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IN THE SUPREME COURT OF FLORIDA
CASE NO. SC13-2170

ANDREW R. ALLRED,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF EIGHTEENTH JUDICIAL CIRCUIT FOR SEMINOLE COUNTY, STATE OF FLORIDA
Lower Tribunal No. 2007-CF-4890A

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This is an appeal of the circuit court's denial of Andrew Allred's motion for post-conviction relief brought pursuant to Florida Rule of Criminal Procedure 3.851. The original record on appeal comprises five consecutively numbered volumes. The pages of volumes one and two are numbered consecutively from 1 to 242. The pages of volumes three through five are numbered consecutively from 1 to 548. Citations to the record on direct appeal in this case will be cited in the form R[volume number]/[page no].

The post-conviction record comprises fifteen consecutively numbered volumes. The pages of volumes one through eleven are numbered consecutively from 1 to 1883. The pages of volumes twelve through fifteen are numbered consecutively from 1 to 674. Citations to the post-conviction record will be cited in the form PC[volume number]/page number].

REQUEST FOR ORAL ARGUMENT

Given the gravity of the case and the complexity of the issues raised herein, Mr. Allred, through counsel, respectfully requests this Court grant oral argument.

STATEMENT OF THE CASE AND OF THE FACTS

a. Statement of the Case and Facts Pertaining to the Trial Proceedings

On October 23, 2007, Andrew Allred was charged by indictment with two

counts of first-degree premeditated murder, one count armed burglary of a dwelling while inflicting great bodily harm or death, one count aggravated battery with a firearm while inflicting great bodily harm or death, and one count criminal mischief of a motor vehicle. R1/35-37. This Court on direct appeal described the crimes as follows:

> The penalty phase was held September 22-24, 2008. 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.
>
> 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. Someone called the police, who upon arrival ordered Allred to stop but did not arrest him.
>
> 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* 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.
>
> 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.

Allred v. State, 55 So. 3d 1267, 1272-75 (Fla. 2010) (footnotes omitted).

Mr. Allred was found indigent and the Public Defender's Office, 18th Judicial Circuit, was appointed on November 6, 2007. R1/39. Attorney Tim Caudill was the lead attorney and Attorney Rebecca Sinclair was the second chair. PC12/164. Although Attorney Caudill was death qualified, Attorney Sinclair was

not death qualified at the time of this trial. PC12/169. Thus, all ultimate strategic decisions were made by Attorney Caudill. PC12/169. On April 30, 2008, Mr. Allred entered written and oral guilty pleas to all charges. R5/472-82. The trial court conducted a plea colloquy of the defendant and accepted the guilty pleas. *Id.* On May 15, 2008, Mr. Allred waived his right to a penalty phase jury. R5/490-99. The penalty phase hearing was held on September 22-24, 2008 before the Honorable O. H. Eaton, Jr. R3/1-200, R4/201-400, R5/401-463. A *Spencer*[1] hearing was held on October 2, 2008. R5/530-42. This Court summarized the penalty phase portion of Mr. Allred's trial as follows:

> 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.

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

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* 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.

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.

Allred, 88 So. 3d at 1275-77.

The aggravating circumstances and mitigating circumstances found by the

trial court were as follows:

> 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. 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.

Allred, 88 So. 3d at 1277.

On November 19, 2008, the Court sentenced the defendant to death as to the two counts of first-degree murder; life imprisonment as to the counts of burglary to a dwelling and aggravated battery with a firearm while inflicting great bodily harm or death; and five years imprisonment for the count of criminal mischief. R5/543-48. The judgment and sentence is located at R2/213-20.

An appeal was filed in the case on November 24, 2008. R2/221-31. The judgment and sentence were affirmed at *Allred v. State*, 55 So. 3d 1267 (Fla.

2010), in an opinion dated December 16, 2010. A motion for rehearing was denied in *Allred v. State*, 2011 Fla. LEXIS 547 (Fla., March 2, 2011). A Petition for Writ of Certiorari was denied by the U.S. Supreme Court on October 3, 2011 in *Allred v. Florida*, 2011 U.S. LEXIS 6406 (U.S., Oct. 3, 2011).

b. <u>Statement of the Case and Facts Pertaining to Post-Conviction Proceedings</u>

Mr. Allred filed a Motion to Vacate Judgment and Sentence and Memorandum of Law on September 28, 2012. PC1/1-40. The State filed its Answer on November 28, 2012. PC1/65-200, PC2/201-401, PC3/402-537. A case management conference was held on February 8, 2013, at which time the court dismissed with leave to amend Claims I, II, III (pertaining only to the issues of change in venue and investigating and/or advising the defendant as to mitigation), and IV. The court granted an evidentiary hearing as to Claim III and Claim V (regarding use of a jury selection expert only). The court reserved ruling as to Claim VI and denied an evidentiary hearing as to Claims VII, VIII, IX, and X. PC14/488-553.

An Amended Motion to Vacate Judgment and Sentence was filed on March 28, 2013, and the State's Response was filed on April 8, 2013. PC4/576-623, PC4/624-56. On April 29, 2013, the court held a second case management conference on the defendant's amended motion. The court granted an evidentiary

hearing for Claims I, II, and III, and denied an evidentiary hearing as to Claim IV. PC15/627-49. On July 3, 2013, the defendant filed a Second Amended Motion to Vacate Judgment and Sentence, which slightly modified Claim I and added Claim XI. PC4/710-63. At a status conference held on July 15, 2013, the court granted the amendment to modify Claim I but denied the amendment to add Claim XI. PC15/650-667.

An evidentiary hearing was held on August 1, 2 and 5, 2013. PC12/1-200, PC13/201-400, PC14/401-461. The circuit court filed an order denying Mr. Allred's Second Amended Motion to Vacate Judgment and Sentence on October 9, 2013. PC11/1856-77. A notice of appeal was timely filed on November 6, 2013. PC11/1878-83.

JURISDICTION

This is a timely appeal from the trial court's final order denying an original motion for post-conviction relief from a judgment and sentence of death. This Court has plenary jurisdiction over death penalty cases. Art. V, ' 3(b)(1) Fla. Const.; *Orange County v. Williams*, 702 So. 2d 1245 (Fla. 1997).

STANDARD OF REVIEW

Under *Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674, (1984), ineffective assistance of counsel claims are a mixed question of law and fact; with the lower court's legal rulings reviewed *de novo* and deference given to factual findings supported by competent and substantial evidence. *Sochor v. State*, 883 So. 2d 766, 772 (Fla. 2004).

SUMMARY OF THE ARGUMENTS

In his first argument for relief, Appellant argues that trial counsel rendered ineffective assistance of counsel during the penalty phase by failing to ensure and present a reasonably competent mental health evaluation. Specifically, Mr. Allred's trial counsel rendered ineffective assistance of counsel for the following: 1) Ineffective assistance for trial counsel's misinterpretation of Dr. Day's diagnosis and opinions of Mr. Allred; 2) Ineffective assistance for unreasonable reliance on Dr. Deborah Day's opinions of Mr. Allred; 3) Ineffective assistance for failure to investigate Mr. Allred's background and thereby presenting to experts all relevant and available mitigation; and 4) Ineffective assistance for failure to obtain and present mental health expert evidence tailored to the specific needs of this case.

In this case, the circuit court failed to consider the totality of mitigation evidence presented during Mr. Allred's penalty phase trial and post-conviction

proceedings. Had trial counsel presented a comprehensive picture of Mr. Allred's background, the balance of aggravating and mitigating circumstances would be different and there exists a reasonable probability Mr. Allred would have received a life sentence. The additional mental health expert testimony provided by collateral counsel through Dr. Caddy and Dr. Geffken would have supported the mitigating circumstance under Fla. Stat. § 921.141(6)(f), the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. Dr. Caddy and Dr. Geffken's expert mental health testimony would have helped tie together the previously presented lay witness testimony from the penalty phase. But for trial counsel's deficient performance at the penalty phase of his capital trial, that information would have been presented to the court, and there is a reasonable probability that the trial court would have sentenced Mr. Allred to a life sentence rather than death based on the additional mitigation.

Argument II argues that trial counsel rendered ineffective assistance of counsel by failing to independently investigate and present to Mr. Allred all circumstances that would bear on his decision to plead guilty. Trial counsel's representation of Mr. Allred fell below acceptable professional standards in several respects and each of these failures severely prejudiced Mr. Allred. Trial counsel

provided ineffective assistance by failing to develop a relationship of trust and close contact with Mr. Allred; properly investigate Mr. Allred's mental status leading up to the day of the crime; consult with and present mental health expert testimony explaining how Mr. Allred's ability to function and form the prerequisite intent was substantially impaired; and investigate and present evidence in opposition to both the element of premeditation in the guilt phase and the cold, calculated, premeditated (CCP) aggravator based on heightened premeditation in the penalty phase.

Argument III argues that trial counsel provided prejudicial ineffective assistance of counsel under *Strickland* by failing to investigate and prepare for potential jury issues. Specifically, trial counsel was ineffective for the following: 1) Ineffective assistance for failing to move for a change of venue; 2) Ineffective assistance for failure to investigate and advise Mr. Allred of mitigation as set out above; and 3) Ineffective assistance for failing to consult an expert on jury selection in order to prepare for voir dire and reasonably communicate with Mr. Allred about jury selection. Trial counsel also failed to understand and fully inform Mr. Allred of the relevant law in his case and how that law related to the facts of his case and his right to move for a change of venue. Mr. Allred's waiver of his right to a jury trial was not knowing, intelligent and voluntary within the

meaning of the Fifth, Sixth and Eighth Amendments.

This Brief also contends that cumulative error deprived the defendant of the fundamentally fair trial guaranteed under the Sixth, Eighth, and Fourteenth Amendments of the United States Constitution (Argument IV); that 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 (Argument V); that the Eight Amendment right against cruel and unusual punishment will be violated as Mr. Allred may be incompetent at the time of execution (Argument VI); that Florida's lethal injection method of execution is cruel and unusual punishment and would deprive Mr. Allred of Due Process and Equal Protection of the law in violation of the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution (Argument VII); and that Fla. Stat. § 945.10 prohibits Mr. Allred from knowing the identity of the execution team members, denying him his constitutional rights under the Sixth, Eighth, and Fourteenth Amendments (Argument VIII).

