty phase, and the error was fundamental; (2) reversible error occurred when the court instructed that its job was to determine the sentence and the state later indicated the jury would return a "recommendation" because those comments misled the jury regarding its sentencing role so as to diminish its sense of responsibility in violation of *Caldwell vs. Mississippi*, 472 U.S. 320 (1985), and the error was fundamental; (3) reversible error occurred when the State violated Mr. Allen's Fifth Amendment right against compelled self-incrimination during the *Spencer* hearing, and the error was fundamental; and (4) reversible error occurred when the court failed to instruct the penalty-phase jury that it must determine beyond a reasonable doubt that the aggravating factors were sufficient to justify the death penalty and that those factors outweighed the mitigating circumstances, and the error was fundamental. This Court *sua sponte* reviewed the sufficiency of the evidence and found that the evidence was sufficient to support the conviction for first-degree murder under the theory that the murder was premeditated.

Mr. Allen filed a Rule 3.851 motion for postconviction relief on January 21, 2023.[3] (PCR. 254-685). A case management conference was held on September 18, 2023. (PCR. 1268-1309). The circuit court summarily denied relief on all claims on October 4, 2023. (PCR. 1227-30). A motion for

[3] The following issues were raised in Mr. Allen's initial Rule 3.851 motion: (1) Mr. Allen was denied his constitutional right to an individualized sentencing when the trial court ordered that his family not be contacted regarding potential mitigating evidence; (2) Mr. Allen was denied his constitutional right to an individualized sentencing when JAC ran out of funding for criminal conflict cases; (3) Mr. Allen was denied his constitutional right to an individualized sentencing when the trial court failed to continue the *Spencer* hearing; (4) Mr. Allen was denied his constitutional right to an individualized sentencing when the trial court failed to call its own mitigation witnesses at the *Spencer* hearing; (5) Mr. Allen was denied his constitutional right to an individualized sentencing when the trial court failed to ensure that a comprehensive Pre-Sentence Investigation report ("PSI") was completed; (6) the State violated Mr. Allen's due process rights by presenting a State-authored PSI that the State knew, or should have known, was inaccurate; (7) Mr. Allen's due process right not to be sentenced based on materially inaccurate information was violated; (8) Mr. Allen was denied his constitutional right to an individualized sentencing when the trial court failed to consider all mitigating circumstances submitted by special counsel; (9) Mr. Allen's due process rights were violated when the trial court allowed him to continue to represent himself after he equivocated; (10) Mr. Allen's right to due process was violated when the court found him competent to proceed with self-representation in spite of ample evidence that he suffers from PTSD, which made him incompetent to present a proper defense; (11) Mr. Allen's right to due process was violated when he was permitted to represent himself in spite of record evidence that he was seeking to be sentenced to death; (12) Mr. Allen's waiver of counsel was not voluntary, as Mr. Allen was operating under the undue influence of another; (13) Mr. Allen's right to due process was violated when the prosecutor misstated the law during jury selection thereby creating a structural error in Mr. Allen's trial; and (14) cumulatively, the combination of procedural and substantive errors deprived Mr. Allen of a fundamentally fair trial.

rehearing was denied on November 1, 2023. (PCR. 1234-35). This appeal timely follows.

STATEMENT OF THE FACTS

I. Waiver of Counsel

Throughout his trial proceedings for this first-degree murder charge, Mr. Allen proceeded *pro se*. On August 31, 2018, he was provisionally appointed a public defender for his arraignment scheduled October 3, 2018. (R. 22). Mr. Allen later filed a one-page motion waiving counsel on November 19, 2018. (R. 57-58, 64-65). Judge Shelfer appointed Dr. Jennifer Meyer as an expert in evaluating Mr. Allen's competency on December 6, 2018. (R. 71-74).

At the December 20, 2018, pretrial conference, the court granted the public defender's motion to be present at the examinations conducted to determine Mr. Allen's competency. (R. 71-74, 858). Also at this pretrial conference, Judge Shelfer conducted a *Faretta*[4] inquiry. Mr. Allen was provided a document titled "Self-Representation Advisory Form/Trial." (R. 859). The statements listed in the document detailed the advantages in proceeding with counsel and the disadvantages of self-representation. (R. 80-81). The court went through each statement with Mr. Allen, and it ensured

[4] *Faretta v. California*, 422 U.S. 806 (1975).

Mr. Allen initialed each statement and provided his signature on the last page. (R. 859-78).

The topic of Mr. Allen's competency to proceed and to represent himself was further discussed at the February 6, 2019 motion hearing. (R. 928-60). The court asked Mr. Allen if he still desired to represent himself, which Mr. Allen confirmed. (R. 931-32).

The court had Mr. Allen review the form provided to him at the December 20, 2018, pretrial conference, and Mr. Allen reaffirmed that he had not changed his mind (R. 932). The court then confirmed that a secondary evaluation was not necessary and, relying on Dr. Meyer's evaluation to proceed, found Mr. Allen competent to proceed. (R. 933, 935). Regarding his competency to represent himself, the court asked Mr. Allen if he understood the procedural aspect of a postconviction capital case and conducted a secondary *Faretta* inquiry. (R. 935-42). The court also inquired as to whether Mr. Allen would like to have standby counsel, which Mr. Allen denied. (R. 938-40). Mr. Allen was found competent to represent himself and waive counsel (R. 942).

Pursuant to the *Faretta* inquiry conducted previously by Judge Shelfer, and the evaluations performed by Dr. Meyer, Judge Ronald Flury, who presided over the trial, issued an order finding Scottie Allen competent to

proceed and competent to represent himself. (R. 118-137). Mr. Allen thereafter represented himself at the following proceedings: (1) the February 13, 2019 pretrial hearing, (2) the February 18, 2019 jury selection, (3) the February 19-20, 2019 trial, (4) the February 21, 2019 hearing, (5) the June 7, 2019 *Spencer*[5] hearing, (6) the June 21, 2019 *Spencer* hearing, and the (7) July 23, 2019 sentencing.

II. Mr. Allen's Trial

The State presented testimony from corrections officers at Wakulla Correctional Institution ("Wakulla CI"). They testified to doing a morning count on October 2, 2017, and seeing both Mr. Allen and the victim together in their cell and sitting on their bunks. (T. 26). A sheet was reportedly placed over the window in the door to their cell at some point after they were seen during morning count. (T. 35). After morning count was completed, the cell doors reopened. (T. 36). The victim never came out of the cell after the doors were re-opened. (T. 198).

The State presented testimony from Bobby Johnson, an inmate at Wakulla CI who was housed in the same unit as Mr. Allen and the victim. (T. 64-65). He testified that on the day of the incident, he noticed that the victim

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

had missed breakfast and lunch. (T. 67). When he asked Mr. Allen about the victim, Mr. Allen reportedly stated that the victim was “a little under the weather.” (T. 67). He also testified that Mr. Allen was trying to sell the victim’s watch and necklace that same day. (T. 68).

Later that afternoon, Mr. Allen approached an officer and stated “I just murdered my roommate.” (T. 56). Officers went into Mr. Allen’s cell and found the deceased victim on his bunk, covered with a blanket. (T. 41; 62). A medical doctor at the prison was notified and responded to the scene, wherein she confirmed that the victim was deceased. (T. 49-52). Dr. Anthony Clark conducted the autopsy of the victim in this case. (T. 159). He testified that the cause of death was ligature strangulation. (T. 162).

An investigator from the State Attorney’s Office in Wakulla County testified that he received a letter reportedly sent by Mr. Allen in late October 2017. (T. 142). He put the letter in an envelope and turned it over to FDLE Special Agent Dana Lapointe. (T. 143). A crime laboratory analyst in the Questioned Documents Section at FDLE testified that she did a comparison of the letter sent to the State Attorney’s Office with known writing of Mr. Allen. (T. 145-49). When she compared the hand printing on the letter to the known hand printing from Mr. Allen, she could neither identify nor eliminate Mr. Allen

as having produced the questioned hand writing. (T. 150). She came to the same conclusion regarding the signature on the letter. (T. 150).

Special Agent Lapointe conducted a taped interview with Mr. Allen as part of his investigation. (T. 189). In this taped interview, Allen stated that he told the officer that his roommate was dead, but that he never said he did it. (T. 190). Mr. Allen initially told officers that he assumed the victim strangled himself with a sheet around his neck. (T. 190-91). Mr. Allen stated that he had been in a relationship with the victim and that every morning he would wake up and give him a kiss, but that on this day, his mouth was bloody. (T. 191-92). He attempted to wake him up and saw that something was tied around his neck. (T. 192). Mr. Allen notified the officer at 2:30-3:00 p.m. He explained the delay in reporting by stating: “I was trying to find a way of getting around it. You know what I mean? It’s hard to (inaudible) when I lived in a cell.” (T. 192). Mr. Allen then stated in this recorded interview that the victim was a child molester, that he knew all about his case, and that he had been helping him with his case. (T. 194). He stated that they had been roommates for about eight or nine months. (T. 194). He also told investigators that the victim had been having problems with his brother because of his charges, and that this was a possible reason for him to hurt

himself. (T. 195). Mr. Allen admitted to having smoked K2 and to having used flakka for three weeks prior. (T. 196-97).

