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IN THE SUPREME COURT OF FLORIDA

ANDREW R. ALLRED,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. SC13-2170

ON APPEAL FROM THE CIRCUIT COURT
OF THE EIGHTEENTH JUDICIAL CIRCUIT,
IN AND FOR SEMINOLE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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TABLE OF CONTENTS

TABLE OF CITATIONS

Federal Cases

State Cases

State Statutes

State Rules

Other Authorities

PRELIMINARY STATEMENT

This case presents a post-conviction appeal after Appellant was denied relief under *Florida Rule of Criminal Procedure* 3.851 (hereinafter "Rule 3.851" or "3.851") in the Circuit Court for Seminole County, Florida. Appellant was convicted of, *inter alia*, two counts of first degree murder and sentenced to death for each murder in 2008. This brief will refer to Appellant as such, Defendant, or by proper name, e.g., "Allred." Appellee, the State of Florida, was the prosecution below. This brief will refer to Appellee as such, the prosecution, or the State. Appellant's defense attorneys at trial will be referred to by proper name and title or "trial counsel." Unless indicated otherwise, bold-typeface or italic emphasis is supplied. Cases cited in the text of this brief and not within quotations are italicized. Other emphases are contained within the original quotations. Under *Fla. R. App. P.* 9.210(c), the State submits its statement of the case and facts.

STATEMENT OF THE CASE

Andrew Allred was charged by indictment with the first-degree, premeditated murders of Michael Ruschak and Tiffany Barwick. (DAR, V1, R35-37).[1] At his arraignment on November 6, 2007, Allred pled not guilty and was

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[1] Cites to the direct appeal record are: "DAR," followed by "V___," for volume number, followed by "R___" for page number. Cites to the post conviction record on appeal are: "V___," for volume number, followed by "R___" for page number.

formally appointed a public defender. On April 30, 2008, Allred withdrew his not guilty plea and entered a written and oral guilty plea that was accepted as knowing, intelligent, and voluntary by the trial court. (DAR, V5, R472-82).

On May 15, 2008, Allred waived a jury and his appearance for the penalty phase. The penalty phase was held on September 22-24, 2008, before the Honorable O.H. Eaton, Jr. The *Spencer*[2] hearing was held October 2, 2008. (DAR, V5, R530-42). On November 19, 2008, Allred was sentenced to death for the murders of Michael Ruschak and Tiffany Barwick. (DAR, V5, R543-48). This Court affirmed Allred's convictions and sentences on direct appeal. *Allred v. State*, 55 So. 3d 1267 (Fla. 2010).

Allred filed his initial post-conviction motion on September 28, 2012. (V1, R1-38). After the trial court granted him leave to amend insufficiently pled claim, Allred filed an amended post-conviction motion on March 25, 2013, and a second amended motion on July 1, 2013. (V4, R576-623, 710-63). An evidentiary hearing was held August 1, 2, and 5, 2013. (Vols.12-14, R1-461). The trial court denied Allred's second amended post-conviction motion on October 9, 2013. (V11, R1856-77). A notice of appeal was filed on November 4, 2013. (V11, R1878-79). Allred's *Initial Brief* was filed on or about May 23, 2014. This answer follows.

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

STATEMENT OF THE FACTS

This Court summarized the factual and procedural history for this case in its opinion following the direct appeal:

I. BACKGROUND

A. Procedural Matters: Waivers and Guilty Plea

Allred was indicted on October 23, 2007, on the following charges alleged to have occurred on September 24, 2007: (1) first-degree premeditated murder of Michael Ruschak by shooting with a firearm; (2) first-degree premeditated murder of Tiffany Barwick by shooting with a firearm; (3) armed burglary of a dwelling while inflicting great bodily harm or death; (4) aggravated battery with a firearm (victim Eric Roberts) while inflicting great bodily harm or death; and (5) criminal mischief of a motor vehicle (Barwick's car). Then, on April 30, 2008, Allred entered written and oral guilty pleas to all charges. The trial court conducted a plea colloquy of the defendant and accepted the guilty plea, concluding as follows:

> The Court finds that you are an alert and an intelligent individual capable of exercising your best judgment, it's your decision to enter a plea of guilty to these offenses, [the plea] has been made freely and voluntarily after [your] having received advice from your attorney with whom you're satisfied, and a factual basis exist[s] for the pleas by your admission under oath. I'll accept the pleas.

The next month, against the advice of counsel, Allred moved to waive his right to a jury in the penalty phase and to waive his right to be present during the proceedings. After determining that Allred understood the consequences of these waivers, the Court overruled the State's objection and granted Allred's requests.

At the conclusion of an August 2008 pretrial hearing, Allred unexpectedly blurted out that he wanted to fire the public defender's office. The trial judge informed Allred that he would soon hold a hearing on this new request. At the September 4, 2008, hearing,

Allred's counsel recited the facts that Allred had requested dismissal of counsel in August and subsequently had given counsel a written request for a hearing on the request to represent himself. Defense counsel explained that the parties still had witnesses to depose and evidence to prepare before the penalty phase could commence. The trial court explained to Allred that a complete record in the case was necessary for Supreme Court review. Thus, if the trial court found after a *Faretta*[FN1] hearing that Allred was capable of representing himself, the process would not speed up—it would actually slow down. Allred acknowledged his understanding of this explanation and withdrew his request to represent himself "[i]f [the proceedings] can be done soon." The parties agreed that they would work expeditiously.

> FN1. *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).

B. Penalty Phase: The State's Case

The penalty phase was held September 22–24, 2008.[FN2] Because Allred pleaded guilty, the State presented evidence regarding the murders to establish a basis for aggravating factors, after which the defense presented mitigation testimony.

> FN2. The trial judge wanted to assure Allred's availability to defense counsel. Accordingly, although Allred waived his presence in the courtroom during the penalty phase, he was nevertheless in the courthouse the first day and viewed the proceedings by live video from another room. On both of the subsequent two days, however, Allred was brought to the courthouse, where he waived his right to be at the courthouse and available to defense counsel and requested to be taken back to jail. The trial court granted the requests.

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

birthday party. When Barwick told Allred she "wanted her stuff back," Allred went to the room they shared, gathered her belongings, and began throwing them over the property's fence.[FN3] Someone called the police, who upon arrival ordered Allred to stop but did not arrest him.

> FN3. Allred lived in a large room that his parents had added downstairs from their home. The room had a separate entrance from the house.

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

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

Allred was fired from his job instructing on the use of computer

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

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

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

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

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

When no one opened the door, Allred went to the back of the house,

where the guests had assembled in the living room. He banged on the sliding glass door, and Barwick ran up the hall to a bathroom near the front of the house. The glass door suddenly shattered when Allred fired a shot into it. He walked into the house, holding his gun. He recognized all of the people standing before him, but he said nothing. The people present began to scream and look for an escape route. Together, Cammarata and Kovacich ran up the hallway to the front door, unlocked it, and fled as they heard gunshots. Kovacich then called 911.

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

At this point, only Barwick and Cochran remained alive in the house with Allred. Barwick was in the hall bathroom at the front of the house, where she fled when Allred first entered. Standing in the bathtub, Barwick called 911. At the beginning of the call, Barwick tried to provide the 911 dispatcher with the necessary information. However, as the gunshots sounded in the background, she began to scream and hyperventilate. Finally, the line went dead. In his confession, Allred recounted that after he gained his release from Roberts, he entered the bathroom. Then, without saying a word, he fired multiple shots into Barwick. She collapsed in the tub and died.
While hidden in the master bathroom, Cochran heard the others yelling and running, and she heard the gunshots. Finally, she heard Barwick's screaming, followed by more gunshots and then silence. Soon, Roberts returned to the house. He saw Ruschak lying face down in the front doorway and then found Cochran still hiding in the

bathroom at the back of the house. Roberts told her that Allred was gone. The police arrived shortly thereafter.

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

Allred was turned over to the Oviedo Police Department, and he was interviewed by two detectives after he was advised of his Miranda[FN4] rights. In his confession, Allred largely admitted the above factual description as to the actual murders. He admitted firing fourteen shots during the incident, emptying the clip, but he denied sending any threatening messages. He stated that he bought the .45 pistol only because he "could" after he turned twenty-one. Although he usually left his gun at home unless he was going to target practice, he gave no reason for taking it with him that night. He acknowledged using Barwick's picture for target practice earlier in the month, but he claimed that he did not think of killing her until the night of the murders. He denied, however, that he went to the house that night with the intent to shoot Barwick and Ruschak and stated that he went there solely to ram her car. He explained that he killed Ruschak because his "ex-best friend" was "an asshole" who sided with Barwick in their breakup, but he gave no reason for the murder of Barwick. Allred did not speak to either victim before he shot them.[FN5]

> FN4. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).
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> FN5. Although appellant asked several times during the interview about the condition of his victims, the detectives did not inform him that they were dead.

The medical examiner, Dr. Predrag Bulic, performed the autopsies on the victims. He testified that Ruschak had four gunshot wounds but

there was no way to determine the order in which the shots were fired. Two wounds were nonlethal. One wound was potentially lethal if not treated within an hour. That bullet passed through the vertebral column, nicked the vena cava, and exited through the upper abdomen. Finally, the cause of death was a shot that entered the middle chest and travelled through the sternum, heart, and left lung.

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

C. Penalty Phase: Mitigation

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

Regarding Allred's progress in school, Tora Allred testified that in grade school, progress reports indicated that Allred was inattentive and did not do his work. Although it was suggested that Allred might have a learning disability, subsequent school testing revealed that he had a high IQ and qualified for gifted classes. Allred was less social

than his brothers and quieter. He left school after eleventh grade and attended a community college to earn his high school diploma. Then, at another nearby college, he obtained a two-year degree in accounting.

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

Allred and Tiffany Barwick had a good relationship and were happy until the birthday breakup. In fact, on the day he turned twenty-one, Tiffany gave him a card that read, "Andrew, happy birthday. I am so happy I've spent the last year with you. I love you, hope you like your gift." Tora Allred, however, also testified that after the breakup, Tiffany gave Allred a T-shirt that had "Failed" written on it. A rebuttal witness, however, subsequently testified at the Spencer[FN6] hearing that Tiffany gave Allred the T-shirt at his twentieth birthday party, a year before the murders. The word "failed" was Allred's catchphrase, and the gift was "meant to be funny" because it was the word he used all the time. In fact, Allred laughed when he saw the shirt.

> FN6. *Spencer v. State*, 615 So. 2d 688 (Fla. 1993). At the *Spencer* hearing, defense counsel presented a written waiver of Allred's presence and right to speak. The only witness at the hearing was Charles Bateman.

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

weekend after the breakup, his father considered that appellant might commit suicide. Allred's parents tried to encourage appellant, telling him that he would "get over" Tiffany.

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

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

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

D. Sentencing

On November 19, 2008, Allred was present for his sentencing hearing. He declined, however, to address the court. The judge then

sentenced Allred to death for the murders of Ruschak and Barwick. Allred was given life sentences for armed burglary of a dwelling while inflicting great bodily harm or death and for aggravated battery with a firearm while inflicting great bodily harm on Eric Roberts. Finally, appellant was sentenced to five years for criminal mischief. All sentences were ordered to be served concurrently.

In sentencing Allred to death for the murders, the court found the following three aggravating factors and ascribed the weight indicated as to Allred's murder of Michael Ruschak: (1) cold, calculated, and premeditated (CCP)—great weight; (2) murder committed while engaged in a burglary—little weight; and (3) prior capital or violent felony conviction (Barwick's contemporaneous murder)—great weight. As to Barwick's murder, the court found the following three aggravators and ascribed the weight indicated: (1) the murder was especially heinous, atrocious, or cruel (HAC)—great weight; (2) CCP—great weight; and (3) prior capital or violent felony conviction (Ruschak's contemporaneous murder)—great weight.[FN7] The court also considered the following mitigating circumstances and ascribed the weight indicated: (1) defendant accepted responsibility by entering guilty pleas—little weight; (2) defendant cooperated with law enforcement-moderate weight; (3) defendant suffered from an emotional disturbance-moderate weight; (4) defendant's emotional and developmental age was less than his chronological age—not established; (5) other factors including that defendant was likely sexually abused—not established; and (6) defendant's developmental problems at a young age impacted his educational and social development—little weight.

> FN7. As to both murders, the trial court rejected the aggravating factor that Allred knowingly created a great risk to many persons because it was clear that "the defendant only intended to kill Tiffany Barwick and Michael Ruschak."

Allred v. State, 55 So. 2d 1267, 1271-1277 (Fla. 2010).

EVIDENTIARY HEARING

The following testimony and evidence was presented at an evidentiary hearing held on August 1, 2, and 5, 2013.

The Mental Health Experts

Dr. Glenn Caddy

Glenn Caddy, Ph.D., is a forensic psychologist who specializes in clinical psychology. He received his doctorate degree in 1974 from the University of South Wales, Australia. (V12, R7). Approximately half of his work involves forensic or medical legal work with the other half consisting of psychotherapy services. He only works with adolescents and adults and is licensed as a psychologist in Florida as well as Australia. He has been qualified to testify as an expert "about two thousand times." About one-third of those cases were criminal cases consisting of either murder or sex cases. (V122, R8, 9).

Caddy met with Allred on two occasions; each meeting lasted for about six and one half hours. (V12, R7, 12-13, 66). Allred's demeanor was "very courteous, but distant and remote" during the initial meeting. Caddy told Allred that he did not want to discuss the crime at all, but rather, "talk to him about his circumstances." Allred then provided Caddy with a substantial amount of information that was relevant and helpful. Allred became more cooperative the longer Caddy met with him. (V12, R14). Caddy also spoke with Allred's parents in

November 2012. (V12, R12, 15).

Caddy reviewed materials that included a report written by Dr. Deborah Day, the results from the Minnesota Multiphasic Inventory test (MMPI-2)[3] that an associate of Dr. Day's administered to Allred, and Day's notes regarding Allred's case. Caddy said the MMPI is the most researched, psychological instrument in the world. (V12, R16, 19-20, 94). In Caddy's opinion, the use of "multiple doctors" is not a common, preferred practice in a forensic setting. Giving input is one thing, but, "dividing up a case" is not a good idea. (V12, R19, 66-7). Caddy did not agree with Day's team effort method. (V12, R66). "Professionally...you don't get other people to do your work." (V12, R93). Caddy said Dr. Day would not have been aware of any issues that might have arisen during the testing unless the administrator notified her. (V12, R100). This practice, however, is not unethical. (V12, R101).

Caddy reviewed the raw data from the MMPI-2 administered to Allred by Day's associate. (V12, R21, 26). Some of Allred's scores were more elevated than others. Allred's depression index was a 72. A score of 72 does not indicate clinical depression. Caddy explained, "... the inference is drawn from that that they are—answering in such a way as there may be reason to believe some level of

[3] The test consists of 567 true/false questions. (V12, R20).

depression…but you wouldn't make an assumption that the person was necessarily depressed, they may be upset about the circumstances, they may be unhappy. But they may not be clinically depressed."

Caddy said Allred scored a 75 on the "PD-scale," which measures psychopathic deviates. (V12, R27). Caddy opined, "It's pretty much inconceivable that if he (Allred) answered his questions truthfully, there would not be some elevation on the PD-scale." Numerous questions pertain to whether or not a person has been arrested, and, because Allred has been, those answers provoked scores on that particular scale. (V12, R28). In Caddy's opinion, the MMPI instrument in itself "doesn't represent a bible for evaluating a patient. It's simply a tool to explore issues." Caddy said Allred scored an elevated scale of 72 on the "low-self esteem scale." (V12, R31, 44). Although he attributed this score to Allred's incarceration, Caddy said, "I can't know. I would have if I had tested for it myself." (V12, R45).