ARGUMENT I

THE CIRCUIT COURT ERRED IN DENYING MR. ALLRED'S CLAIM THAT HE RECEIVED PREJUDICIAL INEFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE OF HIS CAPITAL TRIAL WHEN TRIAL COUNSEL FAILED TO ENSURE A REASONABLY COMPETENT MENTAL HEALTH EVALUATION.

a. Introduction

Trial counsel provided prejudicial ineffective assistance of counsel under *Strickland* by failing to adequately investigate and present mitigation at the penalty phase of Mr. Allred's trial. Claim One of Mr. Allred's motion for post-conviction relief was framed broadly, and it contains more specific sub-claims, which identify areas in which trial counsel provided ineffective assistance: 1) Ineffective assistance for trial counsel's misinterpretation of Dr. Day's diagnosis and opinions of Mr. Allred; 2) Ineffective assistance for unreasonable reliance on Dr. Deborah Day's opinions of Mr. Allred; 3) Ineffective assistance for failure to fully investigate Mr. Allred's background and thereby providing experts all relevant and available mitigation; and 4) Ineffective assistance for failure to obtain and present mental health expert evidence tailored to the specific needs of this case. The circuit court denied this claim following an evidentiary hearing stating that trial counsel was not unreasonable to rely on Dr. Day's conclusions and trial counsel made a strategic decision not to call Dr. Day at the penalty phase because she

advised that her testimony would be more aggravating than mitigating. PC11/1862. Further, the circuit court stated "the Defendant failed to demonstrate that presenting the testimony of either Dr. Caddy or Dr. Geffken would have altered the outcome of the Defendant's penalty phase in any way." PC11/1867. Mr. Allred seeks review of these findings.

b. Mitigation Presented in Post-Conviction

1. <u>Dr. Glenn Caddy</u>

Glenn Ross Caddy, Ph.D. has been a licensed clinical forensic psychologist since 1977. PC12/1. In his current practice, fifty percent of his work involves forensic or medical legal work. PC12/8-9. Dr. Caddy has been qualified as an expert over 2,000 times in the areas of clinical psychology, forensic psychology, and neuropsychology.[2] PC12/9.

Dr. Caddy was contacted by CCRC-Middle in June 2013 and asked to provide a mental health examination and conduct a records review for Andrew Allred. PC12/12-13. Dr. Caddy reviewed various records including: school records, employment records, trial counsel's files, discovery materials, and Dr.

[2] Dr. Caddy's education and experience at contained within his Curriculum Vitae, entered as Defense Exhibit 1 at the evidentiary hearing. PC10/1709-88.

Deborah Day's psychological records, reports, and test data.[3] PC12/15-16. Dr. Caddy also interviewed Mr. Allred on two separate occasions (totaling 13 hours of examination time), and interviewed both of Mr. Allred's parents. PC12/13-16.

Dr. Caddy first criticized Dr. Day's practice of using other practitioners to administer clinical tests to a patient because "by participating in [the administration] yourself, you get more information then you will if you designate some other person to do that." PC12/16-17. By administering the test personally, follow up questions may be asked and nonverbal cues may be assessed as it is necessary to "look at specific answers that load on particular scales, and not only check them in terms of their reliability, but understand why it was that the person responded in that particular way." PC12/18-19. Dr. Caddy noted that the use of multiple doctors is "not a common preferred practice" amongst clinical and forensic psychologists and falls below the standard of care. PC12/19, 67.

Dr. Caddy reviewed the MMPI-2 which was administered to Mr. Allred by Dr. Day's office, the results of which he believed "disproportionately influence[d] some of [Dr. Day's] thinking in regard to the data that she put down in the file." PC12/16. Although the MMPI-2 is the most highly researched psychological

[3] The full list of records reviewed by Dr. Caddy in forming his opinions was entered as Defense Exhibit 2 at the evidentiary hearing. PC10/1789-91.

instrument in the world, Dr. Caddy notes "the test is not in and of itself and should not be used as a diagnostic instrument, but possible hypotheses to diagnostic indicators." PC12/19-20. Dr. Caddy noted that the MMPI-2 has only been tested on two populations: a forensic population and a general clinical population, which results in scoring issues since "people from other cultures . . . get very different responses . . . [j]ust within the general community, different people have different values and different symptoms, and so the instrument really can't take into account the complexity of the population against which it's compared." PC12/24-25. Further, death row inmates are "a different population then simply the general forensic population." PC12/24-25. The MMPI-2 has not been normed for individuals on death row, or even in the criminal justice system, only normed against a forensic setting interpretation. PC12/25-26.

The MMPI-2 is scored into three primary scales. PC12/21. Mr. Allred had three scales showing slight elevation in scores: depression index (D scale), psychopathic deviates index (PD scale), and low self-esteem index, scoring 72, 75, and 72 respectively. PC12/26-27, 31. Dr. Caddy stated that any score above 65 is considered "elevated, but high elevations start at around 85 to 90." PC12/26. Dr. Caddy noted that the PD scale should have had a slight elevation due to the several questions regarding whether one has ever been arrested or criminally charged.

PC12/27-28.

Dr. Caddy testified it is his opinion that Mr. Allred does not have antisocial personality disorder (ASPD). PC12/33-34. Specifically, there is a complete lack of a conduct disorder in childhood, as all the evidence reviewed showed that Mr. Allred has no history of getting into any significant trouble. PC12/33-34. Mr. Allred's functioning is interesting since he had some unique intellectual talent but performed poorly in school, likely due to a lack of interest. Also, he lacked normal social skills, having only a few friends but none unduly close. PC12/36-37. Mr. Allred's father had a serious drinking problem and there was not a great deal of connection between the two. PC12/38. There was also domestic violence within the household. PC12/38. Mr. Allred was shy and untrusting with others. PC12/41. "He tended to stick to himself and not join study groups." PC12/42. But Mr. Allred was not a violent person; he was reserved, but not aggressive. PC12/44.

Further, Dr. Caddy noted specific instances in Mr. Allred's childhood that "fly in the face of concepts like antisocial personality disorder." PC12/39. For example, when Mr. Allred was around age 13-14, Mr. Allred's father assaulted his mother, prompting Mr. Allred to call the police over concerns of his mother's safety. PC12/38-39. Another instance occurred where Mr. Allred complained to

his supervisor at AT&T over employee practices of selling overly expensive packages to elderly clients who were not aware they were incurring extra fees, resulting in Mr. Allred's termination. PC12/39-40. These examples are inconsistent with ASPD "because he's actually showing the normal courage to stand up and try and do the right thing for people at possible cost to himself. There's some empathy or concern that this is not the correct thing to be doing." PC12/40. Also, Mr. Allred was characteristically shy throughout his life, which is inconsistent with ASPD, as ASPD people "are much more likely in your face." PC12/43. Mr. Allred's threat to commit suicide immediately after the murders is also inconsistent with ASPD as ASPD people are "interested in manipulating, they're not interested in dying." PC12/43-44. Finally, Mr. Allred's low self-esteem, as seen on the MMPI-2, is conflicting because ASPD individuals have a strong sense of self, a sense of superiority, and typically arrogance. PC12/44-45.

Dr. Caddy disagreed with Dr. Day and testified that despite the obvious lack of a conduct disorder, Mr. Allred does not met *any* of the other criteria for ASPD. PC12/40-41. Dr. Caddy stated:

> Because a person who's going to develop a personality disorder does so in their childhood and adolescence, that's why the criteria for all the personality disorders requires the emergence of these phenomena by a certain age . . . In addition . . . there's a precursor requirement, and that is conduct disorder in childhood because people don't just get

> to fourteen and a half years of age and flip off into antisocial personality disorder, that's an evolutionary process.

PC12/40-41.

Following his evaluation, Dr. Caddy opined that Mr. Allred was experiencing a disassociation phenomenon during the time of the murders. PC12/48. A disassociation is a period of time where "a patient disconnects from a clear understanding of the circumstances of their present day functioning," brought upon by extreme stress or traumatic events. PC12/47-48. Dr. Caddy found evidence that Mr. Allred was possibly in a dissociative state in this case. PC12/48. First, through Mr. Allred's subsequent police interview and interview with Dr. Caddy, Mr. Allred's memory of the night of the murders is clear up until the ramming of Tiffany Barwick's car. After this moment, his memory is poor and fragmented, his motives were unclear, he imagined people who weren't actually at the house party, he asked whether the victims were ok, and he experienced an overall reduced awareness of what had actually happened. PC12/48-49, 55, 60. Dr. Caddy testified that Mr. Allred's intent was to only destroy Tiffany's vehicle, noting it is illogical to destroy someone's car and then kill them. PC12/86. "Though, he did a number of things that could be considered to be quite purposeful in terms of the murder . . . people can be in a relatively limited state of function in disassociation, and still be capable of doing these sorts of things." PC12/50. "His

ego impairment was so extreme that he didn't see . . . he was not able to take rational perspective on the consequences of his behavior." PC12/91.

Mr. Allred's dissociation was caused by traumatic events leading up to the night of the murders. First, the very public break-up from Tiffany Barwick during his twenty-first birthday party. The break-up caused a "sense of degradation . . . so extreme, and what that points to is that there was always some underlying limitations in his strength." PC12/52. The break-up was demoralizing, embarrassing, and brought out his sense of inadequacy. The obsessive and irrational behavior that Mr. Allred exhibited towards Tiffany after the break-up set the stage for the disassociation, and as his level of internal stress was building to the point of becoming unmanageable, the next level becomes disassociation. PC12/54. "The trauma was such, that it made it difficult for him to process into memory details of the event and the whole sequence of the event." PC12/49-50. Dr. Caddy described Mr. Allred as "having an emotional breakdown for several weeks" which eventually triggered this disassociation. PC12/86. Dr. Caddy noted that even during Mr. Allred's evaluation in August 2012, traces of disassociation still existed. PC12/57. In Dr. Caddy's opinion, Mr. Allred met the statutory mitigator of diminished capacity of functioning. PC12/63-64.

2. Dr. Gary Geffken

Gary Roy Geffken, Ph.D. has been a licensed clinical psychologist since 1987 and has been practicing clinical psychology at the University of Florida, Department of Psychiatry for twenty-six years. PC12/109. His current practice includes clinical psychology counseling, training psychology students through post-doctoral degrees, and training new psychiatric residents. PC12/110. Dr. Geffken has had much experience with the diagnosis and treatment of individuals with autism spectrum disorder ("ASD"). PC12/111. He was the former director of an inpatient pediatric program where there was an exceptionally high referral of children with autism and approximately 20% of his current practice involves individuals with autism. PC12/111. Dr. Geffken has been previously qualified to testify as an expert in court in the area of clinical psychology.[4] PC12/111-12.

Dr. Geffken was contacted by CCRC-Middle in January 2013 and asked to provide a mental health evaluation on Andrew Allred. PC12/113. Dr. Geffken reviewed various records[5] and interviewed Mr. Allred on April 8, 2013 for approximately six hours. PC11/113-15. Dr. Geffken used several different testing

[4] Dr. Geffken's education and experience at contained within his Curriculum Vitae, entered as Defense Exhibit 3 at the evidentiary hearing. PC11/1792-1840.
[5] The full list of records reviewed by Dr. Geffken in forming his opinions was entered as Defense Exhibit 2 at the evidentiary hearing. PC11/1841-42.

measures as a basis for his evaluation with Mr. Allred, including: a social communication measure related to autism, a repetitive behavior measure related to autism, a language communication measure, and an adaptive behavior questionnaire. PC12/115. Dr. Geffken's primary focus was on the adaptive behavior questionnaire, which is used to measure standards of social and personal responsibility to assess social and emotional development compared to normally developing adolescents. PC12/115-16.

