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 REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

ARGUMENT IN REPLY[1]

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

Contrary to the lower court's ruling this claim is not procedurally barred as it could not have been raised on direct appeal. Appellant does not argue that it is always error, or fundamental error, to respect a defendant's wish that their family not be contacted. Rather the determination of error is case specific and would depend on what facts were prohibited from the court's consideration. The facts that were prohibited from the court's review are outside of the appellate record whereas "errors that are properly subject to appellate review are invariably reflected in the trial record." *Carroll v. State*, 815 So. 2d 601, 620 (Fla. 2002).

The analysis hinges on the importance of the mitigation that the lower court was deprived from hearing. The circuit court erred in denying an evidentiary hearing in order to assess the mitigation Allen's family provided to postconviction counsel. The mitigation detailed in Allen's 3.851 is not

[1] Allen will utilize the same citations to the records and transcripts as he did in his Initial Brief. Those citations are copied here for ease: "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. Allen's Initial Brief will be cited as "IB" and Appellee's Answer Brief will be cited as "RB".

cumulative to what was presented at the *Spencer* hearing and an evidentiary hearing was needed in order to assess the weight of the newly discovered mitigation.

This Court recognized that it is a difficult balance to both "honor the defendant's right of self-determination and the constitutional requirement that death be imposed reliably" and that the solution must be achieved on a "case-by-case basis." *Farr v. State*, 656 So. 2d 448, 450 (Fla. 1995).

Appellee cites to *Mora* where Mora's death sentence was reversed because the lower court mistakenly made Mora choose between representing himself (to ensure his family was not contacted) or allowing his counsel to contact his family. *Mora v. State*, 814 So. 2d 322, 333 (Fla. 2002).[2] The case was remanded with instructions that the lower court "apply our decisions in *Koon*, *Farr v. State*, 656 So. 2d 448 (Fla.1995) and *Muhammad v. State*, 782 So. 2d 343 (Fla.2001)." *Id*. While the case does illustrate Appellee's point of the defendant having autonomy as to his case, it also points lower courts to *Muhammad*, where this Court determined that the lower court has an independent interest in fully hearing mitigation.

[2] Mora asked that his elderly siblings not be contacted for mitigation due to their age. The age of Mora's siblings was something that the court could independently verify without relying solely on Mora's representations. Allen's stated reason, that his mother was in poor health, was not something the court could validate. (T. 401-02).

Contrary to Appellee's arguments, the safeguards of *Muhammad* should not be restricted by the defendant's wishes. The author of the PSI, or special counsel, are not there to oblige the defendant, but rather to provide the Court with mitigation that the defendant is not putting forward. Special counsel in this role is "acting solely as an officer of the court." *Muhammad v. State*, 782 So. 2d 343, 364 (Fla. 2001).

The lower court in this case gave a fair amount of weight to the mitigation it heard. This makes Appellee's reference to *Bevel* distinguishable. In *Bevel*, evidence of a statutory mitigator was presented, but the lower court found that it was not proven. *Bevel v. State*, 376 So. 3d 587, 593-95 (Fla. 2023). The testimony regarding the mitigator was heard by the jury and the court. *Id*. This Court reasoned that, in light of the aggravators and the "no weight" that was given to the other mitigation in *Bevel*, even the statutory mitigator would not have "tipped the scale." *Id*. at 596. Here, the mitigation addressed in this claim was not even presented, and unlike in *Bevel*, the other mitigation that was presented was given "great weight," "some weight," and "moderate weight." (R. 817-20).

In addition to the mitigation relating to Allen's background that went unheard, there was also evidence that would have led to reasonable doubt

as to the aggravators. All of this in combination with the mitigation the Court already considered would have tipped the scales.

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

The JAC funding issue did negatively impact Allen's case as it further restricted the ability of the mitigation specialist to investigate Allen's background and it prevented special counsel from requesting experts he otherwise would have.

