

IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC02-371

LLOYD CHASE ALLEN,

Appellant.

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE
SIXTEENTH JUDICIAL CIRCUIT, IN AND FOR
MONROE COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the Circuit Court's summary of denial of Mr. Allen's Motion for Postconviction Relief. The motion was brought pursuant to Fla. R. Crim. P. 3.850.

The following symbols will be used to designate references to the record in this appeal.

"R" - record on direct appeal to this Court.

"TRT" - transcript of trial proceedings contained in record on direct appeal to this Court;

"PCR" - Record on instant 3.850 appeal to this Court.

REQUEST FOR ORAL ARGUMENT

Mr. Allen has been sentenced to death. The resolution of the issues involved in this action will therefore determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Mr. Allen, through counsel, accordingly argues that the Court permit oral argument.

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SUMMARY OF ARGUMENT

- Point I : The Lower Court Erred in Summarily Denying Mr. Allen's Claim that Critical, Exculpatory Evidence was not Presented In Violation of Brady V. Maryland, 373 U.S. 83 (1963)
- Point II : The Lower Court Erred in Summarily Denying Mr. Allen's Claim that Mr. Allen Received Ineffective Assistance of Counsel In The Guilt Phase of His Trial
- Point III: Error to Deny Evidentiary Hearing on Mr. Allen's Involuntary Waiver of Mitigation.
- Point IV : Error to Deny Evidentiary Hearing on the Denial of Mr. Allen's Right to Competent Mental Health Assistance.
- Point V : Error to Deny Evidentiary Hearing on Claim That Mr. Allen Innocent of the Death Penalty.
- Point VI : Error to Deny Evidentiary Hearing on Claim That Trial Counsel Failed to Challenge State's Evidence and Object to Unconstitutional Jury Instructions.
- Point VII: Trial Court Erred In Denying Postconviction Counsel's Request to Interview Jurors; The Rules Prohibiting Appellant's Lawyers From Interviewing Jurors are Unconstitutional.
- Point VIII: Florida's Capital Sentencing Statute is Unconstitutional.
- Point IX : Mr. Allen is Being Denied His Right to Effective Representation By The Lack of Funding Available to Fully Investigate and Prepare His Postconviction Pleadings. Under staffing, and the Unprecedented Workload on Present Counsel and Staff.
- Point X : Procedural and Substantive Errors Which as a Whole Deprived Mr. Allen of a Fair Trial.

STATEMENT OF THE CASE AND FACTS

Mr. Allen was charged with kidnaping, grand theft auto, grand theft, robbery with a deadly weapon, and first-degree murder (R. 4-5). The defense motion for judgment of acquittal was granted on two charges, robbery with a deadly weapon and grand theft (R. 531). The jury acquitted Mr. Allen of kidnaping and convicted him of car theft and murder (R. 655).

This is a case about a ridiculous suicide defense. The medical examiner testified that the victim's legs and arms were tied, and the victim was alive when she was repeatedly stabbed (TRT 412-15). Nevertheless, defense counsel suggested in cross-examination that it was possible that Ms. Cribbs killed herself (TRT 428). However, the medical examiner explained how unlikely that was due to the nature of the wounds that Ms. Cribbs would stab herself (TRT 429-30). All the evidence from witnesses indicated that Ms. Cribbs appeared incredibly happy with Mr. Allen (TRT 182, 89, 93, 201, 02, 10, 11). Nevertheless, defense counsel suggested with no testimony to support it that Ms. Cribbs was so devastated by a con man that she killed herself (TRT 569, 65, 607).

The jury did not hear any incriminating statements by Mr. Allen. Nor was the jury presented with any physical testimony linking Mr.

Allen to a knife found in Ms. Cribbs house that could have been the murder weapon (TRT 319).

This Court summarized the facts on direct appeal:

1

Cribbs left her home in Ohio to drive to Florida in November, 1991. She apparently met Allen at a truck stop in Atlanta. Allen accompanied Cribbs during her visit with friends in Jacksonville Beach and during a stop in Bunnell to set her trailer.

Allen, whom Cribbs introduced as "Lee Brock," told Cribbs' friends in Jacksonville Beach and Bunnell that he owned a ranch in Texas and a trucking rig. Cribbs told the friends that she was going into the trucking business with Allen after she sold her trailer in Bunnell and vacation home in Summerland Key. Cribbs was paid \$4100 in hundred dollar bills for the trailer. Allen witnesses this transaction on November 12. The friends in both locations stated that Cribbs was wearing a diamond-studded horseshoe-shaped ring, which was valued at \$8,000.

A man working at the house across the street from Cribbs' Summerland Key house saw her exit and reenter the house early on the morning of November 13. He also observed Allen exit and re-enter the house around 11 a.m. The worker left for lunch at 11:45 a.m. When he returned a little after 1 p.m., the worker noticed that Cribbs' 1988 Ford Taurus was gone.

The real estate agent who managed Cribbs' property arrived between 12:30 and 1 p.m. to investigate Cribbs' unexpected arrival at the house. When no one responded to his knocks, the agent used his own key to enter the house. The television set, which was on high volume, was emitting loud static and a snowy picture.

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The coffee pot was turned on and half-full. The agent discovered Cribbs' body on the floor of the master bedroom. She was lying face down on a pillow and her body was surrounded by a puddle of blood.

The medical examiner placed the time of death between 4 a.m. and 2 p.m. on November 13. There were two stab wounds to the right side of Cribbs' face, ligature marks on her wrists and ankles, and a stab wound to her left neck that severed the carotid artery. The angle of the neck wound indicated that it was inflicted as Cribbs lay face down. The left stab wound caused Cribbs to bleed to death. The medical examiner estimated that Cribbs lived for fifteen to thirty minutes after this wound was inflicted and was conscious for fifteen minutes. Based upon the lack of defensive wounds and blood splatter, the medical examiner opined that Cribbs was bound at the time that she was stabbed.

The following items were recovered from the scene: a suitcase containing a blue shirt and a camera loaded with undeveloped film depicting Allen; a pair of grey lizard skin boots; a pair of blue jeans containing a blood stain on the right knee, found at the foot of the bed; a sperm-stained hand towel, found by the side of the bed; a piece of window sash cord found under Cribbs' left arm consistent with the ligature marks and also consistent with a cord that had been cut in the spare bedroom; and a sheathed knife and a rag found in the spare bedroom. The contents of Cribbs' purse were scattered across the bed; the \$4100 and diamond ring were missing. There were no signs of forcible entry and no fingerprints of value were found. The interior of the house and its contents appeared to have been wiped clean with a damp rag.

Expert witnesses testified that the body fluids found on the hand towel were consistent with Cribbs' and Allen's blood types and DNA

genotypes; the blood on the jeans was consistent with Cribbs' blood. The suitcase, boots, and shirt recovered from the scene were identified by witnesses as items that Allen had or wore in Jacksonville Beach and Bunnell. Pursuant to the State's motion granted by the court, Allen tried on these items of clothing, which, with the exception of the jeans, fit him. Allen's inability to fit into the jeans was explained by a considerable weight gain following his arrest.

A taxi driver testified that he picked up Allen at the Buccaneer Lodge Tiki Lounge between 12:30 and 12:45 p.m. on November 13, that he took Allen to Key Largo, and that

Allen paid the eighty-dollar fare with a hundred-dollar bill. Cribbs' automobile was located in the parking lot of the Buccaneer Lodge on December 23. The car was covered with debris, indicating that it had been parked there for some time. Allen's prints were lifted from the car. A trucker's log book containing a credit card number and a sequence of telephone numbers led the police to Allen's location in California, where he was arrested on February 18, 1992.

What the jury did not learn at trial which was revealed in postconviction investigation was that FDLE had a report with two hairs found in Ms. Cribbs hand that did not match Mr. Allen(PCR 768). That report was not furnished to defense counsel (PCR 768).

The jury also never heard that a report from FDLE found no fingerprints in the Taurus matching Mr. Allen (PCR 768). This report contradicted testimony from Monroe County Sheriff's Office that there was a print in the car matching Mr. Allen (TRT 462-64).

Finally, the jury never learned of handwritten notes in the FDLE report that suggested contamination was a problem in the handling of evidence by Monroe County Sheriff's Office (PCR 769).

The jury should have learned of prior inconsistent descriptions by Mr. Woods of the man that he eventually identified at trial as Mr. Allen, but trial counsel failed to effectively impeach Mr. Woods (PCR 783). In addition, trial counsel failed to elicit testimony by Ionia McClain that would have bolstered the defense theory that someone else committed the homicide (PCR 794-95).

Prior to the start of the penalty phase, trial counsel moved to withdraw and Mr. Allen made known his intention to waive the presentation of mitigation to the jury (TRT 659-71). The trial court made no inquiry whatsoever into Mr. Allen's knowledge or understanding of mitigation in general or mitigation specifically applicable to his case (TRT 661-73). Instead, the court conducted a standard Faretta inquiry and concluded that Mr. Allen had knowingly waived his right to counsel for the purposes of the penalty phase (TRT 661-73). After subsequent competency evaluations and related testimony, the court concluded Mr. Allen was competent to proceed (TRT 684-95). Neither of the two experts appointed to evaluate Mr. Allen for competency knew that he intended to waive all mitigation and affirmatively ask for the death penalty or were even asked if this would have had an effect on their opinions (TRT 687, 694).

Mr. Allen, representing himself, thereafter presented no mitigation evidence to the penalty phase jury, disavowed the existence of mitigation, and asked the jury to vote for death. See Allen, 662 So. 2d at 327. Relevant to the jury's penalty phase recommendation, Dr. Robert Nelms had testified during the guilt/innocence phase of the trial that the cause of death in this case was the knife wound to the carotid artery (TRT 417). He further testified that it would have taken 15 to 30 minutes for the victim to bleed to death (TRT 419-20). When asked how long the victim would have remained conscious, he testified, "**It's just a guess**, but I would estimate fairly close to the 15 minutes" (TRT 420)(emphasis added).

The State Attorney relied specifically upon Dr. Nelms' testimony to urge the jury to sentence Mr. Allen to death (TRT 728-9). The jury recommended death by a vote of eleven to one. See Allen at 327.

At the subsequent sentencing hearing before the judge, Mr. Allen abandoned his pro se status and was again represented by Mr. Hooper (TRT 779-812); see Allen at 329. Even though he was now represented by counsel, Mr. Allen again waived his right to present mitigation (TRT 779-812); see Allen at 329. Mr. Hooper this time did not move to withdraw (as he did prior to the penalty phase), but, instead, indicated to the court that he felt compelled to "muzzle"

himself in acquiescence to Mr. Allen's wishes (TRT 802). During the sentencing hearing, Mr. Hooper told the court that he was following Mr. Allen's wishes to not present any mitigation and that, moreover, Mr. Hooper had no mitigation to present anyway because Mr. Allen would not cooperate or provide information relative to mitigation (TRT 801-02, 804). At no time during the sentencing hearing did the trial court make any inquiry of Mr. Allen regarding his desire not to present mitigation during the sentencing hearing (TRT 804-10). Furthermore, as the record reflects and as this Court held on direct appeal:

Although the judge asked defense counsel whether he had informed Allen about the statutory mitigating factors available, there was no indication that counsel had investigated Allen's background or history to determine whether particular mitigating evidence was available. Counsel also made no proffer of mitigating evidence that could be presented to the court.

Allen, 662 So. 2d at 329.