Autism spectrum disorder ("ASD") is a neurological disability affecting one percent of the population, marked by the most significant feature of social deficits or delay in social development. PC12/116-17. In general, autism has become better known over the last 25-30 years and was often missed as a diagnosis when Mr. Allred was a child. PC12/125. Under the DSM-IV, autism and Asperger's Disorder were considered separate disorders, the latter being a high-functioning variant of autism where there is less intellectual impairment and no onset of a language delay. PC12/118, 152. Under the DSM-V, autism and Asperger's are grouped under the overarching classification of pervasive developmental disorders. PC12/119. Individuals can be diagnosed with pervasive developmental disorder when they don't meet all the criteria for autism or Asperger's. PC12/119.

Dr. Geffken noted there are common misconceptions about persons

suffering from pervasive developmental disorders ("PDD"). PC12/119. These people can hold employment and have meaningful relationships. PC12/119. Many individuals are high-functioning, like healthcare professionals, although high-functioning ASD or PDD individuals are more difficult to diagnose because their symptoms are less overt and obvious. PC12/119-21. High-functioning ASD or PDD individuals are sometimes called "odd but active, in that they'll initiate social interactions and respond socially, but most people could probably pick up there's something different about them." PC12/122. High-functioning ASD or PDD individuals are commonly misdiagnosed with attention deficit disorder and may develop coping strategies to help hide their abnormalities so symptoms are not as outward. PC12/121, 123. However, "deficiencies in social development is probably key or the most pervasive deficit characterizing individuals with autism spectrum disorder that . . . can range from very severe to . . . the individuals with autism spectrum disorder again who are married and hold occupations." PC12/123-24.

Dr. Geffken testified that after several hours of speaking with Mr. Allred, he would classify Mr. Allred as suffering from a pervasive developmental disorder. PC12/126. Dr. Geffken opined that Mr. Allred falls into the broad class of high-functioning autism spectrum disorder, or at the very least, he can be diagnosed

with a pervasive developmental disorder. PC12/126. Specifically, Mr. Allred's emotional development is extremely delayed compared to other peers his age. PC12/126-27. School records described him as quiet, avoidant and isolative. PC12/127. There was no evidence of any conduct disorder during his adolescence. PC12/127. There is also evidence in his records of a potential restrictive and repetitive behavior pattern where, as a child, Mr. Allred would lick his hand and then hit his head. PC12/130. While Dr. Geffken did not see signs of a restrictive or repetitive behavior pattern presently, he testified that high-functioning ASD individuals, like Mr. Allred, are less likely to show obvious aberrant, repetitive behaviors as an adult as they can either outgrow or mask these behaviors. PC12/131. Also, there was a variety of emotional and social developmental characteristics of adolescents that Mr. Allred seemed to lack, including lack of knowledge regarding jealousy, embarrassment, empathy, compliments, and sympathy. PC12/126, 142. Lack of empathy in the context of a pervasive developmental disorder is sometimes described as "theory of mind, and it means that an individual . . . has very little idea of what's going on in another person's thoughts and feelings." PC12/150.

After the traumatic experiences of his girlfriend, Tiffany Barwick, breaking up with him and learning his best friend, Michael Ruschak, had sex with her,

"[Allred] was just at a loss, and had no ability to cope after." PC12/128. Someone like Mr. Allred who has a pervasive developmental disorder "is more at a loss than your average individual who would have more social skills and more emotional skills from, and have learned from their prior experience . . . he had this intense attachment and just had no way to cope with it." PC12/128. It is not uncommon for individuals with a pervasive developmental disorder to have an intense attachment to specific individuals. PC12/129-30. "The social deficiency is the most pervasive distinguishing characteristic" and Mr. Allred displayed this throughout his childhood record. His ADHD was likely a misdiagnosis, his poor adaptation to the gifted placement program in school, and the "tick" of licking his hands and slapping his head. PC12/132. Dr. Geffken also noted that the MMPI-2 is not designed to detect autism or pervasive developmental disorders, and has never been used as such. PC12/148.

3. <u>State Experts</u>

Deborah Day, Psy.D. is a licensed clinical psychologist, licensed mental health counselor, and certified family mediator currently working in her private practice called Psychological Affiliates. PC13/335-38. Dr. Day was retained as a confidential mental health expert by trial counsel but was never called to testify at Mr. Allred's penalty phase trial. PC13/339. Psychological Affiliates has eight

other psychologists who work under Dr. Day's direction. PC13/338-39. Dr. Day and two associates, Dr. Robert Janner and Dr. Amanda Janner, became involved with Mr. Allred's case shortly after the murders occurred. PC13/339. Three tests were administered to Mr. Allred by Dr. Robert Janner: Wechsler Adult Intelligence Scale, 3rd Edition (WAIS); Minnesota Multiphasic Personality Inventory (MMPI-2); and the Validity Indicator Profile (VIP). PC13/343-44. Dr. Janner scored the tests and Dr. Day independently looked at the tests. PC13/344.

Dr. Day testified that she never reached a final diagnosis for Mr. Allred. PC13/346. The words in the memorandum authored by Attorney Sinclair were not conclusions reached by Dr. Day; rather she informed trial counsel that "he had antisocial features . . . He had some psychopathy features . . . Typically, when I am talking about diagnoses, they're not very helpful, so it's better to describe behaviors, but sometimes we try to put them in categories. So we have features." PC13/347. Dr. Day based her conclusions on multiple interviews with Mr. Allred, collateral interviews, document review and psychological testing. PC13/349. Dr. Day stated the ASPD features she saw in Mr. Allred were poor impulse control, anger, manipulation, cynicism, lack of remorse, and lack of guilt, all of which were consistent with results from the MMPI-2. PC13/347-48. Mr. Allred did not meet all the criteria for ASPD because Dr. Day never saw clear indications of childhood

or adolescent conduct disorder. PC13/356. Dr. Day noted there was no "pervasive pattern from fifteen forward," rather there "were more recent of the last couple of years difficulties of societal norms, some deceitfulness, the impulsivity or failure to plan ahead." PC13/359. "[S]o the problem with this diagnosis was the pervasiveness of those traits. They were relatively short lived, and only some of them could be demonstrated over the last couple of years of his adulthood." PC13/359.

Attorney Caudill made the final decision that Dr. Day would not testify at trial. Dr. Day informed Attorney Caudill that she believed her testimony would be harmful because "there were very little [statutory mitigation] that I could testify to, if any, but there were certainly aggravators on the side of the State that I could be crossed examined on." PC13/354.

On cross-examination, Dr. Day testified that some behaviors that lead her to believe Mr. Allred had ASPD features were mostly interpersonal difficulties with relationships with family and friends. PC13/362. The domestic violence incident where Mr. Allred called the police on his father is a circumstance inconsistent with ASPD, noting "to me that is indicative of family dysfunction, not ASPD." PC13/363. Further, the incident where Mr. Allred was a "whistle blower" at his job is also inconsistent with ASPD. PC13/363. Dr. Day agreed that the inability to

have empathy is both a characteristic of ASPD and autism spectrum disorder. PC13/366.

Jeffrey A. Danziger, Ph.D. is forensic psychiatrist called by the State at Mr. Allred's evidentiary hearing. PC13/376-77. Dr. Danziger was originally retained by trial counsel immediately after the murders for the sole purpose of determining whether an insanity defense existed. PC13/381. At that time, Dr. Danziger interviewed Mr. Allred only once, determined no evidence supported an insanity defense, and was never called to testify at trial. PC13/381. The State retained Dr. Danziger in February 2013 and asked him to evaluate the opinions of collateral counsel's experts. PC13/381-82. Dr. Danziger met with Mr. Allred on July 15, 2013 for approximately two hours and did not administer any formal testing. PC13/382, 419. Dr. Danziger did not review any of Mr. Allred's school and medical records, police reports or police interviews, or Dr. Day's files and raw testing data. PC14/410-11. Dr. Danziger's information came from his review of the transcripts of the penalty phase trial and post-conviction depositions. PC14/410-11.

Dr. Danziger testified that he would currently diagnose Mr. Allred with an adjustment disorder with a depressed mood. PC13/383. An adjustment disorder "is a development of emotional or behavioral symptoms in response to some

identifiable stressors, and while the symptoms do cause some distress or impairment, they are not severe enough to meet the criteria for any other mood anxiety or psychotic disorder." PC13/383. Dr. Danziger referred to this as a "situational low-level depression." PC13/385.

Dr. Danziger agreed with Dr. Caddy that Mr. Allred does not meet the criteria for ASPD due to the lack of conduct disorder prior to age fifteen. PC13/386. Dr. Danziger noted "you need to have these behaviors before age fifteen, and they need to persist into adulthood. As an adult, one must have this continued pattern of violating societal norms or rules." PC13/387. Dr. Danziger further agreed with Dr. Caddy that Mr. Allred is likewise not a sociopath or psychopath. PC14/413. Dr. Danziger did agree that Mr. Allred's "whistle blower" incident at work is inconsistent with ASPD. PC14/414-15. Aside for the murders and events related to the murders, Dr. Danziger did not find any behavioral issues in Mr. Allred that would support a finding of ASPD. PC14/414. However, Dr. Danziger disagreed with Dr. Caddy's finding of a dissociative emotional state as he agreed with the trial court's finding of the CCP aggravator, stating that Mr. Allred went to the party with the heightened premeditated intent to commit the murders. PC13/392-94. Dr. Danziger did agree that a dissociative state can be caused by stressful events or trauma and can last for a long period of time. PC14/421. Dr.

Danziger noted a change in Mr. Allred from when he first met him in 2007 to his evaluation in 2013 as he was less hostile and angry, and much more cooperative and good mannered. PC14/422.

Dr. Danziger also disagreed with Dr. Geffken's finding of a diagnosis of pervasive developmental disorder or autism spectrum disorder because Dr. Danziger found no evidence of a restrictive repetitive pattern of behavior or activities. PC13/398-99. "Now, if you're a professor and you want to say to yourself, there is enough features here, I'm going to treat this as someone's who's within the range. Well, that's fine and as clinicians who can do that." PC14/403.

c. Ineffective Assistance of Counsel

The United States Supreme Court has held that counsel has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process. *Strickland*, 466 U.S. at 688. Specifically, counsel has a duty to investigate in order to make the adversarial testing process work in the particular case. *Id.* at 690. There are two prongs to an ineffective assistance of counsel claim.

> First, a petitioner 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, whose result is unreliable.

Id. at 687. To establish deficient performance, a petitioner must demonstrate that counsel's representation "fell below an objective standard of reasonableness." *Id.* at 688. In order to show prejudice, it is not necessary to establish that counsel's deficient conduct more likely than not altered the outcome in the case. *Id.* at 693. Instead, "[t]he defendant must show that 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." *Id.* at 694.

In *Wiggins v. Smith*, the United States Supreme Court held "*Strickland* does not establish that a cursory investigation automatically justifies a tactical decision with respect to sentencing strategy. Rather a reviewing court must consider the reasonableness of the investigation said to support that strategy." *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527, 2538, 156 L.Ed. 2d 471 (2003).

> Strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness.

Id. at 2535. Counsel's highest duty is the duty to investigate and prepare. Where counsel does not fulfill that duty, the defendant is denied a fair adversarial testing process and the proceedings' results are rendered unreliable. A reasonable strategic decision is based on informed judgment. "[T]he principal concern . . . is not whether counsel should have presented a mitigation case. Rather, [the] focus [should be] on whether the investigation supporting counsel's decision not to introduce mitigating evidence . . . was itself reasonable." *Wiggins* at 2536. In making this assessment, the Court "must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Id*. at 2538.

