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

REPLY 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 abbreviations will be utilized to cite to the record in this cause, with appropriate page number(s) following the abbreviation.

"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.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

ARGUMENT IN REPLY

ARGUMENT I

ERROR TO DENY DEFENDANT'S BRADY CLAIM

Mr. Allen's conviction and sentence are seriously undermined by the reports and memoranda that the prosecution withheld in his case in violation of Brady v. Maryland, 373 U.S. 83 (1963). As in Kyles, "[b]ecause the State withheld evidence, its case was much stronger, and the defense case much weaker, than the full facts would have suggested," thus the withheld evidence undermined confidence in the verdict. Kyles v. Whitley, 514 U.S. 419, 424 (1995). In Mr. Allen's case, the withheld evidence would have severely damaged the prosecution's case against Mr. Allen in several ways including supporting his contention that someone else committed the crime, assisted his attorney in impeaching key state witnesses who testified to physical evidence linking Mr. Allen to the crime scene and limiting Mr. Allen's culpability in the crime. As in Young, Appellee "does not

dispute the existence and contents of documents that are the subject" of Mr. Allen's Brady claim. Young v. State, 739 So. 2d 553, 561 (Fla. 1999). Instead, Appellee misinterprets Mr. Allen's claims and misstates the facts in order to argue that Mr. Allen's claims should be denied.

This Court in Thompson v. State, 759 So. 2d 650 (Fla. 2000)identified the three elements of a Brady claim: "[1] The evidence at issue must be favorable to the accused; either because it is exculpatory or because it is impeaching; [2] that evidence must have been suppressed by the State, either willfully or inadvertently; and [3] prejudice must have ensued, quoting Strickler v. Green, 119 S. Ct. 1936, 1948 (1999). Id. at 662. Mr. Allen should be given the opportunity to prove at an evidentiary hearing that the State suppressed reports and memoranda with information regarding physical evidence found at the crime scene. Had trial counsel been aware of this favorable information and presented it to the jury, it would have made a difference.

Appellee suggests that the evidence comprising Mr. Allen's Brady claim particularly the FDLE report dealing with hair found in Ms. Cribbs' hands could have been discovered by the defense with the use of due diligence (Answer Brief at 17, 18). The cases Appellee cited to support its contention are distinct from Mr. Allen's case. In United States v. Grintjes, 237 F.3d 876, 880, 881 (7th Cir. 2001), the evidence

at issue consisted of verification forms that Grintjes had in his possession well before trial which the court found that if Grintjes had been interested in investigating whether they were forged he could have easily done so.

In Mr. Allen's case his trial attorney, Mr. Hooper, did not have the same access to the information that the trial attorney had in Grintjes. In fact, Mr. Allen had no ability to obtain the test results and memorandum unless the agencies were willing to turn them over to him.

Similarly, Appellee's reliance on United States v. Corrado, 227 F.3d 528, 538 (6th Cir. 2000) is also misplaced. In Corrado, the evidence consisted of transcripts of grand jury members of several alleged bookmakers and gamblers whose names were mentioned in recorded conversations involving the defendants.

This Court held:

> Moreover Corrado has made no showing that he would have been unable to identify, locate, and interview these individuals through reasonable efforts on his own part. Indeed, it was the defendant's own recorded conversations that brought these alleged bookmakers and gamblers to the government's attention in the first place. Id. at 538.

In the instant case, Mr. Allen did not have equal or greater access to the information then the Government, but far less to FDLE reports than the State possessed.

The State cites United States v. Maloof, 205 F.3d 819, 827 (5th Cir. 2000) in at (Answer Brief at 18) which can be easily distinguishable from Mr. Allen's case. In Maloof, the defendant contended on appeal that the government's failure to disclose a statement made by Danny Fang to the FBI violated Brady. The Federal District Court held that the statement made by Fang to FBI agents on June 21, 1995 was not Brady material because Maloof's defense counsel had obtained Fang's version of the facts from his attorney. Id.

Mr. Allen did not learn of the FDLE reports from any source.

Ironically, the State cited Johns v. Bowersox, 203 F.3d 538, 545 (8th Cir. 2000), to stand for the proposition that "[t]here is no suppression of evidence if the defendant could have learned of the information through reasonable diligence'")

However, a closer examination of Johns revealed that the first element of Brady was satisfied in Johns.