The State Attorney again relied on Dr. Nelms' testimony during the sentencing hearing, this time to urge the judge to impose the death penalty:

Here we are in the final argument to you to apply the death penalty. And the last thing I want you to consider, judge, if you will, is heinousness of the crime. I would like you to remember Dr. Nelms' testimony that the witness was alive for 30 minutes after she was stabbed and she was conscious for somewhere between 15 and 30 minutes as the blood flowed out of her

mouth . . . This lady laid there tied up, knowing she was dying, blood flowing through her mouth, unable to do a thing about it. Her face was mashed in a pillow and she had no way to seek help. She was just allowed to bleed to death.

(TRT 796-97).

In addition, the trial court relied on this testimony as the sole support for the heinous, atrocious, and cruel aggravating factor:

Further, the Court finds the aggravating circumstance that the capital felony was especially heinous, atrocious and cruel in that the Court finds it extremely wicked, shocking, evil, vile and with a high degree of indifference to the suffering that the victim was mortally wounded and thereafter it took from fifteen to thirty minutes for death to occur. There being unrefuted testimony in the record that the victim would have been conscious and aware of her circumstances for upwards of fifteen minutes prior to losing consciousness.

(TRT 239). The Florida Supreme Court on direct appeal relied on Dr. Nelms' testimony to uphold the HAC aggravator. Allen v. State, 662 So. 2d 323, 331 (Fla. 1995).

Mr. Allen's certiorari was denied by the United States Supreme Court in Allen v. Florida, cert. denied, 517 U.S. 1107 (1996).

Mr. Allen filed his final amended motion for post-conviction relief on March 16, 2001 (PCR 873-74). The Court issued a written summary denial on December 17, 2001 (PCR 1026-1087).

Mr. Allen filed a timely notice of appeal on January 14, 2002

(PCR 1344). This appeal from the trial court's summary denial of Mr. Allen's initial motion for post-conviction relief follows.

ARGUMENT
POINT I

**THE LOWER COURT ERRED IN SUMMARILY
DENYING MR. ALLEN'S CLAIM THAT
CRITICAL, EXCULPATORY EVIDENCE WAS
NOT PRESENTED IN VIOLATION OF BRADY
V. MARYLAND, 373 U.S. 83 (1963).**

There was much more to the Cribbs murder than was ever revealed to the jury at Mr. Allen's trial. Indeed, there was much more than was revealed to Mr. Allen's trial attorney.

**1. WITHHELD FDLE REPORT CONCERNING
HAIRS FOUND IN VICTIM'S HANDS**

The lower court erred by summarily denying Mr. Allen's first claim that the State failed to disclose exculpatory evidence (PCR 1041-1044). Specifically, the FDLE's report uncovered in postconviction investigation revealed that hairs found in or on the victim's hand did not match the Defendant's hair (PCR 768). In Kyles v. Whitley, 115 S. Ct. 1555 (1995), the United States Supreme Court set out the law regarding Brady and its progeny. Kyles was granted relief due to the State's withholding of favorable information from the defense, which taken as a whole raised a reasonable probability that disclosure would have produced a different result. The cumulative effect of the withheld information undermined the confidence in the verdict.

The court in Kyles discussed the interrelationship of Brady, Agurs, and Bagley. In so doing, the court recited the law of stating ". . .the suppression by the prosecution of evidence favorable to an accused violates due process where the evidence is material either to guilt or to punishment". Kyles at 1558. The court further explained " . . . a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal . . ." Kyles, at 1566 (citations omitted).The court also stated: "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence". Kyles, at 1566. The court emphasized that materiality was not a sufficiency of the evidence test. "A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough to convict". Kyles at 1566. The court stated further that once Bagley materiality is shown, "there is no need for further harmless-error review." Kyles, at 1567. Regarding the State's obligation the Court stated ". . . the prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable." Kyles at 1567-1568.Kyles also requires a

cumulative evaluation of the evidence. Kyles, at 1569. A cumulative evaluation of the evidence withheld in Mr. Allen's case clearly demonstrates that it had an impact upon the effectiveness of trial preparation, investigation, strategy, cross-examination and development of the defense case.

The lower court attempts to distinguish this case from Hoffman v. State, 800 So. 2d 174 (Fla. 2001)(PCR 1043-1049). However, the lower court failed to note that the most critical distinction between Hoffman and the instant case is that Hoffman appeals the trial court's denial, after an evidentiary hearing of postconviction relief, and Mr. Allen was denied an evidentiary hearing. Id. at 175,176 Hoffman was granted a new trial because this court ruled that the evidence presented at the evidentiary hearing demonstrates the State withheld exculpatory evidence and there is a reasonable probability that had the defense known of this information, the result of the trial would have been different. Id. at 180, 182.

The lower court's erroneous summary denial of a hearing in the instant case is contrary to this court's ruling in Way v. State, 630 So. 2d 177 (Fla. 1993). This court held:

On appeal, Way argues that an evidentiary hearing is warranted to clear up disputed issues of fact surrounding the photographs and to allow Way to try to substantiate his claims. We agree. There has been no evidentiary determination of whether there was an improper withholding of the photographs and whether, even if there was, it would have affected the

outcome of Way's trial. We are unable to conclusively determine from the record that this "new evidence could not support an alternative theory of the deaths of his wife and daughter and provide a basis on which a jury could find him innocent.

Accordingly, we reverse the summary denied of the motion postconviction relief and remand to the circuit court for an evidentiary hearing on Way's allegations.
Id. at 178, 179

In the instant case, the evidence of withheld hairs in the victim's hands that do not match the Defendant demonstrates an alternate theory that would provide a basis to find Mr. Allen innocent and necessitates an evidentiary hearing.

Without even conducting an evidentiary hearing, the lower court "notes that the State incorrectly argues that because counsel was put on notice of the State's intention to seek analysis of the hairs, the State had no duty to disclose the results. "This argument is flawed in light of Strickler and Kyles, which squarely place the burden on the State to disclose all information in its possession that is exculpatory." Id., at 440. (PCR 1044).

The lower court's finding that the State had a duty to disclose the FDLE report of the hair analysis because it is exculpatory is contradicted by the lower court's finding on the preceding page of the lower court's order that "[T]he presence of the hairs in or on the victim's hands neither inculcates nor exculpates the Defendant

(PCR 1043-1044).

In Strickler v. Green, 527 U.S. 263, 144 L. Ed. 2d 286, 119 S. Ct. 1936 (1999), the United States Supreme Court held:

..... There are three components of a true violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching, that evidence must have been suppressed by the State either willfully or inadvertently, and prejudice must have ensued. Id. at 302.

In the instant case, evidence of hairs found in or near victim's hands of hair not matching the Defendant would be favorable to the defense's position that Mr. Allen did not murder the victim. Therefore, this withheld evidence is exculpatory.

In Hoffman, this Court stated:

[H]owever in order to be entitled to relief based on this nondisclosure, Hoffman must demonstrate that the defense was prejudiced by the State's suppression of evidence. See Strickler, 527 U.S. at 280-82, 119 S. Ct. 1936. To make this determination, the suppressed evidence must be viewed in context with the other evidence that was presented at trial. Id. at 179.

The lower court omits from its analysis of Hoffman "the other evidence linking Hoffman to the crime was his confessions to FBI agents and Jacksonville Beach Police Officer. Hoffman argued at trial that he never made the Jackson, Michigan confession. Additionally, he argued the unrecorded statements given to the Jacksonville Beach police officers resulted from his drug addiction

and did not contain any information that had not been published in the papers and known to everyone. Moreover, at the evidentiary hearing, Hoffman presented evidence that another suspect also confessed to the crimes. Id. at 180.

This court determined that [w]ith the evidence excluding Hoffman as the source of the clutched hair, defense counsel could have strenuously argued that the victim was clutching the hair of her assailant but that assailant was not Hoffman. Id. at 180.

Similarly, defense counsel could argue in this instant case that the victim was clutching her assailant's hair and the scientific evidence excluded Allen as the source of the hair.

The lower court was incorrect in concluding that, "unlike the facts of Hoffman, there is no question that the Defendant was in the victim's house from the night before the murder when the two arrived in Summerland Key until he left sometime after 11:45 a.m., on the 13th of November" (PCR 1043-44). This conclusion is erroneous based on the testimony at trial, as well as impeachment material of Mr. Wood and Ms. McClain's testimony that was not presented at trial, this testimony be offered at an evidentiary hearing (PCR 1043-44).

Mr. Allen's case for relief is more compelling than in the Hoffman case because Mr. Allen made no inculpatory statements to the police before his trial, and his statements at sentencing did not inculcate him as the killer. As a result, this court should grant

Mr. Allen an evidentiary hearing to afford a factual development of this claim.

2. WITHHELD FINGERPRINT REPORT

The lower court also erred by denying, without a hearing, the claim that the evidence of the State's fingerprint expert was false (PCR 1044). This expert testified that she identified the Defendant's fingerprints in the victim's vehicle (TRT 462-64). The FDLE report indicated that there were no matches (PCR 768).

The lower court ignores the evidentiary value for purposes of the withheld FDLE report.

In Kyles v. Whitley, 115 S. Ct. 1555 (1995), the United States Supreme Court held:

In the third prominent case on the way to current Brady law, United States v. Bagley, 473 U.S. 667, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985), the court disavowed any difference between exculpatory and impeachment evidence for Brady purposes. Id.

Specifically, the court in Kyles recognized the value of impeachment material to the defense when it wrote:

Even if Kyles' lawyer had followed the more conservative course of leaving Beanie off the stand, though, the defense could have examined the police to good effect on their knowledge of Beanie's statements and so have attacked the reliability of the investigation in failing even to consider Beanie's possible guilt and in tolerating (if not countenancing) serious possibilities that incriminating evidence had been planted. See, e.g. Bowen v.

Maynard, 799 F.2d 593, 613 (CA 10 1986) ("A common trial tactic of defense lawyers is to discredit the caliber of the investigation or the decision to charge the defendant, and we may consider such use in assessing a possible Brady violation."); Lindsey v. King, 769 F. 2d 1034, 1042 (CA 5 1985) (awarding new trial of prisoner convicted in Louisiana State Court because withheld Brady evidence "carried within it the potential....for the discrediting....of the police methods employed in assembling the case.").¹⁵ Id.

In the instant case, the FDLE report could have been used to the Defendant's advantage by discrediting the caliber of the Monroe County Sheriff's investigation and to suggest that Ms. Rohner, as well as other State witnesses, were falsely testifying.

Consequently, an evidentiary hearing is necessary to determine if the confidence in the outcome of the trial would have been undermined by the withheld FDLE fingerprint report.

3. WITHHELD HANDWRITTEN NOTES IN THE FDLE REPORT REGARDING CONTAMINATION

The lower court erred by denying, without a hearing, the claim that an FDLE report with handwritten notes that was withheld from trial counsel indicated that the FDLE lab contacted Assistant State Attorney McLaughlin and Dr. Pope, Serologist for the Monroe County Sheriff's Office about the contamination problem (PCR 1045-47).

What the lower court neglects in addressing the issue of contamination is the FDLE report indicating that FDLE lab technicians

refused to test some of the evidence because of the incompetence of Monroe County Sheriff's Office resulting in contaminated samples that could not yield scientifically sound results (PCR 769-770). The error of constitutional magnitude lies in the fact that this information was suppressed from the defendant. As a result, the impeachment material in the FDLE report undermines the confidence in the outcome of the trial because the jury was deprived of this critical information. Therefore, an evidentiary hearing on this issue should be granted.

POINT II

**THE LOWER COURT ERRED IN SUMMARILY
DENYING MR. ALLEN'S CLAIM THAT
MR. ALLEN RECEIVED INEFFECTIVE
ASSISTANCE OF COUNSEL IN THE
GUILT PHASE OF HIS TRIAL**

Under rule 3.850, a post-conviction defendant is entitled to an evidentiary hearing unless the motion and record conclusively show that the defendant is entitled to no relief. Gaskin v. State, 737 So. 2d 509 (Fla. 1999) ; Rivera v. State, 717 So. 2d 477 (Fla. 1998).