Counsel's duty to investigate and prepare applies to the penalty phase, as well as the guilt phase, of a capital trial. *See, e.g.*, *Id.*; *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed. 2d 389 (2000); *Porter v. McCollum*, 558 U.S. 30, 130 S.Ct. 447, 175 L.Ed. 2d 398 (2009); *Sears v. Upton*, 130 S.Ct. 3259, 177 L.Ed. 1025 (2010). In *Rompilla v. Beard*, the United States Supreme Court held that counsel rendered deficient performance which fell below prevailing norms as set out in the ABA Guidelines, citing counsel's failure to review Rompilla's prior conviction, failure to obtain school records, failure to obtain records of Rompilla's prior incarceration, and failure to gather evidence of a history of substance abuse.

Rompilla v. Beard, 545 U.S. 374, 125 S.Ct. 2456, 2463, 162 L.Ed. 2d 360 (2005). The *Rompilla* Court found that "this is not a case in which defense counsel simply ignored their obligation to find mitigating evidence, and their workload as busy public defenders did not keep them from making a number of efforts . . ." *Id.* at 2462. However, despite the scope of this mitigation investigation, including speaking to family members and consulting with mental health experts, the Court still found that counsel rendered deficient performance by failing to look at a court file, which contained a report that detailed mitigation and suggested numerous areas of mitigation to investigate.

The Sixth Amendment requires competent mental health assistance to ensure fundamental fairness and reliability in the adversarial process. *Ragsdale v. State*, 798 So.2d 713 (Fla. 2001). Meaningful assistance of counsel in capital cases requires counsel pursue and investigate all reasonably available mitigating evidence, including mental illness. *Frazier v. Huffman*, 343 F.3d 780 (6th Cir. 2003). Counsel renders deficient performance when he fails to ensure an adequate and meaningful mental health examination. *Ponticelli v. State*, 941 So. 2d 1073, 1095 (Fla. 2006); *Sochor v. State*, 833 So. 2d 766, 722 (Fla. 2004). Prejudice is established, e.g., when counsel fails to investigate and present evidence of brain damage and mental illness. *Ragsdale v. State*, 798 So. 2d 713, 718-19 (Fla. 2001);

Rose v. State, 675 So. 2d 567, 571 (Fla. 1996)(citing *Porter v. Singletary*, 14 F.3d 554, 557 (11th Cir. 1994)). "Prejudice, in the context of penalty phase errors, is shown where, absent the errors, there is a reasonable probability that the balance of aggravating and mitigating circumstances would have been different or the deficiencies substantially impair confidence in the outcome of the proceedings." *Gaskin v. State*, 737 So. 2d 509, 516 n. 14 (Fla. 1999) receded from in part on other grounds by *Nelson v. State*, 875 So. 2d 579, 582-83 (Fla. 2004), *see Hoskins v. State*, 75 So. 3d 250, 254 (Fla. 2011).

1. <u>Deficient Performance</u>

In this case, trial counsel was deficient for incorrectly relying on Dr. Deborah Day's mental health analysis of Andrew Allred. Trial counsel hired Dr. Day as a confidential mental health expert to conduct a psychological evaluation of Mr. Allred and perform any necessary and appropriate testing. PC13/339. After Dr. Day's assessment, she was never called to testify at Mr. Allred's penalty phase trial, although she was listed as a defense witness. PC13/339. As lead attorney, all ultimate strategic decisions regarding Mr. Allred's case were made by Attorney Caudill. PC12/169. Attorney Caudill did not annotate his case files regarding mental health evidence or discussions. PC13/198-99, 204-05. However, despite the lack of annotation, an internal defense memorandum did exist in the trial

attorney files. Defense Exhibit 5 from the evidentiary hearing is a memorandum which asserts that Dr. Day found Mr. Allred is a "sociopath or psychopath" and therefore concludes that failure to call Dr. Day as a witness "is not, per se, acting ineffectively." PC11/1843.

Attorney Caudill testified that it was his understanding that Dr. Day determined Mr. Allred was a sociopath or psychopath. PC13/208. Attorney Caudill stated that "[i]t was my understanding that she had come to a conclusion that if she were to offer a diagnosis in court, that would be the diagnosis." PC13/209. Dr. Day was listed as a defense witness and withdrawn after she informed Attorney Caudill that she could not help provide any mitigating evidence. PC13/209-10. The last meeting between Attorney Caudill and Dr. Day occurred shortly before the penalty phase, but he could not recall a specific date. PC13/211. Attorney Caudill did not document the substantive reasons Dr. Day provided him for arriving at ASPD diagnosis. PC13/213. Attorney Caudill never questioned this diagnosis and never sought a second opinion. PC13/214. Attorney Sinclair drafted the memo, not Dr. Day, but Dr. Day used the words "sociopath" and "psychopath" during her discussions. PC13/236. Further, Attorney Caudill did not provide a substantive answer to the Court when announcing that no mental health evidence would be provided at the penalty phase. R5/460-61; PC13/207. Rather, Attorney

Caudill informed the court:

> Judge, the only thing I would say now is that we had a discussion in our office, we considered all aspects of this case and this hearing as we were approaching it, and we also consulted outside of the office, and based upon all of the information that we had and all the conversations that we had, we made a decision not to present any expert testimony at this hearing.

R5/460.

Attorney Caudill's understanding of Dr. Day's potential testimony is contrary to Dr. Day's testimony at the evidentiary hearing, where she stated that she never reached any firm conclusion regarding a diagnosis; rather, she stated that Mr. Allred merely had features of ASPD. PC13/347. However, trial counsel had sufficient background information to know that an ASPD diagnosis was not accurate for Mr. Allred. There is a complete absence in Mr. Allred's school records and other history to show conduct disorder with onset before age fifteen years, which is essential to such a diagnosis of ASPD. *See* Antisocial Personality Disorder – Diagnostic and Statistical Manual of Mental Disorders Fourth edition Text Revision (DSM-IV-TR), American Psychiatric Association (2000) pp. 645–650. Attorney Caudill testified that he is aware that a conduct disorder is needed to make an ASPD diagnosis. PC13/263-64. In fact, every expert who testified at the evidentiary hearing (Drs. Day, Caddy, Geffken, and Danziger) all agreed that ASPD could not be diagnosed because of the clear lack of a conduct disorder prior

to age fifteen. PC12/33-34, PC13/356, 386. This fact alone was a red flag that should have alerted trial counsel to the fact that the Dr. Day's mental health conclusions were inadequately supported and insufficient thus, further mental health investigation was needed. Further, the defense memorandum and Attorney Caudill's misunderstanding that Dr. Day would testify to an ASPD diagnosis suggests an uninformed misinterpretation of Dr. Day's conclusions.

Trial counsel's strategy for Mr. Allred's penalty phase trial relied heavily on mental health evidence; thus, it was deficient for trial counsel to not have pursued additional mental health experts for trial. Attorney Caudill's defense strategy at penalty phase was described as follows:

> My strategy was to hope to, just because the only thing that I saw that would possibly have a potential of saving Mr. Allred from the death penalty given the facts of the case, was strong mental health mitigation that we could tie to the events themselves, because as I'm sure you know, merely having indication that your client suffers from mental illness or personality disorders or anything else when there's brain damage, if you can't tie it to the offense, and your client – you know what the statutory mental health mitigators are as well, you have to tie it to the offense to the kill them. So that was the strategy to try to develop that information to present on his behalf, but to go along with that because we don't want a situation where our doctors are claiming, our client duffers from some series mental health issue in a vacuum, as if there's no background to support it. So we also investigate background issues, childhood issues, issues surrounding our client, so the plan the strategy unlimitedly what's presented anything and everything that we could about his background, his life, his childhood, his family, his relationships, but ultimately, the real

strategy was to try and present mental health mitigators.

PC12/189-90. Attorney Caudill testified that he needed mental health expert testimony to be successful during penalty phase. PC12/189-90. Thus, based on Attorney Caudill's own words, the evidence he presented at penalty phase was lacking because there was no mental health expert testimony, the result of which was based upon his own misinterpretation of Dr. Day's opinions. The lack of a mental health expert who could help tie together all the lay testimony which was presented caused trial counsel's strategy to fail. Despite Attorney Caudill presenting evidence of an early psychiatric referral, possible sexual abuse, and domestic violence within the family, Judge Eaton's sentencing order states that Mr. Allred had a normal, happy childhood. PC12/191-94. Attorney Caudill noted he needed a mental health expert to pull all the elements of mitigation together: "It certainly would have been helpful, and, again to try to tie all of those elements of his childhood and background into again, what he did at the time of the killings and for purposes of mental health mitigation, yes, I couldn't tie them together as well myself." PC12/194. Attorney Caudill testified that he has "never previously conducted a penalty phase . . . where we didn't present a mental health expert." PC13/212. Attorney Caudill confirmed there was benefit or quid pro quo for choosing to proceed without mental health expert testimony. PC12/166.

Consulting with another mental health expert would not have been unusual for Attorney Caudill. Attorney Caudill testified that in previous cases, he has gone to other experts for a second opinion who are unaffiliated with the case if he was uncomfortable with the first expert's opinions. PC12/167-68. However, in this case, Dr. Day was the sole expert for the investigation and presentation of mental health mitigation. PC12/195. Attorney Caudill never considered or consulted with another expert. PC12/196. He never considered seeking an expert with qualifications specific to Mr. Allred's previous psychiatric diagnosis (i.e. tick disorder and ADHD). PC12/196-97. Attorney Caudill never considered bringing Dr. Danziger back on the case because he worried about running out of time prior to the penalty phase. PC13/220-22. Further, Attorney Caudill testified that Mr. Allred did not prevent him from pursuing another mental health expert. During his representation, Mr. Allred spoke with Attorney Caudill several times, as well as with Attorneys Sinclair and Figgatt, Investigator Jeff Geller, Dr. Danziger and Dr. Day, and cooperated during the testing administered by Dr. Day's associates. PC12/172-73. Mr. Allred never told any lay witnesses not to cooperate with Attorney Caudill's representation. PC12/173. Attorney Caudill was "not limited from presenting mitigation." PC12/185.

The circuit court ruled that trial counsel made a strategic decision not to call

Dr. Day at the penalty phase because her testimony would have been more aggravating than mitigating. However, this strategy was wrong as any aggravation that Dr. Day would have testified to was already known to the State. Mr. Allred's state of mind during the murders (seen through statements made at police station post-murders, etc.) was not a secret. PC13/253. Attorney Caudill agrees that the harmful information were facts already known to the State and presented at trial to support the CCP aggravator. PC13/220-22. Further, Attorney Caudill's strategy was inherently flawed as he was relying on a misinterpretation of Dr. Day's conclusions regarding her mental health findings for Mr. Allred.