The Court wrote:

> There is no suppression of evidence if the defendant could have learned of the information through "reasonable diligence". United States v. Jones, 160 F.3d 473, 479 (8th Cir. 1998) (Citing Westley v. Johnson, 83 F.3d 714, 726 (5th Cir. 1996)). Nor can't there be suppression when the defendant and the State have equal access to the information. See United States v. Jones, 34 F.3d 596, 600 (8th Cir. 1994). The State argues that it did not suppress information about the reward because Johns could have discovered it in a St. Louis area newspaper.
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> That the reward was published in an

> unidentified St. Louis newspaper does not mean that Johns had equal access to the information. The State learned of the reward, and of Keener's interest in it, from Keener himself. Even if Johns had managed to learn from a newspaper that the reward existed, he had no way of learning that Keener had repeatedly inquired about the reward. Thus, the State's nondisclosure of the evidence regarding the reward satisfied the first element of Brady. Id.

Although the State addresses Hoffman v. State, 800 So. 2d 174 (Fla. 2001) in the context of the relative weakness of the government's case in Hoffman versus the instant case, the State chooses to ignore the lengthy analysis that led this Court to conclude that a Brady violation occurred. This Court held in Hoffman:

Hair Evidence

> [3] First, Hoffman argued that the trial court erred in denying his claim that the State violated Brady by withholding the results of an exculpatory hair analysis, an analysis which excluded Hoffman, codefendant White and the male victim, Ihlenfeld, as the sources of the hairs found in the female victim's hands.[1] The State contends that in its response to a discovery request, it disclosed the existence of a hair analysis to defense counsel. This disclosure, the State asserts, should have placed Hoffman's attorney on notice of any other evidence flowing therefrom. Evidence presented at the evidentiary hearing indicates a long brown hair was found in the right hand of Ms. Parrish, and hairs were found in the clutch of her let hand. Evaluation by the FDLE showed these hairs were Caucasian male head and pubic hairs that did not match that of the defendant. Additionally, the head hair did not match that of the male victim.

[1] The hair was also excluded as belonging to the female victim.

> [4] Hoffman argues this evidence was not available to defense counsel at trial because the report was not disclosed. The record indicates the defense filed a demand for discovery on November 5, 1981. The State answered the demand on November 6, 1981, and indicated there were scientific reports available concerning the autopsy, fingerprinting, blood analysis, and hair analysis. However, the report which indicated the Causation hair found in the female victim's hand did not match Hoffman's hair was not done until February 11, 1982. There is no indication that the State ever disclosed this report to the defense, and the State does not argue that this report was disclosed. Instead, the State essentially argues that defense counsel should have inquired further once told of the existence of other hair analysis.
>
> [5] The State's additional argument is that defense counsel Harris elicited information at trial from a serologist about the hairs. The information solicited, however, was merely the fact that hairs were gathered at the scene. The State asserts this testimony sufficiently apprised the defense of the existence of this evidence. This argument is flawed in light of Strickler and Kyles, which squarely place the burden on the State to disclose to the defendant all information in its possession that is exculpatory. In failing to do so, the State committed a Brady violation when it did not disclose the results of the hair analysis pertaining to the defendant. Id. at 179

The State suggests in its Answer Brief that the State could not have suppressed evidence because "Defendant was aware that the State had found a hair in Ms. Cribbs' hand." (R. 46-47). He knew that the State had submitted this hair for testing and that problems had arisen. (S.R. 848-50). However, those arguments were rejected in Hoffman and this Court should reaffirm the principal to "place the burden on the

State to disclose to the defendant all information in its possession that is exculpatory."

Although the State tries to suggest that the State case against Hoffman was much weaker than the case against Mr. Allen, the State fails to mention "the other evidence" linking Hoffman to the crime was his confessions to FBI agents and Jacksonville Beach Police Officers. Id. at 180. Most important, Mr. Allen never confessed to killing Ms. Cribbs.

In Hoffman, this Court wrote that "Hair evidence found in the victim's clutched hand could tend to prove recent contact between the victim and a person present in that room at the time of her death." With 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.

The above argument could be equally applicable to Mr. Allen. Likewise, given the circumstances of his case, there is reasonable probability that had the evidence been disclosed that the outcome of his trial would have been different.