The defendant is entitled to an evidentiary hearing on a claim of ineffective assistance of counsel if he alleges specific facts which are not conclusively rebutted by the record and which demonstrate a deficiency in performance that prejudiced the defendant. Gaskin at 516 citing Roberts v. State, 568 So. 2d 1255, 1259 (Fla. 1990). The trial court must accept all allegations in the motion as true to the

extent they are not conclusively rebutted by the record. See Gaskin at 516; Valle v. State, 705 So. 2d 1331 (Fla. 1997).

On appeal, in order to uphold a trial court's summary denial of claims raised in a 3.850 motion, the claims must be either facially or conclusively refuted by the record. See Peede v. State, 748 So. 2d 253, 257 (Fla. 1999). Where no evidentiary hearing is held below, this Court must accept the defendant's factual allegations to the extent they are not refuted by the record. *Id.* An evidentiary hearing is presumed necessary absent a conclusion demonstration that the defendant is entitled to no relief. Gaskin at 516. There is a presumption in favor of granting evidentiary hearings on initial 3.850 motions asserting fact-based claims. See Gaskin, 737 So. 2d 509, 517 (Fla. 1999) n. 17.

1. FRYE

The lower court erred by denying the claim that counsel was ineffective for failure to request a Frye hearing before the State's DNA evidence was admitted (PCR 1066-1068). The lower court did not dispute the conclusion that the expert David Nippes was not qualified to offer an expert opinion concerning the frequency or infrequency that the Defendant's DNA would appear in any population (PCR 1066-1068).

Although the lower court wrote, "the DNA evidence did not prove the culpability of the Defendant with respect to the victim's murder.

The semen, blood and DNA evidence simply went to confirm the Defendant's presence in Summerland Key with the victim, a fact that was not in dispute. The failure to conduct a Frye hearing or alternatively, the exclusion of the DNA evidence would not have affected the outcome of the trial" (PCR 1067).

The court's conclusion ignored the great weight that the State attached to the DNA evidence. The State argued in closing that the jeans tied Lloyd Allen to the scene, and there was more than a little spot of blood on the jeans (TRT 587). The State noted that the blood on the jeans could have come from 10.4% of population and the jeans were one foot from the victim's body (TRT 588). Then the State argued that the DNA on the semen on the towel narrowed the percentage down to 1.4% of the population matching Mr. Allen (TRT 588).

Defense counsel's failure to object to Mr. Nippes offering an expert opinion was a deficient performance by Mr. Hooper. Mr. Allen was prejudiced by the introduction of inadmissible expert testimony that conveyed the false impression that Mr. Allen was scientifically linked to items that suggested Mr. Allen's culpability in this homicide. Therefore, this Court should grant relief.

2. SUICIDE THEORY

In Strickland v. Washington, 466 U.S. 668, 688 (1984), the Supreme Court held that counsel has a "duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial

testing process." Strickland requires a defendant to prove that this trial counsel's performance was unreasonable and that he was prejudiced by counsel's inadequate performance. Mr. Allen can meet that standard.

Mr. Hooper's failure to investigate and prepare for Mr. Allen's trial resulted in a desperate trial strategy - suggesting that the victim had committed suicide. The victim had two superficial stab wounds on her face and her carotid artery was cut (R. 414-15). The medical examiner described the neck wound:

[T]here was a long cut, which is part of a stab wound entering the left neck below the ear, a little over one inch below the ear. The cut was a little over an inch long or three centimeters long. The cut was a little irregular with jagged edges. When it was probed the stab wound extended through the neck and actually into the mouth behind the left molar teeth.

(R. 415). There was also evidence that the victim's wrists and ankles had been tied when she was stabbed - abrasions and ligature marks on her wrists and ankles (R. 412-13) and the absence of defensive wounds on her hands (R. 414, 421).

Despite the evidence that Ms. Cribbs was bound and stabbed, Mr. Hooper suggested that she had killed herself. He raised this theory during his cross-examination of the medical examiner:

Q. Would it have been medically possible for Ms. Cribbs to have put that knife into her own throat?

- A. In what manner? You mean standing there and -
- Q. Standing there or lying down, would it have been possible for her to puncture her own throat with that knife?
- A. If she were able to stand pain by self-hypnosis she might be able to penetrate her throat. There is a reflex when you try to stab yourself that stops you. That is why you have hesitation marks when someone tries to cut themselves. It's hard to envision how she would do it by standing there and driving the knife in. I can't say it is not possible, but it is highly improbable.
- Q. You mentioned overcoming pain and hesitation marks. What did you mean when you say hesitation marks, doctor?
- A. Well, the only time I have seen self-induced wounds is actually slashing wounds rather than stab wounds. I can't say I have seen a person stab themselves. With a slashing type of wound there may be some superficial type of slash. Even the deeper slashes have several slashes before it got that deep just because of the reflect that a person has to pull away.
- Q. Is common that in a suicide the person makes a couple of hesitation marks and then makes a final cut?
- A. That is the way it looks. You see several superficial cuts and at least one deeper cut that cuts through the vessel.

Q. The wound to the neck , is that on the left side?

A. Yes.

Q. The other mark was to the right side over here?

A. Yes.

Q. Is it medically possible they were hesitation marks, she took two attempts and brought the knife up this way to her neck? Is that a medical possibility?

A. I believe she could reach those areas and could make the superficial stabs. The deeper stab perhaps, if she were able to block the pain she could do it. I don't think, I just don't think it's probable. I don't know if I can say it's impossible, but I have never seen it happen.

(R. 428-30). The State Attorney essentially destroyed the suicide theory on redirect:

Q. Would it be possible for someone to stab themselves in the neck and then, as this victim was stabbed all the way through to the back of the throat, stop the bleeding long enough to wash off the knife and put it in another room and come back and lay down to bleed to death?

A. That is more improbable than stabbing yourself in the first place.

(R. 431-32)

However, Mr. Hooper clung desperately to the suggestion of

suicide in his closing statement. First, he attempted to ridicule the medical examiner for eliminating it as the cause of death:

[H]e is so desperate to get in the scenario that fits the prosecutions' theory that he says: Well, I ruled out suicide. So could she have done it? Yes. Why did you rule it out? I don't think someone could kill her, that is not natural. Suicide is not natural. If you are going to rule out suicide because it is not natural, don't even consider it, no matter what the circumstances are. No one likes to think about it and it is not natural. It is possible. Should it be casually ruled out by the Medical Examiner because he is uncomfortable with the thought? No one likes to think about a lonely widow that is taken in by a drifter and one who is traveling under an assume name. No one likes to talk about things like that. We are not having a chat at Happy Hour.

(R. 564-65). Mr. Hooper repeatedly suggested to the jury that

the victim had committed suicide (R. 567, 570). Again during his rebuttal argument, Mr. Hooper mentioned suicide:

Suicide? Can't be ruled out, not by the Medical Examiner. He doesn't like it and it doesn't fit in with what he said on the stand with the State's scenario, but he can't rule it out medically. The woman lost her husband, she was lonely and was never seen in the company of men and she would go out with the girls dancing.

(R. 607-08) Trial counsel's suicide theory was the result of his desperate attempt to defend Mr. Allen after doing no investigation and inadequately preparing for trial.

In Rose v. State, the Florida Supreme Court found re-sentencing counsel ineffective for failing to investigate and prepare. The Court explained what occurred as a result of counsel's failures:

Under these circumstances re-sentencing counsel chose to present an "accidental death" theory urged upon him by an appellate attorney who had previously represented Rose on appeal, but had not been appointed to represent Rose at sentencing or in any other capacity at the time. It appears that counsel acquiesced in this strategy simply because the pressure of time and his lack of competence and experience in handling a capital sentencing proceeding. Re-sentencing counsel also chose to present this theory even though he thought it was far-fetched at the time.

675 So. 2d 567, 572 (Fla. 1996). The Court concluded:

We find counsel's performance . . . to be deficient. It is apparent that counsel's decision, unlike experienced trial counsel's informed choice of strategy during the guilt phase, was neither informed nor strategic. Without ever investigating his options, counsel

latched onto a strategy which even he believed to be ill-conceived. Here, there was not investigation of options or meaningful choice. As noted above, it appears to have been a choice directly arising from counsel's incompetency and lack of experience.

Id. at 572-73 (citations omitted). See also Horton v. Zant, 941 F.2d 1449, 1462 (11th Cir. 1991)(holding that "case law rejects the notion that a 'strategic' decision can be reasonable when the attorney has failed to investigate his options and make a reasonable choice

between them."). Evidence existed that could have supported Mr. Allen's innocence. This evidence was undiscovered due to counsel's ineffectiveness. Mr. Allen was prejudiced. Relief is proper.

The lower court attempts to minimize the effect of this suicide theory on the jury, but factual development of this issue is necessary to determine if Mr. Allen was prejudiced as a result of defense counsel's argument. Therefore, this Court should grant an evidentiary hearing.

3. WOODS' IMPEACHMENT

The jury was deprived of critical information when Mr. Hooper failed to fully cross-examine Larry Woods regarding prior inconsistent descriptions of the man he eventually identified at trial as Mr. Allen. Mr. Woods testified that he saw Mr. Allen at the victim's house on the morning of the crime (R. 388). Mr. Woods made the composite sketch and viewed a photograph shown to him by the police (R. 386-87). Mr. Hooper was ineffective for failing to ask Mr. Woods whether he saw anyone else near Ms. Cribbs' house on the morning of the murder, information that would have supported Mr. Allen's argument that someone else committed this crime. In addition, in an initial statement to the police, Mr. Woods admitted that he was not sure whether the person he saw outside Ms. Cribbs' house was a man or a woman; in fact, he told the police that the individual he saw "was either an anorectic [sic] looking man or a

very thin woman." Further, the physical description given by Mr. Woods to the police was inconsistent with Mr. Allen; Mr. Woods told the police that the individual he saw was approximately 5'5" to 5'8" tall; by all accounts, Mr. Allen is significantly taller. For example, Department of Corrections records describe him at being 6'1"; the information charging Mr. Allen also describes him as being 6'1". Mr. Woods' handwritten statement to the police also described an individual of vastly different weight than Mr. Allen. In his statement, Woods describes the person he saw as "135-145lb". By all accounts, Mr. Allen is a much larger man - again, the Department of Corrections lists Mr. Allen as weighing 175 pounds and describe him as "tall and stocky"; the charging document written at the time also describes Mr. Allen as weighing 175. Mr. Allen's actual physical characteristics can hardly be described as an "Anorexic looking man" as described by Mr. Woods. Moreover, Mr. Woods described the person as having "sandy blonde" hair; Mr. Allen's hair is brown. Trial counsel was ineffective for failing to use these prior statements to impeach Mr. Woods' identification of Mr. Allen at the trial; in fact, counsel did not question Mr. Woods at all about his alleged description and identification of Mr. Allen (PCR 793-99). Therefore, the failure to impeach Woods constitutes deficient performance and necessitates an evidentiary hearing.

4. McCLAIN

The failure to impeach Woods' identification of Mr. Allen was even more prejudicial to the case in light of the failure of counsel to elicit the testimony by Ionia McClain.