Further, the impact of aggravating testimony would have been less impactful in this case since there was no jury for the penalty phase. "There were facts of this case that . . . would have been harmful even with Judge Eaton, but you're correct in general, that the argument is blindly having a judge consider the evidence, because they understand the legal ramifications of the evidence and don't particularly use their emotions." PC13/219. Thus, there was nothing to lose by presenting a mental health expert testimony since the aggravation was already known by the state and there were no jury prejudice issues to be concerned with. Any "double edged sword" argument would have been blunted because Mr. Allred waived a penalty phase jury. One of the purposes of a *Spencer* hearing is to

present such testimony to the Court outside the presence of the jury, and in effect the entire penalty phase here was a *Spencer* hearing.

In this case, adequate investigation into mental health issues for *Wiggins* purposes would have required going beyond merely accepting at face value what appears to be an oral representation that asserts an expert opinion which does not meet the diagnostic criteria established by accepted scientific authority. Trial counsel misinterpreted Dr. Day's findings regarding Mr. Allred. Further, trial counsel failed to retain experts who were tailored to the needs of the case and rather relied on an "all-purpose expert." *See* American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, 10.11. (Commentary at p.112-13) (2003) ("Counsel should choose experts who are tailored to the needs of the case, rather than relying on an "all-purpose" expert who may have insufficient knowledge to testify persuasively about a particular fact/field of expertise.").

2. <u>Prejudice</u>

Unlike trial counsel, collateral counsel provided two experts in post-conviction who were tailored to the particular needs of Mr. Allred's case and who would have been able to tie together all the lay mitigation previously presented at the penalty phase. Dr. Caddy described Mr. Allred as having a disassociation

phenomenon during the time of the murders. PC12/48. This was evidenced on Mr. Allred's fragmented memory as seen in his mental health evaluation and police interviews; providing a full confession after the murders; calling 911 personally to report the crime; and still having the murder weapon in his possession when police arrived. PC12/48-49, 55, 60. None of these actions on Mr. Allred's part are self-serving and no benefit can be taken from him lying about these actions.

Dr. Caddy's testimony supports the statutory mitigator Fla. Stat. § 921.141(6)(f), the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. Dr. Caddy stated that Mr. Allred's "ego impairment was so extreme . . . he was not able to take rational perspective on the consequences of his behavior." PC12/63-64, 91. The disassociated state was the result of traumatic events that were previously presented as evidence during the original penalty phase through lay testimony. These events included: the very public, demoralizing, and embarrassing break-up from Tiffany Barwick during his twenty-first birthday party; the obsessive and irrational behavior that Mr. Allred exhibited towards Tiffany after the break-up (setting the stage for the disassociation); and finally discovering that Tiffany and Michael had sex after their break-up. PC12/52-54, 86. These events cannot be discussed in a vacuum; expert testimony was

necessary to explain the emotional consequences of these events for someone like Mr. Allred who always had underlying limitations to his strength and mental stability. PC12/52. The trauma of these events was such "that it made it difficult for him to process into memory details of the event and the whole sequence of the event." PC12/49-50. Dr. Caddy described Mr. Allred as "having an emotional breakdown for several weeks" which eventually triggered this disassociation. PC12/86. Dr. Caddy's testimony could only have been provided through a mental health expert.

Likewise, Dr. Geffken provided testimony during the evidentiary hearing that could only have been presented by a mental health expert. Dr. Geffken opined that Mr. Allred falls into the broad class of high-functioning autism spectrum disorder, or at the very least, he can be diagnosed with a pervasive developmental disorder. PC12/126. Specifically, Mr. Allred's emotional and social development is extremely delayed compared to other peers his age. PC12/126-27. Dr. Geffken testified that after the traumatic experiences of his girlfriend breaking up with him and learning his best friend had sex with her, "[Allred] was just at a loss, and had no ability to cope after." PC12/128. Someone like Mr. Allred who has a pervasive developmental disorder "is more at a loss than your average individual who would have more social skills and more emotional skills from, and have learned from

their prior experience . . . he had this intense attachment and just had no way to cope with it." PC12/128. It is not uncommon for individuals with a pervasive developmental disorder to have an intense attachment to specific individuals. PC12/129-30. Mr. Allred's social and emotional deficits did give a plausible explanation for why he reacted the way he did in this case.

Although the trial court found that neither Dr. Caddy nor Dr. Geffken's testimony would have changed the outcome of the defendant's penalty phase in any way, this is false because both experts were able to speak to the statutory mitigator Fla. Stat. § 921.141(6)(f). Both Dr. Caddy and Geffken testified to opinions that could only be presented through expert testimony. Both helped provide an understanding, not an excuse, for why someone like Mr. Allred, who had an unhappy childhood, was socially inept with peers, and not coping well overall, was able to form a completely unhealthy and obsessive relationship with Tiffany Barwick. More importantly, their testimony helps explain why Mr. Allred, unlike others his age, was unable to cope with the stress and devastating emotions after the intense break-up with Ms. Barwick. The crime in this case is difficult to understand and the testimony presented during post-conviction, while certainly not an excuse, would have helped the trial court better understand the "why."

In *Williams v. Taylor*, the United States Supreme Court noted that the trial

court's prejudice determination, when reweighing it against the evidence in aggravation, was unreasonable because it failed to evaluate the *totality* of the available mitigation evidence, both that adduced at trial and during the habeas proceedings. *Williams v. Taylor*, 529 U.S. 362, 397-98 (2000), citing *Clemons v. Mississippi*, 494 U.S. 738, 751-52, 108 L.Ed. 2d 725, 110 S.Ct. 1441 (1990). In this case, the circuit court failed to consider the totality of mitigation evidence presented during Mr. Allred's penalty phase trial and post-conviction proceedings. Had Mr. Allred's attorneys presented a comprehensive picture of Mr. Allred's background, the balance of aggravating and mitigating circumstances would be different and there exists a reasonable probability Mr. Allred would have received a life sentence.

Attorney Caudill testified that he needed mental health expert testimony to be successful during penalty phase. Thus, the evidence he presented at penalty phase was lacking because there was no mental health expert testimony, the result of which was based upon his own misinterpretation of Dr. Day's opinions. The lack of a mental health expert who could help tie together all the lay testimony which was presented caused trial counsel's strategy to fail. The additional mental health expert testimony provided by Dr. Caddy and Dr. Geffken can support the finding of substantial impairment and would have tied together the previously

presented lay testimony from the penalty phase. But for trial counsel's deficient performance at the penalty phase, that information would have been presented during to the court, and there is a reasonable probability that the trial court would have sentenced Mr. Allred to life rather than death based on the additional mitigation.

ARGUMENT II

THE CIRCUIT COURT ERRED IN DENYING MR. ALLRED'S CLAIM THAT TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO INDEPENDENTLY INVESTIGATE AND PRESENT TO MR. ALLRED ALL CIRCUMSTANCES THAT WOULD BEAR ON HIS DECISION TO PLEAD GUILTY

a. Introduction

Trial counsel's representation of Mr. Allred fell below acceptable professional standards in several respects. Each of these failures, discussed below, severely prejudiced Mr. Allred. Trial counsel provided ineffective assistance when he failed to do the following: develop a relationship of trust and close contact with Mr. Allred; properly investigate Mr. Allred's mental status leading up to the day of the crime; consult with and present mental health expert testimony explaining how Mr. Allred's ability to function and form the prerequisite intent was substantially

impaired;[6] and investigate and present evidence in opposition to both the element of premeditation in the guilt phase and the cold, calculated, premeditated (CCP) aggravator based on heightened premeditation in the penalty phase.

Mr. Allred has never denied that he was the one who shot the victims, however he denied having the specific intent to murder either one of them. The night of his arrest he gave a full confession, but stated he had gone to the victims' location intending only to ram Tiffany Barwick's car, not to shoot them. R3/158-99. Allred told the detectives that after the shootings, he thought about suicide. R3/192. Everything seemed to catch up with him at one time; he had no girlfriend, no friends, and had lost his job. R3/192. The interview concluded with him again asking for information about the condition of the victims. R3/196-97.

Allred purchased the gun used in these shootings on September 1, 2007, more than three weeks before the murders and just a few days after his twenty-first birthday. R1/127-128 (State Exhibit 44). Because of the three day waiting period he was not able to take possession of the gun until September 7, 2007. Allred told police that he bought the gun at that time because "he could." R3/176, 181. In

[6] This is part of the component for Argument I within this brief. Any argument regarding trial counsel's ineffective assistance of counsel due to failure to investigate and present reasonably competent mental health evidence is fully incorporated herein in this Argument.

other words, the purchase was timed to the fact that he became old enough to make it, not to any criminal intent. He grew up in a gun owning environment and had used firearms all of his life. In the days and weeks after the break-up with Ms. Barwick, he had access to at least two shotguns and a rifle which had been owned by his family for years. R4/305-06; R5/404, 412. "Both of Allred's parents testified that the family kept guns in the house for hunting and skeet and target shooting." *Allred v State*, 55 So. 3d at 1276.

During the plea colloquy the court read the indictment, which included allegations that the defendant acted from a premeditated design. Consistently with his prior acknowledgments of guilt, Mr. Allred acknowledged that he was guilty of the crimes charged. There was no further elaboration of the factual basis for the plea. The plea was accepted without further attention to the apparent inconsistency between Allred's denial of intent to kill in his confession and the formal allegations that he acted from a premeditated design in the indictment.

The State urged and the trial court eventually found the existence of CCP. In its *Spencer* memorandum, the defense argued that at the time of the shootings Allred "lost it," and the fact that he did not enter the house where the shootings took place in a stealthy manner weighed against finding the CCP aggravator. R1/189. The memorandum did not address Allred's earlier denial of an intent to

kill. The sentencing order contains the finding: "The court rejects the defendant's statement that he did not preplan the murders."[2] R2/205. The trial court then gave this aggravator great weight.

This Court considered and ultimately rejected Allred's claim that the CCP aggravator should not have been found in either case at length. In doing so, the Court observed:

> Citing our decision in *Santos v. State*, 591 So. 2d 160 (Fla. 1991), appellant also argues that his actions on that day resulted from an ongoing domestic dispute and therefore were not "cold" and "calculated." In that case, we stated that a murder arising from a domestic dispute tended to negate the CCP aggravator. *Id*. at 162. Then, upon finding, based on a mental health expert's testimony, that the "ongoing, highly emotional domestic dispute" had "severely deranged" Santos and that he was under extreme emotional distress and unable to appreciate the criminality of his conduct, we struck the aggravator. *Id*. at 163.
>
> Appellant's argument fails for two reasons. First, Allred presented no mental health testimony establishing that he was mentally impaired. Further, the record supports the trial court's determinations that Allred was "suffering from an emotional disturbance" but that it was not severe or extreme and that appellant was able to conform his actions to the requirements of law.

[2]The oral pronouncement of the sentence was only a summary of the more lengthy sentencing order and did not elaborate on the Court's finding of the CCP aggravator.

Allred v State, 55 So. 3d 1267, 1279. Obviously, especially in light of the (unrevealing) exchange quoted above in Argument I between the judge and the lawyers about the fact that the defense had listed a mental health expert as a witness and then failed to present her testimony, the two reasons for rejecting Allred's claim on direct appeal are closely related.