Agent Lapointe later conducted a second taped interview with Mr. Allen. (T. 200). In that second interview, Mr. Allen stated that he sent the letter to the State Attorney's Office because he was "tired of the charade." (T. 202). "I did what I did because I felt like he deserved it" because the victim was a "chomo." (T. 201-02). Mr. Allen admitted that he had a friend write the letter that was sent to the State Attorney's Office, but that he dictated it. (T. 212). He also made sure his fingerprints weren't on the letter for plausible deniability. (T. 212). He then stated "the whole flakka thing was a ruse" and that he was not under the influence of a drug as previously claimed. (T. 204). Mr. Allen stated that he was not a drug addict, and that drugs were not a part of his life. (T. 204). He further stated that a couple weeks before the incident, he decided that he was going to kill the victim because he had been lying about charges. (T. 206). Mr. Allen found out the truth about his charges one day when the victim left his locker open and he saw his legal work. (T. 206).

Mr. Allen did not testify in his own defense, did not call any witnesses, and did not give a closing argument. (T. 217-18; 270).

Prior to the start of the penalty phase, Mr. Allen repeatedly stated to the court that he did not believe he had any mitigation. "I don't think it's in my

best interest because there's really nothing that I can provide them that is positive about my background." (T. 298-99). He also stated to the court that he would prefer to be on death row because he would be by himself and not around other people. (T. 301).

Among the evidence presented by the State during the penalty phase was an additional letter sent by Mr. Allen to the State Attorney's Office detailing the murder. (T. 384-85). The State also presented testimony from Andrew Smith with the Broward Sheriff's Office to testify about the prior murder for which Mr. Allen was incarcerated when this incident occurred. (T. 347). He testified as to the facts of that murder, and that it had been committed by Mr. Allen and his then pregnant girlfriend, Katie Cardino. (T. 348). He further testified that Mr. Allen was convicted and sentenced to second degree murder in that case. (T. 351).[6]

Mr. Allen did not present any evidence during the penalty phase. (T. 352-53).

III. Appointment of Special Counsel

After Mr. Allen's guilt and penalty phases were completed, the trial court scheduled a *Spencer* hearing and ordered a presentence investigation

[6] What was not mentioned was the fact that Mr. Allen pled guilty almost immediately with the understanding that in doing so, his pregnant girlfriend, Katie Cardino, would not be charged with murder.

report ("PSI"). (T. 401; R. 414-15). Mr. Allen confirmed that he did not wish to have counsel appointed to represent him during the *Spencer* hearing, nor did he wish to have standby counsel for that proceeding. (T. 403-04; R. 891-93). In light of this decision, the court appointed Robert A. Morris as special counsel on February 21, 2019. (R. 416-17). Special counsel was tasked with independently investigating mitigation in Mr. Allen's background in preparation for the *Spencer* hearing. Special counsel moved for a mitigation specialist, Monica Jordan, and a mental health expert, Dr. Marten E. Falb, and the court granted the order on April 2, 2019. (R. 443-46). Pursuant to Ms. Jordan's investigation, special counsel requested the court continue the *Spencer* hearing. (R. 431-37). The court granted the request on April 1, 2019, and continued the hearing to June 7, 2019. (R. 438).

IV. The *Spencer* Hearing

During the *Spencer* hearing, special counsel presented the testimony of Ms. Jordan and Dr. Falb; Mr. Allen allocuted; and the State presented the testimony of Dr. Greg Prichard.

Ms. Jordan testified that she was severely limited in what she could do in this case because of the court's order not to contact family witnesses. (R. 992). She testified about what should have been done in Mr. Allen's case as it relates to mitigation, and what she would have done absent the restrictions

placed on her by the court and JAC, including interviewing family members, obtaining next-of-kin releases, investigating the circumstances of the prior murder, and consulting with mental health experts. (R. 993-96). Ms. Jordan then testified as to the very brief life history that she was able to compile based on interviews with Mr. Allen and court documents that she was able to obtain. (R. 997-1016).

Dr. Falb conducted a psychological evaluation of Mr. Allen and reviewed some of his records that that were obtained by special counsel. (R. 1074). He testified that Mr. Allen met the criteria for PTSD with the possibility of dissociative effects. (R. 1081). It was his opinion that Mr. Allen was under the influence of extreme mental or emotional distress when he committed the crime. (R. 1085). It was also his opinion that Mr. Allen's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. (1086-87).

Mr. Allen allocuted and gave very brief testimony concerning his relationship with his father, his time in the boys' home Starr Commonwealth, the sexual molestation by his cousin and his grandfather, his prior suicide attempt, and his drug abuse. (R. 1057-63).

Dr. Prichard testified that he agreed with the previous diagnosis of antisocial personality disorder, but disagreed with Dr. Falb's diagnosis of

PTSD. (R. 153-54; 161-164). Dr. Prichard also disagreed with Dr. Falb that the mental health statutory mitigators applied to Mr. Allen. (R. 164-73).

SUMMARY OF ARGUMENT

ISSUE 1: The circuit court erred in summarily denying Mr. Allen's claim that he was denied an individualized sentencing when the court ordered that his family not be contacted. The no-contact order prevented his family from providing extensive mitigation evidence related to his upbringing.

ISSUE 2: The circuit court erred in summarily denying Mr. Allen's claim that he was denied an individualized sentencing due to the JAC running out of funding for criminal conflict cases. Without funding special counsel did not retain the necessary experts or conduct the necessary travel to obtain documents and interview witnesses.

ISSUE 3: The circuit court erred in summarily denying Mr. Allen's claim that he was denied his constitutional right to an individualized sentencing when the court failed to further continue the *Spencer* hearing. The tight timeframe and lack of JAC funds during that timeframe forced special counsel and Ms. Jordan to forego necessary investigation into mitigation, including going to Michigan to locate school records and interview witnesses.

ISSUE 4: The circuit court erred in summarily denying Mr. Allen's claim that he was denied his constitutional right to an individualized sentencing when

the trial court failed to call its own mitigation witnesses at the *Spencer* hearing. Family members and additional expert witnesses would have provided valuable mitigation for the court to consider.

ISSUE 5: The circuit court erred in summarily denying Mr. Allen's claim that he was denied his constitutional right to an individualized sentencing when the trial court failed to ensure that a comprehensive Pre-Sentence Investigation report ("PSI") was completed. The officer completing the PSI spoke only to Mr. Allen and did not even procure records from the Department of Corrections ("DOC") which would have revealed Mr. Allen's mental health issues and repeated incidents of victimization while in custody.

ISSUE 6: The circuit court erred in summarily denying Mr. Allen's claim that the State violated his due process rights by presenting a State-authored PSI that the State knew, or should have known, was inaccurate. Information in the PSI is directly contradicted by Mr. Allen's DOC records.

ISSUE 7: The circuit court erred in summarily denying Mr. Allen's claim that his due process right not to be sentenced based on materially inaccurate information was violated. The PSI is supposed to be a comprehensive report upon which the court can rely, but instead was minimal and inaccurate.

ISSUE 8: The circuit court erred in summarily denying Mr. Allen's claim that his right to due process was violated when the trial court found him

competent to proceed with self-representation in spite of evidence that he suffers from PTSD, which made him incompetent to present a defense.

ISSUE 9: The circuit court erred in summarily denying Mr. Allen's claim that his right to due process was violated when he was permitted to represent himself in spite of record evidence that he was seeking to be sentenced to death. This was not an adversarial proceeding.

ISSUE 10: The circuit court erred in summarily denying Mr. Allen's claim that his waiver of counsel was not voluntary as he was operating under the undue influence of another who had advised him to waive counsel and encouraged him to be sentenced to death.

ISSUE 11: The circuit court erred in summarily denying Mr. Allen's claim that his right to due process was violated when the prosecutor misstated the law during jury selection. The jury mistakenly believed that if the aggravators outweighed the mitigators they were required to sentence Mr. Allen to death.

ISSUE 12: The circuit court erred in summarily denying the claim that cumulatively the combination of procedural and substantive errors deprived Mr. Allen of a fundamentally fair trial as guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and corresponding rights under the Florida Constitution.

ISSUE 13: The circuit court abused its discretion in denying Mr. Allen access to public records in possession of the Florida Department of Corrections relating to Mr. Allen's repeated victimization while in custody.

ARGUMENT

ISSUE 1: The circuit court erred in summarily denying Mr. Allen's claim that he was denied an individualized sentencing by ordering that his family not be contacted regarding potential mitigation evidence.

The Eighth and Fourteenth Amendments to the United States Constitution require individualized sentencing in capital cases. *See Lockett v. Ohio*, 438 U.S. 586 (1978). In order to ensure the constitutionality of the capital sentencing process in cases where the defendant waives mitigation, this Court created certain safeguards, including the preparation of a comprehensive PSI and the appointment of special counsel to present mitigating evidence. *See Muhammad v. State*, 782 So. 2d 343 (Fla. 2001). These *Muhammad* safeguards were intended to "ensure that the defendant's relevant background information regarding mental health and family history will be considered by the trial court and this Court" and "that the decision as to the appropriate sentence is well informed." *Id*. at 367 (Harding, J., concurring).

In this case, Mr. Allen not only proceeded to trial *pro se* and without standby counsel, but he also failed to present any mitigation on his own

behalf during the penalty phase of his trial. After the penalty phase verdict, Mr. Allen reaffirmed that he did not want to have counsel appointed to represent him, nor did he want standby counsel, at the *Spencer* hearing. (T. 403-05). Pursuant to *Muhammad*, the trial court ordered a PSI "to include information such as previous mental health problems, school records, and relevant family background." (T. 401). Additionally, the trial court indicated that it was considering the appointment of special counsel to investigate and present mitigation evidence at the *Spencer* hearing. (T. 402-03).