McClain told the police in a handwritten statement that on the evening before the victim was discovered, she noticed two vehicles parked at Ms. Cribbs' house - a light colored vehicle and a dark colored vehicle. The following morning (the same morning that the victim was discovered and the same morning that Woods described to the police), McClain informed the police that she saw a heavy-set female and a "thin man" on the porch of the victim's home. She described the man as "young looking w/dirty blond hair." Importantly, she also told the police that "Both vehicles were at the residence this morning." She later noticed that the vehicles were "gone." McClain's description also does not match Mr. Allen. Significantly, the existence of more than one vehicle at Ms. Cribbs' home both the night before and the morning of her death, completely contradicts the State's case, and further buttresses Mr. Allen's defense at trial (PCR 794-95). Counsel unreasonably failed to elicit this testimony at trial. As a result, Mr. Allen should be granted an evidentiary hearing on this issue.

CONCLUSION

In State v. Gunsby, 670 So. 2d 920, 924 (Fla. 1996), this court

reversed the order denying Gunsby's motion to vacate his conviction and remanded the case for a new trial. As this court explained:

To the extent, however, that Gunsby's counsel failed to discover this evidence, we find that his performance was deficient under the first prong of the test for ineffective assistance of counsel as set forth in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984)(to establish ineffective assistance of counsel, a defendant must show that (1) counsel performed outside the broad range of competent performance and (2) the deficient performance was so serious that the defendant was deprived of a fair trial). The second prong of Strickland poses the more difficult question of whether counsel's deficient performance, standing alone, deprived Gunsby of a fair trial. Nevertheless, when we consider the cumulative effect of the testimony presented at the rule 3.850 hearing and the admitted Brady violations on the part of the State, we are compelled to find, under the unique circumstances of this case, that confidence in the outcome of Gunsby's original trial has been undermined and that a reasonable probability exists of a different outcome. Cf. Cherry v. State, 659 So. 2d 1069 (Fla. 1995)(cumulative effect of numerous errors in counsel's performance may constitute prejudice); Harvey v. Dugger, 656 So. 2d 1253 (Fla. 1995) (same). Consequently, we find that we must reverse the trial judge's order denying Gunsby's motion to vacate his conviction. Gunsby, 670 So. 2d at 924 (emphasis added).

Similarly, the combination of trial counsel's deficient performance at the guilt phase, coupled with Brady violations, undermines the confidence in the outcome of the trial. Consequently, the lower court was erroneous in summarily denying an evidentiary

hearing for Mr. Allen.

POINT III

**ERROR TO DENY EVIDENTIARY HEARING
ON MR. ALLEN'S INVOLUNTARY WAIVER
OF MITIGATION**

The lower court erred by summarily denying Mr. Allen's claims (as asserted in Claim III and Claim IV of his Second Amended Motion to Vacate pp.67-82, 105-08; (PRC 814-29, 852-55)) that due to both the ineffective assistance of trial counsel and trial court error, Mr. Allen did not knowingly and voluntarily waive his fundamental right to present mitigating evidence. Mr. Allen claims that he was entirely precluded from knowingly and voluntarily waiving his right to present mitigation because trial counsel failed to conduct any investigation into the possible available mitigation. See (PCR 816-17)(where Second Amended Motion (pp.69-70) alleges in part, "Mr. Hooper's failure to investigate Mr. Allen's background during the ten months that he was his lawyer precluded Mr. Allen from making a valid waiver of mitigation.") Included in this claim is Mr. Allen's contention that had trial counsel conducted even minimal investigation, counsel would have discovered that substantial and available mitigation existed, both statutory and non-statutory, and that counsel's failure to present this evidence constituted ineffective assistance of counsel (PCR 821-28). Mr. Allen further

claims - and the record on its face affirmatively establishes - that the trial court conducted a constitutionally inadequate inquiry into Mr. Allen's decision to waive the presentation of mitigating evidence (PCR 814-29; 852-55). The lower court erred by concluding that these claims were procedurally barred and by not granting an evidentiary hearing.

Prior to the start of the penalty phase, when trial counsel moved to withdraw and Mr. Allen made known his intention to waive the presentation of mitigation to the jury, the trial court made no inquiry whatsoever into Mr. Allen's knowledge or understanding of mitigation in general or mitigation specifically applicable to his case (TRT 661-73). Instead, the court conducted a standard Faretta inquiry and concluded that Mr. Allen had knowingly waived his right to counsel for the purposes of the penalty phase (TRT 661-73). After subsequent competency evaluations, the court concluded Mr. Allen was competent to proceed (TRT 684-95). (Neither of the two experts appointed to evaluate Mr. Allen for competency knew that he intended to waive all mitigation and affirmatively ask for the death penalty or were even asked if this would have had an effect on their opinions (TRT 687, 694)). Mr. Allen, representing himself, thereafter presented no mitigation evidence to the penalty phase jury, disavowed the existence of mitigation, and asked the jury to vote for death. See Allen, 662 So. 2d at 327. The jury recommended death by a vote of

eleven to one. See id.

At the subsequent sentencing hearing before the judge, Mr. Allen abandoned his pro se status and was again represented by Mr. Hooper (TRT 779-812); see id. at 329. Even though he was now represented by counsel, Mr. Allen again waived his right to present mitigation (TRT 779-812); see Allen, 662 So. 2d at 329. Mr. Hooper this time did not move to withdraw (as he did at the at the penalty phase), but, instead, indicated that he felt compelled to "muzzle" himself in acquiescence to Mr. Allen's wishes (TRT 802). During the sentencing hearing, Mr. Hooper told the court that he was following Mr. Allen's wishes to not present any mitigation and that, moreover, Mr. Hooper had no mitigation to present anyway because Mr. Allen would not cooperate or provide information relative to mitigation (TRT 801-02, 804). At no time during the sentencing hearing did the trial court make any inquiry of Mr. Allen regarding his desire not to present mitigation during the sentencing hearing (TRT 804-10). Furthermore, as the record reflects and as this Court held on direct appeal:

Although the judge asked defense counsel whether he had informed Allen about the statutory mitigating factors available, there was no indication that counsel had investigated Allen's background or history to determine whether particular mitigating evidence was available. Counsel also made no proffer of mitigating evidence that could be presented to the court.

Allen, 662 So. 2d at 329.

**1. COUNSEL'S FAILURE TO CONDUCT ANY
INVESTIGATION INTO MITIGATION PRECLUDED
A KNOWING AND VOLUNTARY WAIVER OF MITIGATION**

In Deaton v. Dugger, 635 So. 2d 4 (Fla. 1994), the Florida Supreme Court granted a resentencing on nearly identical facts. The defendant in that case also waived his right to testify and to call witnesses to present mitigation at the penalty phase. However, the waiver was not knowing and voluntary because trial counsel failed to investigate:

In this case, the trial judge found that Deaton had waived the right to testify and the right to call witnesses to present evidence in mitigation, but concluded that, because his counsel failed to adequately investigate mitigation, Deaton's waiver of those rights was not knowing, voluntary, and intelligent. The rights to testify and to call witnesses are fundamental rights under our state and federal constitutions. Although we have held that a trial court need not necessarily conduct a Faretta type inquiry in determining the validity of any waiver of those rights to present mitigating evidence, clearly, the record must support a finding that such a waiver was knowingly, voluntarily, and intelligently made.

635 So. 2d 4, 8 (1994) (citation omitted). Because Mr. Hooper conducted no investigation to uncover the existence of mitigation, Mr. Allen did not knowingly and voluntarily waive his right to present such evidence.

In Battenfield v. Gibson, 236 F.3d 1215 (10th Cir. 2001), the death-sentenced defendant appealed the denial of his federal habeas

petition challenging his state conviction and argued that, although he told the state trial court and his trial counsel that he did not want to present any mitigating evidence, he nonetheless did not knowingly and intelligently waive his right to do so. He specifically argued that his trial counsel was ineffective for not discovering and presenting any mitigating evidence and that, prior to his purported waiver of mitigation, neither his trial counsel nor the trial court adequately informed him of the nature or purpose of mitigating evidence. See id. at 1226. After first finding that trial counsel was ineffective for conducting no penalty phase investigation, the Tenth Circuit concluded that counsel's failure to investigate "clearly affected [counsel's] ability to competently advise [the defendant] regarding the meaning of mitigation evidence and the availability of possible mitigation strategies." Id. at 1229. Additionally, the court found that the trial court's questioning of the defendant regarding his decision to waive was inadequate. Id. at 1231. The court disagreed with the state courts' conclusion that the defendant's waiver was voluntary:

[T]he record is clear that [trial counsel] did not adequately apprise [the defendant] of the meaning of mitigation evidence or what particular mitigating evidence was available in his case. Further, it is apparent the trial judge failed, at the time he questioned [the defendant] on the record, to ensure that [the defendant] had sufficient information to knowingly waive his right to present mitigation evidence [footnote omitted]

Id. 1232. The court held that in deciding whether the defendant knowingly waived his right to present mitigating evidence:

. . . it is necessary to review several factors, including the investigative efforts of defense counsel prior to the beginning of the penalty phase, his penalty phase strategy, the advice he rendered to [the defendant] prior to [the defendant]'s alleged decision to waive the presentation of mitigating evidence, and the trial court's examination of [the defendant] regarding his alleged waiver.

Id. at 1227. The court concluded that the defendant did not knowingly and voluntarily waive his right to present mitigation because (1) trial counsel failed to investigate penalty phase mitigation and (2) the trial court failed to conduct an adequate colloquy to determine that the defendant had a proper understanding of the general nature of mitigating evidence or the specific types of mitigating evidence that might be available for presentation, and failed to adequately determine that the defendant had been provided sufficient information from his trial counsel to make a knowing decision. See Id. at 1226-34.

Mr. Hooper's duty to investigate Mr. Allen's background for mitigation was not obviated by Mr. Allen's expressed desire to waive mitigation. In Blanco v. Singletary, the court explained counsel's duty in such a situation:

[A] defendant's desires not to present mitigating evidence do not terminate counsel's responsibilities during the sentencing phase of

a death penalty trial: "The reason lawyers may not `blindly follow' such command is that although the decision whether to use such evidence is for the client, the lawyer must evaluate potential avenues and advise the client of those offering potential merit."

. . .

The ultimate decision that was reached not to call witnesses was not a result of investigation and evaluation, but was instead primarily a result of counsels' eagerness to latch onto Blanco's statements that he did not want any witnesses called. Indeed, this case points up an additional danger of waiting until after a guilty verdict to prepare a case in mitigation of the death penalty: Attorneys risk that both they and their client will mentally throw in the towel and lose the willpower to prepare a convincing case in favor of a life sentence.

943 F.2d 1477, 1502-03 (11th Cir. 1991).

The law clearly states that "a defendant's desires not to present mitigating evidence do not terminate counsels' responsibilities during the sentencing phase of a death penalty trial." Blanco, 943 F.2d at 1502. Eleventh Circuit case law rejects the notion that a lawyer may "blindly follow" the commands of the client.

Eutzy v. Dugger, 746 F. Supp 1492, 1499 (N.D. Fla. 1989), aff'd, No. 89-4014 (11th Cir. 1990) (quoting Thompson v. Wainwright, 787 F.2d 1447 (11th Cir. 1986)). As the Eutzy court explained:

Although a client's wishes and directions may

limit the scope of an attorney's investigation, they will not excuse a lawyer's failure to conduct any investigation of a defendant's background for potential mitigating evidence. Id. at 1451; Thomas v. Kemp, 796 F.2d 1322 (11th Cir.), cert. denied, 479 U.S. 996, 107 S. Ct. 602, 93 L. Ed.2d 601 (1986); Gray v. Lucas, 677 F.2d 1086 (5th Cir. 1982), cert. denied, 461 U.S. 910, 103 S. Ct. 1886, 76 L. Ed.2d 815 (1983). At a minimum, a lawyer must evaluate the potential avenues of investigation and then advise the client of their merit. Trial counsel in this case neglected to perform his duty to investigate and to discuss with his client the merits of alternative courses of action. Such neglect--albeit because counsel expected a different result--fell below an objective standard of reasonableness, and as a result, trial counsel's representation fell outside the range of competent assistance.