The State in its Answer Brief does not rebut the assertion in the Defendant's amended 3.850 motion that the withheld fingerprint report could have been valuable Brady evidence to impeach Marjorie Rohner.

Instead, the State asserts that the fact that FDLE did not find

a match does not show that the Sheriff's investigation was deficient. (Answer Brief at 20) However, the withheld fingerprint report could certainly have been used to attack Ms. Rohner's credibility as well as the quality of the Monroe County Sheriff's Office investigation.

Therefore, the State withheld valuable evidence coupled with the compelling nondisclosure of the hair evidence that affected the outcome of this case.

The State argues that "any contamination regarding the hairs would only have been cumulative to the arguments made by defense counsel." (Answer Brief at 21) However, the State fails to recognize that evidence of contamination coupled with the nondisclosure of the hair evidence and the fingerprint report could have affected the outcome of this case.

ARGUMENT II

ERROR TO DENY INEFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE

The State asserts that Defendant's reliance on Rose v. State, 675 So. 2d 567 (Fla. 1996) is misplaced. It should be noted that Rose was decided after the trial court conducted an evidentiary hearing.

This Court held:

> Under these circumstances resentencing 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 o the pressure of time and his lack of competence and experience in handling a capital sentencing proceeding. Resentencing counsel also chose to present this theory even though he thought it was far-fetched in the time. At the hearing below, resentencing counsel testified that,
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> > "I would have never in my wildest dreams gone on the theory that it was an accidental death and that it may have been a manslaughter instead of a murder and that he freaked and disposed of the body. That was something that I would have never formulated, okay. To me the better strategy would have been to constantly maintain that he did not do the crime, it's a circumstantial case, and gone with other areas of mitigation or things of that nature." Id. at 572.

The amended 3.850 motion sets out the development of Mr. Hooper's suicide defense in his cross-examination of Dr. Nelms culminating with Mr. Hooper advancing the suicide defense in his closing argument. (R. 800-803) Perhaps Mr. Hooper could justify his actions as being informed or strategic. However, an evidentiary hearing is necessary to enable Mr. Hooper to explain what appears to be a "far-fetched" theory.

The State provides a lengthy defense of Mr. Hooper against allegations of ineffectiveness for how counsel cross examined Larry Woods. (Answer Brief at 25, 26) The State never addressed (1) whether

the failure to have impeached Mr. Woods with the fact that he was not initially sure of the gender of the defendant; and (2) the discrepancy regarding the height where Mr. Woods told the police that the individual he saw was approximately 5'5" to 5'8" tall and the Department of Corrections, as well as the charging information listed Mr. Allen as 6'1" constituted deficient performance. Instead, the State summarily concludes that given all of these facts, there is no reasonable possibility that impeachment of Mr. Woods with the above information could have affected the outcome. (Answer Brief at 26)

Given the withheld information coupled with a ridiculous defense theory, an evidentiary hearing should be conducted so that Mr. Hooper could have the opportunity to explain whether he made an informed or strategic decision not to impeach Mr. Woods with this information.

The State in its Answer Brief attempted to discredit Ms. McLean. (Answer Brief at 27, 28) Although the State makes a credible argument that Mr. Allen gained weight since the time of the homicide, the State chose not to explain how Mr. Allen became significantly younger from the time of the homicide to the time of trial since Ms. McClain described seeing a heavy-set woman with a thin young-looking man with dirty blond hair. Nor could the State without the benefit of an evidentiary hearing discredit Ms. McClain's eyesight to the extent that she was mistaken when she saw two cars at the scene of the murder, both the night before and the morning of the murder. Only an evidentiary

hearing can determine whether Ms. McClain's testimony would have had an impact on the outcome of this case.

ARGUMENT III

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

Appellee's main contention is that Mr. Allen's claim that he did not knowingly and voluntarily waive his right to present mitigation evidence both during the penalty phase before the jury and during the sentencing hearing before the judge is procedurally barred. Appellee's argument, like the trial court's order, is premised on the incorrect assertion that this issue raised in the rule 3.850 motion is the same issue decided on direct appeal. Appellee's points are without merit as explained below.