Caddy explained the criteria for antisocial personality disorder is as follows: a pervasive pattern of disregard for and violation of the rights of others occurring since age fifteen years as indicated by three or more of the following: 1) failure to conform to social norms with respect to lawful behaviors as indicated by repeatedly performing acts that are grounds for arrest; 2) deceitfulness, as indicated by repeated lying, use of aliases, or conning other for personal profit or pleasure;

3) impulsivity or failure to plan ahead; 4) irritability and aggressiveness, as indicated by repeated physical fights or assaults; 5) recklessness (sic) disregard for safety of self or others; 6) consistent irresponsibility, as indicated by repeated failure to sustain consistent work behavior or other (sic) financial obligations; 7) lack of remorse, as indicated by the indifferent to or rationalizing having hurt, mistreated, or stolen from others.[4] (V12, R32-3). Caddy said a diagnosis of antisocial personality disorder is for someone at least 18 years old and there must be evidence of a conduct disorder before age 15. (V12, R33). Caddy did not, however, utilize the DSM-IV-TR when he evaluated Allred. (V12, R66).

Caddy said the terms "sociopath," "psychopath," and "antisocial personality disorder" are essentially the same thing. (V12, R33). In Caddy's opinion, Allred does not meet the criteria for antisocial personality disorder. (V12, R34, 40). Caddy said, "there's absolutely no data to support any of the parameters of this diagnosis." Caddy conceded that Dr. Day found "traits" of antisocial personality disorder for Allred. (V12, R71).

Caddy said Allred's childhood was not "normal" from a clinical standpoint; however, Allred's "parents would have seen it as normal, and most others who knew him would have seen it as essentially normal." (V12, R35). Allred's early

[4] Caddy read aloud from the *Diagnostic and Statistical Manual of Mental Disorders*, Fourth Edition "DSM-IV." The DSM-V was released in May 2013.

school records indicated the possibility of Attention Deficit Disorder (ADD) or Attention Deficit Hyperactivity Disorder (ADHD). Allred was also administered several intellectual assessments which indicated above normal into the superior intellectual range. Allred's actual scholastic performance, however, was consistent with mediocre functioning. (V12, R36). Caddy opined that Allred might have been seen by some "to be a bit of a weird duck" because he did not have many social relationships. He had some friends, but not many, and he was not close to them, either. (V12, R36). Caddy said Allred was shy as a child and did not trust others. (V12, R41). Caddy said, "He's interesting, but in a slightly strange way, but not what you'd call strangely abnormal." (V12, R37).

Caddy opined that, despite Allred's high intelligence, he did not succeed in school because he was not interested. There were also "other things" going on in Allred's life. For example, Allred's brother had died of a drug overdose and his father had a serious drinking problem. Allred was close to his brother as well as his father. On one occasion, Allred witnessed his father assaulting his mother. (V12, R37, 38). As a result, Allred called police. Caddy said there was "some instability" within the family but no indications of meaningful childhood trauma. (V12, R38, 74). Caddy clarified that Allred's brother died from an accidental prescription drug overdose in 2010, well after the 2007 murders. (V12, R69). In addition, Allred did not tell Caddy about the altercation between his parents. Caddy learned of the

incident from other evidence. (V12, R69). On another occasion, while Allred was working for a phone company, he complained to a supervisor about sales tactics of pushing more expensive phone plans to potential customers. As a result, Allred was fired. (V12, R39, 40). Allred did not tell Caddy about this incident, either. (V12, R70). Nonetheless, in Caddy's opinion, Allred's actions "fly in the face of concepts like antisocial personality disorder." (V12, R39, 70). Caddy "couldn't rule out" that Allred's ego was the reason for the disagreement with the phone company; Allred believing that he was right, everyone else was wrong, and they should do things his way. Additionally, Allred going into pre-trial confinement and then prison shortly after he turned twenty-one restricted his advancement. (V12, R70).

Allred was close with his two brothers but only had a few long-time friends. Although he went on to community college after high school, Allred mostly stayed to himself and did not develop many friendships or social networks. (V12, R42). In Caddy's opinion, Allred initially "intended that the police kill him rather than he kill himself...I think his courage to allow that to happen collapsed." (V12, R43-4, 61). Caddy said people with personality disorder are "interested in manipulating, they're not interested in dying." (V12, R43-4).

Caddy said nothing in Allred's background would have been reasonably predictive of the violence that took place the night of the murders. In Caddy's

opinion, Allred "wasn't a violent person. He was somewhat reserved, not aggressive." The day before his twenty-first birthday, it was clear that Allred "had ambition to go on and create a world for himself, maintain a relationship...be essentially as a normal person as Mr. Allred was capable of being." (V12, R44). In Caddy's opinion, there is no "arrogance" in Allred which is a "pre-requisite" in sociopaths. (V12, R45).

Caddy concluded that, in his opinion, Allred would not have been diagnosed as suffering from any mental disorder prior to the murders. (V12, R45). Although there were some low-grade adjustments issues, they would not have met the requirements for an adjustment disorder with mixed emotional features. There was underachievement and some vague indicators of social limitations as well as Allred not performing to his intellectual capacity. Allred exhibited "some slight personality impairments, but nothing that you would say...this person is having some personality disorder...some significant psychological problems." (V12, R45-6). Caddy opined that Allred's "issues" with his former girlfriend, the female victim, "were a little bit confounding to him." Caddy said, "she had been giving him some mixed messages...that were emotionally destabilizing, but...he thought that everything was okay...she certainly had become the center of his universe."

Caddy said Allred exhibits signs of dissociation—where a person "disconnects from a clear understanding of the circumstances of their present day

functioning." (V12, R47, 48). Some examples of people suffering from dissociation include "soldiers in combat...people who suffer from posttraumatic stress disorder...people traumatized in childhood...." (V12, R47-8). Some who experience extreme stress develop a "fugue state" when a person is not aware of where he or she is going and how he or she got there. (V12, R48). Caddy said Allred told him that he was clear on the events leading up to the time that he rammed his car into the victim's car. He seemed to be "very unclear" about his specific motives and behaviors from that point until the time of his arrest. In Caddy's opinion, "there were indications that he was still emotionally relatively disconnected from the situation of what he had done...not a complete disconnect, but a reduced awareness of what had actually happened...how to interpret what happened...that he was being tape recorded by the detective after he was arrested." (V12, R49, 84). Caddy acknowledged, however, that Allred called 911 subsequent to the murders and said he had just shot two people. (V12, R84). In Caddy's opinion, Allred was not "diagnostically" in "a legitimate fugue state." (V12, R61, 62).

Caddy's diagnosis of a dissociative disorder for Allred was not based on the results from the MMPI that was administered to Allred by Dr. Day's associate. Caddy's opinion was based on police interview reports, his conversations with Allred, and Allred's self-report of the events that happened the night of the

murders. (V12, R98-9).

Caddy opined that alcohol and drugs did not cause Allred's dissociative state. He did not have a history of drug abuse or medication and only had two beers with a friend prior to the murders. Allred's "circumstances brought on a trauma in him." (V12, R49). And despite Allred's father's alcoholism, Allred did not become a substance abuser. To the contrary, Allred objected to the use of alcohol with the exception of getting drunk on his twenty-first birthday. (V12, R67-8). Although Allred's explanation of the shooting was very poor and fragmented, "he's pretty clear about driving into a vehicle and intending to destroy a vehicle...from that point on, he's pretty unclear about the sequence of events that happened until he's getting in the police car." (V12, R50, 72).

Caddy said there were "a number of things" that Allred did that were quite "purposeful in terms of the murder(s)" such as calling the police. Caddy explained, however, "people can be in a relatively limited state of function in a dissociation, and still be capable of doing those sort of things." (V12, R50).

Caddy said Allred had been hoping for reconciliation with Tiffany Barwick. When that did not happen, Allred's emotions became "just really unstable" and he started "the fantasy, the notion of killing her that she would die. They both were to die." (V12, R54). Allred's internal level of stress became "so unmanageable" and "progressively more irrational that the foundation was being laid for the next level

of emotional escalation, and the next level was ignoring the actual murder from mind, and the next level was the dissociation state." (V12, R54). In Caddy's opinion, Allred's knows what he did, but has very little memory of the murders—"he doesn't know who he shot first. He doesn't know how many times he shot—he knows that he shot until the gun ran out." (V12, R54-5).

It is possible that Allred experienced a fragmented memory from the physical stress of shooting somebody. (V12, R79). When a violent act such as a shooting occurs it causes certain physiological responses that even the shooter experiences: elevated heart-rate, increase in adrenaline, tunnel vision, fragmented memory. This especially occurs with individuals who are inexperienced with physical confrontation and violence. Caddy said Allred did not have a violent background prior to the murders and was not experienced with confrontational physical force. (V12, R80). Caddy could not determine whether or not the dissociative state set the stage for the shooting or the shooting caused the dissociative state. (V12, R79). Caddy said "[there is] no way of proving which one is true." (V12, R80).

In Caddy's opinion, subsequent to Allred's arrest, Allred asked questions that were not "manipulative." Allred asked police, "Are they alright?" In Caddy's opinion, if Allred was able to "rationally conceptualize" what had happened, he would not have asked about his victims' welfare. (V12, R55). Subsequent to the

murders, in Caddy's opinion, Allred was not interested in helping himself because "he was still so consumed by the irrationality of his ego disintegration that he persisted in wanting to make the point about how terrible these people were for doing this to him." (V12, R56). Allred was "completely obsessional." He did not understand that there was no justification for what he had done. (V12, R57). In Caddy's opinion, Allred was introverted and not an aggressive person. (V12, R73-4). Caddy said there was still a level of dissociation with Allred when he evaluated him in August 2012. There was some "self-loathing" but Allred was still trying "to hold his ego together." (V12, R57). In Caddy's opinion, Allred did not make a "formal decision" when he was going to kill his victims. It was, however, made sometime after Allred's twenty-first birthday. (V12, R58).

Caddy said Allred learned about the gathering being held at the victims' home the night of the murders and decided he also would go. (V12, R59, 74). He knew who was going to be there. (V12, R74). Allred claimed it was initially his intention to only destroy Barwick's car to "get back at her." (V12, R59-60). Caddy conceded, however, that prior to the murders, Allred used a photograph of Barwick for target practice, sent Barwick the photo, made threats to both Barwick and Ruschak, and then went to the victims' home with his gun. (V12, R72-3). Nonetheless, in Caddy's opinion, Allred suffered from diminished capacity at the time of the crimes "in terms of his overall processing." (V12, R63, 85). There was

"some level of planning…but…the real planning had to do with the destruction of murdering people, not planning of the murder." (V12, R63). Caddy said, "There was a significant amount of irrationality going on." (V12, R85). Allred was suffering from diminished capacity the night of the murders due to depression, betrayal, and Barwick's ongoing dishonesty; "just profound ego disintegration." (V12, R86, 91). Caddy said Allred's fantasy about killing Barwick turned into a reality. (V12, R86). In Caddy's opinion, Allred also met the requirements of diminished capacity at the time of sentencing. (V12, R64). Caddy said, "he was so dumbfounded in his sort of foggy world, and he failed to kill himself at the scene. He withdrew...from the trial...he just wanted them to put him away...kill him...put an end to it, put an end to the misery." (V12, R64).

Caddy conceded that, upon arriving at the victims' home the night of the murders, Allred acted in the following way: he rammed Barwick's car with his own; went to the front door and banged on it; went around to the back of the home and fired a gunshot into the sliding glass door; entered the home, looked at all the people that he could see, *did not* shoot at any of them; found Ruschak in the kitchen area but someone grabbed Allred from behind and put him in a bear hug; shot that person in the leg, but he *did not* turn around and kill that person; *kept moving* until he found Ruschak in the foyer and then shot him four times; kept moving until he found Barwick hiding in the bathroom and then shot her six times.

In Caddy's opinion, Allred's actions were not "rational" even though Allred stood within point-blank range and fired several rounds with a high-caliber weapon. (V12, R78-9).

Allred was experiencing anger, depression, confusion, indications of violence with revenge, as well as the emotional trauma of losing his girlfriend to one of his close friends. (V12, R81). In Caddy's opinion, Barwick "played with his head" on whether or not they had a future together. Further, although he did not "know for a fact," Caddy believed there was evidence that Barwick "was manipulating" Allred in order to get her computer back, which further created "emotional chaos" for Allred. (V12, R81-2). In Caddy's opinion, Allred "had not made the decision that he was going to kill them when he went to the scene." (V12, R82). Caddy opined that Allred made the decision to go into the victim's home around the time he rammed Barwick's car. (V12, R85). In Caddy's opinion, Allred had been having an emotional breakdown for several weeks. Allred's "intent" was to destroy Barwick's vehicle. Allred's actions of first ramming Barwick's vehicle and then entering the home to kill her were "illogical." (V12, R86).

Caddy said Allred had only recently demonstrated remorse for the murders in an intellectual way, rather than an emotional way, because he was locked into his delusion of justifying his own behavior. Allred, however, had not "fully connected" to what he had done. (V12, R82, 83). He wrote a few letters to the

Barwick family and made a "token acknowledgement" of sorrow to them until they sought a restraining order against him. (V12, R83-4). He then wrote letters to the Barwicks and expressed a desire that they be miserable for the rest of their lives. (V12, R84). In Caddy's opinion, these were examples of Allred's continued irrational behavior. Caddy opined that Allred was not effectively examined by a mental health expert during this time period. (V12, R92). Caddy said, however, that Allred acknowledged in letters to his mother that he had ruined his own life by his own actions. (V12, R87).

Caddy said Allred became delusional when Barwick broke up with him. "That was the seed element, and it rapidly evolved" along with the way he perceived her actions and her involvement with Ruschak. (V12, R88-9). In Caddy's opinion, however, Allred is competent. In addition, Allred has not been administered any psychotropic medications by the Department of Corrections. (V12, R89).

Dr. Gary Geffken

Gary Geffken, Ph.D., has been a psychologist for almost thirty years. He is currently employed by the University of Florida where he trains psychology and psychiatry interns through their postdoctoral training. Approximately 20% of his current practice includes evaluating and treating autistic individuals. (V12, R109-10, 111). He has testified as an expert in about two to four cases a year for the past

twenty-six years. He has testified in about 30-40 criminal cases over his entire career. About two-thirds of those cases were juvenile cases. Geffken works mostly with family law cases testifying as to the best interest of a child in a divorce case. (V12, R133, 134).

Geffken evaluated Allred in April 2013. In addition to spending about six hours with Allred, he reviewed school records, penalty phase testimony from Allred's teachers, and a report generated by Dr. Day subsequent to the administration of the MMPI. He did not talk to Allred's parents. (V12, R115, 136, 148). Geffken said Allred was generally cooperative but initially "guarded." Their rapport, however, improved over the course of the day. (V12, R116).

Geffken administered several tests to Allred that included the following: a social communication measure related to autism; a repetitive behavior measure related to autism; a language communication measure; and an adaptive behavior questionnaire "which is a measure of standards of social and personal responsibility to assess his development socially and emotionally compared to children adolescent adults." Geffken said the behavior questionnaire was the most informative test he relied upon. (V12, R115-16, 134-35).