Eutzy, 746 F. Supp. at 1499-1500 (emphasis added). Mr. Hooper's decision to forego an investigation was unreasonable, particularly in light of the fact that, as alleged by Mr. Allen in his motion (PCR 819), Mr. Allen's family was available and willing to provide any information concerning mitigation, records were easily available had counsel sought them out, and powerful mental health evidence was available had counsel done an adequate investigation.

In Thompson v. Wainwright, 787 F.2d 1447 (11th Cir. 1986), the Eleventh Circuit found counsel ineffective when faced with a situation similar to both Eutzy and the instant case. The Thompson court explained that the reason lawyers may not "blindly follow" the commands of their client is that "although the decision whether to use such evidence in court is for the client, . . . the lawyer first must

evaluate potential avenues and advise the client of those offering possible merit." Id. at 1451 (citations omitted). In Mr. Allen's case, counsel clearly "decided not to investigate . . . [Mr. Allen's] background only as a matter of deference" to Mr. Allen's wish. Id. "Although [Mr. Allen's] directions may have limited the scope of [counsels'] duty to investigate, they did not excuse [counsels'] failure to conduct any investigation of his background for possible mitigating evidence." Id.

Mr. Hooper's duty to prepare for the penalty phase did not arise at the conclusion of the guilt phase so any suggestion that he had no penalty phase responsibility because he withdrew from representation before the penalty phase actually began is irrelevant. In fact, the court only allowed one hour for penalty phase preparations so both sides were expected to be prepared to proceed directly to the penalty phase. See Blake v. Kemp, 758 F.2d 523, 533 (11th Cir. 1985) ("It should be beyond cavil that an attorney who fails altogether to make any preparations for the penalty phase of a capital murder trial deprives his client of reasonably effective assistance of counsel by the objective standard of reasonableness."); Martin v. Maggio, 711 F.2d 1273, 1280 (5th Cir. 1983) ("defendant's instructions that his lawyers obtain an acquittal or the death penalty did not justify his lawyer's failure to investigate the intoxication defense . . . uncounseled

jailhouse bravado, without more, should not deprive a defendant of his right to counsel's better-informed advice.").

It is well-established that the failure to investigate a client's background for mitigation constitutes the ineffective assistance of counsel. See Williams v. Taylor, 120 S. Ct. 1495 (2000); Rose v. State, 675 So.2d 567, 572-573 (Fla. 1996); Michael v. State, 530 So.2d 929, 930 (Fla. 1988); O'Callaghan v. State, 461 So.2d 1354, 1355-56 (Fla. 1984); Baxter v. Thomas, 45 F.3d 1501, 1513 (11th Cir. 1995); Stephens v. Kemp, 846 F.2d 642, 653 (11th Cir. 1988); Thompson v. Wainwright, 787 F.2d 1447, 1450-51 (11th Cir. 1986); Beavers v. Balkcom, 636 F.2d 114, 116 (5th Cir. 1981). Because of Mr. Hooper's failure to conduct any background investigation, Mr. Allen did not know what mitigating factors were available or what factors might apply to his case. As a result, Mr. Allen simply did not know what he was waiving, making his waiver unknowing and involuntary.

The fact that Mr. Allen represented himself at the penalty phase is irrelevant to his counsel's duty to prepare for the penalty phase by investigating Mr. Allen's background for the presence of mitigation. In Hamblen v. State, 527 So. 2d 800 (Fla. 1988), the Florida Supreme Court considered how to balance the competent defendant's right to not present mitigation with society's interest in the non-arbitrary imposition of the death penalty:

[That] all competent defendants have a right to control their own destinies . . . does not mean that courts of this state can administer the death penalty by default. The rights, responsibilities and procedures set forth in our constitution and statutes have not been suspended simply because the accused invites the possibility of a death sentence. **A defendant cannot be executed unless his guilt and the propriety of his sentence have been established according to law.**

Id. at 804 (emphasis added). In that case, the court concluded that despite the defendant's wishes to waive mitigation, the trial judge had been apprised of family, employment and criminal history and "protect[ed] society's interest in seeing that the death penalty was not imposed improperly." Id. In order to prevent the arbitrary and capricious imposition of the death penalty, the Florida Supreme Court upholds waivers of mitigation only when the trial court is informed, contrary to the defendant's desires, of the available mitigation. See, e.g., Durocher v. State, 604 So. 2d 810 (Fla. 1992); Clark v. State, 609 So. 2d 513 (Fla. 1992); Anderson v. State, 574 So. 2d 87 (Fla. 1991); Petit v. State, 591 So. 2d 618 (Fla. 1992).

In this case, Mr. Hooper made no proffer of the available mitigating evidence because he neglected to conduct any investigation. Further, Mr. Allen affirmatively denied the existence of mitigation:

A lot of people, it has amazed me, if convicted of something or had things happen in their life -- I had a bad childhood or this happened. Ladies and gentlemen, I was raised right. I was raised real right. The values that

was instilled in me at the time which I no longer have at this time are probably the same values that each and every one of you received. I don't stand here and say I had a bad home.

(R. 736-37). Mr. Allen also denied that he ever had an alcohol or drug problem (R. 737). Mr. Allen now maintains in his motion that even the most cursory investigation of his background would have revealed the presence of significant statutory and nonstatutory mitigation (PCR 821-27).

Mr. Allen alleges in his motion that a wealth of compelling mitigation evidence was not presented to the jury in violation of Mr. Allen's right to a fair and reliable sentencing required by the Eighth Amendment (PCR 822-29). See Williams v. Taylor, 120 S. Ct. 1495 (2000); Woodson v. North Carolina, 428 U.S. 280, 305 (1976); Furman v. Georgia, 408 U.S. 238, 309-10 (1972). Because of counsel's lack of investigation and preparation, Mr. Allen executed an invalid waiver of his right to present mitigation. As a result, the judge and jury received a woefully incomplete personal portrait of the person they convicted and sentenced to die.

Mr. Allen asserts in his motion that Mr. Hooper was ineffective for failing to investigate Mr. Allen's background for mitigation (PCR 822-29). As Mr. Hooper himself explained:

I don't have any mitigating factors to present simply because -- he does not have the attitude or spirit of uncooperativeness but he refused to provide me with mitigating factors. He also repeatedly requested I not plead for his life in

this case.

(TRT 801). Mr. Hooper's explanation that Mr. Allen refused to provide him with mitigating factors is inadequate to excuse his failure to investigate. It is not the client's responsibility to know what mitigating factors apply to his case or to understand what in his background constitutes mitigation. The client's uncooperativeness or refusal to supply information is irrelevant to counsel's duty to investigate and prepare for the penalty phase. Williams v. Taylor, 120 S. Ct. 1495 (2000). Clearly Mr. Hooper did not conduct a mitigation investigation because he latched onto Mr. Allen's desire to seek death and "blindly follow[ed]" Mr. Allen's wish not to present mitigation.

Beyond the guilt-innocence stage, defense counsel must also discharge very significant constitutional responsibilities at the sentencing phase of a capital trial. The Supreme Court has held that in a capital case, "accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die [made] by a jury of people who may have never made a sentencing decision."

Gregg v. Georgia, 428 U.S. 153, 190 (1976) (plurality opinion). In Gregg and its companion cases, the Court emphasized the importance of focusing the sentencer's attention on "the particularized characteristics of the individual defendant." Id. at 206. See also Roberts v. Louisiana, 428 U.S. 325 (1976);

Woodson v. North Carolina, 428 U.S. 280 (1976).

Counsel here did not meet rudimentary constitutional standards.

As explained in

Tyler v. Kemp, 755 F.2d 741 (11th Cir. 1985):

In Lockett v. Ohio, the Court held that a defendant has the right to introduce virtually any evidence in mitigation at the penalty phase. The evolution of the nature of the penalty phase of a capital trial indicates the importance of the [sentencer] receiving accurate information regarding the defendant. Without that information, a [sentencer] cannot make the life/death decision in a rational and individualized manner. Here the [sentencer] was given no information to aid [him] in the penalty phase. The death penalty that resulted was thus robbed of the reliability essential to confidence in that decision.

Id. at 743 (citations omitted).

No tactical motive can be ascribed to an attorney whose omissions are based on ignorance, see Brewer v. Aiken, 935 F.2d 850 (7th Cir. 1991), or on the failure to properly investigate or prepare. See Kenley v. Armontrout, 937 F.2d 1298 (8th Cir. 1991); Kimmelman v. Morrison, 477 U.S. 365 (1986). See also Rose v. State, 675 So. 2d 567 (Fla. 1995); Hildwin v. Dugger, 654 So. 2d 107 (Fla. 1995); Deaton v. Dugger, 635 So. 2d 4 (Fla. 1994). Mr. Allen's sentence of death is the resulting prejudice. Mr. Allen asserts in his motion that he can demonstrate a reasonable probability that the results of the sentencing phase of the trial would have been different if the

available mitigation had been presented to the jury (PCR 822-29). See Strickland, 466 U.S. at 694. Furthermore, Mr. Hooper's failure to investigate Mr. Allen's background during the ten months that he was Mr. Allen's lawyer precluded Mr. Allen from knowingly and voluntarily waiving hi right to present mitigation.

The trial court's finding that Mr. Allen was competent and knowingly and voluntarily waived the right to counsel during the penalty phase is irrelevant to the validity of his waiver of mitigation -- the relevant issue here is whether his purported waiver of mitigation was knowing, voluntary, and intelligent. Deaton v. Dugger, 635 So. 2d 4 (Fla. 1994); Koon v. Dugger, 609 So. 2d 246 (Fla. 1993). It cannot be the law that pro se defendant's waiver of mitigation is necessarily and automatically made knowing and voluntary by virtue of the sole fact that he waived counsel and is permitted to proceed pro se. Even if Mr. Allen was competent to waive counsel during the penalty phase and did so knowingly and voluntarily, he still possessed his constitutional right to present mitigation until such time as the trial court made the necessary inquiries to conclude that he knowingly and voluntarily waived that separate and distinct constitutional right. To say that Mr. Allen's waiver of counsel also acted as a knowing and voluntary waiver of mitigation turns on its head the concept of what constitutes a knowing and voluntary waiver of a constitutional right. "The purpose of the 'knowing and voluntary' inquiry . . . is 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). In Boykin v. Alabama, 395 U.S. 238 (1969), the Supreme Court, in discussing a criminal defendant's waiver of constitutional rights, held:

The requirement that the prosecution spread on the record the prerequisites of a valid waiver is no constitutional innovation. In Carnley v. Cochran, 369 U.S. 506, 516 [1962], we dealt with a problem of waiver of the right to counsel, a Sixth Amendment right. We held: "Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandably rejected the offer. Anything less is not waiver."

We think that the same standard must be applied to determining whether a guilty plea is voluntarily made. For, as we have said, a plea of guilty is more than an admission of conduct; it is a conviction. [footnote omitted] Ignorance, incomprehension, coercion, terror, inducements, subtle or blatant threats might be a perfect cover-up of unconstitutionality.

Boykin, 395 U.S. 242-43 (emphasis added). The Court noted that, for a plea of guilty to be valid under the Due Process Clause, it must be

. . . "an intentional relinquishment or abandonment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458, 464 (1938). Consequently, if a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void. Moreover, because a guilty plea is an admission of all the elements of a formal

criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts."