The circuit court denied this claim stating that since the defendant did not testify at the evidentiary hearing, "there was no evidence to establish that the Defendant would not have entered his plea but for counsel's alleged ineffectiveness." PC11/1867. Mr. Allred seeks review of these findings.

b. Evidence Presented in Post-Conviction

During the evidentiary hearing, Attorney Caudill testified that the defense strategy if the case went to a guilt phase trial would have been to argue for a lesser included offense. PC12/178. However, Attorney Caudill stated that conversations regarding this strategy were discussed "very little" with Mr. Allred because "in this particular case, we were never going to trial, so those discussions were cut off." PC12/178. Attorney Caudill testified that he recalls after the crime, Mr. Allred informed police he did not go over to the house with the intent to kill the victims, but rather only the intent to destroy Tiffany's vehicle. PC13/216. Attorney Caudill stated that he had no defense prepared to support this contention.

PC13/217-18.

As previously mentioned in Argument I, Attorney Caudill's defense strategy during the penalty phase was the following:

> My strategy was to hope to, just because the only thing that I saw that would possibly have a potential of saving Mr. Allred from the death penalty given the facts of the case, was strong mental health mitigation that we could tie to the events themselves, because as I'm sure you know, merely having indication that your client suffers from mental illness or personality disorders or anything else when there's brain damage, if you can't tie it to the offense, and your client – you know what the statutory mental health mitigators are as well, you have to tie it to the offense to the kill them. So that was the strategy to try to develop that information to present on his behalf, but to go along with that because we don't want a situation where our doctors are claiming, our client duffers from some series mental health issue in a vacuum, as if there's no background to support it. So we also investigate background issues, childhood issues, issues surrounding our client, so the plan the strategy unlimitedly what's presented anything and everything that we could about his background, his life, his childhood, his family, his relationships, but ultimately, the real strategy was to try and present mental health mitigators.

PC12/189-90.

Further, Attorney Caudill had discussions with Mr. Allred's parents regarding Mr. Allred's decisions in the case (i.e. to plead guilty and waive a penalty phase jury) and the impact it would have. PC12/181-82. However, Attorney Caudill never arranged a meeting between Mr. Allred and his parents to directly discuss these issues, nor were Mr. Allred's parents present for any meeting where Attorney Caudill spoke with Mr. Allred regarding his decisions. PC12/181-

82. Attorney Caudill recalls "a conversation with [Allred's] mother, and how she would really like to talk to him about that, but wasn't comfortable with it, and that was maybe my fault, because I had a proscription on family members talking to my clients about the case itself, but she wanted to, I don't know if she ever did." PC12/182-83. Attorney Caudill never brought in third parties (like clergy or death row representatives) to the discussions with Mr. Allred to help fully inform Mr. Allred before he made the decision to plead guilty or waive a jury. PC12/183-84. Attorney Caudill stated that he never even "considered it in this case." PC12/184.

c. Ineffective Assistance of Counsel

In *Strickland v. Washington*, 466 U.S. 668 (1984), the United States Supreme Court held that counsel has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversary testing process. *Id.* at 688. Specifically, counsel has a duty to investigate in order to make the adversarial testing process work in the particular case. *Id.* at 690. "An ineffective assistance of counsel claim has two components: A petitioner must show that counsel's performance was deficient and that the deficiency prejudiced the defendant. To establish deficient performance, a petitioner must demonstrate that counsel's representation 'fell below and objective standard of reasonableness.'" *Strickland v. Washington*, 466 U.S. 668, 687-688, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984)

(internal citations omitted). Prejudice is defined as "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* At 694.

When a defendant enters a guilty plea to an offense, he is waiving several fundamental constitutional rights; a guilty plea is more than just an admission of conduct, it is a conviction. *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709 (1969).

> Consequently, if a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void. Moreover, because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts.

Id at 243 (citing *McCarthy v. United States*, 394 U.S. 459, 466, 89 S.Ct. 1166, 1171 (1969)(emphasis added). The *Boykin* court recognized that "a number of important federal rights are implicated in the plea process," including "his privilege against compulsory self-incrimination, his right to trial by jury, and his right to confront his accusers." *Id* at 243.

When a defendant challenges a guilty plea under an ineffective assistance of counsel claim, the two part *Strickland* standard applies. *Hill v. Lockhart*, 474 U.S.

52, 106 S.Ct. 366 (1985). "The failure of an attorney to inform his client of the relevant law clearly satisfies the first prong of the *Strickland* analysis adopted by the majority, as such an omission cannot be said to fall within 'the wide range of professionally competent assistance' demanded by the Sixth Amendment." *Hill v. Lockhart*, 474 U.S. 52, 62 (1985) (White, J., with Stevens, J., concurring) (*quoting Strickland*, 466 U.S. at 690 (1984)).

"If no written guarantee can be obtained that death will not be imposed following a plea of guilty, counsel should be extremely reluctant to participate in a waiver of a client's trial rights. [Prevailing norms] may require counsel to do everything possible to prevent a depressed or suicidal client from pleading guilty where such a plea could result in an avoidable death sentence." *See* American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, 10.9.2-Entry of Plea of Guilty (Commentary) (2003).

In this case, Mr. Allred pled guilty to two counts of premeditated murder. R5/472-82. Trial counsel's representation of Mr. Allred fell below acceptable professional standards in several respects and severely prejudiced Mr. Allred. First, trial counsel failed to investigate and present evidence in opposition to both the element of premeditation in the guilt phase and the cold, calculated, premeditated (CCP) aggravator based on heightened premeditation in the penalty

phase. Attorney Caudill testified that the defense "strategy" at guilt phase would have been to argue for a lesser included offense, but this strategy was discussed "very little" with Mr. Allred because "in this particular case, we were never going to trial." PC12/178. Although Mr. Allred wanted to plead guilty to the charges, Attorney Caudill was still obligated to investigate and present to Mr. Allred evidence to help rebut the premeditation and CCP aggravator so that Mr. Allred could make a fully informed decision regarding his plea.

Secondly, trial counsel provided ineffective assistance when he failed to properly investigate Mr. Allred's mental status leading up to the day of the crime. Specifically, trial counsel failed to consult with and present mental health expert testimony explaining how Mr. Allred's ability to function and form the prerequisite intent was substantially impaired. What appears from the record on direct appeal is that a defendant who was fully cooperative and forthcoming – he called 911, gave police his location, had the murder weapon at his feet, told them he "was the one they were looking for," and gave a confession – nevertheless denied acting from a premeditated design. Aside from his *pro forma* acquiescence to the reading of the indictment in full at the pleas colloquy, there is nothing on the record explaining the discrepancy between what Allred told the police about his mental state and the essential legal requirement of premeditated design. There is no

indication that his statement about mental state to the police was addressed by the defense, which brings into question whether the plea itself was knowing and voluntary. The trial judge "rejected" an argument that had not even been offered in his *Spencer* memorandum. The lack of mental health expert input was cited by this Court as apparently the decisive reason for denying his argument against application of CCP. Moreover, trial counsel's files are conspicuously devoid of any information about counsel's independent investigation of the defendant's mental state at the time of the offense.

Further, for all of the reasons set out in Argument I above, Mr. Allred contends that defense counsel provided ineffective assistance of counsel with regard to the investigation and presentation of expert evidence pertaining to Mr. Allred's mental status and, with regard to this argument, that such ineffectiveness undermined the validity of the plea as well as the result of the penalty phase.

ARGUMENT III

THE CIRCUIT COURT ERRED IN DENYING MR. ALLRED'S CLAIM THAT TRIAL COUNSEL'S PERFORMANCE IN FAILING TO INVESTIGATE AND PREPARE FOR POTENTIAL JURY SELECTION FELL BELOW PREVAILING PROFESSIONAL NORMS AS COUNSEL WAS DEFICIENT FOR FAILING TO MOVE FOR A CHANGE OF VENUE, FAILING TO INVESTIGATE AND ADVISE OF ALL MITIGATION, AND FAILING TO CONSULT WITH AN EXPERT ON JURY SELECTION

a. Introduction

In the case at hand, trial counsel provided prejudicial ineffective assistance of counsel under *Strickland* by failing to investigate and prepare for potential jury issues. Claim III of Mr. Allred's motion for post-conviction relief was framed broadly, and it contains more specific sub-claims, which identify areas in which trial counsel provided ineffective assistance: 1) Ineffective assistance for failing to move for a change of venue; 2) Ineffective assistance for failure to investigate and advise Mr. Allred of mitigation as set out above; and 3) Ineffective assistance for failing to consult an expert on jury selection in order to prepare for voir dire and reasonably communicate with Mr. Allred about jury selection. Trial counsel also failed to understand or fully inform Mr. Allred of the relevant law in his case and how that law related to the facts of his case and his right to move for a change of venue. Mr. Allred's waiver of his right to a jury trial was not knowing, intelligent and voluntary within the meaning of the Fifth, Sixth and Eighth Amendments. The circuit court held an evidentiary hearing on this claim and denied relief. PC11/1868-73. Mr. Allred seeks review of these findings.

b. Mitigation Presented in Post-Conviction

1. <u>Dr. Harvey Moore</u>

Harvey Allan Moore received his Ph.D. in sociology in 1972. PC13/277-78.

Dr. Moore has testified as an expert in the areas of venue decisions, pretrial publicity, and the meaning of evidence. PC13/278. Dr. Moore has taught as a professor of sociology and criminology, was previously the director of Florida Mental Health Institute, and published numerous articles regarding drug use, drug treatment, treatment of sex offenders, and clinical and social observations made to record trial proceedings. PC13/280.

Dr. Moore founded a trial consulting firm called Trial Practices, Inc. in 1989. PC13/278. Trial Practices, Inc., has approximately 18-20 employees and provides numerous trial services through the "logic of simulation" to create models of courtroom behavior. PC13/282. Services "can range from a full blown replicate trial, a mock trial . . . down to small focus groups where you simply discuss issues with jury eligible citizens." PC13/282-83. Within focus groups, his organization "will evaluate witnesses, evaluate openings, evaluate direct/cross examination, evaluate voir dire techniques to see what it is that is communicated during voir dire." PC13/283. Trial Practices, Inc. covers all trial services like providing graphics and animation, electronic courtroom presentations (e.g. power point), and court room support with electronic equipment. PC13/283. Other services include creation of communication vehicles like "day in life videos, or settling videos, or even courtroom presentations have a background in electronic media." PC13/283.

The staff of Trial Practices, Inc. is diverse to help provide different perspectives, including: a journalist, attorneys, two former CNN award winning correspondents, a statistician ("who will opine on sampling techniques in the application or extension in the research finding"), psychologists, and individuals previously involved with the theatre. PC13/283-85.

Dr. Moore testified that trial consulting is a vast and varied field as "there are far greater number of types of professions that may be involved . . . you bring those people in on an ad hoc basis as you're trying to solve the particular problem at trial." PC13/284. "Each of those consultants have a different perspective, and I think when you think about trial consultants, they're reflected in the American Society of Trial Consultants, you'll see that there is no one discipline, as a corner on this this." PC13/285. A former employee of his office now is employed as a trial consultant for the Hillsborough County Public Defender's Office. PC13/286.