Geffken explained that the "Autism Spectrum disorder" is a disability that affects 1% of the population. (V12, R116). Its most significant features include a delay in social development, a possible language delay, and some aberrant

behaviors in terms of a need for saneness (sic)[5] and repetitive behaviors. (V12, R117, 123). Approximately 75% with the condition are intellectually disabled, although Allred does not fall into this category. Within the current edition of the DSM-V, it is categorized within the neurodevelopmental disorders.[6] (V12, R117). Autism spectrum disorder is also called pervasive developmental disorder which includes the following disorders: autism, Asperger's Disorder, Rett's Disorder, and childhood developmental disorder. (V12, R119). Asperger's disorder is considered a high-functioning variant of autism when there is less intellectual impairment. (V12, R118, 135-36). Geffken opined that since Allred was in the "high functioning spectrum," he would not have been a problem for his parents. (V12, R132, 136). Geffken said records indicated that Allred exhibited unusual repetitive behaviors as a child that included licking his hands, and hitting himself in the head afterwards. In addition he also had ticks. (V12, R130). His ticks and unusual behaviors (licking his hands and slapping himself) were early indicators of

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[5] The evidentiary hearing contains a scrivener's error regarding the word "saneness," which should correctly reflect the word "sameness," at the following cites: V12, R117, line 4; V12, R119, line 7; V12, R122, line 9; V12, R144, line 16; V12, R144, line 22, V14, R419, line 24; and V14, R420, line 4. See also V11, R1865 n.8 (trial court's order denying postconviction motion). Throughout the remainder of the pleading the errata "saneness" will be replaced with the correct term "sameness."

[6] Geffken said his clinic was not yet using the DSM-V. (V12, R135).

emotional and social deficiencies, although there were no current indications that Allred had continued this behavior. (V12, R132, 140).

In Geffken's opinion, Allred was misdiagnosed as having ADHD when he was a child. (V12, R132). Geffken said common misconceptions others have regarding people with Autism Spectrum disorders include the following: intellectual delay, aloofness, and lack of attachment to others. In Geffken's opinion, however, some of these individuals have attachments, particularly to their mothers. There are many high functioning, highly intelligent people with autism spectrum disorder who hold down jobs and have relationships. (V12, R119-20, 121). Doctors with less exposure and experience with people who have autism spectrum disorder may "miss it" and diagnosis the person with ADHD or attention problems. (V12, R121). Higher functioning individuals develop coping strategies and are able to hide some of their abnormalities. (V12, R123, 131, 153). A deficiency in social development is the most pervasive deficit in people with autism spectrum disorder. (V12, R123). Geffken said that individuals with this disorder may also have "less empathy...[be] less able to take another's point of view...deficient in social emotional areas...may act impulsively...be...unaware of how they are going to react." (V12, R124, 125). In Geffken's opinion, awareness of autism has become more prevalent in the last twenty five years and was often missed as a diagnosis when Allred was a child. (V12, R125).

Geffken concluded that Allred met the criteria for autism spectrum disorder. Geffken initially did not believe that Allred met the criteria for the condition. But after spending about "four hours with him," Geffken believed the characteristics became apparent. (V12, R126). Geffken based his opinion on Allred's inability to "discuss jealousy...didn't describe having sympathy, really didn't know what empathy was, claimed that he never apologizes, doesn't give people compliments, doesn't get embarrassed, doesn't embarrass others...denied being scared, just his emotional development really appeared delayed…for a young adult." (V12, R126-27, 147). In addition, Allred was living with his family when he and Barwick broke up and "he was just at a loss, and had no ability to cope after having this really intense attachment and sexual relationship...[and] in a rather horrendous way just went over to this party where his former girlfriend and former best friend were in front to of other people and shot them without any kind of deceptive planning or anything." (V12, R127-28). In Geffken's opinion, a person who exhibits features of autism for pervasive developmental disorder would be more at a loss than an average individual in reacting to an emotional situation. (V12, R128).

Prior to the murders, Allred did not exhibit a need for sameness and did not currently exhibit restrictive or repetitive behavior patterns. (V12, R143, 144). Restrictive, repetitive behaviors, however, may still be present but less likely to be obvious. (V12, R156). In Geffken's opinion, people with high-functioning

spectrum can function without assistance and make judgment calls. (V12, R137).

Geffken said one of the criteria for autism spectrum includes having a deficiency in developing relationships and intimacy. Prior to the murders, however, Allred had friends and an intimate relationship with a girlfriend. (V12, R140-41). Geffken said Allred had a normal childhood and did not have any language deficiency. Allred is an intelligent individual who did not excel in high school due to his social problems. (V12, R138-39). Nonetheless, in Geffken's opinion, after spending a six-hour day with Allred, Geffken said Allred has a social and emotional disability. (V12, R142). He has an absence of normal, emotional social skills. (V12, R145). Geffken admitted that the murders Allred committed were not typical of a person with a diagnosis within the autism spectrum. Allred's plan was very deliberate. (V12, R145, 146).

Geffken said Allred demonstrated a lack of remorse for killing Barwick and Ruschak. (V12, R148). Although he indicated a lack of remorse, "it wasn't particularly about this horrendous thing that he did." Geffken said Allred told him that "he doesn't feel sorry." (V12, R149). The letters Allred wrote to the Barwick family subsequent to her murder "could be" consistent with antisocial personality disorder. (V12, R149-50). Although, Geffken opined, "people who have that, are big rule breakers they often show a lack of empathy...I don't think it's exactly the same as somebody with autism." (V12, R150).

Geffken was not aware of any medication that the DOC was administering to Allred nor was Allred seeing any mental health professionals while incarcerated. (V12, R150-51). Allred does not want to see anyone; he just wants to be "isolative." (V12, R151). Geffken said that although Allred's judgment is poor, he is not legally incompetent. Geffken, said, "This whole thing that he did was like depraved." (V12, R151).

Dr. Deborah Day

Deborah Day, Psy.D., is a psychologist, licensed mental health counselor, and certified family mediator in private practice. She earned her doctoral degree in clinical psychology in 1985 and opened her own practice in 1988. She currently specializes in clinical psychology. She has testified as an expert in over six hundred cases in six states as well as England, and at least eight of them were capital murder cases. (V13, R335-36, 337-38).

Day got involved in Allred's case after Caudill contacted her shortly after the murders. (V13, R339). She, along with Drs. Robert Janner and Amanda Janner,[7] went to see Allred at the jail. The Janners saw Allred first followed by Day. (V13, R339, 346). Day's approach with cases is a team effort because "it controls for bias, and it controls for decision making. We brainstorm, we meet and

[7] The Janners were psychologists employed by Day's practice. (V13, R339).

talk about the cases, so we don't miss anything." In addition, each of the psychologists in Day's practice have a specialty—Dr. Robert Janner specializes in neuropsychology and psychological testing. (V13, R339, 340). In Day's opinion, she avoids various types of biases by utilizing her team effort approach. For example, she avoids the practice of becoming potentially biased "towards the side that retains you...biased against your own client...anchoring bias, meaning the minute you get the referral, that becomes your own working hypothesis...confirmatory bias...selectively only looking for information about that hypothesis...We want a control for those." (V13, R339-40). Day conducts regular staff meeting to discuss cases as well as "checking each other." (V13, R340).

Dr. Day said Dr. Robert Janner conducted a two hour meeting with Allred and administered the following psychological tests: 1) Wechsler Adult Intelligence Scale, 3rd edition, "WAIS III" which measure Intelligence Quotient;[8] 2) Minnesota Multiphasic Personality Inventory, "MMPI"[9] which assesses personality and psychopathology; 3) Validity Indicator Profile, "VIP" which assesses responses as they relate to malingering or deception. (V13, R343-44). Day and Janner discussed

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[8] Allred scored in the "high end of average." (V13, R360). In Day's opinion, Allred scored lower than the prior school-administered IQ tests because "jail was not the optimal motivation or setting to get your best IQ score." (V13, R361).

[9] Dr. Day said the MMPI is currently the "most widely used well-researched psychological test instrument" available in assessing personalities. (V13, R349).

the test results after Dr. Janner had scored them. Day independently interpreted the test results as well. (V13, R344).

In order to assess Allred, Day requested copies of Allred's school records, medical records, police reports, and the crime scene. She received 12 compact discs containing information as well as copies letters Allred wrote while in the Seminole County jail. Records included copies of cell phone records and text messages that Allred made, crime scene photos and video, Allred's interviews with police, interviews with witnesses, police notes, autopsy information of both victims, messages Allred sent to the victim's mother, and information pertaining to several 9-1-1 calls. (V13, R344-45).

Day and her team visited Allred five times in the jail. (V13, R346). She spoke with Allred's parents and obtained an overall history from Allred. (V13, R362). Allred's parents were not open about their relationship. They acknowledged the domestic dispute that Allred witnessed as well as some other conflicts, "but they were fairly closed about that." (V13, R373). Although Day discussed several diagnoses with trial counsel that included terms like sociopath, psychopath, and antisocial personality disorder, she did not author a memorandum using those definitive terms. In Day's opinion, Allred had "psychopathy features." He had been diagnosed as a child with ADHD and diagnosed as "gifted." (V13, R347). Day said Allred "had a presentation of being relatively immature. He had

poor impulse control. He was angry. He had a history of manipulations. He had some antisocial beliefs...he was fairly cynical. He demonstrated a lack of remorse and a lack of guilt....” In Day’s opinion, those traits “fit with antisocial.” In Day’s opinion, Allred also exhibited signs of deception, irresponsibility, poor behavior controls, lack of empathy, and a disregard for others. (V13, R347-48).

Day said that the MMPI results indicated Allred had long-standing personality issues that included acting out, agitation, and anger. He also had issues with depression, immaturity, and compulsive behavior. (V13, R348). Allred’s scores were elevated on the Scale-4, the Psychopathic Deviate Scale; the “F Back” scale, which indicated he did not pay close attention to the back side of the test as compared to the front side; and Scale-2, which is the depression scale. His scale on the trauma scale was also elevated. (V13, R348-49, 370). In Day’s opinion, Allred was not deceptive in his answers. (V13, R370).

Day said that the MMPI results are only one factor she utilizes when conducting a forensic evaluation. She also conducts collateral interviews, reviews documents provided to her, and administers or reviews the results of psychological test instruments. (V13, R349-50). In addition, she takes into account the client’s environment as “being in jail in not an optimal test taking situation.” (V13, R350). The results from the MMPI indicated Allred was “open and frank, and he exaggerated symptoms to a degree” but Allred did not “come close to invalidating

the test." (V13, R350-51).[10] Day interpreted the MMPI results in conjunction with the VIP test instrument and determined Allred's efforts "fell within acceptable ranges. So, if anything, he approached it giving me pretty accurate data about how he was functioning or perceiving himself in that moment." (V13, R351).

Dr. Day recalled that her colleague Dr. Janner visited Allred in jail in April 2008 at the request of Caudill as Allred "had been decompensating in jail, and Mr. Caudill asked us to just make sure he was still competent and able to proceed." (V13, R351). Janner reported that Allred was suffering from "severe depression." In Day's opinion, "...he was sad, and he saw his future as hopeless. So it wasn't a biological depressive, or suicidal ideation that he was having, it was coming to the realization that he was in jail for the rest of his life." (V13, R370, 371). Subsequent to Janner's meeting with Allred, Day informed Caudill that she and her colleagues would no longer be visiting Allred in jail but remained active on his case until the time of trial. (V13, R353).

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[10] Based upon Dr. Day's entire testimony, Appellee submits the transcript contains a scrivenor's error at V13, R350, line 25, when it states Dr. Day testified as follows: "In Mr. Allred's situation, he presented as relatively as open and frank, and he exaggerated symptoms to a degree, but *did invalidate*, or even come close to invalidating the test." (V13, R350, lines 22-25, R351, line 1). Appellee submits the transcript is missing the word "not" and should read as follows: "In Mr. Allred's situation, he presented as relatively as open and frank, and he exaggerated symptoms to a degree, but did ***not*** invalidate, or even come close to invalidating the test." (V13, R350, lines 22-25, R351, line 1).

In Day's opinion, "there were very few" statutory mitigators that she could testify to in Allred's case. She relayed her concerns to Caudill who made the decision on whether or not she would be called as a witness. In Day's opinion, Allred's level of premeditation was a concern as well as the letters he wrote to the female victim's family. (V13, R353, 354, 355-56). In her opinion, Allred's letters indicated he lacked "the ability to understand what they were going through, and the reciprocity of the relationship, including empathy." (V13, R356). Additionally, Allred wrote the letters to Barwick's family after he learned they had gotten a restraining order against him. (V13, R359).

In Day's opinion, Allred does not meet the criteria for a diagnosis of antisocial personality disorder. There were no clear indications of adolescent conduct disorder. (V13, R356, 374). Although he met some of the criteria, i.e., inability to have empathy, interpersonal difficulties, and conduct that consisted of rule violations, Day did not diagnosis him with antisocial personality disorder because Allred had not shown a pervasive patterns of conduct disorder from age fifteen. (V13, R356, 357, 358). He did show some patterns of reckless disregard for the safety of others, lack of remorse, and mistreated or stolen from others. These patterns were "relatively short-lived." (V13, R359). In addition, Allred's behavior patterns of deceitfulness and impulsivity or failure to plan ahead were more recent although his irritability seemed to be relatively long-standing. (V13,

R358). Dr. Day also stated that antisocial personality disorder traits in an introverted person like Allred could remain dormant until triggered by a traumatic event. (V13, R361).

Day was aware that Allred was having some friend and work-related difficulties prior to the murders. He was arguing with his parents over some of his choices; "there was ongoing family conflict" and he had lost his job after complaining about employment practices of "ripping off elderly customers." (V13, R362, 363). She was aware that Allred's father abused alcohol and that he had physically abused Allred's mother when Allred was about twelve-years-old, to the point that Allred called police. In Day's opinion, Allred's behavior and these events were consistent with family dysfunction not antisocial personality disorder. (V13, R363).

Dr. Day did not specifically recall a meeting with Caudill in the parking lot of the jail although it was likely that some type of meeting occurred. (V13, R364). Day recalled Caudill provided her with copies of the letters Allred wrote to Barwick's family and as well as copies of phone calls from Allred to the police and to Barwick's mother. (V13, R365). Day said that, in forming her opinions about a defendant, "I want to see the good stuff and the bad stuff. I don't limit what I review in order to render an opinion." (V13, R366).

Day said that lack of empathy is a characteristic of antisocial personality

disorder as well as autism spectrum disorder. She evaluates autistic individuals on a regular basis as well as individuals for ADHD. (V13, R366-67). Day was aware that Allred had been referred to a psychiatrist at age five, was diagnosed with ADHD as well as a tick disorder, and that there were allegations that he was sexually abused by his grandfather. (V13, R367). Records, however, do not indicate that Allred's tick disorder continued past the early elementary age. (V13, R372). Day was concerned that Allred showed a lack of remorse, and an inability to feel empathy, which "they're not, per se, aggravating, but they go under cold calculating because of the manner...the predatory natures of his behavior." (V13, R369).

Dr. Jeffrey Danziger

Jeffrey Danziger, M.D., is a psychiatrist practicing in Maitland, Florida. He earned his medical degree in 1982 and completed his internship in psychiatry in 1987 at Washington University in Missouri. (V13, R376, 377). Although the majority of his practice is in forensic psychiatry, he also maintains an outpatient general psychiatry practice treating patients with depression, bipolar disorder, schizophrenia, anxiety disorders, ADHD, autism spectrum disorders,[11] complicated substance abuse, and other medical issues. Dr. Danziger participates in ongoing

[11] Danziger said a small percentage of his practice relates to treating patients with autism spectrum disorder. (V14, R416).

clinical research trials that involve new medications not yet on the market and also serves as a principal investigator in a number of ongoing studies. As a board-certified forensic psychiatrist, he offers expert opinions in both criminal and civil cases throughout Florida's federal and state courts. (V13, R378-79; V14, R415).

Danziger has been involved in numerous criminal cases for both the State and the defense regarding issues pertaining to competency to stand trial, sanity at the time of offense, and mitigation. (V13, R379). He is "split about fifty-fifty" as far as his involvement between the state and defense with capital cases. During the last 25 years, he has testified for either the state or the defense between 18-25 times in capital cases. (V13, R380).