Appellee argues that special counsel's statement that he does not rely on JAC to "keep the lights on" demonstrates that Allen's case was unaffected, however this merely let the lower court know that he did not subsist on JAC contracts alone. This statement cannot be interpreted to mean that he was offering to pay for experts out of his own pocket. To the contrary, counsel recognized that this was going to "invariably" be a problem for "specialists, psychologists, investigators, process servers, etc." (R. 457-60). Experts were needed to aid the lower court in explaining some of the mental health mitigation. Monica Jordan, the court-appointed mitigation specialist, acknowledged that she would have to front the cost of travel related to her investigation. She did not travel to Michigan, where she could have gotten further records and perhaps spoken to non-family members, nor

did she travel to interview witnesses anywhere that could have provided insight into Allen's background.[3]

Allen would have met with experts. This is clear from his willingness to meet with Dr. Falb and Dr. Prichard. While Allen was against meeting with the State's expert, he did do so after the lower court remonstrated with him on this issue. Contrary to Appellee's assertion, the lower court did not order him to meet with Dr. Prichard. An order was discussed, but became unnecessary as it was clear that Allen was willing to cooperate.

REPLY TO ISSUE 3: The circuit court erred in summarily denying Allen's claim that he was denied his constitutional right to an individualized sentencing when the court failed to further continue the *Spencer* hearing.

For this issue, Allen would rely on the arguments raised in his Initial Brief.

REPLY TO ISSUE 4: The circuit court erred in summarily denying 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.

Under *Muhammad* the trial court is empowered to call their own witnesses when they suspect there is mitigation to be presented. As argued above, this process is to assist the court in ensuring that the sentencing is

[3] There were various aspects of Allen's background and circumstances of the crime that were not investigated at all: his victimization in prison, his prior crime, or the drug use that led up to this crime.

appropriate. Allen's purported "waiver of mitigation" should have no effect on what the court does independent of Allen.

Additionally, Allen did not provide a knowing, intelligent waiver of mitigation. While there was one instance where the court referred to a waiver of mitigation that was made "freely and knowingly" by Allen, that is clearly contradicted by the record. (T. 352). Allen's waiver was unknowing and unintelligently made as, in explaining why he does not wish to present mitigation, he asserted "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). The court then attempts to correct Allen's misunderstanding and explain that mitigation may not be positive, but is meant to explain how you got where you are. (T. 299). Allen does not grasp this and reiterates that "It's nothing positive." (T. 299).

Mitigating evidence does not have to be positive but instead may show that the defendant has had a difficult and adverse childhood. *See Wiggins v. Smith*, 539 U.S. 510, 535 (2003) (quoting *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) ("'Evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background . . . may be less culpable than defendants who have no such excuse.'")).

REPLY TO ISSUE 5: The circuit court erred in summarily denying the claim that 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.

Appellee argues that the trial court did not err because this claim was procedurally barred. (AB at 12-16). However, appellate counsel is unable to raise a claim when the claim relies on facts that are extrinsic to the record. See *Rutherford v. Moore*, 774 So. 2d 637, 646 (Fla. 2000), ("[a]ppellate counsel cannot be deemed ineffective for failing to investigate and present facts in order to support an issue on appeal.)" Therefore, it stands to reason that potential claims relying on facts arising outside of the record cannot be raised on direct appeal. This claim relies on facts developed outside of the record on appeal. Officer Lorne Smith's explanation of the instructions given to him was only investigated in postconviction. (PCR. 299). The mitigating evidence from the Department of Corrections ("DOC") records received in postconviction were not contained in the Presentence Investigation report ("PSI"). The DOC records directly contradicted the PSI's assessment of Allen's mental health; they showed a long history of depression, medications, and previous suicide attempts. (PCR. 648-51).[4] These facts required

[4] Additionally, the records showed Allen was frequently targeted by other inmates while he was in DOC custody prior to the murder. (PCR. 299-529). There was also the inspector general's interview with Steven Williams,

investigation, and therefore, this claim could not have been raised on direct appeal and is not procedurally barred.

Appellee also argues this issue is meritless because Allen did not object to the PSI, thereby waiving issues related to it, and that any defects did not deprive him of an individualized sentencing. (AB at 38-42). However, the PSI, as a report written by a state actor, is similar to statements or testimony put on by the State. Therefore, it is appropriate to look at the PSI and any obligations by the State in constructing or correcting the PSI under the lens of *Napue v. Illinois*, 360 U.S. 264 (1959).