Mr. Allen claims in his motion for post-conviction relief that his purported waiver of his constitutional right to present mitigation evidence was not knowing and voluntary because defense counsel, Mr. Hooper, never investigated and discovered voluminous and available mitigation evidence.[2] See gen. Battenfield v. Gibson, 236 F.3d 1215 (10th Cir. 2001)(setting forth factors to review in order to determine if a waiver of mitigation is knowing and voluntary). Because Mr. Hooper

[2]The evidence Mr. Hooper failed to investigate and discover is set forth in detail in Mr. Allen's Second Amended Motion to Vacate Judgments of Conviction and Sentence with Request for Evidentiary Hearing, pp.74-80 (See PCR 821-27).

did not discover the existence of this evidence, he therefore could not have possibly competently advised and informed Mr. Allen as to the meaning and significance of Mr. Allen's decision to waive the presentation of mitigating evidence such that the waiver was knowing, intelligent, and voluntary.

To support its procedural bar argument, Appellee argues that this issue was decided on direct appeal and states that it is "untrue" that on direct appeal this Court only decided that the procedural requirements of Koon did not apply. As Appellee obviously realizes, if this Court on direct appeal decided only that the trial court did not err by not adhering to the procedural requirements of Koon, the claim that Mr. Allen now raises on post-conviction (that he did not knowingly and voluntarily waive his right to present mitigation) is not procedurally barred.

Appellee asserts but does not explain how this Court's opinion on direct appeal decided the issue now raised in post-conviction. Appellee does not address the fact that the text of this Court's opinion on direct appeal clearly indicates that the Court ruled only that the trial did not err by not following the Koon procedure. See Initial Brief pp.52-54. This Court on direct appeal stated the issue to be decided as follows:

> On appeal, Allen raises six issues as error: . . . 2) the waiver of presentation of mitigation evidence **without meeting the requirements of Koon**

v. Dugger, 619 So. 2d 246 (Fla. 1993); . . . .

Allen v. State, 662 So. 2d 323, 327 (Fla. 1995)(emphasis added). Most telling is the Court's unambiguous statement of its holding on the issue:

> **Because the Koon procedure was not applicable** either during the penalty phase proceeding before the jury or during the sentencing proceeding before the judge, we find no error on this point.

Allen at 329 (emphasis added). Nowhere in the Court's opinion does the Court ever hold, state, suggest, or imply that Mr. Allen's waiver of his constitutional right to present mitigation evidence was knowingly and voluntarily entered. Nor could the Court have so held since to do so necessarily would have required that the record set forth the investigative efforts of defense counsel, counsel's penalty phase strategy, and the substance of counsel's advice to Mr. Allen prior to his decision to waive the presentation of mitigating evidence. See Battenfield, 236 F.3d at 1227. The Court does not even mention the words "knowing", "intelligent", or "voluntary" in the context of Mr. Allen's waiver of mitigation. The Court only discusses whether the Koon procedures should have been applied. The issue on direct appeal was whether the trial court erred in failing to follow the specific procedures set forth in Koon. The issue raised in post-conviction is the substantive issue of whether Mr. Allen's waiver was knowing, intelligent, and voluntary. These issues are clearly separate and

distinct and Appellee's argument they are the same is simply wrong.

One thing is clear: the current record strongly indicates that Mr. Hooper conducted no mitigation investigation. However, in order to properly determine Mr. Allen's claim that his waiver was not knowing and voluntary, an evidentiary hearing is required in order to flesh out all the facts necessary to determine the issue. See Battenfield.

In an attempt to argue that the issue of whether the waiver was knowing and voluntary was decided on direct appeal, Appellee appears to suggest that the existing record in fact establishes that the waiver was knowing and intelligent (Answer Brief pp.32-33)(e.g. Appellee argues, "Defendant's decision [to waive mitigation] was . . . a reasoned decision made well before trial." Answer Brief at 33)). This argument lacks merit. Neither the written waiver (R. 188-89) nor Mr. Hooper's representations on the record that he and another attorney "discussed it" with Mr. Allen (T. 661, 801-02) in any manner, much less, conclusively so, refute Mr. Allen's present claim that the waiver was not knowing and voluntary. The current record does not reveal the substance of either Mr. Hooper's or the other attorney's discussion with Mr. Allen regarding the waiver of mitigation. The record does not reveal whether not Mr. Allen was aware of or understood the significance of the mitigation that was available but undiscovered by Mr. Hooper. Absent findings on these factual matters, Mr. Allen's claim that he did not knowingly and voluntarily waive the presentation of

mitigation evidence to the both the penalty phase jury and the trial court during the sentencing hearing is not conclusively refuted by the record and an evidentiary hearing is required.