Danziger was involved with Allred's case in the beginning when Attorney Caudill hired him to evaluate Allred for a possible insanity defense. Danziger met with Allred shortly after the murders in October 2007. (V14, R409). After interviewing Allred at the Seminole County jail, in Danziger's opinion, both then and now, Allred did not meet the criteria for an insanity defense. Danziger did not write a report and was not asked to perform any other work in this case at that time. (V13, R381; V14, R409, 410).

Danziger was contacted by the State in February 2013 and asked to evaluate Allred's case. He reviewed the following: the indictment, penalty phase transcripts, sentencing order; the briefs on appeal and subsequent findings by the Florida

Supreme Court; Allred's postconviction and amended motions; trial counsel's defense files; the proffers and opinions offered by Drs. Geffken and Caddy; and Drs. Day, Geffken and Caddy's 2013 depositions. He also evaluated Allred on July 15, 2013. (V13, R381-83; V14, R411). After reviewing all of the material provided to him and evaluating Allred, in Danziger's opinion, Allred has "an adjustment disorder with depressed mood." (V13, R383).

Danziger explained that an adjustment disorder is a development of emotional and behavioral symptoms in response to some identifiable stressor. While the symptoms do cause some distress or impairment, in Danziger's opinion, Allred's "are not severe enough to meet the criteria for any other mood anxiety or psychotic disorder." (V13, R383). Danziger said that Allred's feeling of hopelessness is "appropriate to someone in a death row setting." (V13, R384).

Danziger was aware that Allred was diagnosed with ADHD as a child, but, because of his tick disorder, was not treated with stimulants. He was given a "Catapres Patch," a blood pressure medication sometimes used to treat ADHD. Danziger explained that stimulants can make ticks worse. (V13, R384). In July 2013, Allred did not exhibit increased motor behavior and was not distractible. Danziger testified, "He was not fidgety. He was not impulsive. He was not blurting out and interrupting me. I didn't see any obvious signs as he sat before me of ADHD...." Danziger concluded that Allred suffers from a situational low-level

depression, "Adjustment Disorder," as well as a historical diagnosis of ADHD. "Other than that, I did not find evidence for any other diagnosis." (V13, R385).

Danziger agreed with Caddy's diagnosis that "there's no definite mental health diagnosis" and that Allred does not meet the criteria for a diagnosis of antisocial personality disorder. (V13, R386; V14, R412). Antisocial personality disorder is a "narrowly drawn carefully constructed diagnosis." (V13, R389). Allred was not diagnosed with a conduct disorder prior to age fifteen and did not have a continued pattern of violating societal norms into adulthood. "He committed antisocial acts." Allred "falls short" for a diagnosis of antisocial personality disorder. (V13, R386-87, 390).

Danziger disagreed with Caddy that Allred would have exhibited sociopathic traits such as being glib, slick, manipulative, or outgoing for a diagnosis of antisocial personality disorder. Danziger explained that those criteria are not listed as any of the required seven criteria in the DSM for antisocial personality disorder. (V13, R390; V14, R412). Danziger also disagreed with Caddy that Allred might have had a "dissociate emotional state" when he committed the murders. "There was nothing in...Allred to find dissociative amnesia." Danziger said, "[T]his was someone who made threats to kill the two victims, Ruschak and Barwick. He sent the photograph of her with bullet holes through it. On the day of the incident, he apparently made comments to his friend...that he was going to kill them. He went

over there with a gun, carried out the acts...called the police...confessed to them....” (V13, R392). Allred was described as “rational and calm.” Danziger concluded, “There is nothing here to suggest any sort of dissociative or fugue state.” (V13, R393).

Danziger said Allred told him he went to the victim’s home “just to ram the car.” (V13, R395; V14, R421). In Danziger’s opinion, the facts indicated otherwise and that Allred was not in a frenzy or out of control. Although Allred might not have an “absolutely perfect memory” of the events, in Danziger’s opinion, Caddy’s “suggestion” that Allred might have been suffering from a dissociative state based upon Allred’s intentions the day of the murders, is “a very thin reading” to base a diagnosis of dissociative disorder. (V13, R395). Although Danziger said that dissociation can last from a brief to a very long period of time, “Dissociative is pretty rare...I’ve seen two cases in thirty years.” (V14, R420-21). In Danziger’s opinion, dissociation did not occur in Allred’s case. (V14, R421). Danziger disagreed with Caddy’s conclusion that Allred suffered from delusions. Although there are several types of delusions including paranoid delusions and somatic delusions, in Danziger’s opinion, Allred did not exhibit signs of any type of delusion. (V13, R397).

Danziger disagreed with Geffken’s diagnosis that Allred falls within the autism spectrum disorder. Danziger explained that penalty phase witnesses

described Allred as a loner and had trouble making friends. Although Allred exhibited some deficits in social skills, "just because someone is introverted, or a bit socially backward...is not enough to make that diagnosis." (V13, R398-99). Even if Allred was "high functioning," he did not exhibit any signs of restrictive or repetitive patterns of behavior. (V14, R403; V14, R418). Notably, Danziger pointed out that Geffken's deposition indicated Allred showed "no signs of restrictive or repetitive patterns of behavior." (V14, R403; V14, R418-19). Allred had a live-in girlfriend, a job where he trained others in software use, had friends, "things that involve some venture of socialization." (V14, R404).

Danziger testified that, in his opinion, Allred did not meet the criteria for extreme emotional distress. Three weeks after his breakup with Barwick, Allred "made threats to kill...the decision to go over there with a gun...shot one person four times, the other six...comments to police...did not show someone who was in a frenzy, agitate, psychotic, disorganized, confused." Nonetheless, Danziger acknowledged that the court found emotional distress. (V14, R406).

In Danziger's opinion, Allred's ability to understand his wrongful conduct was not substantially impaired. Allred understood he was going over to the victim's home to break into the house, and understood that killing two people was wrong. There was nothing to suggest there was anything that affected Allred's ability to conform his conduct to the requirements of the law. (V14, R406).

Danziger agreed with Dr. Day's opinion that Allred does not meet the criteria for antisocial personality disorder. "There were features but not enough to make a full scale diagnosis." (V13, R391; V14, R413). In addition, in Danziger's opinion, Day's practice of utilizing a group effort approach with respect to evaluating a client is valuable. "If you look at the dynamics in groups, it can be helpful that ideas get bounced around, and rejected...as long as one person is the decider...Dr. Day was the decider in this case and made the ultimate decision on what can and can't be said." (V14, R408).

In Danziger's opinion, Allred is competent and not suffering from any active mental illness. (V14, R423). Danziger concluded that there was nothing he could have suggested for mitigation that was not raised in the penalty phase. "I can't think of anything I would have added that would have been helpful." (V14, R407-08).

Trial Counsel

Timothy Caudill

Timothy Caudill was Allred's lead trial counsel. Rebecca Sinclair was second chair.[12] (V12, R162, 164, 169; V13, R225). Caudill made the ultimate

[12] Caudill said James Figgatt, Assistant Public Defender, met with Allred early in the case on a few occasions but had a very limited role. (V12, R168, 172; V13, R226).

strategic decisions in this case. (V12, R169). Since graduating from law school in 1990, Caudill worked for 14 months in the Juvenile Division as an Assistant State Attorney for the Eighteenth Judicial Circuit, and for the past 20 years, worked his way from misdemeanor cases up to felonies and then to capital cases for the Public Defender's Office. (V12, R158-59, 160; V13, R224). Caudill started working on capital cases in October 1997 and sat first chair on his first capital case in December 1997. (V12, R160; V13, R224-25). Caudill has defended over "a hundred" various capital cases. About twenty-five of those cases proceeded to trial. Eight of those defendants were sentenced to death. (V12, R160-61; V13, R225). Caudill attends continuing legal education (CLE) courses on a regular basis. (V12, R198).

Caudill initially met with Allred two days after the murders. (V13, R229). Allred talked about entering a guilty plea early after his arrest. (V12, R175). Despite Allred's wish to enter a guilty plea, Caudill continued to develop a strategy for trial. (V12, R176). They discussed the guilty plea that Allred wanted to make and the fact that Allred wanted to waive a jury. (V12, R163; V13, R219). Caudill and Allred also discussed the fact that Allred wanted to waive presentation of mitigation. (V12, R163; V13, R233). Caudill told Allred, "Basically you can keep me from presenting mitigation on your behalf, you can't prevent mitigation from being presented because the Court is going to require it. The Court is going to

appoint another lawyer. It won't be your lawyer. It will be the Court's lawyer...I explained to him...the proceedings might actually take longer if he went in that direction...." (V12, R164). Caudill recalled meeting with Allred more than ten times, and that Allred spoke with Sinclair, Drs. Day and Danziger, and also with the defense investigator. (V12, R172). Caudill said it was very hard to establish a rapport with Allred because was very closed off and uncooperative. (V13, R232-33). Caudill did not want Allred to plead guilty. Against Caudill's advice, however, Allred pled guilty as charged. (V12, R173). In his experience, even if Allred had gone to trial and was found guilty of first-degree murder, there was a chance he would not have been sentenced to death. Caudill would have strategically started the mitigation process during the guilt phase. (V13, R245). Against his advice, however, Allred pled guilty. (V13, R247). In addition, Caudill did not want Allred to waive his presence at court appearances and the penalty phase. (V13, R246, 247). Caudill delayed Allred's desire to enter a guilty plea as long as he could. He told Allred that he would schedule court time after he got certain tasks accomplished. They went "back and forth" in delaying "what was ultimately going to happen." (V13, R246). Caudill did not recall a plea deal being offered by the State and Allred never asked Caudill to pursue an offer. (V13, R247).

Caudill said that, by pleading guilty, Allred deprived himself of "numerous

constitutional arguments about the constitutionality of our death penalty statute...[and] there's a school of thought among lawyers who defend these cases...if you plead guilty and you just have a penalty phase, the State isn't going to present their evidence quite so thoroughly...." (V12, R173-74). In this case, however, Caudill said that school of thought was not true. In addition, in his experience, judges and juries are not inclined to find a guilty plea as "particularly mitigating." Further, a defendant who pleads guilty has deprived oneself of an opportunity that something would happen at trial; i.e., a witness does not testify, testifies differently, or the defendant receives a lesser sentence. (V12, R174).

Caudill's strategy would have been to argue for a lesser included offense which he discussed with Allred. (V12, R178). Allred, however, "was never open to the possibility of going to trial as in a guilt phase." (V12, R179). Caudill and Sinclair had "lengthy discussions" with Allred regarding his waivers at court appearances. Caudill was opposed to Allred's wishes and told him so. (V12, R179). Caudill also spoke to Allred's mother, and to a lesser extent, his father, about Allred's wishes to plead. Caudill, however, advises clients to limit their discussions with family members because those conversations are recorded at the jail. (V12, R181). Allred's mother "wasn't comfortable" in talking to Allred about his decision to plead. (V12, R182). In addition, Caudill did not utilize clergy as a third party to sway Allred not to plead because Allred did not give indications of

having any religious beliefs. (V12, R184).

Caudill convinced Allred to allow the defense team to present mitigation on Allred's behalf because it was a better strategy than having a "lawyer hired by the court" to do so. In addition, if Allred formally waived presentation of mitigation then the proceedings would take longer. Nonetheless, Allred "limited" their efforts. (V12, R185). Allred was not fully cooperative with defense experts. He would not fully discuss his background and psychological state. There were times he refused to meet with counsel as well as Dr. Day. (V12, R186, 188). In addition, Allred's mother told counsel about Allred being sexually abused as a child by his paternal grandfather. Allred "became angry when we brought it up" which limited the investigation into the allegation. At one point, Allred "threatened to shut us down completely if we were going to go there." Allred was adamant that he had not been abused. (V12, R186; V13, R233, 234). Although he did not consider Allred a "volunteer" for a death sentence, "he was close." (V12, R170).

Caudill said Dr. Danziger had a limited role early on. Danziger ultimately determined that Allred was competent. Caudill determined that Danziger would not be helpful to Allred's case. (V12, R194-95). Dr. Day was subsequently hired. (V12, R164; V13, R227). Both state and defense experts were initially scheduled for depositions but they were eventually canceled. (V12, R164, 166). Caudill's investigator (Jeff Gelner) accompanied him when he first visited Allred. They

obtained Allred's school records. They also spoke with Allred's parents. Investigator Gelner was very involved in the case.

When Caudill and Sinclair visited Allred's grandfather in his assisted living facility, the grandfather said things that were consistent with having "abuse him." (V12, R187; V13, R227).[13] Caudill could not establish that Allred had been abused even after gaining access to the State Attorney's files on Allred's cousin, Billy. (V13, R234, 235). Caudill's original strategy was to present strong mental health mitigation that was tied to the murders as well as tied to Allred's background and childhood issues. (V12, R189, 190). Caudill presented evidence at the penalty phase that consisted of the following: Allred became difficult at age five and was referred to a psychiatrist; Allred was diagnosed with ADHD; the psychiatrist opined that Allred's behavior suggested sexual abuse; Allred's father had a drinking problem and had two DUI arrests; Allred's father had physically abused his mother on at least one occasion and, as a result, Allred called police. In sum, Caudill's strategy was to present evidence of a troubled childhood which was ultimately rejected by the trial court. (V12, R191-93).

There was never any indication from Day's office that further testing should

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[13] Allred's mother speculated that Allred had been abused based on allegations made by Allred's cousin Billy, who allege their paternal grandfather had sexually abused him. (V12, R187, 191, 193; V13, R234).

be conducted, i.e., seeking a neuropsychological examination or a potential MRI. (V12, R195-96). Caudill did not seek an expert who treated people with ticks or ADHD based on conversations Caudill had with Allred, Dr. Day, and Allred's mother. (V12, R196). In Caudill's experience, "I didn't think that that was a valid diagnosis to pursue." The defense already had Dr. Day as a resource. (V12, R197).

Caudill said it is not his practice to annotate his files minutely. (V12, R198). He said, "When I'm handling a capital case, I am able to keep in my memory and in the discussions with...the people working on the case, what our client tells us...what the conversations that we have with our experts and our investigators...so I don't feel the need...while I'm working on a case." In addition, Caudill said it creates a "trust" issue with his clients. (V12, R198; V13, R243). In his experience, taking copious notes when meeting with a client interferes with his ability to "listen and learn from them." Caudill took notes during several interviews and the penalty phase, and he also had the investigator's notes. (V13, R243-44).

Caudill recalled a September 10, 2008, memo, written by co-counsel Sinclair indicated Dr. Day had concluded Allred "is a sociopath or psychopath." (V13, R206-07, 208). Caudill said, however, that those terms were not interchangeable with a diagnosis of "antisocial personality disorder." He said, "There are features that are unique to each." (V13, R208). As a result, Caudill said that if Dr. Day was called as a witness, she would have offered that diagnosis, "the only diagnosis that

she could offer." (V13, R209, 212). Caudill said Day could not offer anything helpful regarding mitigation. "You don't want to use them if it's not going to be helpful." (V13, R210, 212). Caudill never questioned Day's diagnosis and never sought a second opinion. (V13, R214). Caudill believed there was evidence of conduct disorder prior to age fifteen in Allred's background "things...from his parents...acting out." However, there was no formal diagnosis of conduct disorder in Allred's records or by Dr. Day. (V13, R260).

In Caudill's experience, the mitigation he had gathered in Allred's case was not enough to get a life recommendation. (V13, R215). If Allred had chosen to have a jury, then Caudill believed he could have gotten "some votes" for a life sentence. (V13, R218). Nonetheless, Caudill preferred to have better evidence of sexual abuse and "mental health mitigation would have been best." (V13, R215). Caudill's strategy regarding the CCP aggravator was that he "really could do nothing about it." (V13, R215-16). Prior to the murders, Allred made threats to the victims through e-mails and text messages; used a picture of Barwick as "target practice" and then sent it to her; the night of the murders he went to the victim's home and first rammed Barwick's car before he entered the home; and, he had his gun with him. (V13, R251-52). Allred's statements to police and the letters he sent from jail to the Barwick family lent further support to the CCP aggravator. (V13, R252). Caudill said that based on the evidence, the trial judge rejected Allred's

statements that he did not intentionally go to the home to murder Barwick and Ruschak. (V13, R217).