Upon hearing this, Mr. Allen stated: "Under no circumstances do I want my family contacted." (T. 401). Upon further questioning by the court, Mr. Allen stated that his family was not aware of his current situation, and that his "mother is very sick and … I feel that this would push her over the edge and I don't want to be responsible for that." (T. 402). Based on these statements from Mr. Allen, the court stated "I will not have the -- whoever is doing the investigation reach out to your family at your request based on what you just told me." (T. 402; 405).

The following day, the court reconvened to inform Mr. Allen of its decision to appoint special counsel and to specifically direct special counsel, as well as DOC in its preparation of the PSI, to not reach out to the family. (R. 893-95). In making this request, Mr. Allen essentially sought to prevent

any mitigation evidence from being discovered and presented to the court during the *Spencer* hearing. And the court's order preventing any contact with Mr. Allen's family, ensured that little to no mitigation investigation would be conducted and presented on his behalf. This effectively created a state impediment which substantially hindered the investigation and presentation of mitigating evidence to the court.

Indeed, Ms. Jordan testified at the *Spencer* hearing about how these limitations hindered her investigation, stating that interviewing family members is the bulk of what she usually does to obtain mitigation evidence. (R. 991-92). Had Ms. Jordan been able to speak to family members, there is no doubt she would have been able to paint a much more vivid picture of Mr. Allen's deplorable childhood, which would have included the information gained in postconviction from family members. (PCR. 264-82).

Although Mr. Allen had the right to represent himself under *Faretta*, this right to self-representation established in *Faretta* has never been held to be absolute. In *Faretta* itself, the Court acknowledged that a trial judge may terminate self-representation if a defendant is deliberately disruptive, or appoint a qualified lawyer to act as standby counsel. *Faretta*, 422 U.S. at 834 n.46. In *McKaskle v. Wiggins*, the Supreme Court held that standby counsel could intervene contrary to the defendant's wishes so long as the defendant

"had a fair opportunity to present his case in his own way." *McKaskle v. Wiggins*, 465 U.S. 168, 177 (1984). *Pro se* defendants also must generally accept unsolicited help or hindrance from the judge, prosecutor, or amicus counsel appointed to assist the court. *Id.* at 177 n.7.

In 2012, this Court explicitly found that the appointment of special mitigation counsel did not violate the defendant's *Faretta* rights. *Barnes v. State*, 29 So. 3d 1010 (Fla. 2012). The death penalty "is qualitatively different from any other punishment, and hence must be accompanied by unique safeguards to ensure that it is a justified response to a given offense." *Id*.

> Because the trial court and this Court each have a constitutional obligation to ensure that Barnes received individualized sentencing and that the death penalty is fairly and constitutionally imposed, Barnes' right to self-representation was not violated by the appointment of independent counsel under the facts and circumstances present in this case. Mitigation counsel was appointed, not to supplant Barnes as his own counsel, but to assist the court by presenting mitigation evidence where Barnes refused to do so.

Id. at 1025-26. On appeal of the subsequent § 2254 petition, one Eleventh Circuit judge wrote a separate concurring opinion "in appreciation of the state trial judge's appointment of special counsel," noting that the defendant's refusal to present mitigation meant the sentencer "would not be able to fully consider Mr. Barnes' character and background. So if the judge had not intervened to develop the record, the 'process of inflicting the penalty of

death' would have proceeded without one of its 'constitutionally indispensable' components." *Barnes v. Sec'y, Dep't of Corr.*, 888 F.3d 1148, 1162 (11th Cir. 2018) (Martin, J., concurring) (citing *Woodson v. North Carolina*, 428 U.S. at 280, 304 (1976)).

In a similar case, Justice Pariente pointed out, "[t]he sole reason offered by the trial court in its written sentencing order for not exercising its important discretion to call mitigation witnesses, or to appoint special counsel to do so . . . was that [the defendant] did not want any witnesses to be called. This was error since the trial court is required . . . to ensure that the defendant is truly deserving of the death penalty, which is not solely dependent on a defendant's own wishes to be sentenced to death." *Sparre v. State*, 164 So. 3d 1183, 1202-04 (Fla. 2015).

The appointment of special counsel is meant to address something other than the right to self-representation. That is, while a defendant has a right to waive mitigation, a defendant does not have a right to choose his sentence; that decision is made by society through our legal system.

While a competent capital defendant has the right to waive presentation of mitigating evidence in Florida, it "does not mean that courts can administer the death penalty by default," or constitutional rights, responsibilities, and procedures have been suspended. *Hamblen v. State*,

527 So. 2d 800, 804 (Fla. 1988). "[A] defendant cannot be executed unless his guilt and the propriety of his sentence has been established according to law." *Id*.; *see Pettit v. State,* 591 So. 2d 618 (Fla. 1992). To ensure death is appropriate, "it is the responsibility of the trial court to affirmatively show that all possible mitigation has been considered and weighed." *See Robinson v. State*, 684 So. 2d 175 (Fla. 1996).

The sole reason offered by the trial court preventing contact with family members is because Mr. Allen did not want them contacted. This was error since the trial court is required to ensure that the defendant is truly deserving of the death penalty, which is not solely dependent on a defendant's own wishes to be sentenced to death. *See* § 921.141(3), Fla. Stat. (2012) (requiring a trial court to weigh the aggravating and mitigating circumstances and, if imposing a sentence of death, to state that there are insufficient mitigating circumstances to outweigh the aggravating circumstances). Indeed, the order preventing contact with family members defeats the entire purpose of appointing special counsel and ordering a PSI. Mr. Allen did not want any mitigation presented, did not present any himself at the penalty phase, and seemingly sought to hamstring all other efforts to discover and present such information.

As Ms. Jordan testified during the *Spencer* hearing, talking to family members is the bulk of what she does during mitigation investigations. This critical information could have corroborated and greatly expanded Mr. Allen's life history and the picture of his abusive childhood. Interviews with family members would have also allowed Ms. Jordan to obtain photographs of Scottie when he was younger in order to humanize him before the court.

This order by the court preventing contact with family members was also an impediment to the preparation of a comprehensive PSI, which was also ordered to be completed.

In Mr. Allen's case, Ms. Jordan and special counsel alerted the court to the existence of significant mitigation not otherwise in the record, critically including Scottie's relationships with family members. The information proffered by special counsel and Ms. Jordan signaled that material mitigation existed, and the trial court needed to act to develop the record when Mr. Allen decided not to do so.

Without this critical information, the court was unable to guarantee Mr. Allen's constitutional right to an individualized sentencing which requires "full consideration of the evidence that mitigates against the death penalty." *See Penry v. Lynaugh*, 492 U.S. 302, 327-28 (1989). "[W]e cannot avoid the conclusion that an individualized decision is essential in capital cases."

Lockett v. Ohio, 438 U.S. 586, 605 (1978) (describing "[t]he need for individualized consideration as a constitutional requirement in imposing the death sentence"); *e.g. Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) ("[C]onsideration of the character and record of the individual offender and the circumstances of the particular offense [are] a constitutionally indispensable part of the process of inflicting the penalty of death."); *McKinney v. Arizona*, 140 S. Ct. 702, 706 (2020) ("In *Eddings*, this Court held that a capital sentencer may not refuse as a matter of law to consider relevant mitigating evidence.").

Mr. Allen's constitutional rights were violated when the court prevented special counsel, Ms. Jordan, and the PSI author from contacting his family members. Had Mr. Allen's family been contact by Ms. Jordan, as is her usual practice, she would have been able to present this compelling mitigation to the court. Ultimately, Mr. Allen did not receive the kind of individualized sentencing that is required by the Constitution's Eighth and Fourteenth Amendments. *See Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Kansas v. Marsh*, 548 U.S. 163 (2006). The circuit court erred in denying an evidentiary hearing on this claim, as it is not procedurally barred nor conclusively refuted by the record.

ISSUE 2: The circuit court erred in summarily denying Mr. Allen's claim that he was denied an individualized sentencing due to the JAC running out of funding for criminal conflict cases.

As stated *supra*, the Eighth and Fourteenth Amendments to the United States Constitution require individualized sentencing in capital cases. *See Lockett v. Ohio*, 438 U.S. 586 (1978). The Florida Supreme Court's safeguards in *Muhammad* were thwarted when a State-created impediment prevented funding for special counsel's mitigation investigation. *See Muhammad*, 782 So.2d 343.

On April 15, 2019, special counsel filed a Notice of Justice Administrative Commission's Funding and Unavailability of Funds. (R. 457). In this notice, special counsel stated: "JAC has basically run out of money to pay [] people." *Id*. According to a statement put out by JAC, all current year appropriations were exhausted as of early April 2019. *Id*. Counsel further stated that he brought this to the court's attention because this will invariably cause problems and hardships for people who are participants in the criminal justice system, including mitigation specialists and attorneys. *Id*.

This created a month's-long window where due process providers would not be receiving any payment for their services. Once the JAC ran out of money, there was no other legally available source to make these payments until the new fiscal year which began on July 1, 2019.

In special counsel's June 6, 2019, "Notice Related to Mitigation", he stated that "Based on the most rudimentary review of material, mitigation investigation and evidence, an effective penalty phase presentation in this case would have required the [multiple] experts." (R. 465-75).