Dr. Moore has been hired to work on over one hundred criminal cases in this circuit. PC13/286, 305. Trial Practices, Inc. also performs numerous pro bono cases and provides a "well publicized" website for attorneys to find volunteer trial services. PC13/286. Dr. Moore has consulted on more than one hundred murder cases and has provided pro bono services for forty death penalty cases. PC13/304.

Based on his records review of Mr. Allred's case, Dr. Moore testified that

there was a lot of publicity from multiple exposures. PC13/289. If trial counsel had asked Dr. Moore to assist with a change of venue motion, Dr. Moore would have first analyzed whether the change was necessary by evaluating the impact of the publicity within the venue through sample surveys of the public. PC13/289-90. Dr. Moore could have also assisted trial counsel with Mr. Allred's decision of whether to enter a plea by meeting with the client and evaluating what the client perceives is going to happen and providing what services would then be useful. PC13/290. Dr. Moore has "not studied or reached a conclusion about whether there's a need to change a venue in this case." PC13/298.

In this particular case, Dr. Moore could have assisted trial counsel by doing the following: suggesting the need for a complete evaluation of Mr. Allred's early development with specific attention to potential issues involving molestation; having client and trial counsel understand that "the idea of a venue motion in itself is something to evaluate in terms of how the case could be tried;" developing a strategy for the trial that can be clearly communicated to a potential jury; and assisting with client and witness testimony training. PC13/291-92. Also, Dr. Moore could have assisted in constructing a jury questionnaire where "you have certain objectives in creating that protocol. It may be to discover cause challenges. It may be to a new or subtle way to develop themes that could be echoed in your

case. So you could be talking about jury selections, you could be taking about a theme developments, you could be talking about a strategy in the case." PC13/298. Even though Mr. Allred pled guilty, Dr. Moore's services could still have been utilized because trial consultants are brought in at all different phases of the trial. PC13/302. Dr. Moore still could have had the opportunity to evaluate a penalty phase jury presentation and helped with preparation for the penalty phase mitigation witnesses. PC13/302-03.

c. Ineffective Assistance of Counsel and Prejudice

The Sixth Amendment provides that a defendant has a fundamental right to a jury trial during the penalty phase of a capital proceeding. *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 584 (2002); *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348 (2000); *Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444 (1968). The right to trial by jury is not a "mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary." *Blakely v. Washington*, 542 U.S. 296, 305-06, 124 S.Ct. 2531, 159 L.Ed. 2d 403 (2004). Fundamental constitutional rights can be waived, *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709 (1969), but an effective waiver of a constitutional right must be knowing and intelligent. *Brady v.*

United States, 397 U.S. 742, 90 S.Ct. 1463 (1970). A citizen accused of a crime can waive his right to a jury, but the waiver will be set aside upon a showing that the relinquishment of the right was not knowing and voluntary. *Patton v. United States*, 281 U.S. 276, 50 S.Ct. 253, 74 L.Ed. 854 (1930) (*abrogated on other grounds* by *Williams v. Florida*, 399 U.S. 78 (1970)).

> Not only must the right of the accused to a trial by a constitutional jury be jealously preserved, but the maintenance of the jury as a fact-finding body in criminal cases is of such importance and has such a place in our traditions, that, before any waiver can become effective, the consent of government counsel and the sanction of the court must be had, in addition to the *express and intelligent consent of the defendant*. And the duty of the trial court in that regard is not to be discharged as mere matter of rote, but with sound and advised discretion, with an eye to avoid unreasonable or undue departures from that mode of trial or from any of the essential elements thereof, and with a *caution increasing in degree as the offenses dealt with increase in gravity.*

Patton, 281 U.S. at 312-13 (emphasis added). There can be no effective waiver of a fundamental constitutional right unless there is an "intentional relinquishment or abandonment of a *known* right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938) (emphasis added).

Because the right to jury trial is critical in protecting a defendant's life and liberty, trial courts must apprise the defendant of the "relevant circumstances and likely consequences," *Brady v. United States*, *supra*, 397 U.S. at 748, to determine

whether the defendant's waiver is made freely and intelligently.

> The decision to waive the right to jury sentencing may deprive a capital defendant of life saving advantages. As we have recognized, the jury operates as an essential bulwark to "prevent oppression by the government." *Duncan v. Louisiana,* 391 U.S. 145, 155, 88 S.Ct. 1444, 1450, 20 L.Ed. 2d 491 (1968) "'[O]ne of the most important functions any jury can perform in making . . . a selection [between life imprisonment and death for a defendant convicted in a capital case] is to maintain a link between contemporary community values and the penal system,'" *Gregg v. Georgia*, 428 U.S. 153, 181, 96 S.Ct. 2909, 2928, 49 L.Ed.2d 859 (1976) (joint opinion of Stewart, Powell and Stevens, JJ.), quoting *Witherspoon v. Illinois*, 391 U.S. 510, 519, n. 15, 88 S.Ct. 1770, 1775, n. 15, 20 L.Ed.2d 776 (1968). Indeed, it has been argued that juries are less inclined to sentence a defendant to death than are judges. *See Spaziano v. Florida*, 468 U.S. 447, 488 n. 34, 104 S.Ct. 3154, 3177 n. 34, 82 L.Ed. 2d 340 (1984)(Stevens, J., concurring in part and dissenting in part), citing H. Zeisel, Some Data on Juror Attitudes Towards Capital Punishment 37-50 (1968).

Jells v. Ohio, 498 U.S. 1111 (1991) (Marshall, J., *dissenting on the denial of certiorari*).

The two pronged *Strickland* test applies to the challenges to guilty pleas based on ineffective assistance of counsel. *Hill v. Lockhart*, 474 U.S. 52, 58-59, 106 S.Ct. 366, 88 L.Ed.2d 203(1985). This standard logically also applies to the waiver of a sentencing jury. A state court unreasonably applies clearly established law when it "unreasonably refuses to extend [the legal principle from Supreme Court precedent] to a new context where it should apply." *Williams v. Taylor*, 529 U.S. 362, 407-08 (2000).

Prevailing standards establish that entering a guilty plea and waiving a jury should only be done in the rarest of circumstances. *Id*. *Defending a Capital Case in Florida 1992-2003, (5th Ed. 1999)* Chapter 6, Guilt Phase Strategy, recommends an aggressive, attacking defense in spite of the fact that most capital cases present with overwhelming evidence of guilt. Ch. 6, p. 4. When counsel may be considering having their client enter a plea to the charges and proceed to bench trial on the penalty phase, experienced Florida capital litigators "*strongly recommended that this rarely if ever should be done*. *This type of 'trial plea' can be as bad, if not worse, than adopting a strategy of a passive defense.* It is very important that before such a plea is entered, that you thoroughly discuss this strategy with as many experienced capital attorneys as possible." Ch. 6, p. 10.

In this case, trial counsel rendered ineffective assistance of counsel by failing to investigate and prepare for potential jury selection issues. Specifically, counsel was ineffective for failing to move for a change of venue, failing to investigate and advise Mr. Allred of mitigation as set out in Argument I above, and failure to consult an expert on jury selection in order to prepare voir dire and reasonably communicate with Mr. Allred about jury selection. Attorney Caudill failed to fully prepare for these issues because as he testified, "in this particular case, we were never going to trial." PC12/178.

Attorney Caudill testified he never considered hiring and speaking with a trial consultant in this case. PC12/184. He has never used a jury consultant in the past. PC13/248. When asked about whether a change of venue motion was ever considered, Attorney Caudill testified that "[t]here would have been some discussion [about change of venue]. I don't remember specifically because it was in the press, and that would have been a concern." PC13/325. Again, rather than investigate all available resources and present the findings to Mr. Allred, Attorney Caudill testified that a change of venue or a jury consultant was a moot point because there was never going to be a trial. PC13/250. Further, unlike Trial Practices, Inc., Attorney Caudill's office does not conduct polls of the community with regard to a specific case. PC13/256.

Counsel's failure to consult with a jury expert to develop a cohesive theory throughout the guilt and penalty phases of the trial, and to have the expert identify potential juror issues regarding facts of the case, failure to develop meaningful questions for voir dire to address issues and concerns in the case, failure to move for individual voir dire, and failure to submit a written questionnaire to jurors prior to jury selection rendered Mr. Allred's waiver of a sentencing phase jury unknowing and involuntary. *See* American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, 10.10.2 -C,

Voir Dire and Jury Selection, (2003) (counsel should consider seeking expert assistance in the jury selection process). Counsel should have devoted substantial time to determining the makeup of the venire, preparing a case-specific set of voir dire questions, planning a strategy for voir dire and choosing a jury selection expert. *Id*. at Commentary Section. The need for a jury selection expert is "most obvious in extraordinary cases such as death penalty cases." NAT'L LEGAL AID & DEFENDER ASS'N, PEFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION, Guideline 7.2 cmt. (1995).

Dr. Moore and his company, Trial Practices, Inc., was an organization that was available during Mr. Allred's trial. A trial consulting firm was a resource that trial counsel should have investigated, at least minimally, to have Mr. Allred give a knowing and voluntary waiver of his right to trial. In order for Mr. Allred to enter his plea knowingly, he needed to be aware of all the resources available for trial.

ARGUMENT IV

THE CIRCUIT COURT ERRED IN DENYING MR. ALLRED'S CLAIM THAT CUMULATIVE ERROR DEPRIVED HIM OF THE FUNDAMENTALLY FAIR TRIAL GUARANTEED UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS

Mr. Allred alleged in Claim VI of the motion for post-conviction relief that cumulative error deprived Mr. Allred of his constitutional right to a fundamentally

fair trial, which is guaranteed under the Sixth, Eighth, and Fourteenth Amendments. PC8/1315-16. *See Heath v. Jones*, 941 F.2d 1126 (11th Cir. 1991); *Derden v. McNeel*, 938 F. 2d 605 (5th Cir. 1991). "[A] court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury." *Strickland*, 466 U.S. at 695-96. The cumulative effect of the number and types of errors involved in his trial (as discussed in Arguments I through III above), when considered as a whole, virtually dictated the sentence that he would receive. *State v. Gunsby*, 670 So. 2d 920 (Fla. 1996). The circuit court denied this claim, stating that "the Court does not find that there is any error singularly or cumulatively which denied a fair trial to the Defendant." 11/1873-74. Mr. Allred seeks review of these findings.

ARGUMENT V

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

Mr. Allred alleged in Claim VII of his motion for post-conviction relief that Florida's capital sentencing scheme denies him his right to due process of law, and constitutes cruel and unusual punishment on its face and as applied. Florida's

death penalty statute is constitutional only to the extent that it prevents arbitrary imposition of the death penalty and narrows application of the penalty to the worst offenders. *See Profitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960 (1976). Florida's death penalty statute, however, fails to meet these constitutional guarantees, and therefore violates the Eighth Amendment to the United States Constitution. *Richmond v. Lewis*, 506 U.S. 40, 113 S.Ct. 528 (1992).