Caudill did not seek Danziger's opinion on mitigation because Allred would have "shut me down." It was Caudill's strategy to present the mitigation that he had gathered. (V13, R220-21, 235). Caudill discussed mitigation "at length" with Allred. (V13, R235). Allred told Dr. Day that he had "ill will" toward his victims—Caudill did not want another expert to have that information as well. (V13, R221-22). Caudill said that although "You can find somebody...I don't believe in finding more. I don't believe that you can adequately make a best presentation for your client, which is what you're supposed to do with somebody who's simply trying to help you." (V13, R223, 228). Caudill relies on the information the experts provide to him, whether helpful or not, in deciding whether or not to put them on the stand. (V13, R229). Caudill said that if Dr. Day had been called as a witness to "absolutely offer a diagnosis," in her opinion, Allred showed "traits" of antisocial personality disorder—which would have been harmful to Allred. (V13, R235, 237-38). In his experience, a diagnosis of antisocial personality disorder is not mitigating. (V13, R238). Caudill had no reason not to trust Day's conclusions. (V13, R237). Caudill said Allred told him he shot the victims because "they were assholes to me, so I was an asshole to them. They deserved it." Allred acted "justified" in his demeanor and was not at all

sympathetic. (V13, R248).

Caudill said he has selected "a couple of hundred" juries during his career and has not hired a jury consultant. Although there was some publicity about this case, that is not always the case. (V13, R249). Caudill said that, had Allred opted for a jury trial, the defense team would have investigated the depth of how the case was publicized, questioned potential jurors about their knowledge of the case as it related to publicity, and would have moved for individual *voir dire* when appropriate. (V13, R255). Caudill did not file a motion for a change of venue because there was not going to be a trial. (V13, R250). His attempts to present as much mitigation as possible were hindered by the family's unwillingness to discuss family problems in court. (V13, R250). Allred's grandfather, Richard Allred, told the defense team that the Allred family had "difficulties...that the parents had not been the best parents in the world...[had] not really provided the best household for Andrew to grow up in...[Allred's] father had...alcohol problems." (V13, R258). However, Richard Allred did not state those issues when he testified. (V13, R259). Richard "made his son and daughter-in-law look good." (V13, R259). Nonetheless, Allred "repeatedly" told Dr. Day "every time she would talk to him about the events" that he killed the victims because "they were assholes to me, so I was an asshole to them. They deserved it." (V13, R252).

Rebecca Sinclair

Rebecca Sinclair was co-counsel and sat second chair. (V13, R310, 316). After receiving her law degree in 2002 and master's degree in taxation, Sinclair worked at the Hillsborough and Pinellas Counties Public Defender's Offices. (V13, R310-12). She spent a month training in the Hillsborough County Baker Act facility. (V13, R321). She attended the "Life Over Death" and "Death is Different" seminars as well as the Public Defenders advanced course. (V13, R314). She subsequently worked for the Seminole County Public Defender's Office from 2007 to 2011. Eventually she worked with Caudill and Tad Figgatt to observe and learn from them, and assisted with research projects. Additionally, she self-studied with documents contained in Caudill's and Figgatt's files. (V13, R314). At the time of the evidentiary hearing, Sinclair was establishing a sole practitioner firm. (V13, R310-12).

Sinclair got involved in Allred's case in the fall of 2007. (V13, R313). She familiarized herself with Allred's case and was directed as to the discovery she would conduct. She attended meetings that Caudill had with Allred. (V13, R314). Sinclair said Caudill and Figgatt tried to build a rapport with Allred but "it was difficult to deal with him...we got him talking as best we could." Allred was very uncooperative and uncommunicative. (V13, R315). Sinclair, Caudill, and Figgatt discussed their concerns about whether or not to call Dr. Day as a witness. Sinclair

wrote a memorandum to Caudill that mentioned Dr. Day had diagnosed Allred as a sociopath or psychopath but they were her words not Day's. She was not present for all of the conversations that occurred between Caudill and Dr. Day. (V13, R316). Sinclair used the terms "sociopath" and "psychopath" in the context of some case law that she had researched. (V13, R316). Day did not make that diagnosis. (V13, R328). The defense team, however, was concerned that if Day was called as a witness, she would testify using terms like "psychopathic deviate... [and] antisocial personality disorder traits...." (V13, R317, 328). Sinclair recalled that she and Caudill talked to Dr. Day (in the parking lot of the jail) about whether or not Day had anything positive to offer in Allred's case. (V13, R317). Sinclair said Day "very clearly" stated that she would "be more damning than helpful." (V13, R318). A tactical decision was made not to call Dr. Day as a witness. (V13, R329).

Sinclair spoke to Allred's parents, aunt, a cousin, and his grandfather. She and Inv. Gelner tried to track down all of Allred's school records. They interviewed teachers and attempted to find the psychologist that treated Allred as a child when there were concerns that he had been sexually abused. The doctor, however, was deceased and there was no records custodian left in his stead. (V13, R318-19). Allred's teachers described him as "a loner." He did not have many friends..."was childlike, immature, angry manipulative, and lacked

communication." (V13, R321-22).

Sinclair and Gelner brought Allred's grandfather to court for the penalty phase for him to testify on Allred's behalf. Sinclair spoke to him about his expected testimony during the drive to court. (V13, R319-20). She recalled discussing Allred's father's drinking problem and that Allred had not been raised in the best environment. (V13, R327). Although Allred's grandfather was cooperative prior to taking the stand, "It went complete 180 from what I expected him to testify to." (V13, R320-21). Sinclair said Grandfather Allred "just wasn't going to be as cooperative, and clearly sitting here in front of the judge wasn't going to testify as to the bad things that happened to his family, and he didn't want to put his family's...dirty laundry out." (V13, R321). The defense made the tactical decision not to declare Allred's grandfather as a hostile witness because "we weren't going to get anything better out of the grandfather when he's sitting on the stand." (V13, R327). After Sinclair discussed what to do with lead counsel Caudill, the decision was made "to shut it down and walk away from the witness." (V13, R321).

Allred would not admit that he had been sexually abused. "He adamantly denied it." He would not expand upon his background and childhood. "It was often simple one word answers, but we spent hours with him trying to get him to open up and let us in...he was just difficult." Further, Allred's acted "justified" in

committing the two murders. (V13, R322). The letters Allred wrote to from jail subsequent to his arrest (State Exh. 2) were concerning to the defense team because they did not assist in creating mitigation. To the contrary, they indicated "a tremendous lack of remorse." (V13, R323).

Sinclair said the defense did not rely "blindly" on an expert. "There is knowledge - - there's discussion. They have their own language. We learn to speak with them. But it is not blind reliance. But when an expert tells me that they can't help me, I'm relying on that statement. And I feel that that's my duty." (V13, R331-32). Although Sinclair believed Allred exhibited signs of conduct disorder as a child, i.e., "acting out at home and their concern about his behavior change, and that he was disruptive and sullen," "that's not my decision to make." Allred did not act out in school. Sinclair said it is an expert's decision on whether or not Allred met the criteria for conduct disorder under the definition within the DSM-IV at the time. (V13, R332, 333).

Sinclair said Allred made the decision to plead guilty despite the entire defense team's recommendation that it was in Allred's best interest to go to trial and have a jury penalty phase. (V13, R324, 325, 329). "Absolutely no one" wanted Allred to plead guilty. "Anything" can happen at a trial, including the possibility of a conviction for a lesser included offense. (V13, R324). It was a tactical decision not to move for a change of venue because the trial judge (Judge Eaton) was "the

scholar in this area of law [and] we didn't see it as a positive." The Defense team explained this to Allred but, "he didn't want a trial" and he did not want a penalty phase with a jury. (V13, R325-26).

Trial Consultant

Harvey Moore, Ph.D.

Harvey Moore, Ph.D., earned his master's degree in social psychology and then his doctorate degree in sociology in 1972. He started his own company in 1989, Trial Practices, Inc., a trial consulting service. Moore previously testified as an expert in Hillsborough County, Florida, federal court in Ohio, and state courts in West Virginia. His prior testimony pertained to matters regarding pretrial publicity, the likelihood of obtaining a neutral venue in a different zone, the meaning of evidence, and the social psychology of evidence. (V13, R277-78). There is no licensing board for the type of services he provides. Moore does not possess any professional licenses or certifications. (V13, R294).

Moore and his staff "create models of court behavior through the logic of simulation" i.e., "a mock trial."[14] (V13, R282). Through the model simulations, Moore evaluates *voir dire*, opening statements, and witness testimony. His

[14] Moore has conducted more than ten thousand mock trials in the last forty years. (V13, R291). He has consulted on about 40 pro bono death penalty cases and over 100 murder cases. (V13, R304).

company "covers all the services of a trial." (V13, R283). Although Moore could not recall a specific trial, he testified that he previously advised attorneys on jurors and the trial itself. "I just don't remember the specific trial here." (V13, R286). Moore's work is primarily in the civil arena. (V13, R293).

Moore said that, in his opinion, moving for a change of venue in any case requires evaluating the impact of publicity within the venue. His method involves utilizing sample surveys[15] in order to identify "the salients of the issue in the minds of potential members of the venire." The issue is not "whether there should be a change of venue, but how this information about the community would inform the trial." He would then evaluate the likelihood of what venue change would be suggested. (V13, R289). Moore has worked on some cases even before a defendant has been arrested; something that happens in federal cases. (V13, R299).

Moore said he could have assisted Allred's trial counsel regarding a plea deal by suggesting the following: meet with the client and the attorney to develop some level of understanding where in the system this client is at; find out what the client understands his attorney wants; evaluate what the client perceives is going to happen. (V13, R290). Given his background with "mental disorders, sex offenders," Moore would have suggested to Allred there was a need for a complete

[15] Also see Moore's deposition at V7, R1212-14.

evaluation of his early development paying specific attention to potential issues of molestation. (V13, R291, 295). In Moore's opinion, Dr. Danziger, who evaluated Allred for competency, should have been informed of the allegations of sexual abuse as alleged by Allred's family. (V13, R296). Moore, however, had "no idea...whether sexual abuse actually occurred." (V13, R308).

Moore said that, in his opinion, a number of jurors "don't think legally." As a result, it is very important to develop a strategy for trial before discussing what a venue might be or how a case can be tried so "that everybody understands that fully." (V13, R292). A "collaborative process" needs to occur for evaluating a case. (V13, R292). Moore said there is no particular point in time when a decision for a change of venue should be made. Further, sometimes "it may be counterproductive and unnecessary to change venue. You might want to have it in the venue because of the publicity." A vast majority of capital cases receive some media attention. (V13, R297). Nonetheless, Moore did not conduct an analysis or reach a conclusion whether or not a change of venue should have been pursued in Allred's case. (V13, R298, 305). Even though Allred pled guilty, Moore could have provided his services for the penalty phase that dealt with jury selection or a change of venue. But due to Allred's decisions to plead guilty and waive a penalty phase jury, Moore said, "Pretty much the only thing I might be doing is testifying in a hearing like this." (V13, R301). Moore offered no expert opinions and reached

no definitive conclusions about Allred's case regarding jury selection, venue, or any other service he typically provides.

STANDARD OF REVIEW

A. INEFFECTIVE ASSISTANCE OF COUNSEL

Claims of ineffective assistance of counsel are reviewed under the standards set forth by the United States Supreme Court in *Strickland v. Washington* and this Court's application of the *Strickland* standard to Florida law. To establish a claim for ineffective assistance of trial counsel:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland v. Washington, 466 U.S. 668, 687 (1984). In order to establish the first prong, Allred must prove that, "counsel's representation fell below an objective standard of reasonableness." *Wheeler v. State*, 124 So. 3d 865, 873 (Fla. 2013) (*quoting Strickland*, 466 U.S. at 688). The objective standard of reasonableness is measured by the prevailing professional norms under the circumstances as seen "from counsel's prospective faced at the time" of trial. *Hannon v. State*, 941 So. 2d 1109, 1125 (Fla. 2006) (*citing Wiggins v. Smith*, 539 U.S. 510, 521-23 (2003)). *See*

also Preston v. State, 970 So. 2d 789, 803 (Fla. 2007). The prejudice prong is met only if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Wheeler*, 124 So. 3d at 873 (*quoting Strickland*, 466 U.S. at 694)*; see also Porter v. McCollum*, 558 U.S. 30 (2009) (explaining that the Court does not require proof "'that counsel's deficient conduct more likely than not altered the outcome' of his penalty proceeding, but rather that he establish 'a probability sufficient to undermine confidence in [that] outcome.'") (*quoting Strickland*, 466 U.S. at 693-94).

The *Strickand* test also applies in the context of a guilty plea. *Long v. State*, 118 So. 3d 798, 803 (Fla. 2013) (*citing Hill v. Lockhart*, 474 U.S. 52, 58-59 (1985)). The deficiency prong is measured the same as if the trial had been contested; Allred must "specifically identity acts or omissions of counsel that were manifestly outside the wide range of reasonably competent performance under prevailing professional norms." *Long*, 118 So. 3d at 803. *See also Lynch v. State*, 2 So. 3d 47, 57 (Fla. 2008) (faced with overwhelming evidence of guilt for murdering a mother and her thirteen-year-old daughter, trial counsel was reasonable to advise the defendant to plead guilty and focus on mitigation at the penalty phase). To establish prejudice in the context of a guilty plea, Allred must

demonstrate "a reasonable probability that, but for counsel's errors, [he] would not have pleaded guilty and would have insisted on going to trial." *Long*, 118 So. 3d at 803 (*quoting Hill*, 474 U.S. at 59). *See also Grosvenor v. State*, 874 So. 2d 1176, 1181 (Fla. 2004). "Counsel's effectiveness is determined according to the totality of the circumstances." *Long*, 118 So. 3d at 803.

For claims that allege counsel was ineffective during the penalty phase, prejudice is measured by "whether the error of trial counsel undermines the [c]ourt's confidence in the sentence of death when viewed in context of the penalty phase evidence and the mitigators and aggravators found by the trial court." *Wheeler*, 124 So. 3d at 873 (*quoting Hurst v. State*, 18 So. 3d 975, 1013 (Fla. 2009). *See also Lynch*, 2 So. 3d at 70-71 ("[The defendant's] ignorance of hypothetical, unsupported defenses and comparatively minor mental health diagnosis could not have affected his decision to waive a penalty-phase jury").

There is a strong presumption that counsel's performance was constitutionally effective. *Hannon*, 941 So. 2d at 1118 (*quoting Strickland*, 466 U.S. at 689) ("Judicial scrutiny of counsel's performance must be highly deferential.")). The defendant must "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Hannon*, 941 So. 2d at 1118 (*quoting Strickland*, 466 U.S. at 689). And "[a] fair assessment of attorney performance requires that every effort be made to eliminate

the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689.

Because a court can make a finding on the prejudice prong of *Strickland* without ruling on the deficiency prong, claims of ineffective assistance of counsel are subject to denial when the court can determine the outcome of the proceeding would not be affected even if counsel were deficient. *See Franqui v. State*, 59 So. 3d 82, 95-97 (Fla. 2011); *Preston v. State*, 970 So. 2d 789, 803 (Fla. 2007) (*citing Whitfield v. State*, 923 So. 2d 375, 384 (Fla. 2005) ("[B]ecause the *Strickland* standard requires establishment of both [deficient performance and prejudice] prongs, when a defendant fails to make a showing as to one prong, it is not necessary to delve into whether he has made a showing as to the other prong.").