Aside from the issue of the strict time constraints placed upon special counsel and Ms. Jordan, there was also the issue of finding any of the above-referenced experts who would agree to work on this case within the truncated time period and knowing that they would not be paid for many months after their work was completed. As Ms. Jordan stated in her testimony: "As we all know, JAC is out of money, so we're all not getting paid…". (R. 991). Despite Ms. Jordan not having an issue with fronting the costs of her services, funding remained a problem for most due process providers during this time. Special counsel recalled concerns over his ability to find the needed experts listed above that would be willing and able to work within the required timeframe and without getting paid for several months.

It is clear from special counsel's Notice Related to Mitigation that multiple experts were needed in order to guarantee Mr. Allen's constitutional right to an individualized sentencing which requires "full consideration of the evidence that mitigates against the death penalty." *See Penry v. Lynaugh*, 492 U.S. 302, 327-28 (1989).

At one point during the *Spencer* hearing, the State objected to Ms. Jordan's testimony, stating that an expert would be needed in order to present such information about drug use and addiction. (R. 1016). Although this objection was overruled, Ms. Jordan revised her answer and did not discuss the literature about childhood drug abuse or what experts have said about it.

In addition to testimony about drug abuse, there was also testimony concerning childhood sexual abuse, trauma, and head injuries, all of which necessitated the hiring of multiple experts.

Furthermore, although Mr. Allen was initially resistant to meeting with experts and putting forth any mitigation whatsoever, he did change his mind prior to the *Spencer* hearing when he agreed to meet with Dr. Falb. He also met with Dr. Prichard and testified on his own behalf regarding mitigation. Had Mr. Allen been asked to cooperate with these additional experts, he would have done so.

Because of this impediment to hiring the necessary experts, Mr. Allen's constitutional right to an individualized sentencing was violated. The circuit court erred in denying an evidentiary hearing on this claim, as it is not procedurally barred nor conclusively refuted by the record.

ISSUE 3: The circuit court erred in summarily denying Mr. Allen's claim that he was denied his constitutional right to an individualized

sentencing when the court failed to further continue the *Spencer* hearing.

The Eighth and Fourteenth Amendments to the United States Constitution require individualized sentencing in capital cases. *See Lockett v. Ohio*, 438 U.S. 586 (1978). The U.S. Supreme Court has long professed the principle that death is different: "[t]he taking of life is irrevocable. It is in capital cases especially that the balance of conflicting interests must be weighed most heavily in favor of the procedural safeguards of the Bill of Rights." *Reid v. Covert*, 354 U.S. 1, 45-46 (1957) (on rehearing) (Frankfurter, J., concurring). *See also Gregg v. Georgia*, 428 U.S. 153, 188 (1976) ("the penalty of death is different in kind from any other punishment imposed under our system of criminal justice.").

The timeframe imposed on special counsel and Ms. Jordan only allowed for a cursory investigation into possible mitigation for Mr. Allen. This was a violation of Mr. Allen's constitutional right to an individualized sentencing, as there was simply not enough time to do a mitigation investigation for a capital case within this abbreviated timeframe. Ms. Jordan testified about the limitations she faced in conducting a mitigation investigation, including the severe time constraints. (R. 991).

Later on in her testimony, Ms. Jordan stated: "I wasn't able to fly to Michigan to go through the records myself, which is what, in the normal

course of business what should have been done." (R. 999). Special counsel filed a status report to the court on March 29, 2019, indicating that one of the pending matters is "travel to Michigan to obtain school records." (R. 431-37). Special counsel stated he didn't believe he personally needed to travel to Michigan, "but it will be necessary for an investigator to travel to Michigan because a vast majority of the documents necessary are not available by simply making a phone call or gaining online access." (R.435, n.1).

Had Ms. Jordan been able to travel to Michigan, she would have been able to obtain Mr. Allen's school records, which contain critical information that the court should have been able to consider. (PCR. 386-486). These school records include his time in public school in Michigan, including his time spent at the boys home, Starr Commonwealth. They indicate that Scottie had an individual education plan or IEP, and that his primary impairment was listed as: "emotionally impaired." *Id*. One of the reports included in his records states that he has "inappropriate peer and adult interactions and relationships and low self- concept." *Id*. In the IEP form there is a checklist for certain behaviors supporting eligibility. Among the items indicated as being applicable to Mr. Allen are "inability to build or maintain satisfactory interpersonal relationships within the school environment", "inappropriate types of behavior or feelings under normal circumstances",

and “general pervasive mood of unhappiness or depression.” *Id*. There is a handwritten note on this same page which states: “Scottie’s reaction to his adversive background is quite intense interfering with his ability to function effectively within the regular curriculum.” *Id*. These records reflect a history of unexcused absences from school, incomplete assignments, and behavioral issues. *Id*. These school records paint a picture of a troubled child. Additionally, they list the names of teachers and other school personnel that would have known Mr. Allen and could have testified about what he was like at school. They serve to corroborate information about his childhood and family life. They also would have been important for Dr. Falb and Dr. Prichard to review in assessing Mr. Allen.

Special counsel and Ms. Jordan indicated to the court that this information was routinely gathered in mitigation investigations and that someone would need to physically go to Michigan. However, there simply was not enough time to get all of this done within a two-month timespan.

Compounding this situation, JAC had run out of funds during this time and due process servers were no longer being paid. The facts concerning JAC funds as pled in Issue 2 are hereby fully incorporated into this claim.

The Florida Supreme Court has emphasized that a defendant’s constitutional rights in criminal cases trump the State of Florida’s financial

shortcomings. *See, e.g., Makemson v. Martin County*, 491 So. 2d 1109, 1113 (Fla. 1986). (holding that absolute fee maximums are "unconstitutional when applied to cases involving extraordinary circumstances and unusual representation."); *see also White v. Board of County Commissioners*, 537 So. 2d 1376, 1378-79 (Fla. 1989) (holding that all death penalty cases are extraordinary and unusual).

As stated in Issue 2, special counsel and Ms. Jordan indicated to the court that certain experts needed to be retained and further evidence from out of state needed to be gathered. However, without proper funding from JAC, this was not going to happen. Special counsel's June 6, 2019, "Notice Related to Mitigation" details not only the proposed mitigation, but experts that were required based on the evidence they already had including Mr. Allen's long-term substance abuse, addiction issues, trauma, PTSD, and sexual abuse. As stated previously, although Mr. Allen was initially resistant to meeting with experts and putting forth any mitigation whatsoever, he did change his mind prior to the *Spencer* hearing when he agreed to meet with Dr. Falb. He also met with Dr. Prichard and testified on his own behalf regarding mitigation. Had Mr. Allen been asked to cooperate with these additional experts, he would have done so.

Moreover, Mr. Allen seemed to have a change of heart about presenting mitigation during the *Spencer* hearing. (R. 1241-42). Considering that even the Court believed that Mr. Allen was equivocating regarding the appointment of counsel, the *Spencer* hearing should have been continued. After all, death is different and "the taking of a life is irrevocable." *See Reid v. Covert*, 354 U.S. at 45-46.

Due to the short timeframe, the lack of JAC funds for experts and travel, the amount of mitigation still left to investigate and present, and Mr. Allen's change of heart regarding the presentation of mitigation, this court should have continued the *Spencer* hearing until a time when JAC was again funded and a proper capital case mitigation investigation could be completed. The *Spencer* hearing in this case was held on June 7 and June 21, 2019. The following fiscal year would have started on July 1, 2019. It would not have been an unreasonable delay in these proceedings to continue the *Spencer* hearing until sometime after July 1, 2019. The failure to do so violated Mr. Allen's right to due process and an individualized sentencing as required by the Eighth and Fourteenth Amendments. The circuit court erred in denying an evidentiary hearing on this claim, as it is not procedurally barred nor conclusively refuted by the record.

ISSUE 4: The circuit court erred in summarily denying Mr. Allen's claim that he was denied his constitutional right to an individualized

sentencing when the trial court failed to call its own mitigation witnesses at the *Spencer* hearing.

The Eighth and Fourteenth Amendments to the United States Constitution require individualized sentencing in capital cases. *See Lockett v. Ohio*, 438 U.S. 586 (1978). Under *Muhammad*, when the trial court is alerted to the probability of significant mitigation, it has the discretion to call persons with mitigating evidence as its own witnesses. *Muhammad*, 782 So. 2d at 363-64.

In Mr. Allen's case, the court was alerted to significant mitigation that was not fully investigated or presented, either due to the time constraints imposed by the court or due to JAC's lack of funds. Nevertheless, the court should have called persons with mitigating evidence as its own witnesses, especially as to the proposed mitigating factors submitted by special counsel. (R. 465-75).

The court was alerted to factors such as extreme poverty that Mr. Allen endured as a child, and the physical, emotional, and sexual abuse he suffered as a child. (R. 1005-06). The court should have called family members as its own witnesses to obtain this information, critical to Mr. Allen's sentencing.

The court was alerted to Mr. Allen's long-term substance abuse and addiction issues. In special counsel's Notice Related to Mitigation, another

expert special counsel recommended was a toxicologist who would explain the effects substance abuse would have on the brain. (R. 473). Special counsel recommended that a toxicologist would need to work alongside a neuropsychologist, who could also consider and evaluate other potential causes of brain impairment. Mr. Allen also suffered physical abuse and physical injuries as a child which have may have caused potential brain impairments. Mr. Allen was injured in high-speed car crashes as child, as discussed in the record, and was physically abused by his mother. The court should have further investigated Mr. Allen's potential head trauma and brain impairments.