Under *Napue*, the obligation is on the prosecution to correct testimony it knows to be false—not the defense. *See also, Commw. of N. Mariana Islands v. Bowie*, 243 F.3d 1109, 1118 (9th Cir. 2001); *Drake v. Portuondo*, 553 F.3d 230, 240 (2d Cir. 2009); *Delhall v. State*, 95 So. 3d 134, 170 (Fla. 2012) (“We are compelled once again to emphasize that the prosecutor has a “duty to seek justice, not merely ‘win’ a death recommendation.”). Furthermore, the prosecution has constructive “knowledge” of evidence contained or held by other state actors. *Henderson v. State*, 745 So. 2d 319, 323 (Fla. 1999) (internal citations omitted); *see also, Gorham v. State*, 597

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where he explained that he masterminded this plot for him, Allen, and inmate Woodbury to kill multiple people. (PCR. 531-646).

So. 2d 782, 784 (Fla. 1992) (holding that the prosecutor is charged with constructive knowledge of evidence withheld by other state agents); *State v. Coney*, 294 So. 2d 82, 87 (1973) (finding constructive possession by the State to include 'the ability of the State to obtain such data').

Here, the PSI was inadequate, inaccurate, and was created and presented by the State. The State had constructive knowledge of Officer Smith's limitations and the DOC records which contradicted facts in the PSI and could have supplemented the PSI. The law is clear that the State's error cannot be absolved by the defense being equally responsible and culpable. *United States v. Stein*, 846 F.3d 1135, 1147-48 (11th Cir. 2017). Allen not objecting does not result in the State being able to forgo its obligations under *Napue*. Additionally, the appointment of special counsel does not result in this either, as Appellee had suggested. *See Muhammad*, 782 So. 2d at 364 n. 15 (Fla. 2001) ("Any counsel performing this function would be acting solely as an officer of the court.").

Furthermore, Appellee suggests that these facts are "comparatively minor." (AB at 41). However, *Napue* requires reversal when the false testimony *could* have affected the fact-finder's judgment because it "involve[s] a corruption of the truth-seeking function of the trial process." *United States v. Agurs*, 427 U.S. 97, 103-04 (1976). Any defects in the PSI

would influence Allen's right to an individualized sentencing because the "truth-seeking function of the trial process" was compromised. The PSI was inaccurate and had statements which the State, through constructive knowledge of Officer Lorne and DOC as a whole, had known to be false or misleading. Therefore, each defect affected the truthfulness of the PSI and affected Allen's right to an individualized sentencing.

REPLY TO ISSUE 6: The circuit court erred in summarily denying 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.

Appellee argues that the trial court did not err because this claim was procedurally barred, such that it could have been raised on direct appeal. (AB at 12-16). However, appellate counsel is unable to raise a claim when the claim relies on facts that are extrinsic to the record. *See Rutherford v. Moore*, 774 So. 2d 637 (Fla. 2000). In this claim, Allen does rely on facts developed outside of the record on appeal. *See supra* Issue 5. (PCR. 299-651). Appellee further argues that Allen had waived any objection by not objecting at trial, that the "testimony" presented in the PSI were Allen's own statements, and that any error was harmless, i.e., not material. (AB at 42-45). Appellee's arguments are similar to those discussed in Issue 5, and those arguments are incorporated herein.

Appellee is correct in identifying this claim as being asserted under *Giglio v. United States*, 405 U.S. 150 (1972). (AB at 42). *Giglio* has been applied by this Court previously, and this Court has stated that, to establish a *Giglio* violation requiring a reversal, the defendant must show (1) that the testimony was false; (2) that the prosecutor knew the testimony was false; and (3) that the statement was material. *Routly v. State*, 590 So. 2d 397, 400 (1991).