B. MITIGATION

A defendant's claim that he was denied effective assistance of counsel because counsel failed to present mitigation evidence will be rejected where the [sentencer] was aware of most aspects of the mitigation evidence that the defendant claims should have been presented. *Troy v. State*, 57 So. 3d 828, 835 (Fla. 2011) (*citing Van Poyck v. State*, 694 So. 2d 686, 692-93 (Fla. 1997)). Further, if the record demonstrates that counsel's decision not to present evidence "might be considered sound trial strategy" the claim may be summarily denied.

Franqui, 59 So. 3d at 99 (*quoting Strickland*, 466 U.S. at 689). Also, this Court has recognized that, "an ineffective assistance claim does not arise from the failure to present mitigation evidence where that evidence presents a double-edged sword." *Winkles v. State*, 21 So. 3d 19, 26 (Fla. 2009). S*ee also Reed v. State*, 875 So. 2d 415, 437 (Fla. 2004). Trial counsel is entitled to rely on the opinions of a qualified mental health expert even if the defendant discovers an expert with a more favorable opinion in post-conviction. *Rodgers v. State*, 113 So. 3d 761, 770 (Fla. 2013). It is entirely reasonable for counsel to make a strategic decision to forgo mental health evidence at the penalty phase when the net result of the mental health evidence could expose unfavorable material about the defendant and cast him in a negative rather than positive light. *Floyd v. State*, 18 So. 3d 432, 453-54 (Fla. 2009). Credibility determinations by the trial court are entitled to deference on appeal. *Stephens v. State*, 748 So. 2d 1028, 1034 (Fla. 1999).

C. PROCEDURAL BAR

This Court has consistently held that a claim that could have been or was raised on direct appeal is procedurally barred in postconviction proceedings. *Miller v. State*, 926 So. 2d 1243, 1260 (Fla. 2006); *Davis v. State*, 928 So. 2d 1089, 1116-1136 (Fla. 2005); *Duckett v. State*, 918 So. 2d 224, 231 (Fla. 2005); *Robinson v. State*, 913 So. 2d 514 (Fla. 2005). Further, it is inappropriate to use a different argument to relitigate the same issue. *Willacy v. State*, 967 So. 2d 131 (Fla. 2007).

A procedurally barred claim cannot be considered under the guise of ineffective assistance of counsel. *Freeman v. State,* 761 So. 2d 1055, 1067 (Fla. 2000) (holding that claims that could have been raised on direct appeal cannot be relitigated under the guise of ineffective assistance of counsel). *See also Rodriguez v. State/Crosby*, 919 So. 2d 1252, 1262 (Fla. 2005).

D. SECONDARY SOURCES AND GUIDELINES

Throughout various portions of his argument, Allred cites as authority to support his ineffectiveness claims various secondary sources, primarily the American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases ("ABA Guidelines").[16] Specifically regarding the ABA Guidelines, this Court has held in no uncertain terms that:

> The ABA Guidelines are not a set of rules constitutionally mandated under the Sixth Amendment and that govern the Court's *Strickland* analysis. Rather, the ABA Guidelines provide guidance, and have evolved over time as has this Court's own jurisprudence. To hold otherwise would effectively revoke the presumption that trial counsel's actions, based upon strategic decisions, are reasonable, as well as eviscerate "prevailing" from "professional norms" to the extent those norms have advanced over time.

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[16] American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, 31 HOFSTRA L. REV. 913 (2003). Allred also cites "Defending a Capital Case in Florida 1992-2003 (5th Ed. 1999)" and "National Legal Aid & Defender Association, Performance Guidelines for Criminal Defense Representation (1995)."

Mendoza v. State, 87 So. 3d 644, 653 (Fla. 2011). The United States Supreme Court said the following about the ABA Guidelines:

> No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions.

Strickland, 466 U.S. at 688-89, c*ited in Mendoza*, 87 So. 3d at 653. The ABA Guidelines and other secondary sources cited by Allred are binding on neither counsel nor this Court.

SUMMARY OF ARGUMENT

Bottom line up front: many of the complaints that Allred raises in post-conviction are the result of his own sullen attitude and unwillingness to cooperate with his attorneys throughout the entire process from arrest to sentencing. For all of his complaints, Allred questioned Attorney Caudill's decisions in hindsight, presented incredible expert testimony in post-conviction, and failed in his burden of proof to establish deficiency or prejudice.

Allred's trial counsel conducted a comprehensive mitigation investigation. Attorney Caudill was faced with the difficult choice of either presenting mental health mitigation that would expose sinister characteristics about Allred, or forego mental health mitigation to maintain the advantage of presenting his client in a

more positive light. Caudill's informed strategic decision to avoid the damaging mental health testimony was reasonable. Attorney Caudill did not misinterpret Dr. Day's opinion; he understood that Allred demonstrated antisocial personality traits, but not a complete diagnosis, yet the traits themselves were damaging evidence he wanted to avoid. Caudill was entitled to rely on his qualified expert. The more favorable, yet incredible, opinions of Allred's post-conviction experts would not have changed the outcome of the case.

The defense team tried to establish rapport with Allred but he rejected them. Allred wanted his case to be completed as soon as possible. He was uncooperative with the defense team's mitigation investigation, but they diligently investigated his case nonetheless. And there was no credible evidence prior to trial or in post-conviction to suggest that Allred was incapable of forming premeditation for first-degree murder or heightened premeditation for the CCP aggravator.

Allred failed to establish that a change of venue was necessary. Experienced attorneys have no obligation to consult with a jury selection expert to prepare for *voir dire*. And in this case, there was never going to be a jury, thus counsel's efforts in hiring a trial consultant or consider changing venue would have been pointless. Bottom line, there was simply no evidence to suggest that Allred would have changed his mind had trial counsel discussed venue with him, discussed more about mitigation, or consulted with a jury selection expert.

There is no error to cumulate in Allred's case. Florida's capital sentencing statute is and always has been constitutional in the wake of *Furman*.[17] Allred's competency-to-be-executed claim is not ripe and is meritless. Florida's lethal injection protocol does not violate the Eighth Amendment. Allred has no right to know the identity of the execution team members.

ARGUMENT

Issue I: Whether Trial Counsel Was Ineffective at the Penalty Phase

In his first claim, Allred argues that trial counsel was ineffective during the penalty phase. Allred frames this claim in four subparts, specifically alleging that trial counsel was ineffective: (1) in his "misinterpretation of Dr. Day's diagnosis and opinions;" (2) for his "unreasonable reliance on Dr. Day's opinions;" (3) for failing to "investigate Allred's background" in order to "provide the experts with all relevant and available mitigation;" and (4) in failing to "obtain and present mental health evidence tailored to the specific needs" of Allred's case. Allred's claim is without merit and should be rejected.

A. The Trial Court's Order Denying Post-Conviction Relief

In denying relief on this claim, the trial court made the following detailed findings:

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[17] *Furman v. Georgia*, 408 U.S. 238 (1972)

> The Court finds that trial counsel reasonably relied upon Dr. Day's expertise as a forensic psychologist and her experience with death penalty cases. Trial counsel was not required to continue searching for an expert who would give a more favorable assessment of the defendant's mental status….The fact that the Defendant has now secured the testimony of a more favorable mental health expert simply does not establish that the original evaluation was insufficient….
>
> Ultimately, trial counsel made a strategic decision not to call Dr. Day at the penalty phase, not just because of her conclusion that the Defendant possessed anti-social personality disorder traits, but also because she indicated that she could not provide helpful testimony….Trial counsel was concerned that Dr. Day's testimony would be more harmful than helpful, in particular that the testimony could open the door to evidence relating to the Defendant's attitude about the murders, his feelings of justification and his lack of remorse.

(V11, R1862-63). The post-conviction court also made credibility findings regarding the experts at the evidentiary hearing.

> **The Court does not find [Dr. Caddy's] testimony credible**…. [T]he intent of Dr. Caddy's testimony was to establish that the Defendant could not have formed the requisite premeditated intent for first degree murder, Dr. Caddy stopped short of testifying that the Defendant was incapable of forming that intent. [E]ven if this Court were to accept the conclusions reached by Dr. Caddy, the Defendant has failed to demonstrate that this testimony would have assisted his defense in anyway…. Dr. Danziger testified that there was no evidence of the Defendant being in a disassociative state at the time of the murders. **This Court finds Dr. Danziger's testimony on this issue to be more credible**.
> …
>
> Dr. Geffken [admitted that] the type of violence exhibited by the Defendant is not typical of someone with an Autism Spectrum Disorder…[and] acknowledged that the Defendant did not have any observable restrictive repetitive behavior patterns [a criteria for a diagnosis of Autism Spectrum]…. Interestingly, the defense made

> much of the Defendant's lack of a conduct disorder to attack Dr. Day's purported diagnosis of anti-social personality disorder but sought to minimize the lack of evidence of restrictive repetitive behavior when it came to Dr. Geffken's [Autism] diagnosis…. **[T]he Court finds that Dr. Geffken's diagnosis also lacks credibility**.

(V11, R1864-65, 1866-67) (internal citations and quotations omitted).

B. Argument

First, Attorney Caudill did not misinterpret Dr. Day's diagnosis or opinions. Allred bases this sub-claim primarily on the memorandum to defense counsel's file written by second-chair counsel, Rebecca Sinclair. The memorandum was intended to memorialize the defense team's strategy that Dr. Day's evaluation did not yield helpful mitigation and she would not be called as a witness. In the memorandum, *Sinclair* used concrete terms such as psychopath and sociopath to describe Allred. Attorney Caudill testified at the evidentiary hearing, however, that he understood Dr. Day's opinions not to be that Allred was definitively a psychopath, sociopath, or had antisocial personality disorder, but rather that her evaluation raised several concerns about Allred's lack of empathy and remorse, that Allred had demonstrated antisocial personality disorder traits (though not a full diagnosis), and that her testimony may do more harm than good. (V13, R206-212).

Dr. Day testified at the evidentiary hearing that she did not reach any final conclusions or diagnoses for Allred, but that in her evaluation Allred showed a spike in psychopathic deviates on the MMPI, a lack of empathy and remorse

towards the victims and the victims' families, a feeling of justification for having killed the victims, most of the criteria for antisocial personality disorder (except the conduct disorder prior to age fifteen), and no remarkable mental illnesses or disorder that would mitigate against Allred's cold, predatory behavior leading up to and during the murders. Dr. Day testified that although she did not reach a final diagnosis of Allred, if she were forced to give a diagnosis, it would have to have been antisocial personality disorder. Attorney Caudill understood that to be the case regarding Dr. Day's evaluation of Allred.

Much of the discussion by the experts as to why Allred did not meet the criteria for antisocial personality disorder was due to the lack of conduct disorder prior to age fifteen. That conclusion is supported by the fact that Allred did not have a conduct disorder reported at school. Attorney Caudill was aware, however, from Allred's parents of Allred having acted out and been disruptive at home. Nonetheless, it was clear that everyone understood that Allred did not meet all of the criteria for antisocial personality disorder. Dr. Caddy attempted to dispute that Allred possessed other traits of antisocial personality disorder such as being manipulative or lack of empathy towards others. Dr. Caddy pointed to the situation where Allred raised a concern with his supervisor at work about deceptive marketing towards elderly people. Dr. Caddy admitted that Allred may not have been expressing empathy in that situation and it could have been his ego—Allred

thinking that he is right and that everyone else is wrong.

Dr. Day's testimony about her findings and Attorney Caudill's testimony about his understanding of her findings is consistent. No matter the words used in the memorandum, and no matter the few positive, yet unremarkable things that could be conjured up about Allred, Attorney Caudill understood that putting Dr. Day on the witness stand would expose dark, ominous character traits about Allred that would have been viewed negatively by any fact-finder. *Floyd*, 18 So. 3d at 453-54 (After Dr. Krop opined that there was no credible mental health mitigation and his testimony may do more harm than good, counsel was reasonable to forgo presenting mental health testimony).

Second, Attorney Caudill was not unreasonable to rely on Dr. Day's findings. *Rodgers*, 113 So. 3d at 770 (trial counsel was reasonable to rely on an experienced neuropsychologist's opinion that there was no reason to suspect brain damage even though a post-conviction expert opined that defendant suffered from brain damage). Essentially, Allred argues that after deciding he could not use Dr. Day's testimony, Attorney Caudill should have continued searching for another expert until he found one with a favorable diagnosis. Attorney Caudill testified that the Public Defender's office has used Dr. Day on several occasions—many of them for Caudill's cases—and that she is a well-respected mental health expert in capital cases. It has never been Attorney Caudill's strategy to employ a mouthpiece

expert willing to reach a biased diagnosis for a fee. Such a witness is usually incredible and such a practice is unethical. Attorney Caudill consulted with a respected expert whom he trusted and had employed in prior cases. When his qualified expert opined that she had nothing helpful for Allred, Caudill had to make a strategic decision. *Floyd*, 18 So. 3d at 453-54. Allred now questions Attorney Caudill's decision in hindsight after hand-picking new experts with more favorable conclusions. Nothing in this Court's precedent applying *Strickland* would suggest that Attorney Caudill's strategy was deficient.

Third, Attorney Caudill was not deficient in the investigation of background material provided to Dr. Day. The defense team interviewed family members and teachers, acquired school and medical records, and earnestly tried to build a rapport with Allred and get information directly from him despite his lack of cooperation. Dr. Day reviewed copies of Allred's school records, medical records, police reports, and reports of the crime scene. Dr. Day received twelve discs of information in addition to copies of letters Allred wrote from jail. The defense team went to great lengths to build a case in mitigation for Allred despite Allred's cantankerous attitude towards the case. Allred's defense team continued to work tirelessly for him even though he wanted the process over as quickly as possible. For example, upon hearing the rumor that Allred's grandfather may have sexually abused Allred's cousin—leading to suspicion that Allred may have suffered the

same abuse—Attorney Sinclair and the defense investigator personally interviewed the grandfather and then drove to Orlando to pick him up and bring him to the penalty phase hearing to testify. During the interview the grandfather made an unsettling comment[18] that spurred the defense team's suspicions about the sexual abuse. But when the grandfather testified, he presented a more wholesome persona. Ultimately the defense team was unable to corroborate anything about the sexual abuse rumor and Allred himself emphatically denied that it had happened. The defense team had to make another strategic decision when the grandfather was simply not going to testify in the same manner as when he was interviewed. The defense shifted away from the grandfather because there was simply nothing to substantiate that he had ever abused Allred. *See Davis v. State*, 928 So. 2d 1089, 1110 (Fla. 2005) (Witness's statement about sexually abusing defendant was "suspect at best" and the defendant denied any abuse occurred. Counsel was not deficient in failing to secure the testimony).

Forth, Attorney Caudill did not fail to consult with and present an expert with evidence "tailored to the specific needs of the case." This subpart is related to

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[18] According to Attorneys Caudill and Sinclair, when interviewed, Allred's grandfather commented something to the effect of teaching a teenage boy how to put on a condom by getting naked with him and putting it on him. It was unclear whether the grandfather was referring to Allred, Allred's cousin, someone else, or simply speaking in hyperbole.

the second subpart above. There is nothing to suggest that Dr. Day was not qualified to address the specific circumstances of Allred's mental health. Attorney Caudill did not skirt his obligations by employing a "catch-all" expert to evaluate Allred. Attorney Caudill employed a qualified expert with a wide range of clinical experience in forensic psychology. Dr. Day operates a practice with multiple clinical psychologists and each case is evaluated with a team approach. The psychologists on her staff have a variety of specialties. That Dr. Caddy disagrees with Dr. Day's team approach to treatment demonstrates nothing more than a difference in professional preference. Dr. Caddy's solo approach does not render Dr. Day's practice unacceptable under professional standards. And even Dr. Caddy himself is not a specialist in any particular area of psychology tailored to the needs of the patient; he is a general practice clinical forensic psychologist with experience treating a wide range of patients and psychological issues. Dr. Geffken, a specialist in Autism, has little experience in the criminal system, especially in homicide cases, and likely has a bias toward finding Autism in a patient.