Mr. Allen was found to have substance abuse conditions, but the effects of those conditions were not ordered to be further investigated by the court. Whether Mr. Allen received any counseling as a child for substance abuse and abandonment was not explored by the court.

The court did not address the current relationships Mr. Allen had with his family members at the time of trial. Special counsel suggested, in response to their preliminary investigation, that Mr. Allen had "no family relationships" and had "been abandoned by every family member." (R. 470). However, Mr. Allen did indicate to the court that he had some ongoing relationship with his family members. During his trial, Mr. Allen told the court

that he had contact with his son within the past month. (T. 298). Even though Mr. Allen had been incarcerated for his prior conviction in 2003, Mr. Allen still maintained some contact with his children. These were individuals with mitigating evidence that the court should have called as its own witnesses per *Muhammad*. Because the court failed to do so, Mr. Allen's right to an individualized sentencing was violated.

Furthermore, as already stated in this motion, while Mr. Allen was initially reluctant to cooperate with experts or mitigation of any kind, he clearly had a change of heart just prior to the *Spencer* hearing. He not only spoke with Dr. Falb and Dr. Prichard, but questioned them during the hearing and testified on his own behalf as to mitigation. The court even took note of this change of heart by Mr. Allen. (R. 1241-44). The circuit court erred in denying an evidentiary hearing on this claim, as it is not conclusively refuted by the record.

ISSUE 5: The circuit court erred in summarily denying the claim that Mr. Allen was denied his constitutional right to an individualized sentencing when the trial court failed to ensure that a comprehensive Pre-Sentence Investigation report ("PSI") was completed.

Under *Muhammad*, 782 So. 2d at 363-64 (Fla. 2001), when a defendant decides to waive mitigation, a trial court must order the Florida Department of Corrections ("DOC") to prepare a PSI "to determine the existence of mitigating circumstances." *See also* § 921.231(1), Fla. Stat.

(2023) (requiring DOC to investigate and draft a report upon court's referral). This PSI must be "comprehensive" and "meaningful," and the State must tender any relevant records in its possession to the trial court. *Muhammad*, 782 So. 2d at 363-64 & n. 11 (citing R. Regulating Fla. Bar 4-3.8(c)); *see also id*. at 367 (Harding, J., concurring) ("comprehensive PSIs ... ensure that the defendant's relevant background information regarding mental health and family history will be considered"). In evaluating errors in the PSI, the Florida Supreme Court "consider[s] whether there is a reasonable possibility that any error in consideration of the PSI contributed to the trial court's decision to impose death," including "the permissible evidence on which the trial court could have legitimately relied." *Barnes v. State*, 29 So. 3d 1010, 1027-28 (Fla. 2010).

In Mr. Allen's case, the PSI included a lengthy narrative of the crime that was copied from the probable cause affidavit, a self-serving statement by Mr. Allen that he would kill again if sentenced to life or placed in a mental institution, and a criminal history. (PCR. 488-97). The only other sections of the PSI included Mr. Allen's "Socioeconomic Status," or educational and employment history, and a "Supplemental Information" section, which included short self-reported remarks. For example, Mr. Allen's "Physical and Mental Health" is checked as "good," and under the "Alcohol/Substance

Abuse" category, it reads: "Defendant advised this officer that he had no prior issues with substance abuse or alcohol." (R. 495). There is no other substantive information contained in the PSI, nor is any of this information verified by anyone other than Lorne Smith, the DOC officer who prepared the PSI.

Officer Smith stated to postconviction investigators that he got information for the PSI directly from Mr. Allen and that he had strict instructions on what he was not allowed to do, like speak to Mr. Allen's family. (PCR. 299). Smith stated that he had an attorney assigned to him to oversee the PSI and to make sure he was protected and following the judge's order. Smith was adamant that he was not allowed to speak to anyone other than Mr. Allen while conducting his investigation for Mr. Allen's PSI.

However, DOC had other background information on Mr. Allen's past that could have been accessed and presented in the PSI. For example, while Mr. Allen was in DOC custody, he was repeatedly victimized by other inmates, a claim that could not be further substantiated because the trial court had denied his records demand on this matter. Various instances of this are detailed in Mr. Allen's DOC records, such as being repeatedly threatened and also being stabbed. (PCR. 499-529). DOC also had information regarding another inmate named Steven Williams, including an

interview where he claims to have Mr. Allen and inmate Michael Woodbury under his control and directed them to commit murders of child molesters. (PCR. 531-646). Within this interview, Williams explicitly stated that the crime Mr. Allen allegedly committed would not have happened without him. (PCR. 621-22). Furthermore, DOC had Mr. Allen's mental health records which would corroborate his long history of depression, his prescribed medications, and two suicide attempts. (PCR. 648-51).

As to prejudice, had DOC followed the *Muhammad* requirement, a PSI revealing significant mitigation could have been compiled, which would have resulted in a sentence of less than death. A PSI compiled based on the available DOC records would have comprehensively revealed a picture of significant mitigation.

The PSI in this case was far from comprehensive, in part due to the trial court's order preventing family contact. The above information would have undercut the case for aggravation and provided additional mitigation, which could have been easily included in the PSI without violating the court's order of not speaking with Mr. Allen's family. Furthermore, the above-mentioned evidence was clearly in DOC custody at the time the PSI was prepared. The failure to include the information found in these records violated Mr. Allen's right to a comprehensive PSI under state law, and there

is a "reasonable possibility" that the cursory PSI "contributed" to the trial court's decision to impose Death.

The facts and evidence presented in this claim are not within the direct appeal record, and factual development, such as the DOC records, was needed to raise this claim. Additionally, the record does not refute the claim, and the trial court did not attach or cite to areas of the record that refute the claim. *See Roberts v. State*, 678 So.2d 1232, 1236 (Fla.1996) (providing that the order denying a motion for postconviction relief should have records attached, citations to the record, or an explanation for the basis of the court's ruling," not just after having considered the motion, the [answer], the records, and arguments of counsel); *Huff v. State*, 762 So. 2d 476, 481 (Fla. 2000) ("Any error by the court in failing to attach portions of the files or records to its order is harmless if the court refers to the specific portions of the files or records in the order"). Mr. Allen should be granted an evidentiary hearing on this claim, as it is not procedurally barred nor conclusively refuted by the record.

ISSUE 6: The circuit court erred in summarily denying Mr. Allen's claim that the State violated his due process rights by presenting a State-authored PSI that the State knew, or should have known, was inaccurate.

The State violates the Due Process Clause of the Fourteenth Amendment when it presents "false or misleading evidence" to a trial court

as well as when it uses implied misrepresentations, even if "technically correct." *Consalvo v. Sec'y for Dep't of Corr*., 664 F.3d 842, 846 (11th Cir. 2011); *United States v. Horner*, 853 F.3d 1201, 1208 (11th Cir. 2017); *see Alcorta v. Texas*, 355 U.S. 28, 31 (1957) (creating a "false impression" violates due process); *United States v. Alzate*, 47 F.3d 1103, 1110 (11th Cir. 1995); *Blankenship v. Estelle*, 545 F.2d 510, 513 (5th Cir. 1977); *Giglio v. United States*, 405 U.S. 150, 153 (1972). A violation occurs even if the false evidence comes from an agency that is not formally part of the prosecution. *See McMillian v. Johnson*, 88 F.3d 1554, 1569 (11th Cir. 1996).

Here, the PSI author Lorne Smith was a state actor due to his position as an officer within DOC, which is an agency within the Florida executive branch. "Florida courts have uniformly held that prosecutors are imputed with 'constructive knowledge and possession of evidence' held by other departments of the executive branch of Florida's government for discovery purposes." *See Henderson v. State*, 745 So. 2d 319, 323 (Fla. 1999) (citations omitted). Although not a formal member of the prosecution, Smith functioned as an investigative officer in accordance with his duty under state law. As a state investigator, any information which he held or was aware of is imputed to the State. *See Kyles v. Whitley*, 514 U.S. 419, 437 (1995) ("[T]he individual prosecutor has a duty to learn of any favorable evidence

known to the others acting on the government's behalf in the case…"); *Gorham v. State*, 597 So. 2d 782, 784 (Fla. 1992) (holding that the prosecutor is charged with constructive knowledge of evidence withheld by other state agents).

The State knew the requirement of a comprehensive PSI in capital cases and had failed to put relevant evidence in mitigation before the trial court. Mr. Allen's DOC records show a history of mitigation that could have been included in the PSI, such as: victimization by other inmates, a relationship of sorts with Steven Williams who claims to have directed this murder, and mental health issues including suicide attempts. (PCR. 499-622); *see* Claim 5. However, the PSI incorrectly listed Mr. Allen's physical and mental health status as "good," which is contrary to the information in the DOCs records, and states that Mr. Allen has "no prior issues with substance abuse or alcohol," which is also untrue. (PCR. 495). The State knew or should have known that the PSI painted a false and misleading picture about Mr. Allen's mental health and personal background. It does not matter that the prosecution did not actively solicit the PSI author to paint the false picture with the defective PSI because it is still a violation of due process when the prosecution "although not soliciting false evidence, allows it to go uncorrected when it appears." *See Napue v. Illinois*, 360 U.S. 264,

269 (1959). DOC had possession of records that detailed Mr. Allen's past victimization as well as his mental health history, and yet, the PSI reported contrary information to what was detailed in DOC's own records.