Appellee repeatedly argues that any claim that defense counsel was ineffective at the penalty phase was waived because Mr. Allen represented himself at the penalty phase. See Answer Brief at 32,33,34). Appellee's argument signifies either a misunderstanding of the claim or an unwillingness to acknowledge the real issue. The real issue here is that defense counsel's failure to investigate and discover the voluminous mitigation set forth in the post-conviction motion resulted in Mr. Hooper being unable to advise and discuss with Mr. Allen the availability and significance of this evidence. This in turn precluded Mr. Allen from executing a knowing and intelligent waiver of mitigation. The issue at this point is whether the waiver was voluntary, not whether defense counsel was ineffective for failing to present this evidence during the penalty phase. Instead, Mr. Hooper's ineffectiveness comes into play in this respect: Because Mr. Hooper failed to conduct any mitigation investigation and therefore failed to discover what a competent investigation surely would have uncovered - the existence of significant and compelling mitigation evidence - Mr. Allen simply could not have waived his right to present this evidence. Mr. Hooper had the duty to conduct a competent mitigation investigation despite any expression by Mr. Allen not to present mitigating evidence

to the jury. See e.g. Blanco v. Singletary, 943 F.2d 1477 (11th Cir. 1981). The fact that Mr. Allen waived his right to counsel at the penalty phase had no bearing on Mr. Hooper's Sixth Amendment duty to conduct a competent mitigation investigation.

Viewed another way, **before** the trial court discharged Mr. Hooper from representing Mr. Allen for the purposes of the penalty phase and while Mr. Hooper was still representing Mr. Allen, Mr. Hooper had the duty to investigate possible mitigation and competently advise Mr. Allen when Mr. Allen made known his desire to waive mitigation so that Mr. Allen would know what it was that he was waiving. Mr. Hooper could not competently advise Mr. Allen when Mr. Hooper had failed to conduct any investigation and failed to discover the compelling mitigation that was available. Furthermore, Appellee never addresses the fact raised in the initial brief (see initial brief p.56) and acknowledged in this Court's opinion on direct appeal (see Allen, 662 So. 2d at 329) that Mr. Hooper did indeed represent Mr. Allen during the sentencing hearing before the trial court. Therefore, as Mr. Allen's attorney for purposes of the sentencing hearing, Mr. Hooper again had the duty to fully and competently advise Mr. Allen on Mr. Allen's desire to waive mitigation. Again, having conducted no investigation into mitigation, Mr. Hooper could not possibly have done so.

Appellee also appears to argue that had Mr. Allen not waived the presentation of mitigation evidence and had Mr. Hooper represented Mr.

Allen at the penalty phase, Mr. Hooper would not have been ineffective for failing to present the mitigation detailed in the motion for post-conviction relief that he never discovered. Appellee reasons that this is so because Mr. Allen "denied having a poor family background or abusing alcohol", because if Mr. Allen had presented military service as mitigation, the state would have presented evidence of unfavorable portions of his military service, because the trial court "found Defendant's military service as mitigation and his family life mitigating even though they were not presented", because the trial court heard Mr. Allen's radio interview in which he stated he was merely a thief and not a violent criminal and that "despite these findings and the presentation of this evidence, the trial court still imposed a death sentence." Answer Brief at 34-5. Without specifically so stating, Appellee essentially argues that the horrendous conditions and circumstances of Mr. Allen's life detailed in the motion for post-conviction relief are merely cumulative to the scant information about Mr. Allen known to the trial court. This argument simply has no merit and cannot be credibly entertained.

The fact that Mr. Allen denied on the record that he had a poor family background or abused alcohol does not establish that Mr. Hooper could not have been ineffective for not investigating and presenting the mitigation evidence set forth in the motion for post-conviction relief. It is virtually common knowledge that alcoholism is a disease

characterized by denial[3]. Furthermore, Mr. Allen cannot be presumed to know that he was the victim of vicious childhood abuse by his parents because he may not know that his parent's conduct constituted abuse and because denial is a characteristic of this condition as well.[4] Mr. Allen is entitled to an evidentiary hearing on this claim.