Boykin at 243, n.5 quoting McCarthy v. United States, 394 U.S. 459, 466 (1969). A capital defendant's right to present mitigation should be afforded no less consideration when the defendant desires to waive his right to present such evidence.

Mr. Allen's waiver of his right to counsel during the penalty phase did not eliminate or make unnecessary the need for an inquiry to determine if his decision to waive mitigation was knowing and voluntary. For example, and by analogy, suppose a defendant wishes to represent himself and plead guilty to a crime. After obtaining from the defendant a valid waiver of counsel pursuant to Faretta, the trial court could not thereafter constitutionally impose a judgment of guilt without conducting an additional and constitutionally sufficient inquiry pursuant to Boykin. In other words, because there are two distinct constitutional rights sought to be waived (in Mr. Allen's case, the right to counsel and the right to present litigation in a capital trial), separate colloquies to assure the knowing and voluntary waiver of each right are necessary. In Mr. Allen's case, the mere fact that he waived his right to counsel at the penalty phase did not and cannot substitute as establishing a knowing and voluntary waiver of his right to present mitigating evidence.

2. TRIAL COURT'S FAILURE TO INQUIRE OF MR. ALLEN REGARDING HIS DECISION TO WAIVE MITIGATION RENDERED WAIVER INVALID

Not only was Mr. Allen precluded from knowingly and voluntarily waiving the right to present mitigation as a result of Mr. Hooper's decision to blindly follow Mr. Allen's wishes, the trial court failed to conduct a constitutionally sufficient inquiry of Mr. Allen. Consequently, the record contains no basis to conclude that Mr. Allen knowingly and voluntarily waived mitigation.

Mr. Allen maintains in his motion that the trial court erred by allowing Mr. Allen to waive the presentation of mitigating evidence absent a constitutionally adequate inquiry into whether his decision was knowing, intelligent and voluntary. Mr. Allen purportedly waived a fundamental constitutional right: the right to present mitigating evidence in a capital sentencing proceeding. See Saffle v. Parks, 110 S. Ct. 1257, 1270 (1990) (Brennan, J., dissenting) ("The right to an individualized sentencing determination is perhaps the most fundamental right recognized at the capital sentencing hearing."). See also Eddings v. Oklahoma, 102 S. Ct. 869, 876-77 (1982); Lockett v. Ohio, 98 S. Ct. 2954, 2964-65 (1978); Woodson v. North Carolina, 96 S. Ct. 2978, 2991 (1976); Deaton v. Dugger, 635 So. 2d 4 (Fla. 1993).

In light of the fundamental nature of the right to present mitigation in a capital sentencing proceeding, significant and meaningful inquiry on the record into Mr. Allen's decision to waive mitigation was required. See Deaton, 635 So. 2d at 8 (" . . . the record must support a finding that such a waiver was knowingly, voluntarily, and intelligently made.") As former Chief Justice Barkett wrote in her dissent in Anderson:

The decision to waive the right to present witnesses in mitigation carries with it the most dire consequences possible under the law -- failure to present mitigating testimony may amount to virtually a life-or-death decision. The decision to waive the right to present mitigating testimony in a capital case is of no less significance than the decision to plead guilty to a crime. Any other conclusion would be illogical and would produce absurd results. For example, a trial court is required by Boykin [v. Alabama], 89 S. Ct. 1709 (1969) to conduct a record inquiry of a defendant's guilty plea to a first-degree misdemeanor charge of criminal mischief, section 806-13(1)(b)(2), Florida Statutes (1989), but the same trial court would not have to hold the same inquiry when the defendant is facing a sentence of death in the electric chair when he waives his right to put on mitigating evidence in the penalty phase of a capital case.

Anderson, 574 So. 2d at 96-97 (Barkett, J., concurring in part and dissenting in part). Due to the trial court's lack of inquiry, the record contains no support to conclude that Mr. Allen knowingly and voluntarily waived mitigation. Mr. Allen's purported waiver of mitigation is therefore invalid. See Deaton; see also Battenfield, 236

F.3d 1215 (10th Cir. 2001)(trial court's limited inquiry into defendant's decision to waive mitigation, when combined with counsel's failure to investigate mitigation, rendered the defendant's purported waiver invalid).

At the penalty phase proceedings, rather than a careful record inquiry to determine whether Mr. Allen knowingly, intelligently and voluntarily waived his right to present mitigating evidence, the trial court questioned Mr. Allen only on his wish to represent himself (TRT 662-74). Mr. Allen was never questioned about his decision to waive mitigation, which, according to Mr. Hooper's representation to the court, had been made before Mr. Hooper's motion to withdraw (TRT 660). As discussed, supra, the trial court's inquiry into Mr. Allen's wish to represent himself is not a substitute for an inquiry regarding his wish to waive mitigation. In fact, the experts who found Mr. Allen competent to represent himself did not know that he intended to waive mitigation and request the death penalty (TRT 688, 694). Furthermore, at the sentencing hearing, when Mr. Allen, while represented by counsel, again decided to present no mitigation, the trial court never once inquired of Mr. Allen regarding his decision (TRT 779-812).

The trial court failed to inquire into Mr. Allen's waiver of mitigation evidence, and counsel failed to conduct an adequate investigation which was necessary to fully inform Mr. Allen of his legal rights and options, thus making it impossible for him to make

rational choices regarding his case. Counsel was also ineffective for failing to advise the court of its obligation to conduct an inquiry regarding Mr. Allen's purported waiver of mitigation evidence. As a result of these errors the outcome of Mr. Allen's sentencing was materially unreliable and no adversarial testing.

3. LOWER COURT'S FINDING OF PROCEDURAL BAR ERRONEOUS

The lower court ruled that both Claim III and Claim VI were procedurally barred because, according to the lower court's order, the issue was "raised on direct appeal and decided adversely to the Defendant" (PCR 1077; see PCR 1076-77; 1080). As a result, the lower court never addressed the merits of Mr. Allen's claim that he did not knowingly and voluntarily waive his right to present mitigation. A review of the issue raised on direct appeal, however, reveals that the issue of whether or not Mr. Allen knowingly and voluntarily waived his right to present mitigation evidence was not decided on direct appeal and, therefore, Mr. Allen should not be precluded from raising the issue in his motion for post-conviction relief.

The issue decided on direct appeal was whether the trial court had erred in accepting Mr. Allen's waiver of mitigation evidence **by not following the procedure set forth in Koon v. Dugger**, 619 So. 2d 246 (Fla. 1993). See Allen, 662 So. 2d at 328-29. Mr. Allen's appellate counsel argued that Mr. Allen's waiver was invalid because "[t]he record [] fails to reflect that the requirements of Koon were met."

Initial Brief, p.30; see also Initial Brief at p.17 ("The trial court erred in failing . . . to conduct an inquiry of the defendant in conformity with the requirements of" Koon.) . On direct appeal, this Court decided only this limited issue and did not reach the question now raised on post-conviction of whether or not Mr. Allen's waiver of mitigation was knowing and voluntary. See Allen at 329 ("We find the procedure established in Koon inapplicable to this case"; "Because the Koon procedure was not applicable either during the penalty proceeding before the jury or during the sentencing proceeding before the judge, we find no error on this point."). Mr. Allen did not (and could not, see infra, ref. below to Battenfield factors) argue on direct appeal the more basic issue that he now raises in his Second Amended Motion to Vacate: Irrespective of whether or not the trial court followed procedural requirements of Koon, Mr. Allen did not knowingly and voluntarily waive his right to present mitigation evidence to the jury or to the sentencing judge.

An analysis of this Court's opinion on direct appeal plainly reveals that this issue was not decided on direct appeal. On direct appeal, this Court first addressed whether the Koon procedure applied when Mr. Allen purportedly waived mitigation during the penalty phase proceedings in front of the jury. The Court concluded that Koon did not apply to Mr. Allen's purported waiver of mitigation during the penalty phase because, since the trial court had concluded that Mr. Allen had

voluntarily waived his right to counsel during the penalty phase, Mr. Allen, in his pro se capacity, simply decided not to present mitigating evidence to the penalty phase jury. See Allen at 329 citing Hamblen v. State, 527 So. 2d 800 (Fla. 1988). The Court next examined whether Koon applied when Mr. Allen purportedly waived the presentation of mitigation to the judge during the sentencing hearing. In analyzing this aspect of the procedure, the Court noted that, unlike the penalty phase in which Mr. Allen appeared pro se, trial counsel represented Mr. Allen during the sentencing hearing. See Allen at 329. While acknowledging that the trial court's inquiry at the sentencing hearing "arguably fell short of" the Koon procedure, the Court affirmed the death sentence based on the Court's sole conclusion that the Koon procedure did not apply during the sentencing hearing because Koon was not applicable to Mr. Allen's case since Koon did not become final until rehearing was denied over three months after the trial court sentenced Mr. Allen. See id. Nowhere in this Court's opinion on direct appeal did the Court conclude that Mr. Allen's decision to waive mitigation was knowing and voluntary. The lower court's determination that this issue, including the inter-related issue of trial counsel's ineffectiveness, was procedurally barred, is erroneous.

In order to determine whether or not Mr. Allen knowingly and voluntarily waived his right to mitigation, the following factual issues must be determined: (1) the investigative efforts of defense

counsel prior to the beginning of the penalty phase; (2) counsel's penalty phase strategy; (3) counsel's advice rendered to Mr. Allen prior to his decision to waive the presentation of mitigating evidence; and (4) the trial court's examination of Mr. Allen regarding his alleged waiver. See Battenfield, 236 F.3d at 1227. Arguably, the current record on its face strongly suggests that, considering these factors, Mr. Allen's waiver was not knowing or voluntary. The current record already establishes that the trial court conducted no inquiry of Mr. Allen regarding his decision to waive mitigation. Furthermore, Mr. Hooper's statements on the record suggest that he conducted no investigation whatsoever into possible mitigation because Mr. Allen had told Hooper he did not wish to pursue mitigation. Mr. Hooper's statements also indicate that his penalty phase "strategy" was nonexistent for the same reason: that Mr. Allen indicated he did not want to present mitigation and in fact ask to be executed. On the other hand, the record contains little indication of what Mr. Hooper advised Mr. Allen prior to Mr. Allen's purported waivers. In sum, the record on its face strongly suggests that he did not knowingly and voluntarily waive and under no reasonable view of the record refutes the claim. See e.g. Gaskin. In light of the factual development required to properly determine the issue, an evidentiary hearing is required. For this same reason (the need for further factual development), this Court could not have determined on direct appeal whether the waiver was knowing and

voluntary had the Court even attempted to do so, which it did not.

Even assuming, *arguendo*, that Mr. Allen's purported waiver of his right to counsel during the penalty phase rendered a non-issue any claim that he did not validly waive mitigation during the penalty phase (an argument that Mr. Allen does not agree with and contends is erroneous under the law, see supra), as the Court noted on direct appeal, Mr. Allen was indeed represented by counsel during the sentencing hearing before the judge. Therefore, his previous waiver of counsel for purposes of the penalty phase could have had no possible effect on his waiver of mitigation during the sentencing hearing. While the Court decided on direct appeal that the trial court did not err in following the Koon procedure when Mr. Allen purportedly waived mitigation during the sentencing hearing, the Court clearly did not address the issue of whether Mr. Allen's purported waiver during the sentencing hearing was knowing and voluntary.