Mr. Allen's DOC files were in possession of the State, and yet, false or inaccurate information was presented in the PSI and used in determining Mr. Allen's sentence, that the State knew of or should have known was inaccurate. The facts and evidence presented in this claim are not within direct appeal record, and factual development, such as the DOC records, was needed to raise this claim. Additionally, the trial court did not attach or cite to areas of the record that refute the claim. *See Roberts v. State*, 678 So.2d 1232, 1236 (Fla.1996); *see also Huff v. State*, 762 So. 2d 476, 481 (Fla. 2000). The State's presentation of false evidence prejudiced Mr. Allen. Based on the mitigating evidence that could have been presented— a picture of victimization by other inmates, mental illness, and suicide attempts—it is reasonable that Mr. Allen would have received a sentence that is less than death. The circuit court erred in denying an evidentiary hearing on this claim, as it is not procedurally barred nor conclusively refuted by the record.

ISSUE 7: The circuit court erred in summarily denying Mr. Allen's claim that his due process right not to be sentenced based on materially inaccurate information was violated.

The false and misleading PSI violated Mr. Allen's due process right to be sentenced based on *accurate* information, which is a separate violation, irrespective of bad faith by any state actor. *See Townsend v. Burke*, 334 U.S. 736, 740-41 (1948) (sentencing based on "untrue" information violates due process of law, regardless whether the presentation was "caused by carelessness or design"); *United States v. Tucker*, 404 U.S. 443 (1972) (overturning sentence where judge considered two invalidated convictions). There is a "general proposition that a criminal defendant has the due process right to be sentenced on the basis of accurate information." *Ben-Yisrayl v. Buss*, 540 F.3d 542, 554 (7th Cir. 2008); *see also U.S. ex rel. Welch v. Lane*, 738 F.2d 863, 864-65 (7th Cir. 1984) ("the offender does have a right to a fair sentencing process—one in which the court goes through a rational procedure of selecting a sentence based on relevant considerations and accurate information").

The accurate sentencing requirement has been recognized and applied in Florida courts and the Eleventh Circuit. *See United States v. Plasencia*, 886 F.3d 1336, 1343 (11th Cir. 2018) ("The defendant's primary due process interest at sentencing is the right not to be sentenced on the basis of invalid premises or inaccurate information.") (internal quotations omitted); *Reese v. State*, 639 So. 2d 1067, 1068 (Fla. 4th DCA 1994) (noting

a “fundamental due process” violation when a sentencing court considers “unsubstantiated allegations of misconduct”); *Petit-Homme v. State*, 284 So. 3d 1126, 1128 (Fla. 5th DCA 2019) (same); *Shelko v. State*, 268 So. 3d 1003, 1005 (Fla. 5th DCA 2019) (finding due process violation when the judge sentenced defendant in part on “cartel” associations having no basis in fact).

In this case, Mr. Allen’s due process right to be sentenced based on accurate information was violated. His PSI was incorrectly deemed and assumed to be a “comprehensive” auditing of potentially available mitigation, as required by State law. *See Muhammad v. State*, 782 So. 2d 343 (Fla. 2001). Yet, it lacked basic information that could have been obtained from DOC records, including a history of victimization by other inmates, a relationship of sorts with Steven Williams who claims to have directed this murder, and mental health issues including suicide attempts. The PSI incorrectly lists his physical and mental health status as “good”, and states that he has “no prior issues with substance abuse or alcohol”, which is also untrue. (PCR. 499-622). Additionally, the PSI author was prevented from adhering to such a requirement because of the Court’s order not to speak to family members, and was not able to comprehensively account for Mr. Allen’s personal and mental health history.

A sentencing procedure in which "significant mitigating information" is not put into evidence—or where it is falsely implied that such mitigation does not exist—results in "a sentence based on incomplete—thereby inaccurate—information." *United States v. Hamid*, 531 A.2d 628, 644 (D.C. 1987) (finding that *Townsend* and lower court cases support that the omission of material information from the sentencing hearing is regarded no less significantly). "[T]he sentence rests on a foundation of confusion, misinformation and ignorance of facts vitally material to mitigation. If justice is to be done, a sentencing judge should know all the material facts." *United States v. Malcolm*, 432 F.2d 809, 817-19 (2d Cir. 1970) (finding due process was violated where court refused to hear evidence in mitigation, namely evidence that defendant had cooperated with the authorities, based on court's "blind faith" in the presentence report which did not mention the cooperation). Mr. Allen was thus sentenced based on "misinformation of constitutional magnitude." *Tucker*, 404 U.S. at 447.

As demonstrated in Issues 5 and 6, the PSI omitted information and presented false or inaccurate evidence. This information was accessible from the DOC records, notwithstanding the trial court's order preventing contact with Mr. Allen's family. The DOC records regarding Mr. Allen's victimization and mental health history were not part of the record on direct

appeal, and therefore this claim could not have been raised on direct appeal. It follows then that the claim is not procedurally barred and was properly raised in the circuit court. *See Roberts v. State*, 678 So.2d 1232, 1236 (Fla.1996); *see also Huff v. State*, 762 So. 2d 476, 481 (Fla. 2000). The circuit court erred in denying an evidentiary hearing on this claim, as it is not procedurally barred nor conclusively refuted by the record.

ISSUE 8: The circuit court erred in summarily denying Mr. Allen's claim that his right to due process was violated when the trial court found him competent to proceed with self-representation in spite of ample evidence that he suffers from PTSD, which made him incompetent to present a defense.

In summarily denying this claim the trial court ruled that it was procedurally barred, and "should have been raised on direct appeal." (PCR. 1229). As argued at the *Huff* hearing and in a motion for rehearing, appellate counsel cannot raise a claim on direct appeal when the claim relies on both the trial record and facts that are extrinsic to the record. *Rutherford v. Moore*, 774 So. 2d 637, 646 (Fla. 2000). This claim requires that factual determinations be made by the trial court; an evidentiary hearing is required. *Walker v. State*, 88 So. 3d 128, 135 (Fla. 2012).

Under the Sixth Amendment, criminal defendants have the right to represent themselves in criminal trials. In *Indiana v. Edwards*, the U.S. Supreme Court made it clear that courts could impose counsel on

defendants who, while competent to stand trial, were not competent to represent themselves due to mental illness. *Indiana v. Edwards*, 554 U.S. 164, 177 (2008).

In Mr. Allen's case numerous *Faretta* inquiries were conducted and a competency evaluation was ordered. In that competency evaluation Dr. Meyer assessed both Mr. Allen's competency to stand trial and his competency to represent himself. (PCR. 653-59). Relevant to this claim, Dr. Meyer assessed whether there were "any other symptoms of severe mental illness that could impair the defendant's ability" to represent himself. Mr. Allen reported to Dr. Meyer that he had a history of intermittent mental health treatment for mild emotional difficulties, but had never received ongoing treatment. (R. 113). Largely the interview focused on his familiarity with criminal law and his ability to access material when he is uncertain of information (R. 113). There is no mention of PTSD anywhere in the assessment, although it does report that Mr. Allen was sexually abused by his grandfather, and has been receiving "intermittent mental health services" since the age of twelve. (R. 109, 110). In addition to this report, the court heard evidence relating to the sexual abuse and Mr. Allen's PTSD diagnosis during the *Spencer* hearing. Indeed, the court found that competent evidence established PTSD. (R. 969). Even with that the court did not take the

opportunity to order another competency hearing or evaluation to assess whether Mr. Allen's PTSD interfered with his ability to competently represent himself. Instead the court made the following assessment: "The Court does not find that a diagnosis of PTSD in this case is tantamount to a severe mental illness that would have had bearing on whether this defendant was competent to stand trial or competent to waive counsel pursuant to *Indiana v. Edwards*". (R. 969-970).

Whether Mr. Allen's PTSD is severe enough to have a bearing on his competency to represent himself is a medical opinion and not something the Court should find *sua sponte*. *Edwards* recognizes that: "Mental illness itself is not a unitary concept. It varies in degree. It can vary over time. It interferes with an individual's functioning at different times in different ways." *Indiana v. Edwards*, 554 U.S. at 175. Further competency evaluations should have been done once the extent of his trauma and his PTSD diagnosis came to light.

Undersigned counsel retained an expert to do a retroactive competency evaluation by assessing the transcripts and looking over Mr. Allen's medical/social history while in the Department of Corrections. That doctor advised that she would have found him incompetent to proceed *pro*

se on the basis that his PTSD limited him from mounting a proper defense and presenting mitigation. (PCR. 1187-1188).

Defendant's desire to not have his family contacted was not the decision of a competent individual. Rather it was born from his own victimization and trauma which lead him to attempt to control and minimize stressors that activate his PTSD. The court seemed to recognize this avoidance behavior in addressing whether the defendant had the ability to conform his conduct to the requirements of law. The court found his abilities "substantially impaired by adverse childhood experiences that have rendered him less effective in making good decisions." (R. 970).

Mr. Allen suffers from unresolved trauma that impinges on his ability to make decisions. Symptoms of PTSD include intrusive experiences, defensive avoidance, anxiety, and dissociation. Intrusive experiences and defensive avoidance are particularly prominent in Mr. Allen's case. Intrusive experiences refer to when individuals re-experience parts of their initial trauma. Defensive avoidance refers to the avoidance or suppression of painful thoughts and memories that would cause individuals to re-experience their trauma. (PCR. 1187-1188).