As to prong (1), Appellee argues that the PSI uses Allen's statements to the Officer Lorne and are thus not false. However, certain statements in the PSI are clearly false, such as Allen's mental health and personal background, as evidenced by Allen's own DOC records. (IB at 42-43); (PCR. 299-651). Appellee's assertion that Allen waived any objection is irrelevant because the State has *its own* obligation to correct inaccuracies. *See*, *Commw. of N. Mariana Islands v. Bowie*, 243 F.3d 1109, 1117-18 (9th Cir. 2001). As to prong (2), the PSI author, Officer Smith, is a state actor due to his position as an officer in DOC, a state agency within the Florida executive branch. *Henderson v. State*, 745 So. 2d 319, 323 (Fla. 1999). Therefore, the State had constructive knowledge of what was contained in the DOC records. *See Gorham v. State*, 597 So. 2d 782, 784 (Fla. 1992) (holding that the prosecutor is charged with constructive knowledge of evidence held by

other state agents); *State v. Coney*, 294 So. 2d 82, 87 (1973) (finding constructive possession to include "the ability of the State to obtain such data"). The DOC records were in existence at the time the PSI was created and were available to DOC Officer Smith.

As to prong (3), Appellee argues that any error in the PSI was harmless, or not material. (AB at 44). The State notes that some evidence of Allen's family background and mental health were presented in front of the trial court. "The harmless error test, however, is not one of overwhelming evidence." *State v. Dougan*, 202 So. 3d 363, 382 (Fla. 2016) (referencing *Gore v. State*, 964 So.2d 1257, 1266 n. 12 (Fla. 2007)). The State must prove "that there is no reasonable possibility that the error contributed to the conviction." *Sheppard v. State*, 338 So. 3d 803, 827 (Fla. 2022) (cleaned up). While the sentencing order does describe some of Allen's family background, substance abuse, and depression (PCR. 817-20), other information that was present in his DOC records were not introduced, considered by this Court, or discussed in the PSI, such as his repeated victimization, that inmate Steven Williams was asserting that he had placed Allen under his influence, and Allen's previous suicide attempts (PCR. 298-301). There is a reasonable probability that the introduction of this evidence would have resulted in a lesser sentence.

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

While Allen relies upon his argument in his Initial Brief, he has provided further clarification herein. Appellee argues that the trial court did not err because this claim was procedurally barred, such that it could have been raised on direct appeal. (AB at 12-16). However, appellate counsel is unable to raise a claim when the claim relies on facts that are extrinsic to the record. *See Rutherford v. Moore*, 774 So. 2d 637 (Fla. 2000). Here, Allen relies on facts developed outside of the record. *See supra* Issues 5 and 6. (PCR. 299-651).

Appellee also argues this issue is meritless and puts forth the same arguments as described in Issues 5 and 6. (AB at 45). Allen does the same and hereby incorporates those arguments herein.

Appellee makes additional arguments that this issue is meritless because Allen had the opportunity to dispute parts of the PSI he disagreed with. (AB at 46) (citing *United States v. Plasencia*, 886 F.3d 1336, 1343 (11th Cir. 2018)). *Plasencia* also states that "[t]he defendant's primary due process interest at sentencing is the 'right not to be sentenced on the basis of invalid premises or *inaccurate information*.'" *Plasencia*, 886 F.3d at 1343 (11th Cir. 2018) (citing *United States v. Jules*, 595 F.3d 1239, 1243 (11th Cir. 2010))

(emphasis added). Besides inaccurate information, the United States Supreme Court has rejected arguments that omissions do not violate due process. *See Alcorta v. Texas*, 355 U.S. 28, 31 (1957) (creating a "false impression" violates due process); *Berger v. United States*, 295 U.S. 78, 85 (1935) (condemning "improper insinuations and assertions calculated to mislead").

Here, Allen's due process right to be sentenced based on *accurate* information was violated. His PSI was incorrectly assumed to be "comprehensive," which Florida law requires. *See Muhammad v. State*, 782 So. 2d 343 (Fla. 2001). Yet, the PSI lacked basic information that could have been obtained from DOC records that were available at the time the PSI was submitted. *See supra* Issues 5 and 6. Additionally, the PSI described Allen's physical and mental health status as "good," contrary to the information in the DOC records, and stated that Allen had "no prior issues with substance abuse or alcohol," which is also untrue. (PCR. 495). These omissions and inaccuracies from the PSI violate Allen's due process rights.

REPLY TO ISSUE 8: The circuit court erred in summarily denying 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.

Allen was not competent to represent himself at the time of his trial. As acknowledged by the lower court, Allen suffers from PTSD which impacts his decision-making process. (R. 970). What the court did not know is that Allen's avoidance of stressful situations is a symptom of his PTSD. (PCR. 1187-88). This avoidance affected his actions in seeking the death penalty and in not wanting an attorney.