**4. TRIAL COUNSEL'S FAILURE TO INVESTIGATE
AND DISCOVER MITIGATION RENDERS HIS DEATH
SENTENCE ARBITRARY AND CAPRICIOUS UNDER
THE EIGHTH AMENDMENT AND PRECLUDED
PROPORTIONALITY REVIEW**

Mr. Allen further asserts in his motion that trial counsel's ineffectiveness in failing to discover and present mitigation also precluded the trial judge from fulfilling his duty to Mr. Allen to conduct an independent evaluation of the evidence, the aggravating and mitigating factors, and give great weight to the jury's sentencing

verdict (PCR 827-29). See Porter v. State, 723 So. 2d 191 (Fla. 1998). In fact, this is one of the bedrock principles of death penalty jurisprudence. In Proffitt v. Florida, 428 U.S. 250 (1976), the Supreme Court explained that, in response to Furman v. Georgia, 408 U.S. 238 (1972), the Florida legislature adopted a new statutory scheme providing that if a defendant is found guilty of a capital offense, "a separate evidentiary hearing is held before the trial judge and jury to determine his sentence." Id. at 248. Following a decision by the jury as to the recommended sentence, "[t]he trial judge is also directed to weigh the statutory aggravating and mitigating circumstances when he determines the sentence to be imposed on a defendant." Id. at 250.

In carrying out the constitutional obligation under Proffitt to assess the appropriateness of the death penalty, the Supreme Court was very specific in explaining that in order to be constitutional, a death sentence must be the result of a considered and sober weighing process by the trial judge:

The sentencing authority in Florida, the trial judge, is directed to weigh eight aggravating factors against seven mitigating factors to determine whether the death penalty shall be imposed. **This determination requires the trial judge to focus on the circumstances of the crime and the character of the defendant.** He must, *inter alia*, consider whether the defendant has a prior criminal record, whether the defendant acted under duress or under the influence of extreme mental or emotional disturbance, whether the defendant's role in the crime was that of a minor accomplice, and whether the defendant's youth argues in favor of a more lenient sentence than might otherwise be imposed. The trial judge must also determine whether the crime was

committed in the course of one of several enumerated felonies, whether it was committed for pecuniary gain, whether it was committed to assist or to prevent a lawful arrest, and whether the crime was especially heinous, atrocious, or cruel. **To answer these questions, . . . the sentencing judge must focus on the individual characteristics of each homicide and each defendant.**

Id. at 251-52 (emphasis added). This Court has repeatedly reiterated that, "'notwithstanding the jury's recommendation, whether it be for life imprisonment or death, the judge is required to make an independent determination, based on the aggravating and mitigating factors.'" Muhammad v. State, 782 So. 2d 343, 362 (Fla. 2001) quoting Grossman v. King, 525 So. 2d 833, 840 (Fla. 1988). The trial court was precluded from fulfilling this constitutional duty because no mitigation evidence was presented for his consideration.

Had trial counsel conducted a thorough investigation into Mr. Allen's background, he would have discovered compelling mitigating evidence which would have precluded a sentence of death. Both statutory and nonstatutory mitigating factors were readily supportable, yet they were not argued during the penalty phase because the information had never been gathered.

A different yet equally compelling problem was also caused by Mr. Hooper's failure to conduct a penalty phase investigation: This Court was precluded from conducting a meaningful proportionality review on direct appeal. On direct appeal, the Court recognized this potential

problem but concluded that "a valid waiver of mitigation does not preclude this Court from conducting the required proportionality review." Allen, 662 So. 2d at 331(emphasis added).

First of all, as argued, supra, and as Mr. Allen argues he can establish at an evidentiary hearing, his purported waiver of mitigation was not valid. Secondly, this Court recently in Muhammad re-visited the issue when the Court considered on post-conviction the defendant's waiver of mitigation evidence:

In all capital cases, this Court is constitutionally required "to engage in a thoughtful, deliberate proportionality review to consider the totality of circumstances in a case, and to compare it with other capital cases." Porter v. State, 564 So. 2d 1060, 1064 (Fla. 1990); see e.g., Urbin v. State, 714 So. 2d 411, 416 (Fla. 1998); Tillman v. State, 591 So. 2d 167, 169 (Fla. 1991). This case provides a perfect example of why the defendant's failure to present mitigating evidence makes it difficult, if not impossible, for this Court to adequately compare the aggravating and mitigating circumstances in this case to those present in other death penalty cases.

Muhammad, 782 So. 2d at 364-64(emphasis added). The Court then noted that due to the defendant's waiver of mitigation, mitigation in the form of evidence of "an extremely difficult childhood" and mental health problems was never presented. See id. at 364. This Court "cannot permit this constitutional obligation [to engage in a thoughtful, deliberate proportionality review to consider the totality of circumstances in a case and compare it with others] to be thwarted by

the defendant's own actions or inactions." Muhammad at 369 (Pariente, J., specially concurring). Given the abundant and compelling mitigation evidence that was available but not presented by Mr. Hooper (see PCR 821-29), this Court was precluded from performing a reliable proportionality review. See Muhammad. Moreover, the trial court was precluded from performing its duty to conduct an independent review of the aggravating and mitigating factors before deciding whether or not to order that Mr. Allen be executed.

POINT IV

ERROR TO DENY EVIDENTIARY HEARING ON THE DENIAL OF MR. ALLEN'S RIGHT TO COMPETENT MENTAL HEALTH ASSISTANCE

The lower court erred by summarily denying Mr. Allen's claims that Mr. Allen was denied the effective assistance of counsel at the guilt and penalty phases of his trial because trial counsel failed to obtain an adequate mental health examination. See Second Amended Motion to Vacate pp.59-66; (PRC 806-13). Because Mr. Allen's claim is sufficient to establish a basis for relief and because the record does not conclusively refute the claim, the lower court should have granted an evidentiary hearing on this claim. See Gaskin.

The lower court's order denying Mr. Allen's claim is erroneous with respect to the court's ruling that Mr. Allen was not entitled to a hearing on his claim that, due to the ineffective assistance of counsel, he was denied his right to expert mental health assistance during the penalty/sentencing phase of the trial. The lower court denied the claim on the basis that "the claim is purely conclusory and does not allege specific facts" and because the motion does not "assert that he was insane or incompetent at the time of the crime or sentencing" (PCR 1071). The court also made the wholly unsupported, and legally erroneous finding that "[t]he Defendant's mental condition became a consideration only after Counsel moved to withdraw based on the Defendant's expressed desire to represent himself in the penalty phase and seek the death penalty" (PCR 1074)(emphasis added).

Contrary to the conclusion of the lower court, Mr. Allen's Second Amended Motion to Vacate alleges specific facts that, if proved, would entitle him to relief. Mr. Allen alleges that, because trial counsel failed to investigate and discover information "needed in order [for a mental health expert] to render a professionally competent evaluation", trial counsel failed to provide Mr. Allen with competent mental health assistance and, further, that counsel's failure in this regard deprived the judge and the jury of being able to determine Mr. Allen's mental condition (See Second Amended Motion to Vacate, pp.61-2; PCR 808-09). Furthermore, the claim as written specifically incorporated all other allegations and factual matters contained elsewhere in the motion (see Second Amended Motion to Vacate, p.59, PCR 806), and therefore the claim includes Mr. Allen's claim that specific and significant mental health-related background information existed but was not investigated or discovered by trial counsel (PCR 821-29). Mr. Allen in fact alleges that trial counsel did no mitigation investigation at all (PCR 821). Trial counsel was ineffective for not discovering this information and providing it to a mental health expert. Therefore, contrary to the lower court's ruling, this claim states a sufficient claim for relief.

By ruling that Mr. Allen's mental condition did not become a consideration until "only after" trial counsel moved to withdraw, the lower court wrongly implies that trial counsel did not have responsibility to investigate the state of Mr. Allen's mental health

prior to that time (see PCR 1074)(emphasis added). This is simply incorrect. As Mr. Allen contends in his motion, trial counsel had the legal duty to investigate Mr. Allen's mental health at the outset, long before the time of trial, because Florida law made his mental health relevant to the proceedings. See PCR 806, 811; Ake; Mauldin v. Wainwright, 723 F.2d 799 (11th Cir. 1984).

Moreover, the lower court's ruling that Mr. Allen's mental health became an issue "only after" Mr. Allen expressed his wish to be executed constitutes an unsupported factual assertion which illustrates exactly why Mr. Allen is entitled to an evidentiary hearing. Mr. Allen alleges as a fact that, given trial counsel's contact with Mr. Allen for the ten months leading up to the time of trial, trial counsel "should have realized that a mental health evaluation was necessary for both phases of the trial" (PCR 811). The lower court's ruling advances a purely factual position that this allegation is not true. Yet, nothing in the record supports the lower court's assertion or refutes Mr. Allen's contra assertion. The record does not reveal anything about the nature of Mr. Allen's pre-trial contact with trial counsel. The lower court's assertion that Mr. Allen's mental health was not a consideration until the point at which he expressed a desire to represent himself and seek the death penalty is erroneous.

The lower court also erred by denying without a hearing Mr. Allen's claim that Mr. Allen was denied a meaningful adversarial

testing of the information relied upon by the trial court to determine that Mr. Allen was competent to represent himself at the penalty phase. Mr. Allen claims that trial counsel rendered ineffective assistance by not advising Mr. Allen, in his capacity as standby counsel, to inquire into the qualification of one of the experts who conducted a competency evaluation. Mr. Allen alleges that post-conviction counsel has discovered that Dr. Wolfe was not a licensed psychologist in the State of Florida (PCR 812) and that failure to impeach Dr. Wolfe or object to his testimony on this ground rendered the trial court's competency finding unreliable. The lower court rejected this claim and reasoned that Mr. Allen stipulated to his expertise (PCR 1075). This does not address the claim that trial counsel failed in his duty to advise Mr. Allen. The lower court also ruled on the basis that "[a]lthough it is not clearly stated in the record, one can assume the Defendant became familiar with Dr. Wolfe's qualifications by consulting with standby Counsel" (PCR 1075). As evident by the lower court's resort to assumptions, the record does not reveal at all what Mr. Allen or standby counsel knew about Dr. Wolfe's qualifications or what, if anything, standby counsel told Mr. Allen in this regard. The lower court should have granted an evidentiary hearing.

POINT V

**ERROR TO DENY EVIDENTIARY HEARING
ON CLAIM THAT MR. ALLEN INNOCENT
OF THE DEATH PENALTY**

The lower court erred in summarily denying Mr. Allen's claim that but for the presentation of false testimony by the State and the ineffective assistance of trial counsel, Mr. Allen would have been found ineligible for the death penalty. (See Second Amended Motion to Vacate Claim V; PCR 842-51). The lower court incorrectly ruled that the issues were raised and decided on direct appeal, and, therefore, procedurally barred (PCR 1078-79).

The lower court incorrectly ruled that Mr. Allen's claim that the HAC aggravator does not apply to his case was procedurally barred. Mr. Allen claims that the State knowingly presented false testimony in the form of Dr. Nelms' testimony that the victim bled to death within 15 to 30 minutes as a result of the knife wound to her carotid artery and that she would have remained conscious for the first 15 minutes of this period (PCR 844-45). Mr. Allen also claims that trial counsel was ineffective for failing to challenge this evidence by presenting an independent pathologist to testify that it is impossible for a person whose carotid artery is slashed to take 30 minutes to bleed to death and that it was impossible for the victim in this case to have been conscious for 15 of those minutes (PCR 845). He also claims that trial counsel was ineffective for failing to object to Dr. Nelms' opinion

testimony that the victim was conscious for the first 15 minutes when Nelms' qualified his opinion as being "just a guess" (PCR 845; TRT 420).

The prosecutor relied on Dr. Nelms testimony to urge the jury to vote for death (TRT 728-29). He also urged the trial court to consider Nelms' testimony as a basis to impose the death penalty (TRT 796-97). Most importantly, the trial court did indeed specifically rely on this testimony to justify the death penalty and this Court similarly relied on this testimony to uphold the HAC aggravator. See Allen, 662 So. 2d at 330-31.