Mr. Allen also suffers from insecure attachment because of his PTSD. This means that he is generally distrusting in his relationships. These

symptoms contribute to his inability to make decisions about his case which are free from the effects of his mental illness. Mr. Allen's decision not to call certain family members that would have testified about his sexual abuse is a direct result of his mental illness and his avoidance of reliving events that would traumatize him. Furthermore, as a child Mr. Allen was verbally and physically abused by his mother. She would tell Mr. Allen that she hated him and that "The best part of you got thrown into the trash," referring to her placenta. (PCR. 1202). It is likely that Mr. Allen's reason for not wanting his mother contacted had more to do with minimizing his own stressors. Even his decision to represent himself is infected by his condition. He is distrusting and needs to control his environment and reduce situations that would cause him stress. This is what led him to not want an attorney involved.

This Court should remand this claim for an evidentiary hearing as it is not procedurally barred, nor is it conclusively refuted by the record.

ISSUE 9: The circuit court erred in summarily denying Mr. Allen's claim that his right to due process was violated when he was permitted to represent himself in spite of record evidence that he was seeking to be sentenced to death.

In summarily denying this claim the trial court ruled that it was procedurally barred, and "should have been raised on direct appeal." (PCR. 1229). As argued at the *Huff* hearing and in a motion for rehearing, appellate counsel cannot raise a claim on direct appeal when the claim relies on both

the trial record and facts that are extrinsic to the record. *Rutherford v. Moore*, 774 So. 2d 637, 646 (Fla. 2000). This claim requires that factual determinations be made by the trial court; an evidentiary hearing is required. *Walker v. State*, 88 So. 3d 128, 135 (Fla. 2012).

Under the Sixth Amendment, criminal defendants have the right to represent themselves in criminal trials. However, the U.S. Supreme Court has held that courts can impose counsel on defendants who, while competent to stand trial, were not competent to represent themselves due to mental illness. *Indiana v. Edwards*, 554 U.S. 164, 177 (2008). Even prior to that, case law recognizes that courts could impose counsel when "unusual circumstances" were present. *State v. Cappetta*, 216 So. 2d 749, 750 (Fla. 1968).

In Dr. Meyer's competency assessment, she noted concerns about Mr. Allen's "desire to be convicted of Capital Murder and his intention to proceed in a manner to reach this outcome." (R. 113). She also noted that Mr. Allen viewed a death sentence as "more favorable than a long incarceration while housed in general population." (R. 113). While she determined that this decision "does not appear influenced by symptoms of mental illness," the truth is that wanting to be in the more controlled environment of death row is an adaptation to trauma. Death row is an escape from stressors, and Mr.

Allen is fleeing from stressors because he has a poor stressor capacity. This is further explained in Issue 8.

A trial is supposed to be an adversarial proceeding, however in Mr. Allen's trial the goal of the state and the goal of the defendant were the same, which brings the trial's integrity into question. "The government's interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant's interest in acting as his own lawyer." *Woodbury v. State*, 320 So. 3d 631, 646 (Fla. 2021) (citing *Indiana v. Edwards*, 554 U.S. 164, 177 (2008) and quoting *Martinez v. Court of Appeal*, 528 U.S. 152, 162 (2000)).

Due to this common goal, there are certain things which did not come to light, that perhaps ought to have. There is the issue of Mr. Allen's prior murder conviction. Had Ms. Showalter been imposed as counsel she would have undoubtedly brought out testimony seeking to ameliorate the prior. (PCR. 662). Detective Smith testified as to the aggravator of a prior violent felony. His testimony was somewhat limited in that he did not get into the details of the crime, but confirmed that Mr. Allen had entered a plea to a second degree murder and been sentenced to 25 years in prison. What was not brought out was that the only evidence of Mr. Allen being the perpetrator of that crime was Mr. Allen's confession and a statement from Katie Cardino, his girlfriend at the time of the crime. Detective Smith could have been cross-

examined and would have admitted that he cannot be certain that it was Mr. Allen and not Katie Cardino who committed this crime. He could have been confronted with his own report which details that before confessing to the crime Mr. Allen asked "what did Katie say happened?" and that only *after* being told that Katie reported he had killed the victim, did he confess. (PCR. 670). He could have confirmed that after remonstrating with Mr. Allen he told them that it was in fact Katie Cardino who had strangled and killed the victim. (PCR. 872-876). In addition, the prior defense attorney could have been called as a witness. She could have testified that (1) Mr. Allen pled to this crime very quickly (prior to her receiving full discovery) and against her advice, (2) Katie Cardino was pregnant with Mr. Allen's child at the time of the crime and the time of the plea, and (3) that in her experience in the jurisdiction, it was very unusual to get an offer of less than life on a murder case from the State Attorney in Broward County. This would have supported the argument that this was not a strong case against Mr. Allen, and that he likely he did not commit the crime, but acted with chivalry in taking the blame so that Ms. Cardino could avoid prison and raise their child.

The jury could have considered this as mitigation as they were properly instructed that mitigation can be "anything which might indicate that the death penalty is not appropriate for the defendant." (T. 328). This would include

"any aspect of the defendant's character, background or life." (T. 328). This contextualization of the circumstances of Mr. Allen's prior was important for the jury to hear and by allowing Mr. Allen to represent himself in spite of the unusual circumstances, he was deprived of his right to due process.

This Court should remand this claim for an evidentiary hearing as it is not procedurally barred, nor is it conclusively refuted by the record.

ISSUE 10: The circuit court erred in summarily denying Mr. Allen's claim that his waiver of counsel was not voluntary, as he was operating under the undue influence of another.

In summarily denying this claim the trial court ruled that it was procedurally barred, and "should have been raised on direct appeal." (PCR. 1229). As argued at the *Huff* hearing and in a motion for rehearing, appellate counsel cannot raise a claim on direct appeal when the claim relies on both the trial record and facts that are extrinsic to the record. *Rutherford v. Moore*, 774 So. 2d 637, 646 (Fla. 2000). This claim requires that factual determinations be made by the trial court; an evidentiary hearing is required. *Walker v. State*, 88 So. 3d 128, 135 (Fla. 2012).

Aside from assessing a defendant's *competency* to represent themselves, their waiver must also be made "voluntarily and intelligently". *Tennis v. State*, 997 So. 2d 375, 377-78 (Fla. 2008) (citing *Faretta*, 422 U.S. at 807). The purpose of this being "to determine whether the defendant

actually *does* understand the significance and consequences of a particular decision and whether the decision is uncoerced." *Godinez v. Moran,* 509 U.S. 389, 401 n.12 (1993).

On June 4, 2018 FDLE agents interviewed inmate Steven Williams as he had been listed as a witness in Michael Woodbury's case. Steven Williams spoke at length with FDLE agents about his relationship with both Michael Woodbury and Scottie Allen. Steven Williams explains a complicated and unusual relationship wherein he is the "master" of both Woodbury and Allen, who are his "slaves," and exercises control over them and their actions. (PCR. 537). Williams asserted that he currently has seven people "under [his] dominance." (PCR. 537). Williams details that he was molested as a child, hates child molesters and has chosen to "fight back" against child molesters. (PCR. 538). He had a plan to kill fifteen child molesters by having each of his four slaves kill three child molesters each, and himself killing three child molesters. (PCR. 553). Williams committed his murder on September 29, 2017 a couple days after Woodbury committed his crime, and the day before Allen committed his crime. (PCR. 539, 593). He is upset with Mr. Allen because he was only able to kill one person. (PCR. 608) He explains how inmates communicate on cell phones between correctional institutions and also use them to identify child molesters by accessing the

internet and locating inmates, looking at their offenses, and looking at what institution they're in. (PCR. 543, 548-51).

Mr. Williams also wrote a letter to Mr. Allen's prosecutor, under the guise of it being from Mr. Allen because he wanted them to go to death row together. (PCR. 635-36). Though not explicitly addressed in the interview Mr. Williams "dominance" over Mr. Allen also affected Mr. Allen's decision to waive counsel. Mr. Allen knew that his "master" wanted him to be on death row. They had discussed the issue and Mr. Williams wanted Mr. Allen to waive counsel.

Given the nature of their relationship and the undue influence that Mr. Williams exercises over Mr. Allen, Mr. Allen's decision to waive counsel cannot be considered voluntary. As such, Mr. Allen's right to due process have been violated. This Court should remand this claim for an evidentiary hearing as it is not procedurally barred, nor is it conclusively refuted by the record.

ISSUE 11: The circuit court erred in summarily denying Mr. Allen's claim that his right to due process was violated when the prosecutor misstated the law during jury selection.

In summarily denying this claim the trial court ruled that it was procedurally barred, and "should have been raised on direct appeal." (PCR. 1229). As argued at the *Huff* hearing and in a motion for rehearing, appellate

counsel cannot raise a claim on direct appeal when the claim relies on both the trial record and facts that are extrinsic to the record. *Rutherford v. Moore*, 774 So. 2d 637, 646 (Fla. 2000). This claim requires that factual determinations be made by the trial court; an evidentiary hearing is required. *Walker v. State*, 88 So. 3d 128, 135 (Fla. 2012).

It is well established law that attorneys are given a certain amount of latitude as to how they explain legal principles during jury selection. Hypotheticals are commonly used and permitted as long as they make "correct reference to the law of the case." *Pope v. State*, 94 So. 865, 869 (1922). Attorneys for both sides generally take jury selection as an opportunity to educate the jury on the applicable law and frequently these analogies are reiterated in closing.