The death sentence in this case is not reliable as Allen's mental illness hampered him from adequately representing himself. As Appellee argued, and this Court has recognized, *Edwards* does not grant a new substantive right. (AB at 48). It does however explain that the right to self-representation is not absolute and "when a defendant's lack of capacity threatens an improper conviction or sentence, self-representation in that exceptional context undercuts the most basic of the Constitution's criminal law objectives, providing a fair trial." *Indiana v. Edwards*, 554 U.S. 164, 176-77 (2008). *Edwards* considers both the defendant's right to a represent themself and the right to a fair trial and reaches the conclusion that the State infringes on the right to self-representation when it "undercuts" the right to a fair trial. *Id.* at 177.

At trial, the court in this case did not have all of the necessary information to determine that Allen's poor legal decisions were borne from

his mental illness. *Edwards* contemplates judges being the best situated to look at the "individualized circumstances of a particular defendant" *Id*. Unfortunately, the competency evaluation that was done pre-trial was devoid of any mention of PTSD and how that might impact Allen's ability to represent himself. (R. 109-13). If the lower court was sufficiently informed of Allen's PTSD symptomology, it could have better tailored a solution to this issue.

Summary denial is inappropriate as the facts (detailed in Allen's 3.851 motion and Dr. Harper's report, *see* PCR. 313-16, 1179-89) that would have led the lower court to question Allen's competency were not part of the record on appeal and therefore could not have been raised previously. Once again this is a claim of error that is fact specific and not a fundamental error that could be raised regardless of the specific circumstances.

REPLY TO ISSUE 9: The circuit court erred in summarily denying 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.

Appellee's answer to this issue focuses solely on the underlying claim and does not address the error of summary denial. It was improper to deny this claim as procedurally barred as it relies on facts outside of the record on appeal.

In raising the issue of Allen's innocence as to his prior crime, undersigned counsel meant to focus on the unreliability of the death

sentence in this case. Allen is aware of his own innocence and aware that Detective Smith also has doubts as to who murdered Karen Abtan.[5] Allen, however, did not cross-examine Detective Smith on his issue.

This is due to Allen's goal of receiving a death sentence.[6] He had no motivation or desire to raise doubt as to any of the aggravators. He even helped establish some of the aggravators in the letters that were received by the State Attorney. The only thing that establishes the premeditated nature of this crime is Allen's own assertion that he planned it.

At an evidentiary hearing, the court could be presented with all the evidence that undermines the State's aggravators as well as additional mitigation that Allen prevented the court and jury from hearing. While Appellee argues that this claim is procedurally barred as it could have been raised on appeal, this claim needs factual determinations to be made by the

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[5] Appellee cites Allen's and Cardino's sworn statements detailing how Allen killed Abtan. However, at an evidentiary hearing the court would be presented with the video of Allen's interrogation and Cardino's interrogation. While her words may say she's innocent, the court should have the opportunity to assess her demeanor during the interrogation as well as the demeanor of the investigators. Additionally, the court would see Allen's recorded interrogation where he confesses to killing Abtan, but when pressed by investigators, admits that Cardino did it. He explains that she is pregnant with their child and he is better suited for prison life.

[6] Appellee seems to argue that Allen's desire to be on death row is not a death wish, but a rational decision unrelated to his PTSD. Regardless of the motivation, an individualized sentencing comes from the jurists and should be based on evidence, not the housing preferences of Allen.

trial court; as the record does not refute the facts as presented by Allen, an evidentiary hearing is required. *Walker v. State*, 88 So. 3d 128, 135 (Fla. 2012).

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

This issue should not have been summarily denied as it could not have been raised on direct appeal. Steven Williams' interview is not a part of Allen's record on appeal. In postconviction, Williams was interviewed and listed as a witness who would have been called to testify in relation to this claim at an evidentiary hearing. (PCR. 1176). The claim that Williams influenced Allen's decision to waive counsel is not refuted by the record in spite of Allen's representations that he was voluntarily waiving counsel. It is difficult to credit many of Allen's representations knowing that it was his goal to be sentenced to death. Waiving counsel was integral to Allen's strategy in obtaining a death sentence, and therefore his representations on that issue are suspect. The lower court should take the opportunity to hear testimony from Williams and assess his credibility at an evidentiary hearing.