At bottom, Allred's claim is nothing more than a claim of having found a "better" expert in post-conviction. There is nothing to suggest that Dr. Day is not a qualified expert—in fact, Allred originally questioned Dr. Day's qualifications in his initial 3.851 motion but later withdrew that portion of his claim in an amended motion after Dr. Day's deposition. (V1, R11, 711). Attorney Caudill was entitled

to, and reasonable to, rely on Dr. Day's conclusions about Allred in making the strategic decision not to call her as a witness. The two experts Allred produced in post-conviction were simply incredible. Dr. Caddy's conclusions were unsupported by the facts of the crime. The scant criteria upon which he based his diagnosis of a dissociative state were more logically explained by the physiological stress of the murders on Allred rather than a mental health diagnosis. Dr. Geffken found autism in Allred even without all of the criteria. As the trial court found, Allred criticized the discussion about antisocial personality disorder because he did not meet all of the criteria for antisocial personality disorder yet he put an expert on the stand to opine that he suffers from autism spectrum disorder despite the expert acknowledging that Allred does not demonstrate all of the criteria for Autism Spectrum. Ultimately, the trial court found that Caddy and Geffken were not credible and Drs. Day and Danziger were credible. Those findings are entitled to deference. *Stephens*, 748 So. 2d at 1034 (recognizing the trial court's superior vantage point in observing bearing, demeanor, and credibility of witnesses).

At the time of the murders Allred was an intelligent man with no remarkable circumstances from his background to extenuate his conduct. Aside from witnessing his father abuse alcohol on occasion and one instance of domestic violence, Allred's childhood was rather normal. Despite having an introverted personality throughout his school years, as an adult Allred established a long-term,

intimate relationship with Barwick and had over fifty people at his twenty-first birthday party. From the time that Allred discovered that Barwick and Ruschak were together, he felt justified in his conduct, even in killing them. Allred even wrote letters to the Tiffany's family demonstrating no remorse or empathy for his actions. Dr. Day's evaluation revealed a sinister side of Allred that Attorney Caudill did not want to expose. It made no difference that the penalty phase was before a judge alone rather than a jury. Dr. Day's testimony would have logically discredited any of the proffered mitigation and would have done more harm than good.

C. Prejudice

Even if counsel was deficient for failing to seek out a different expert, Allred was not prejudiced. *Arbelaez v. State*, 898 So. 2d 25, 35 (Fla. 2005) (Counsel's failure to present mental health mitigation of low intelligence and depressive disorder did not prejudice the defendant in light of the heavy aggravation where Arbelaez killed a five-year-old to exact revenge on his ex-girlfriend). The experts Allred produced in post-conviction would not have resulted in Allred getting a sentence less than death. Dr. Caddy's opinion—that Allred suffered extreme emotional distress and that his ability to conform his conduct to the requirements of the law at the time of the murders—was based on an extremely weak foundation. Essentially, Dr. Caddy opined that because Allred's long-term

girlfriend broke up with him and took up with his best male friend, Allred's "ego-disintegration" caused him to act irrationally. Whether presented to a jury or a seasoned judge, the "broken-heart, irrational behavior" defense perpetuated through Dr. Caddy would have been unpersuasive. *Lamarca v. State*, 931 So. 2d 838, 847 (Fla. 2006) (No basis to disturb the sound trial court finding that Dr. Caddy "was not a particularly credible witness" in his opinion that the defendant's posttraumatic stress disorder was triggered by his daughter stating he had raped her thus rendering the defendant incompetent).

Even if Dr. Geffken were to testify about Allred and the autism spectrum, it would not have amounted to compelling mitigation. Assuming Allred were high functioning autistic, Geffken admitted that someone that is high functioning can make judgment calls and decisions. Allred is intelligent and capable of rationalizing his choices. Allred's social awkwardness would not persuasively mitigate his culpability for his predatory behavior. Furthermore, the facts about Allred's personality and family background discussed by the experts in post-conviction are cumulative to the facts presented by the family members and teachers in Allred's penalty phase. *Troy*, 57 So. 3d at 835. The weak mitigation Allred developed in post-conviction could not have outweighed the aggravation of CCP, HAC, during the commission of a burglary, and contemporaneous double murders.

Issue II: Whether Trial Counsel Was ineffective in Investigating All Circumstances Bearing on Allred's Decision to Plead Guilty

In several subparts, Allred alleges that his attorneys were ineffective leading up to his decision to plead guilty. Specifically, Allred alleges that his attorneys failed to: (1) develop a relationship of trust and close contact with Mr. Allred; (2) properly investigate Allred's mental status leading up to the day of the crime; (3) consult with and present mental health expert testimony to explain that Allred's ability to "form the prerequisite intent was substantially impaired;" and (4) investigate and presented evidence to contest the guilty phase premeditation element and the penalty phase CCP aggravator. (*Initial Brief* at 50-51).[19]

A. The Trial Court's Order Denying Post-conviction Relief

The post-conviction trial court found that there was no evidence presented at the hearing to establish that Allred would not have entered his plea but for the alleged errors of his attorneys. In fact, the post-conviction court found that the evidence that was presented at the hearing indicated the contrary:

> The Defendant's correspondence to his parents, his counsel and to the court indicated his primary concern was getting his case concluded as quickly as possible. Attorney Caudill testified the Defendant began talking about entering a plea early in the process, and that he Defendant was never open to the possibility of going to trial. Attorney Caudill strenuously advocated against the Defendant

[19] The latter two subparts will be discussed together below.

> entering a plea. In fact, Attorneys Caudill, Sinclair and Figgatt all advised against entering a plea and the Defendant did so against their advice. Therefore, all of the evidence before this Court indicates the Defendant would have entered a plea regardless of any additional actions taken by trial counsel…. Furthermore, as discussed above in Claim I, the Defendant has failed to demonstrate that trial counsel was ineffective with regard to investigating expert evidence regarding the Defendant's mental health and failed to establish that he lacked the requisite intent due to his mental health issues.

(V11, R1868).

B. Argument

Bottom line up front: the complaints that Allred raises are the result of his own actions and unwillingness to cooperate with his attorneys throughout the entire process from indictment to the pronouncement of his sentence.

Establishing Rapport with Allred

First, the Sixth Amendment does not guarantee a "meaningful relationship" between a defendant and the attorney. *Everett v. State*, 54 So. 3d 464, 473 (Fla. 2010) (*citing Morris v. Slappy*, 461 U.S. 1, 14 (1983)). *Strickland* evaluates "the quality of counsel's performance, not the quality of counsel's relationship with the defendant." *Id*. Even so, Allred's attorneys attempted to establish rapport with him but he wanted none of it. Attorney Sinclair testified at the evidentiary hearing that after initial attempts by Caudill himself, Caudill had Sinclair meet with Allred alone to see if he would respond to a younger person. It did not work. Nonetheless, the defense team was prompt and diligent in meeting with their client. Allred was

arrested at 10:45 p.m. on September twenty-forth. (DAR, V1, R1). The public defender was appointed at Allred's first appearance at 2:30 p.m. on September twenty-fifth. (DAR, V1, R5). Caudill and Investigator Gellner met with Allred at 10:00 a.m. on September twenty-sixth. (V5, R779; State's Exhibit 1). Someone from the defense team, mostly lead counsel Caudill, visited Allred ten times over the course of the proceedings. Attorney Caudill testified that he wanted to take the case to trial and attempt to get the jury to return lesser conviction. Allred insisted on pleading guilty. Attorney Caudill wanted to have a jury at the penalty phase and present a comprehensive case in mitigation to argue for a life recommendation. Allred insisted on waiving a jury and his presence at the penalty phase bench trial.

Allred would not communicate with his defense team. Allred's letters to his family members indicated that he wanted his case to be completed as soon as possible. Allred did not want anything to drag the process out any longer. That was a deciding factor in Allred electing to remain represented despite his disagreement with his attorneys on strategy. The defense team wanted to investigate mitigation, mental health, and anything that could establish reasonable doubt as to premeditation or mitigate against the death penalty. Allred was uncooperative with his attorneys investigating his background and looking for mitigation. After the trial court explained to Allred that firing his attorneys and representing himself would only drag the process out further, Allred agreed to remain represented so

that his case could be completed sooner. If there was no relationship of trust and close contact between Allred and his attorneys, it was because Allred did not want one and frustrated any attempt by the attorneys to establish rapport.

Investigate Mental Health

Second, the defense team did not fail to investigate Allred's mental health. To the contrary, as Allred admits in his initial brief, at the penalty phase-*Spencer* hearing, Attorney Caudill informed the trial court that the defense had "consulted outside this office, and based upon all of the information that we had…we made a decision not to present any expert testimony at this hearing." At the penalty phase, Attorney Caudill's statement to the trial court was vague and non-specific. Of course it was. At that point, Attorney Caudill certainly would not reveal any confidential or privileged information in a public forum that could be detrimental to his client. Once the veil is lifted in post-conviction, we learn from Attorney Caudill and Dr. Day why Caudill was so ambiguous in his statement to the trial court in the penalty phase; expert testimony about Allred's mental health would have exposed terrible character traits and a haunting sense of justification for the murders. Attorney Caudill investigated Allred's mental health and made the strategic decision to avoid exposing harmful mental health testimony about his client. Caudill made an informed strategic decision that is "virtually unchallengeable." *Downs v. State*, 453 So. 2d 1102, 1108 (Fla. 1984) (ruling that

an attorney's strategic choices are "virtually unchallengeable").

Attorney Caudill consulted an experienced mental health expert who staffed Allred's case with a team of psychologists. He lead a defense team that obtained school records, interviewed family members and school teachers, and diligently tried to establish mitigation on Allred's behalf. Caudill even filed a motion to compel production of the investigation from the State Attorney's Office regarding Allred's cousin's sexual abuse allegation against Allred's grandfather. (DAR, V5, R483-89). The motion was granted, Sinclair interviewed the grandfather, but there was simply not enough to substantiate anything regarding Allred. The defense team pursed all of this while Allred sat with his arms folded, pouting and refusing to cooperate. Any lack of evidence in the mitigation investigation was Allred own doing. As *Strickland* itself teaches, "The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." 466 U.S. at 691. *Cf. Anderson v. State*, 18 So. 3d 501, 510 (Fla. 2009) (Counsel was not deficient in failing to discover sexual abuse incident from defendant's childhood where Defendant withheld the information from his attorney).

Ability to Form Prerequisite Intent and Heightened Premeditation

Third, there was nothing to suggest that Allred could not form the required intent to commit the murders. Attorney Caudill had Allred evaluated for

competency and a potential insanity defense and there was nothing to suggest he was incompetent or insane. That Allred told the police in his post-arrest statement that he "just went over there to ram Tiffany's car," does not negate his deliberate, calculated actions immediately after ramming the car. Neither does it negate the deliberate and planned actions before the murders where Allred used a picture of Tiffany for target practice (the day he bought his gun) and then sent it to her, made threats to each victim through digital messaging that he would kill them the next time he saw them, and purchased the same gun that he used for the murders only a few weeks prior to the murders.

Attorney Caudill had Allred evaluated by two different mental health experts—one for competency and one for mitigation—and neither one of them provided any indication that Allred lack the ability to form the requisite intent for the murders. To the contrary, Dr. Day was very concerned with Allred's heightened level of premeditation. Dr. Caddy's opinion that Allred experienced a dissociative state at the time of the murders was incredible. The principal circumstance upon which Dr. Caddy based his opinion was the fact that Allred had a fragmented memory of the actual murder itself; "he's pretty clear about driving into a vehicle and intending to destroy the vehicle…from that point on, he's pretty unclear about the sequence of events that happened until he's getting in the police car." But Caddy admitted that the physical stress of the shooting itself—elevated

heart rate, increase of adrenaline, tunnel vision, and the overall hyperarousal physiological effect of violence—could have caused Allred to have a fragmented memory.

Dr. Caddy also opined that Allred's break-up with Tiffany cause a complete "ego disintegration" and that Allred was not "thinking rationally." But Dr. Caddy also admitted that Allred contemplated other means of copping with his break-up with Tiffany rather than killing her and Michael. Allred had discussed leaving the county, locating to another state, or finding employment elsewhere. Allred's behavior on the night of the murders was not frantic or emotional. Quite the opposite, when Allred was in the house, he looked at the occupants and did not start shooting; he hunted for his victims. The individual who tried to grab Allred and stop him got shot in the leg; Allred had the chance to kill him but did not. Allred found Ruschak and killed him, found Barwick and killed her, then immediately confessed to the police. There was no question that Allred exhibited heightened premeditation to kill his victims.

D. Prejudice

Even if counsel should have done more in developing a relationship, investigating mitigation, or challenging premeditation, Allred suffered no prejudice. Allred continues to show no interest in his case as demonstrated by his absence at the evidentiary hearing. The mitigation Allred developed in post-

conviction was incredible and unpersuasive. Lastly, this was a case with unquestionable evidence of CCP. Anything counsel could have presented to challenge premeditation would not have changed the guilty plea nor resulted in a lesser sentence.

Issue III: Whether Trial Counsel was Ineffective for not Advising Allred about Change of Venue, Mitigation, or Jury Selection and for not Consulting with a Jury Selection Expert Prior to Allred Waiving his Penalty Phase Jury

In this argument, Allred alleges that trial counsel was deficient in failing to: (1) move for a change of venue; (2) investigate and advise Allred of mitigation (as set out in the previous issue); and (3) consult with an expert on jury selection in order to prepare for *voir dire* and reasonably communicate with Allred about jury selection.

A. The Trial Court's Order Denying Relief

The trial court made the following findings of fact in denying relief on Allred's claim:

> There was no evidence to establish that the Defendant would not have waived a penalty phase jury but for counsel's alleged ineffectiveness. In fact, the evidence at the hearing indicated the contrary…. Defendant waived a penalty phase jury and waived his appearance at the penalty phase against counsel's advice. The Defendant wanted the process over as soon as possible…. Defendant acknowledged that he was waiving the jury and his appearance against the advice of counsel…he also acknowledged that he understood the implications of his waivers…. [T]he Defendant complained to the trial court that he wanted to enter his guilty plea as early as January but trial counsel

delayed it until April…. At a *Faretta* hearing…the trial court explained that if [Allred] represented himself…it would…slow [the process] down. [Allred] responded that he would keep his counsel, "if it can be done soon." Therefore, all of the evidence before this court indicates the Defendant would have opposed any additional actions by trial counsel that might have delayed the process and he would have waived the penalty phase jury regardless of any additional actions taken by trial counsel.…

Dr. Moore acknowledged that he did not have an opinion regarding the need for change in venue in this case…. There was no evidence presented at the hearing to establish that the inhabitants of the community were so infected by knowledge of the case that they could not be impartial jurors….Further, since there was no jury trial, the argument lacks merit.…

The only specific advice Dr. Moore offered for mitigation was for trial counsel to investigate the issue of possible sexual abuse of the Defendant by his grandfather. However, Dr. Moore was only vaguely aware of the extent of the investigation trial counsel conducted….In fact…trial counsel fully investigated the allegations….

In addition, Dr. Moore did not testify regarding any specific advice he would have given the Defendant and trial counsel concerning the claim for failure to consult him as to jury selection in this case.…

Dr. Moore did not testify about any research he did on the trial judge in this case or about any specific advice he would have given regarding the trial judge.[FN12]

> FN12. The Court notes that this case was before the Honorable 0. H. Eaton, one of the preeminent death penalty authorities in the nation. "Judge Eaton is among the most knowledgeable judges in Florida on the death penalty." *Lynch v. State*, 2 So. 3d 47, 86 (Fla. 2008) (Pariente, J., specially concurring).