In *Cave v. State*, 476 So. 2d 180, 186 (Fla. 1985), defense counsel misstated the law of felony murder to the jury in closing, stating that if the jury could not find that the defendant personally committed the murder than they could not convict him. After this argument was made the judge required that the rest of counsel's closing be proffered before the jury could hear it. In reviewing these actions the Florida Supreme Court stated "Counsel may not contravene the law and the jury instructions in arguing to the jury." *Id.*

During jury selection in Mr. Allen's case, the prosecutor, Mr. Evans, misstated the law to the jury, explaining that if the aggravating circumstances outweighed the mitigating circumstances, the jury needed to vote for death. He used an analogy of a person going skydiving, that if the conditions were right, they needed to jump out of the plane. (R. 1414).

Each panel of jurors heard this same analogy and some jurors were then questioned on their ability to jump out of an airplane. (R. 1297-1300, 1307, 1335-39, 1345, 1372-74, 1382-85, 1412-14).

This analogy incorrectly tells jurors that if the "circumstances are appropriate" they are to sentence the defendant to death. In fact the instruction that was given states quite the opposite, "even if you find that the sufficient aggravators outweigh the mitigators-the law neither compels nor requires you to determine that the defendant should be sentenced to death." (T. 380). Under the law it is perfectly acceptable to go up in the plane, get to the door, and decide not to jump even when the circumstances are appropriate.

During jury selection, the prospective juror who was ultimately selected as a juror, Prospective Juror Welch, referenced the phrase from the *Bible*, "an eye for an eye." Mr. Allen countered with "Forgive your brother 70 times 7." He then asked her why she would lean towards condemning him rather

than forgiving him, to which she replied that “whenever you are looking at forgiveness, that’s a personal matter.” (R. 1360). She then indicated that being a juror was a different type of circumstance and she would have to base her opinion on the facts. (R. 1361). This response illustrates the confusion that Mr. Evans’ misstatement created; the idea that forgiveness has no place in a courtroom. The law *does* allow for forgiveness, even in the face of aggravation that outweighs mitigation. That is why the instruction is so often referred to as a “mercy instruction”. Mr. Evans’ hypothetical led jurors to believe that the law compelled them to impose death “if the circumstances are appropriate.”

The misconceptions of the jury as to what was permissible in regards to their sentence created a structural error in Mr. Allen’s trial. In *Johnson*, the Florida Supreme Court endorsed the understanding of structural errors as “*structural defects* in the constitution of the trial mechanism” and as “*structural defect[s]* affecting the framework within which the trial proceeds, rather than simply an error in the trial process.” *Johnson v. State*, 53 So. 3d 1003, 1012 (Fla. 2010) (citing *Arizona v. Fulminante,* 499 U.S. 279, 309–10 (1991). Because this misstatement occurred in jury selection and shaped the jurors understanding of their duties “[t]he entire conduct of the trial from beginning to end is obviously affected ...” *Fulminante,* 499 U.S. at 309–10.

While structural error and fundamental error are typically appropriate for review on direct appeal. There are considerations in this instance that are not contained within the four corners of the record. Mr. Evans is a very experienced State Attorney. He informed the venire of this stating "I've been doing this for 26 years, and been involved in death penalty cases for most of those 26 years." (R. 1370). In addition to being a long time State Attorney, he is a prominent figure in Wakulla County. He has served on the Sopchoppy City Council for 20 years and during a portion of that time was also the mayor of Sopchoppy. (PCR. 685). He is well known and respected in this small community. While the jury ought to have heeded the judge's actual instruction (given at the close of trial) that they are never compelled to return a verdict for death, Mr. Evans' position as a public figure and his colorful illustration imposed upon the jury with the idea that if all the aggravators were proven and outweighed the mitigators, they were to vote for a death sentence.

Two of the jurors acknowledged knowing Mr. Evans, but confirmed that their knowledge of him would not lead them to give more weight to the *evidence* he presented. (R. 1439-40). However, there was no inquiry as to how their knowledge of him would affect their understanding of the *law* as

presented by him. One of those jurors, Juror Edwards, did ultimately serve on the jury and was the foreperson.

This Court should remand this claim for an evidentiary hearing as this claim relies on facts extrinsic to the record it cannot be procedurally barred, nor is it conclusively refuted by the record.

ISSUE 12: The circuit court erred in summarily denying Mr. Allen's claim that cumulatively, the combination of procedural and substantive errors deprived him of a fundamentally fair trial as guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the corresponding rights under the Florida Constitution.

In summarily denying this claim the trial court ruled that it was procedurally barred, and "should have been raised on direct appeal." (PCR. 1229). As argued at the *Huff* hearing and in a motion for rehearing, appellate counsel cannot raise a claim on direct appeal when the claim relies on both the trial record and facts that are extrinsic to the record. *Rutherford v. Moore*, 774 So. 2d 637, 646 (Fla. 2000). This claim requires that factual determinations be made by the trial court; an evidentiary hearing is required. *Walker v. State*, 88 So. 3d 128, 135 (Fla. 2012). This Court must accept as true the factual allegations that are not conclusively refuted by the record. *Tompkins v. State*, 994 So.2d 1072, 1081 (Fla. 2008).

Mr. Allen did not receive the fundamentally fair trial to which he was entitled under the Sixth, Eighth, and Fourteenth Amendments. The errors in

Mr. Allen's trial, when considered as a whole, virtually dictated a sentence of death. While there are means for addressing each individual error, addressing these errors on an individual basis will not afford adequate safeguards required by the Constitution against an improperly imposed death sentence. The errors as claimed in this motion are hereby specifically incorporated into this claim. These errors cannot be harmless. Under Florida caselaw, the cumulative effect of these errors denied Mr. Allen his fundamental rights under the United States and Florida Constitutions. *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986). A series of errors may accumulate a very real prejudicial effect. The burden remains on the State to prove beyond a reasonable doubt that the individual and cumulative errors did not affect the verdict and/or sentence. *Chapman v. California*, 386 U.S. 18 (1967). The flaws in the system which convicted Mr. Allen of murder and sentenced him to death are many.

This Court should remand this claim for the circuit court to assess the cumulative error after holding an evidentiary hearing on the claims that are not procedurally barred.

ISSUE 13: The circuit court abused its discretion in denying Mr. Allen access to public records in possession of the Florida Department of Corrections relating to his repeated victimization while in custody.

A denial of public records requested pursuant to Fla. R. Crim. P. 3.852 is reviewed for an abuse of discretion. *Bowles v. State*, 276 So. 3d 791, 795 (Fla. 2019). An abuse of discretion can occur from an erroneous view of the law or the evidence. *McDuffie v. State*, 970 So. 2d 312, 326 (Fla. 2007).

In a demand for public records under Fla. R. Crim. P. 3.852, the defendant bears the burden of showing that the records in the demand relate to a colorable claim for postconviction relief. *Branch v. State*, 236 So. 3d 981 (2018).

On May 2, 2022 Mr. Allen filed a demand for additional public records from the Florida Department of Corrections ("DOC"). (PCR. 149).[7] In this demand he sought classification files for nine incarcerated/previously incarcerated individuals as well as "Reports or data recorded in the Security Threat Group Operational Review Management System relating to the Bloods and Latin Kings during the time frame of 2003-2017." (PCR. 150). For each of the individuals the classification records were specific to the time period when the individual and Mr. Allen would have been at the same institution. (PCR. 150). DOC filed its objections to the demand on July 1,

[7] To the extent that the records would be mitigating and Mr. Allen was unaware of the material in those records, the records sought would be *Brady* material.

2022, and a hearing on these objections was held on November 21, 2022. (PCR. 191).

At the hearing Mr. Allen argued that the inmates listed in the demand were all individuals that had targeted him. (PCR. 1356). The records contained in Mr. Allen's own DOC records indicated that many of these individuals were members of a security threat group. (PCR. 1356). Mr. Allen argued that the classification files of these individuals were relevant to a mitigation claim relating to the systemic failure of the Department of Corrections to ensure Mr. Allen's safety from members of a security threat group. (PCR. 1357). Similarly, the "Reports or data recorded in the Security Threat Group Operational Review Management System relating to the Bloods and Latin Kings during the time frame of 2003-2017" were relevant to the same claim as the policies of the Department contributed to Mr. Allen's victimization. (PCR. 1357).

At the conclusion of the records hearing on November 21, 2022, the circuit court denied the demand as to the files for the nine incarcerated individuals and the reports and data relating to security threat groups.

At the trial level Mr. Allen's repeated victimization in prison was not something that either the court or the jury was made aware of and these records would have provided additional insight into the ongoing difficulties

Mr. Allen faced in prison as well as providing context as to his frame of mind while incarcerated. As the crime was committed while Mr. Allen was incarcerated this mitigation would have contributed to a better understanding of the "circumstances of the offense." *Downs v. State*, 572 So. 2d 895, 899 (Fla. 1990).

Mr. Allen met his burden in showing how the records related to a colorable claim for relief and the circuit court abused its discretion in denying the records. This Court should remand this case for the circuit court to order the Department of Corrections to produce the records listed in the May 2, 2022 demand.

CONCLUSION AND RELIEF SOUGHT

Mr. Allen respectfully requests this Honorable Court reverse the circuit court's denial of his claims and remand for an evidentiary hearing.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via electronic service to all counsel of record, on this 11th day of April, 2024.

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CERTIFICATE OF COMPLIANCE

This is to certify that the Initial Brief of Appellant was generated in Arial 14-point font, pursuant to Fla. R. App. P. 9.100 and 9.210.

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