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

This issue merited an evidentiary hearing to further develop the record, as this issue addresses not just the inaccurate picture that was painted for jurors, but also this particular prosecutor's familiarity and credibility with the jury. The facts alleged in the 3.851 motion are not clearly refuted by the record, and as such, the summary denial was erroneous.

As recognized in the 3.851 motion, structural error and fundamental error are appropriate for review on direct appeal, however the full issue was not clear on the face of the record on appeal as there are vital details about the prosecutor in this case that need to be considered jointly. In many instances, the judge's instruction on mercy would cure the issue. However, when the jurors know and trust the prosecutor as a public figure in Wakulla County, his explanation of the law is not going to be disregarded.[7] The prosecutor's status as a local public figure is not clear on the face of the record; therefore, this issue could not have been fully raised on direct appeal. *Carroll v. State*, 815 So. 2d 601, 620 (Fla. 2002). Appellee fails to address the prosecutor's status as a public figure in their Answer Brief and has thereby abandoned any argument as to that point.

[7] The prosecutor explaining the law to the jurors during jury selection has served on the Sopchoppy City Council for 20 years, and during a portion of that time, was also the mayor of Sopchoppy.

Turning to the erroneous explanation itself, while the State certainly may excuse jurors who could never vote for death, they should not conflate the weighing of the aggravators and mitigators with the determination of whether a death sentence is appropriate. Contrary to Appellee's assertions that the State did not tell jurors that if the aggravators outweighed the mitigators they needed to vote for death, the State's voir dire questioning did in fact state that jurors should be able to apply the death penalty after finding that the aggravators outweigh the mitigators (AB. at 64). As noted in Appellee's brief, the proper analysis involves four determinations: was an aggravator proved beyond a reasonable doubt; did the aggravator justify the death penalty; did the aggravator outweigh the mitigation; and is death really the appropriate sentence. (AB at 64-65). The prosecutor here conflated the weighing of the aggravators and the mitigators with determining if a death sentence is appropriate, when really that is a final step and determination that happens *after* the jurors have determined that the aggravators outweigh the mitigators.

> So, do you think, Mr. Trotman, that you could- - you could listen to what the aggravating circumstances are and determine whether or not they exist? Do you think you could do that...And then do you think you could weigh them against any possible mitigating circumstances and reach a conclusion? (R.1306-1307).

> Do you believe that you could, in fact, serve as a juror and apply the death penalty if you thought the aggravating circumstances outweighed the mitigated circumstances and warranted the imposition of the death penalty? (R. 1418).
>
> Aggravating factors are what- - are factors the State has to prove in order to show somebody is death eligible for the death penalty. And that's what - - the aggravating factors are what you have to weigh against any mitigating circumstances to determine whether or not the death penalty is appropriate in this case. That's what the law requires. (R. 1339).

In fact, the law requires even more than that. The law requires that the aggravators outweigh the mitigators **and** a further determination that the death penalty is the appropriate sentence. That final determination is where a juror can use their personal judgment and recommend a life sentence even when "sufficient aggravators outweigh the mitigators" as "the law neither compels nor requires you to determine that the defendant should be sentenced to death." (T. 380).

REPLY TO ISSUE 12: The circuit court erred in summarily denying 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.

As none of these issues are procedurally barred this Court should assess the cumulative prejudice of all the errors.

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

While Allen relies upon his argument in his Initial Brief, he has provided further clarification herein. On May 2, 2022, Allen filed a demand to DOC for additional public records, including (1) classification files for nine individuals who were incarcerated for a period of time identical to when Allen was incarcerated and (2) reports or data, recorded in the Security Threat Group Operational Review Management System, relating to gangs the Bloods and the Latin Kings during the time frame of 2003 to 2017. (PCR. 149-53). DOC filed its objections to the demand, calling both of the above-described demands as "irrelevant" and "overly broad." (PCR. 191-96). Allen filed a response wherein he explained their relevance:

> 1. The records indicate that they are people that have had negative interactions with Mr. Allen during his time in prison in Florida and are alleged to belong to security threat groups. Further information (such as special reviews, disciplinary reports, incident reports, etc.) on these people who have had violent or aggressive encounters with Mr. Allen would be relevant to a mitigation claim relating to Mr. Allen's repeated victimization by members of a security threat group.
>
> 2. The records the Department of Corrections has already disclosed indicate that the Defendant has been repeatedly victimized by members of various security threat groups. The items requested in 2(b) are relevant to the systemic treatment of security threat groups by the Department of Corrections and could serve as mitigating material as it relates to the Defendant and his experiences in the custody of the Department of

> Corrections. Agency failures that have negatively impacted the Defendant could serve as powerful mitigation.

(PCR. 234-38). The court held a hearing on this issue, and then denied the demand as to those two specific requests. (PCR. 1353-68, 1364-65).

The standard of review for a lower court's denial of a public records request pursuant to Florida Rule of Criminal Procedure 3.852 is whether there was an abuse of discretion. *Bowles v. State*, 276 So. 3d 791, 795 (Fla. 2019). This can occur from an erroneous view of the law or evidence. *McDuffie v. State*, 970 So. 2d 312, 326 (Fla. 2007)

Appellee argues that Allen failed to identify a colorable claim for postconviction relief. (AB at 73). However, Appellee acknowledged that Allen argued that there was mitigating evidence within these records and provided background that Allen had been victimized in DOC custody. (AB at 73). The systemic failure of DOC to ensure Allen's safety from members of a security threat group is mitigating evidence. The policies of DOC that contributed to Allen's victimization were listed in the demand as substantive proof of the claim was put forth in his initial postconviction motion. (PCR. 1357). Because the crime was committed while he was incarcerated, mitigation of his repeated victimization by other inmates while in DOC custody would have contributed to a better understanding of the "circumstances of the offense."

Downs v. State, 572 So. 2d 895, 899 (Fla. 1990). (IB at 65-66); *see* (PCR. 234-35).

Furthermore, Appellee argues that Allen's requests were overbroad because he failed to explain what the victimization entailed and why he needed to obtain classification files for nine inmates and records relating to the Bloods and Latin Kings gangs from 2003 to 2017. (AB at 73-74). Florida Rule of Criminal Procedure 3.852(g)(3)(C) only requires that the "records sought are relevant to the subject matter of a [capital postconviction proceeding], or appear reasonably calculated to lead to the discovery of admissible evidence." *See also Geralds v. State*, 111 So. 3d 778, 801-03 (Fla. 2010), *revised on denial of reh'g* (Feb. 2, 2012) (defendant's public records request for any and all files related to 48 individuals who were witnesses or provided statements about crime, without listing any other specific information regarding relevancy to prosecution, was unduly broad and vague); *Rimmer v. State*, 59 So. 3d 763, 774-75 (Fla. 2010) (denial of any and all files relating to 34 people).

Here, Allen had clearly limited his request to nine inmates that were incarcerated for the same period of time Allen was who had direct involvement in Allen's victimization. Allen did not request DOC produce records for every named individual in his records, nor did he request the

entire files of the nine inmates he had already limited himself to. (PCR. 150). Additionally, Allen had limited his request on gang activity to two specific gangs that had victimized Allen and were relevant to his potential claim. Allen did not request that DOC produce all records and files related to gang activity in DOC facilities, nor did he request all reports related to the two specific gangs, simply those that occurred during DOC's own documented observance of Allen's victimization.

The trial court clearly abused its discretion in denying the requests. Allen laid the relevance out in his motions and at the records hearing and reasonably limited his requests. Allen met his burden in showing how the records related to a colorable claim for relief, and the court abused its discretion in denying the request for records.

CONCLUSION AND RELIEF SOUGHT

Allen respectfully requests this Honorable Court reverse the circuit court's denial of his claims and remand for an evidentiary hearing, or a new trial.

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 30th day of August, 2024.

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CERTIFICATE OF COMPLIANCE

This is to certify that the Reply Brief of Appellant was generated in Arial 14-point font, pursuant to Fla. R. App. P. 9.100 and 25 pages consistent with Fla. R. App. P. 9.210.

/s/ Dawn B. Macready
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