ARGUMENT IV

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

Appellee misstates Mr. Allen's claim when Appellee argues that Mr. Allen's claim is that "because the trial court inquired if Defendant had been treated for any mental illness during the Faretta inquiry, counsel should have been on notice that he had mental problems." Answer Brief at 36. As argued in both the post-conviction motion and the initial brief, trial counsel had the legal duty to investigate Mr. Allen's mental health at the outset, long before the time of trial. See PCR 806, 811; Initial Brief at 63.

Appellee also argues that defense counsel, Mr. Hooper, had no duty to investigate Mr. Allen's mental health and that the lower court properly denied an evidentiary hearing and relief on this claim because "**[defense] counsel had no indication that Defendant had any mental**

[3]Kellerman, Joseph L., A Guide For The Family Of The Alcoholic (Hazeldon: Center Cty, MD.) p.5

[4]Herman, Judith, Trauma and Recovery, Basic Books, New York, 1992, p.101-102.

problems." Answer Brief at 37; see also Id. at 38 ("As counsel had no indication that Defendant was mentally ill, he had no duty to investigate Defendant's mental state, and the lower court properly summarily denied this claim."). First of all, this is a purely factual assertion that has no support in the record. By making this argument, Appellee ironically highlights exactly why an evidentiary hearing is required. A hearing is required in order to establish on the record exactly what Mr. Hooper knew or had "indications" of regarding the need for a pre-trial mental health assistance. Appellee's reliance on Mr. Hooper's single statement during the Faretta inquiry that he found Mr. Allen to be "coherent and rational" (Answer Brief at 37; (TRT. 661)) does not conclusively refute Mr. Allen's claim that Mr. Hooper should have conducted a pre-trial mental health investigation. Appellee cannot credibly argue that a person who appears "coherent and rational" necessarily cannot suffer from mental illness or mental health-related infirmities.

While Appellee argues that, "[a]s [Mr. Hooper] had no reason to believe that Defendant was, **or ever had been**, mentally ill, he had no duty to investigate Defendant's mental state" (Answer Brief at 38-9)(emphasis added), Appellee does not explain how Mr. Hooper's opinion that Mr. Allen at the time of the Faretta hearing appeared "coherent and rational" refutes the possibility that Mr. Allen had suffered ill mental health in the past. The record simply does not conclusively

refute the claim as Appellee tries to argue.

Secondly, even if Mr. Hooper "had no indication that [Mr. Allen] had any mental problems" as Appellee charges, Mr. Allen is still entitled to an evidentiary hearing because, obviously, had Mr. Hooper conducted a competent pre-trial investigation into Mr. Allen's background, he would have discovered the wealth of mental health-related evidence of Mr. Allen's traumatic life marked by physical abuse, violence, alcoholism and the mental illness of severe depression (see Second Amended Motion to Vacate, pp.74-80; (PCR 821-27). These facts, along with Mr. Allen's claim that Mr. Hooper was ineffective in failing to conduct a background investigation, were incorporated into the instant claim by specific reference. See Second Amended Motion to Vacate, p.59; PCR 806). Had Mr. Hooper knew of this evidence, he would have had an "indication" of the need for pre-trial mental health-related expert assistance.

As to Appellee's prejudice argument, Mr. Allen plainly asserted in his motion for post conviction relief the existence of the above-referenced mental health-related mitigation. See Second Amended Motion to Vacate, pp.74-80; (PCR 821-27). As noted, these facts - as well as the related claim of Mr. Hooper's failure to investigate and discover these facts - were alleged and incorporated by reference into the instant claim. The denial of competent mental health assistance precluded this information from being made available to Mr. Allen to

defend himself in this capital case. It also precluded Mr. Allen from executing a knowing, intelligent, and voluntary waiver of mitigation (See Point III). Mr. Allen has sufficiently alleged prejudice. An evidentiary hearing is required.

CONCLUSION

The State hid significant exculpatory evidence from Mr. Allen. There is absolutely no question the prosecutor was under a constitutional obligation to provide Mr. Allen's counsel with FDLE reports. Moreover, the lower court erred by summarily denying Mr. Allen's ineffective of assistance guilt phase claims.

Finally, the lower court erred in two aspects of the penalty phase by 1) Denying Mr. Allen an evidentiary hearing on Mr. Allen's involuntary waiver of mitigation, and 2) Denying an evidentiary hearing on the denial of Mr. Allen's right to competent mental health assistance.