(V11, R1868-72).

B. Argument

In order for counsel to have been deficient in failing to move for a change of venue, defendants must establish that a motion would have been granted. *Rolling v. State*, 825 So. 2d 293, 301-02 (Fla. 2002) (No change of venue would have been granted in serial murder case that received national media attention over several years). *See also Dillbeck v. State*, 964 So. 2d 95, 104 (Fla. 2007) (Counsel was not deficient in failing to move for a change for venue in a capital murder that received extensive pretrial publicity). Furthermore, jury selection is something that is well within the professional ambit of experienced attorneys. *San Martin v. State*, 705 So. 2d 1337, 1346 (Fla. 1997).

First, there was no need for Attorney Caudill to consider a change of venue. There was never going to be a jury selected in this case, neither for the guilt or penalty phases. Allred was adamant from the beginning that he wanted to plead guilty and he wanted to waive his penalty phase jury. He did not even want to be present at his penalty phase bench hearing. Furthermore, Allred pled guilty and waived his penalty phase jury *against the advice* of his attorneys. Allred cannot fault Attorney Caudill for failing to move for a change of venue when Allred's actions and statements (from the time he was put in confinement) indicated to Attorney Caudill that there was not going to be a trial. *Strickland,* 466 U.S. at 691 ("The reasonableness of counsel's actions may be determined or substantially

influenced by the defendant's own statements or actions").

Second, as addressed above, Attorney Caudill led Allred's defense team through a comprehensive mitigation investigation. The defense team investigated Allred's background even though Allred was not cooperative and did not want to participate in his penalty phase. Attorney Caudill cannot be faulted for failing to conduct an investigation that was in fact conducted. The defense team cannot be faulted for Allred's personal stubbornness and reclusiveness.

Third, Attorney Caudill is an experienced capital defense attorney who has conducted jury selection dozens of times in capital cases alone in the Eighteenth Circuit. There was no need for him to consult with someone like Dr. Moore. Even so, Dr. Moore offered no opinion or advice that he would have provided to counsel in this particular case about jury selection. Allred failed in his burden of proof. It would have been a foolish waste of time and resources to devote any attention toward a jury selection consultant given Allred's insistence that he pled guilty, waive his penalty phase jury, and voluntarily sulk in his jail cell during his penalty phase hearing.

C. Prejudice

Not only did Allred fail to establish that counsel was deficient, he failed to establish that he suffered prejudice from counsel's alleged errors. Even if there had been a jury, Allred failed to present evidence about the volume of publicity (other

than Moore's vague reference to a stack of newspaper articles), he failed to present an opinion from his expert on venue, and he failed to establish that a motion for change of venue would have been granted. At bottom, Allred failed to establish that had Caudill consulted any of those sources it would have changed his decision to plead guilty and waive his penalty phase jury. Indeed, there was no evidence presented that *Allred* would have done anything differently.

Issue IV: Cumulative Error

Allred claims "the cumulative effect of the number and types of errors involved in his trial … virtually dictated the sentence that he would receive." (*Initial Brief* at 71). First, this claim is insufficiently briefed. Second, if this claim is considered sufficient to present a claim, there is no basis for relief because there is no error to cumulate. Indeed, this Court has recently held:

> As we have determined, however, none of Butler's individual claims of ineffectiveness of counsel warrant relief. "Where, as here, the alleged errors urged for consideration in a cumulative error analysis 'are either meritless, procedurally barred, or do not meet the *Strickland* standard for ineffective assistance of counsel[,] ... the contention of cumulative error is similarly without merit.'"*Bradley v. State*, 33 So. 3d 664, 684 (Fla. 2010) (alteration in original) (quoting *Israel v. State*, 985 So. 2d 510, 520 (Fla. 2008)).

Butler v. State/Tucker, 100 So. 3d 638, 668 (Fla. 2012). *See also Simmons v. State*, 934 So. 2d 1100, 1111 n.12 (Fla. 2006); *Coolen v. State*, 696 So. 2d 738, 742 n.2 (Fla. 1997) ("failure to fully brief and argue these points constitutes a waiver of these claims"); *Duest v. Dugger*, 555 So. 2d 849, 852 (Fla. 1990). Allred's

cumulative error claim should fail and the trial court's order should be affirmed.

Issue V: Whether Florida's Capital Sentencing Statute is Unconstitutional for Failing to Prevent the Arbitrary and Capricious Imposition of the Death Penalty and for Violating the Guarantee Against Cruel and Unusual Punishment in Violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution

Allred's claims that Florida's capital sentencing statute is unconstitutional because it "fails to provide any standard of proof for determining that aggravating circumstances outweigh the mitigating factors" and that Florida law "creates a presumption of death where but a single aggravating circumstance applies." (*Initial Brief* at 72). This claim is procedurally barred, without merit, and counsel could have been ineffective.

A. The Trial Court's Order Denying Postconviction Relief

Following this Court's precedent, the trial court denied Allred's constitutional challenge to Florida's capital sentencing statute. Specifically, the lower court held:

> In Claim VII, the Defendant asserted Florida's capital sentencing statute 1s unconstitutional on its face and as applied. "The issue of whether section 921.141 1s unconstitutional, in whole or in part, has been addressed repeatedly by this Court. This Court has consistently found section 921.141 to be constitutional." *Lowe v. State,* 2 So. 3d 21, 46 (Fla. 2008) (citing *Schoenwetter v. State,* 931 So. 2d 857 (Fla. 2006); *Foster v. State,* 929 So. 2d 524 (Fla. 2006); *Stephens v. State,* 787 So. 2d 747 (Fla. 2001); *Brown v. State,* 721 So. 2d 274 (Fla. 1998)). Therefore, the Defendant has failed to demonstrate an entitlement to relief as to Claim VII.

(V6, R898-99).

B. Argument

Preliminarily, it is worth noting that since *Profitt v. Florida*, 428 U.S. 242 (1976), in the wake of *Furman v. Georgia*, 408 U.S. 238 (1972), the United States Supreme Court has upheld Florida's capital sentencing statute as constitutional on numerous occasions. *See e.g.*, *Hildwin v. Florida,* 490 U.S. 638 (1989); *Spaziano v. Florida,* 468 U.S. 447 (1984); *Barclay v. Florida*, 463 U.S. 939 (1983); *Bottoson v. Moore*, 833 So. 2d 693, 695 (Fla. 2002). Allred gave no compelling reason to disrupt well settled precedent.

First, this claim is procedurally barred because it could have been raised on direct appeal. *Johnson v. State*, 104 So. 3d 1010, 1027 (Fla. 2012). Allred cannot use a claim of ineffective assistance of counsel to circumvent the procedural bar. *Foster v. State*, 132 So. 3d 40, 67 (Fla. 2013) (*citing Gore v. State*, 846 So. 2d 461, 466 n.4 (Fla. 2003)). The constitutionality of Florida's capital sentencing statute is purely a question of law appropriate for review in a direct appeal. Allred could have raised this claim on direct appeal. He did not. The trial court's denial should be affirmed.

Second, Allred's claim has no merit. This Court has consistently rejected the "presumption of death" claim regarding the weighing of aggravation and mitigation and the felony murder aggravator. *Wheeler v. State*, 4 So. 3d 599, 611

(Fla. 2009) (penalty phase jury instructions do not unconstitutionally shift the burden to the defendant); *Gore v. State*, 964 So. 2d 1257, 1276 (Fla. 2007) ("Even without th[e] procedural bar, this Court has repeatedly summarily denied [the presumption of death] claim due to its lack of merit, regardless of the circumstances"). *See also Williams v. State*, 967 So. 2d 735, 760-61 (Fla. 2007) (instructions on weight aggravation and mitigation are not unconstitutional); *Elledge v. State*, 911 So. 2d 57, 78 (Fla. 2005) (*citing Proffitt*, 428 U.S. at 255-56 (upholding constitutionality of Florida's death penalty statute against multiple challenges, including challenge based on vagueness and overbreadth of aggravating and mitigating circumstances and the lack of guidance for the jury in weighing such factors)); *Pooler v. State*, 704 So. 2d 1375, 1380-81 (Fla. 1997) (felony murder aggravator does not create a presumption of a death sentence).

Third, if Allred wanted to pursue this claim under an ineffective assistance of counsel theory, he failed in his burden because he elicited no testimony from trial counsel at the evidentiary hearing about this claim. Indeed, Allred conceded in his postconviction motion to the trial court that this claim did not require an evidentiary hearing. (V1, R30). In any event, counsel cannot be deficient for failing to raise a meritless claim. *Troy*, 57 So. 3d at 844; *Teffeteller v. Dugger*, 734 So. 2d 1009, 1023 (Fla. 1999). The trial court's denial of Allred's claim should be affirmed.

Issue VI: Competency to be Executed

Allred concedes that his claim involving competency-to-be-executed is not ripe for review because a death warrant has not been signed. (*Initial Brief* at 74). And Allred's competency has never been in question. This Court has repeatedly found that no relief is warranted on similar claims. *Butler*, 100 So. 3d at 671-72. *See also Nelson v. State*, 43 So. 3d 20, 34 (Fla. 2010); *Sexton v. State*, 997 So. 2d 1073, 1089 (Fla. 2008); *Barnhill v. State/McDonough*, 971 So. 2d 106, 118 (Fla. 2007) (*citing State v. Coney*, 845 So. 2d 120, 137 n. 19 (Fla. 2003); *Jones v. State*, 845 So. 2d 55, 74 (Fla. 2003) (finding claim that defendant may be insane to be executed "not ripe for review" where defendant was not yet found incompetent and death warrant not yet been signed; noting that defendant made claim "simply to preserve it for review in the federal court system"); *Hall v. Moore*, 792 So. 2d 447, 450 (Fla. 2001) (stating that it is premature for a death-sentenced individual to present a claim of incompetency or insanity, with regard to his execution, if a death warrant has not been signed). Accordingly, there is no merit to this claim and it should be denied.

Issue VII: Lethal Injection

Allred challenges the constitutionality of Florida's lethal injection procedures. In a single statement with no supporting facts or argument, Allred claims that Florida's lethal injection procedure will cause extreme pain to the

condemned inmate, as evidenced by the complications in the Angel Diaz execution in 2006. The trial court denied relief based on this Court's well settled precedent. This Court should affirm.

This Court has reviewed several iterations of Florida's lethal injection procedures numerous times and has consistently found that they do not constitute cruel and unusual punishment. *See Howell v. State*, 133 So. 3d 511 (Fla. 2014), *cert. denied*, 134 S.Ct. 1376 (2014); *Chavez v. State*, 132 So. 3d 826 (Fla. 2014), *cert. denied*, 134 S.Ct. 1156 (2014); *Muhammad v. State*, 132 So. 3d 176 (Fla. 2013), *cert. denied*, 143 S.Ct. 894 (2014); *Pardo v. State*, 108 So. 3d 558 (Fla. 2012); *Valle v. State*, 70 So. 3d 530, 541 (Fla. 2011), *cert. denied*, 132 S.Ct. 1 (2011); *Smith v. State*, 998 So. 2d 516, 529 (Fla. 2008); *Lightbourne v. McCollum*, 969 So. 2d 326, 353 (Fla. 2007), *cert. denied*, 553 U.S. 1059 (2008); *Schwab v. State*, 969 So. 2d 318, 325 (Fla. 2007); *Provenzano v. State*, 761 So. 2d 1097, 1099 (Fla. 2000). The federal courts have also rejected claims that Florida's lethal injection protocols are unconstitutional. *See Chavez v. Warden, Florida State Prison*, 742 F.3d 1267 (11th Cir. 2014), *cert. denied*, 134 S.Ct. 1156 (2014); *Ferguson v. Warden, Florida State Prison*, 493 F. App'x 22, 25 (11th Cir. 2012), *cert. denied*, 133 S.Ct. 498 (2012); *Pardo v. Palmer*, 500 F. App'x 901, 903-905 (11th Cir. 2012), *cert. denied*, 133 S.Ct. 815 (2012).

First, this issue is not ripe because Allred is not under a death warrant.

Second, this Court has rejected the speculation of unnecessary risk based on an isolated incident—such as Angel Diaz—in *Valle*, where this Court recognized that "the United States Supreme Court has advised that an isolated mishap alone does not give rise to an Eighth Amendment violation, precisely because such an event, while regrettable, does not suggest cruelty, or that the procedure at issue gives rise to a substantial risk of serious harm." 70 So. 3d at 545, *citing Baze*, 553 U.S. at 50 (internal quotations omitted). Third, this Court has even settled constitutionality of Florida's latest lethal injection protocol—which Allred does not mention—in *Howell, Chavez,* and *Muhammad*. The trial court's denial should be affirmed.

Issue VIII: Identity of Execution Team Members

Allred argues that *Fla. Stat.* § 945.10 denies him his constitutional rights by preventing him from knowing the identity of the execution team members. This claim has no merit and should be denied by this Court. As the Florida Supreme Court stated in *Darling:*

> We previously found section 945.10 facially constitutional and decline to recede from our decision now." (*citing Bryan v. State*, 753 So. 2d 1244, 1250 (Fla.2000); *Provenzano v. State*, 761 So. 2d 1097 (Fla.2000))).
>
> Furthermore, even if the Court were willing to recede from this precedent, as of this date the Governor has not signed a death warrant for Darling; thus, even if ordered to do so, the Department of Corrections could not state with any certainty who Darling's eventual executioners will be. *Cf. Lightbourne*, 969 So. 2d at 343 ("This Court previously stated that there is a presumption that the members of the executive branch will properly perform their duties in carrying out an

> execution." (*quoting Provenzano v. State*, 761 So. 2d 1097, 1099 (Fla. 2000) (brackets omitted))).

Darling v. State/McNeil, 45 So. 3d 444, 448 (Fla. 2010). With the exception of this being Allred's first post-conviction proceeding, Allred is in the same position as Darling. Allred's constitutional challenge to the statute has repeatedly been rejected, even in the wake of complications such as the execution of Angel Diaz. Notwithstanding the lack of merit, even if the Court were to grant Allred relief on this claim, he is not under a death warrant and there is no way of knowing who his executioner would be.

Additionally, Allred's attempt to find error in the statute by comparing with constitutional provisions and statute that govern medical professionals and patients' rights is misplaced. *Cf. Baze v. Rees*, 553 U.S. 35, 59-60 (2008) ("The asserted need for a professional anesthesiologist to interpret the BIS monitor readings is nothing more than an argument against the entire procedure, given that both [state] law and ethical guidelines prohibit anesthesiologists from participating in capital punishment"). Allred is not a medical patient. An execution is not a medical procedure. The execution procedure must be humane and avoid "substantial or objectively intolerable risk of harm;" it does not have to meet the standards of a medical procedure—such as a surgery in a hospital—as Allred suggests. An execution and a medical procedure are two different processes with two different—indeed, polar opposite—objectives. One seeks to end life; the other

seeks to preserve it. Allred has failed to advance any reason why this Court should not sustain its well established precedent. This Court should affirm the denial of relief.

CONCLUSION

Based on the authorities and arguments herein, the State respectfully requests this Honorable Court affirm the order of the circuit court and deny all relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on July 31, 2014, I electronically filed the foregoing using the E-Portal System which will send a notice of filing and serve an electronic copy to the following: Julie A. Morley, Assistant CCRC-Middle, morley@ccmr.state.fl.us; Mark S. Gruber, Assistant CCRC-Middle, gruber@ccmr.state.fl.us, support@ccmr.state.fl.us; Capital Collateral Regional Counsel, 3801 Corporex Park Drive, Suite 210, Tampa, FL 33619-1136.

CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Times New Roman 14 point font.

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