The record does not at all refute, much less conclusively so, Mr. Allen's claims related to the imposition of the HAC aggravator. See e.g. Gaskin. The lower court's conclusion that Mr. Allen's HAC-related claims are procedurally barred is erroneous. The lower court justifies its conclusion merely by pointing out that this Court rejected Mr. Allen's argument on direct appeal that the trial court erred in finding the HAC aggravator in light of Dr. Nelms' testimony that his opinion that the victim was conscious for 15 minutes was just "a guess" (PCR 1078-9; see Mr. Allen's initial brief on direct appeal pp.53-9).

First of all, Mr. Allen did not and could not raise on direct appeal, and this Court did not address on direct appeal, the issue of the State's presentation of false testimony or trial counsel's ineffectiveness in failing present evidence and challenge Dr. Nelms'

testimony. These are claims that cannot be decided absent an evidentiary hearing. Secondly, while appellate counsel argued on direct appeal that the trial court erred in finding HAC based on Dr. Nelms' mere "guess" that the victim remained conscious for fifteen minutes, the issue had not been preserved because trial counsel did not object to Nelms' "guess" testimony. Not surprisingly, because trial counsel did not object and preserve the issue, this Court did not at all address this issue (Nelms' "guess") on direct appeal. The Court literally ignored the argument made on direct appeal when the Court, without even mentioning that Nelms' opinion was merely a "guess", found in support of its decision to affirm the HAC finding, "The medical examiner also testified that she would have remained conscious for fifteen minutes after the artery was severed." Allen at 331. It is exactly trial counsel's failure to object to Nelms' opinion based on a "guess" that Mr. Allen now raises this issue on post-conviction as constituting ineffective assistance of counsel. To say that the HAC-related claims are procedurally barred is erroneous.

The lower court also erred when it summarily denied Mr. Allen's claim that he has been denied a meaningful proportionality review (PCR 1079-80) (see PCR 849-51). Mr. Allen claims that due to the fact that significant and compelling mitigation evidence was available but not presented, he was denied his constitutionally required proportionality review (PCR 849). See (mitigation not presented set forth at PCR 821-

29). The lower court denied this claim for the sole reason that this Court on direct appeal held that Mr. Allen's "valid waiver of mitigation does not preclude this Court from conducting the required proportionality review. See Hamblen v. State, 527 So. 2d 800 (Fla. 1988)]." See (PCR 1079-80) (lower court's summary denial quoting Allen at 331.

The lower court's summary denial on this issue must be reversed. First of all, as argued in Point III, supra, Mr. Allen can establish at an evidentiary hearing that his purported waiver of mitigation was not valid. Secondly, the portion of Hamblen relied upon by this Court on direct appeal and, subsequently, by the lower court in its summary denial of Claim V, has since been disapproved of by a majority of the Court. In Muhammad v. State, 782 So. 2d 343 (Fla. 2001), the defendant waived mitigation. The majority of this Court re-visited the issue of the effect of a waiver of mitigation on the Court's constitutionally mandated proportionality review. In Hamblen, and on direct appeal in Mr. Allen's case, the Court held that a waiver of mitigation does not preclude a proportionality review. However, in Muhammad, the Court apparently reconsidered its position and held:

In all capital cases, this Court is constitutionally required "to engage in a thoughtful, deliberate proportionality review to consider the totality of circumstances in a case, and to compare it with other capital cases." Porter v. State, 564 So. 2d 1060, 1064 (Fla. 1990); see e.g., Urbin v. State, 714 So. 2d 411, 416 (Fla. 1998); Tillman v. State, 591 So. 2d

167, 169 (Fla. 1991). This case provides a perfect example of why the defendant's failure to present mitigating evidence makes it difficult, if not impossible, for this Court to adequately compare the aggravating and mitigating circumstances in this case to those present in other death penalty cases.

Muhammad, 782 So. 2d at 364-64 (emphasis added). The Court then noted that due to the defendant's waiver of mitigation, mitigation in the form of evidence of "an extremely difficult childhood" and mental health problems was never presented. See id. at 365. This Court "cannot permit this constitutional obligation [to engage in a thoughtful, deliberate proportionality review to consider the totality of circumstances in a case and compare it with others] to be thwarted by the defendant's own actions or inactions." Muhammad at 369 (Pariente, J., specially concurring). Given the abundant and compelling mitigation evidence that was available but not presented by Mr. Hooper (see PCR 821-29), this Court was precluded from performing a reliable proportionality review in Mr. Allen's case. This is especially true in light of the incorrect application of the HAC aggravator, which, as discussed supra, Mr. Allen now claims he can establish given the opportunity at an evidentiary hearing. The lower court's order denying Claim V of Mr. Allen's Second Amended Motion to Vacate should be reversed.

POINT VI

**Error To Deny Evidentiary Hearing
On Claim That Trial Counsel Failed**

**to Challenge State's Evidence and
Object to Unconstitutional Jury
Instructions**

The lower court erred by denying Mr. Allen's claims as set forth Second Amended Motion to Vacate pp.92 (PCR 829-39). Specifically, the lower court erred by denying without a hearing Mr. Allen's claim that trial counsel was ineffective for failing to challenge the evidence presented by the State during sentencing hearing in which the State called witnesses in an attempt to refute Mr. Allen's penalty phase closing statement suggesting that another person committed the murder. See (PCR 833-4). Detective Glover testified that the Buccaneer Lodge did not have any records showing that Mr. Allen had registered there (TRT 789). Mr. Allen now asserts that evidence in fact existed and does exist proving that Mr. Allen was registered there and was accompanied by another adult male. See (PCR 834). His claim that trial counsel was ineffective in failing to discover and present this evidence and that the State knowingly presented false evidence (see PCR 834) is not conclusively refuted by the record. See Gaskin. The lower court should have granted an evidentiary hearing.

The lower court also erred by denying Mr. Allen's claim that trial counsel was ineffective for failing to object to the introduction of Mr. Allen's radio interview at the sentencing hearing. See (PCR 837-38). On February 16, 1993, after the jury returned its sentencing recommendation, Mr. Allen gave a radio interview (TRT 894-907). The

State Attorney played the interview for the judge at the sentencing hearing (TRT 781). The court had already heard Mr. Allen's closing statement to the jury in which he asserted his innocence and suggested an alternative theory based on the evidence. The radio interview was irrelevant to sentencing, and trial counsel was ineffective for failing to object to the admission of this prejudicial evidence.

The lower court also erred by denying Mr. Allen's claim that trial counsel was ineffective for failing to object to jury instructions and comments to the jury by the prosecutor that unconstitutionally diluted the jury's sense of its responsibility at sentencing and shifted the burden to Mr. Allen to prove that life is an appropriate sentence. See (PCR 829-31); See Caldwell v. Mississippi, 472 U.S. 320 (1985); Mullany v. Wilbur, 421 U.S. 684 (1975). Mr. Allen also claims that counsel was ineffective for failing to object to vague instructions on the heinous, atrocious, or cruel aggravating factor. See (PCR 831-33). The lower court erred by denying these claims.

Finally, the lower court also erred by denying Mr. Allen's claims that the trial counsel was ineffective for failing to object the prosecutor's improper argument at the penalty phase that suggested that the jury must sentence Mr. Allen to death to prevent him from escaping and committing crimes in the future and for failing to object to the prosecutors improper argument at the sentencing hearing that urged the court to consider the conscience of the community. See (PCR 834-38).

POINT VII

**TRIAL COURT ERRED IN DENYING POST-CONVICTION
COUNSEL'S REQUEST TO INTERVIEW JURORS; THE RULES
PROHIBITING APPELLANT'S LAWYERS FROM INTERVIEWING
JURORS ARE UNCONSTITUTIONAL**

As argued in Claim IV of the post-conviction motion (PCR 840-41), the ethical rule (Rule 4-3.5(d)(4), Rules Regulating the Florida Bar) that prevents Mr. Allen, through counsel, from investigating any claims of jury misconduct or racial bias that may be inherent in the jury's verdict violated Mr. Allen's rights under the First, Fifth, Sixth, Eighth and Fourteenth Amendments and denied his right of access to the courts under article I, section 21 of the Florida Constitution. Furthermore, the trial court erred by denying post-conviction counsel's motion to permit juror interviews (PCR 841).

POINT VIII

**FLORIDA'S CAPITAL SENTENCING STATUTE IS
UNCONSTITUTIONAL**

As argued in Claim VIII of Mr. Allen's motion for post-conviction relief (PCR 857-60), Florida's capital sentencing statute fails to prevent the arbitrary and capricious imposition of the death penalty and deprived Mr. Allen of his right to due process of law and constitutes cruel and unusual punishment on its face and as applied.

POINT IX

**MR. ALLEN IS BEING DENIED HIS RIGHT TO EFFECTIVE
REPRESENTATION BY THE LACK OF FUNDING AVAILABLE
TO FULLY INVESTIGATE AND PREPARE HIS
POSTCONVICTION PLEADINGS, UNDERSTAFFING, AND THE**

**UNPRECEDENTED WORKLOAD ON PRESENT COUNSEL AND
STAFF**

As asserted on Claim IX (PCR 857-60) Mr. Allen is now, and will continue to be, prevented from fully pleading this Motion to Vacate Judgment and Sentence because of the existence of circumstances that preclude the full investigation and presentation of his Rule 3.850 motion. Mr. Allen is represented by the Office of the Capital Collateral Regional Counsel for the Southern Region of Florida (CCRC-South). Mr. Allen is guaranteed effective representation during his postconviction proceedings. Spalding v. Dugger, 526 So. 2d 71 (Fla. 1988). However, past and present circumstances outside the control of Mr. Allen or his counsel have and will continue to impede counsel's ability to properly and effectively represent Mr. Allen. The lower court erred by failing to grant an evidentiary hearing on this claim.

Effective legal representation has been denied to Mr. Allen due to CCRC-South's chronic and acute under funding. Even during the periods of time when Mr. Allen had designated counsel, his case could not be investigated due to CCRC-South's inability to proceed with the case due to lack of funds. To the extent that Mr. Allen's counsel discover new evidence in his case, the prior situation with collateral counsel should excuse any procedural default the State might raise.

POINT X

**PROCEDURAL AND SUBSTANTIVE ERRORS WHICH AS A
WHOLE DEPRIVED MR. ALLEN OF A FAIR TRIAL**

As asserted in Claim XI (PCR 867-68), Mr. Allen did not receive the fundamentally fair trial to which he was entitled under the Sixth, Eighth and Fourteenth Amendments due to the cumulative affect of constitutional error. See Heath v. Jones, 941 F.2d 1126 (11th Cir. 1991); Derden v. McNeel, 938 F.2d 605 (5th Cir. 1991); State v. Gunsby, 670 So. 2d 920 (Fla. 1996); Jones v. State, 569 So. 2d 1234 (Fla. 1990); Nowitzke v. State, 572 So. 2d 1346 (Fla. 1990); Ellis v. State, 622 So. 2d 991 (Fla. 1993)(new trial ordered because of prejudice resulting from cumulative error); Taylor v. State, 640 So. 2d 1127 (Fla. 4th DCA 1994).

CONCLUSION

Mr. Allen respectfully requests this Court to reverse lower court's order summarily denying the motion for post-conviction relief and remand for an evidentiary hearing. The record entirely fails to demonstrate that Mr. Allen's substantial claims of ineffective assistance of trial counsel are refuted by the record. In addition, post-conviction investigation revealed substantial Brady violations that require an evidentiary hearing. Finally, Mr. Allen's penalty phase was seriously undermined by trial counsel's deficiencies as well as incorrect rulings by the trial court.