Florida's death penalty statute fails to provide any standard of proof for determining that aggravating circumstances "outweigh" the mitigating factors, *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881 (1975), and does not define "sufficient aggravating circumstances." Further, the statute does not sufficiently define for the judge's consideration each of the aggravating circumstances listed in the statute. *See Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759 (1980). Florida's capital sentencing procedure does not utilize the independent re-weighing of aggravating and mitigating circumstances envisioned in *Profitt v. Florida*. The aggravating circumstances in the Florida capital sentencing statute have been applied in a vague and inconsistent manner. *See Godfrey v. Georgia*; *Espinosa v. Florida*, 505 U.S. 1079, 112 S.Ct. 2926 (1992).

Florida law creates a presumption of death where but a single aggravating circumstance applies. This creates a presumption of death in every felony murder

case, and in almost every premeditated murder case. The systematic presumption of death is fatally offensive to the Eighth Amendment's requirement that the death penalty be applied only to the worst offenders. *See Richmond v. Lewis*, 506 U.S. 40, 113 S.Ct. 528 (1992); *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726 (1972); *Jackson v. Dugger*, 837 F.2d 1469 (11th Cir. 1988). Execution by lethal injection imposes unnecessary physical and psychological torture without commensurate justification, and therefore constitutes cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution.

To the extent trial counsel failed to properly preserve this issue, defense counsel rendered prejudicially deficient assistance. *See Murphy v. Puckett*, 893 F.2d 94 (5th Cir. 1990). The circuit court denied this claim and Mr. Allred seeks review of these findings. PC11/1874.

ARGUMENT VI

THE EIGHT AMENDMENT RIGHT AGAINST CRUEL AND UNUSUAL PUNISHMENT WILL BE VIOLATED AS MR. ALLRED MAY BE INCOMPETENT AT THE TIME OF EXECUTION

Mr. Allred alleged in Claim VIII of the motion for post-conviction relief that in accordance with Florida Rules of Criminal Procedure 3.811 and 3.812, a prisoner cannot be executed if "the person lacks the mental capacity to understand the fact of the impending death and the reason for it." *Ford v. Wainwright*, 477

U.S. 399, 106 S.Ct. 2595 (1986). The undersigned acknowledges that under Florida law, a claim of incompetency to be executed cannot be asserted until a death warrant has been issued. However, in *In Re: Provenzano*, No. 00-13193 (11th Cir. June 21, 2000), the Eleventh Circuit Court of Appeals suggests a claim of incompetence to be executed is waived if not raised in the initial state post-conviction proceeding.

The Eleventh Circuit appears to have receded from *Provenzano*, but is predisposed to interpret the exception very narrowly:

> The Supreme Court held in *Panetti* that the statutory bar on filing second or successive habeas petitions does not apply to the "unusual" claim of incompetency to be executed because such a claim is not ripe until the execution date has been established. FN6 551 U.S. at 945-47 (2007). Subsequent to *Panetti,* the Eleventh Circuit decided *Tomiki v. Secretary of the Department of Corrections,* 557 F.3d 1257 (11th Cir. 2009). In *Tomiki*, the Eleventh Circuit stated that the "*Panetti* case only involved a *Ford* [incompetency] claim, and the Court was careful to limit its holding to *Ford* [incompetency] claims." *Id*. at 1259. Although the Eleventh Circuit suggested in *Tomiki* that *Panetti's* holding may extend further to encompass other claims that become ripe only after the first petition is filed, it did not ultimately hold as much and later emphasized in an unpublished decision that the Panetti exception is a "narrow" one. *Jeremiah v. Terry*, 322 Fed. Appx. 842, 844 (11th Cir.2009) (unpublished decision).

Marek v. McNeil, 2009 WL 2488296 (S.D. Fla. Aug. 13, 2009). Given the noted tendency of the Eleventh Circuit to interpret *Panetti* narrowly, the defendant raises this issue in an abundance of caution. Statistics have shown that many inmates

incarcerated over a long period of time incur diminished mental capacity. *See Panetti*, 127 S.Ct. 2842 at 2852: "All prisoners are at risk of deteriorations in their mental state." Because the defendant may well be incompetent at time of execution, his Eighth Amendment right against cruel and unusual punishment will be violated.

The circuit court denied this claim and Mr. Allred seeks review of these findings. PC11/1874.

ARGUMENT VII

FLORIDA'S LETHAL INJECTION METHOD OF EXECUTION IS CRUEL AND UNUSUAL PUNISHMENT AND WOULD DEPRIVE MR. ALLRED OF DUE PROCESS AND EQUAL PROTECTION OF THE LAW IN VIOLATION OF THE FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND CORRESPONDING PORTIONS OF THE FLORIDA CONSTITUTION

Mr. Allred alleged in Claim IX of the motion for post-conviction relief that the Eighth Amendment to the United States Constitution prohibits the "unnecessary and wanton infliction of pain," *Gregg v. Georgia*, 428 U.S. 153, 173, 96 S.Ct. 2726 (1976) (plurality opinion), and procedures that create an "unnecessary risk" that such pain will be inflicted. *Cooper v. Rimmer*, 379 F.3d 1029, 1033 (9th Cir. 2004). The Eighth Amendment has been construed by the Supreme Court of the United States to require that punishment for crimes comport

with "the evolving standards of decency that mark the progress of a maturing society." *Roper v. Simmons*, 543 U.S. 551, 561, 125 S.Ct. 1183 (2005) (quoting *Trop v. Dulles*, 356 U.S. 86, 100-01, 78 S.Ct. 590 (1958) (plurality opinion)). Executions that "involve the unnecessary and wanton infliction of pain," *Gregg*, 428 U.S. at 173 (plurality opinion), or that "involve torture or a lingering death," In re *Kemmler*, 136 U.S. 436, 447, 10 S.Ct. 930 (1890), are not permitted. Florida's present method of execution by lethal injection entails an unconstitutional level of risk that it will cause extreme pain to the condemned inmate in violation of the Eighth and Fourteenth Amendments of the U.S. Constitution and the Florida Constitution's prohibition against cruel and unusual punishment. This claim is evidenced by the botched execution in Florida of Angel Diaz on December 13, 2006. As such, the defendant requests that the death sentence be vacated or that this Court order that any execution be stayed.

The circuit court denied this claim and Mr. Allred seeks review of these findings. PC11/1874-75.

ARGUMENT VIII

FLA. STAT. 945.10 PROHIBITS MR. ALLRED FROM KNOWING THE IDENTITY OF THE EXECUTION TEAM MEMBERS, DENYING HIM HIS CONSTITUTIONAL RIGHTS UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION

Mr. Allred alleged in Claim X of the motion for post-conviction relief that prohibiting his knowledge of the identity of the execution team members is unconstitutional. Section 945.10, Fla. Stat. (2006) exempts from disclosure under Section 24(a), Article I of the Florida Constitution (the right to access public records): "(g) Information which identifies an executioner, or a person prescribing, preparing, compounding, dispensing, or administering a lethal injection." This statute was found to satisfy the Florida constitutional requirement that such exemptions provide a meaningful exemption that is supported by a thoroughly articulated public policy in this case based upon concerns for the safety of those involved in executions. *Bryan v. State*, 753 So. 2d 1244, 1250-51 (Fla. 2000).

Federal courts have found that concerns that execution team members would be publicly identified and retaliated against was an overreaction, supported only by questionable speculation. *California First Amendment Coalition v. Woodford*, 299 F.3d 868 (9th Cir. 2002). Importantly, that court pointed out that numerous high profile individuals are involved with the implementation of executions, including a warden, a governor and judges, and there is a significant history of safety around these publicly known officials. *Id*. at 882. Pennsylvania courts have likewise found safety concerns as a basis for protecting the identity of execution witnesses

as wholly unsupported speculation. *Travaglia v. Dept. of Corrections*, 699 A.2d 1317, 1323 n.5 (Pa. Commw. Ct. 1997).

The litany of states that have had challenges to the manner in which lethal injection is used as a means of execution has consistently grown as additional problems with executions in these states have been noted. These states include Florida (where a moratorium was placed on all executions following problems in the execution of Angel Diaz); Maryland (where executions were stayed when chemicals leaked onto the floor during a previous execution); *Oken v. Sizer*, 321 F. Supp. 2d 658, 659 (D. Md. 2004)); Ohio (where two recent executions were marked by long delays related to venous access, including one in which the inmate's hand swelled because of improper venous access and litigation regarding lethal injection is pending) *see State v. Rivera,* Case No. 04CR065940, Lorraine County, Court of Common Pleas; California (where a federal district court held that execution protocols violated the Eight Amendment based in part on execution team members who were disciplined for smuggling drugs into prison and another diagnosed with post-traumatic stress disorder) *Morales v. Tilton*, 465 F. Supp. 2d. 972 (N.D. Cal. 2006)); and Missouri (where a federal district court temporarily put a halt to executions after hearing testimony from a medical doctor involved in executions that the doctor had been sued for malpractice more than twenty times

and had his privileges had been revoked at two hospitals, *Taylor v. Crawford*, 2006 WL 1779035 (W.D. Mo. 2006), and where a nurse employed in executions by both the federal government and Missouri was on probation for multiple charges and had to receive permission from his probation officer in order to travel to some executions.))

The recent problems with lethal injections documented in numerous states raise specific concerns about Eighth Amendment considerations. In order to avoid the infliction of unnecessary pain during an execution, it is essential that the inmate be properly anesthetized prior to and during the injection of the other chemicals. Evidence of inmates: (1) taking longer than expected times to die; (2) writhing, twitching and exhibiting other signs of pain after the administration of at least two of the drugs; (3) having improper amounts of drugs in their system post-mortem; (4) having chemicals spill out onto the death chamber floor; and (5) showing signs of not being completely unconscious after the period expected by the administration of the anesthetic, all point to problems with the drugs not being properly administered by competent personnel.

Moreover, the exemption violates Art. X, § 25(a), Fla. Const. The provision generally known as Amendment 7, adopted in 2004 by Florida's electorate, states: "In addition to any other similar rights provided herein or by general law, patients

have a right to have access to any records made or received in the course of business by a health care facility or provider relating to any adverse medical incident." Art. X, § 25(a), Fla. Const. Amendment 7 thus provides an avenue for patients to get access to records of a health care provider's adverse medical incidents. *See Fla. Hosp. Waterman, Inc. v. Buster*, 984 So. 2d 478, 486 (Fla. 2008). The Florida Supreme Court has recognized that this popularly adopted amendment affects, or even abrogates, statutes that previously exempted records of investigations, proceedings, and records of peer review panels from discovery in civil or administrative actions. *See Buster*, 984 So. 2d at 488-89; *Advisory Op. to Att'y Gen. re: Patients' Right to Know About Adverse Med. Incidents*, 880 So. 2d 617, 620-21 (Fla. 2004). "[O]ne of the primary purposes of the amendment is to provide a patient contemplating treatment by a medical provider access to that provider's past history of adverse medical incidents." *Buster*, 984 So. 2d at 489 n. 6. "[A]mendment 7 is self-executing and does not require legislative enactment." *Id*. at 492.

The exemption for the identity of the execution team members also conflicts with FL ST §381.026, the "Florida Patient's Bill of Rights and Responsibilities." This statute states:

(4) (b) Information.—

> 1. A patient has the right to know the name, function, and qualifications of each health care provider who is providing medical services to the patient.

Id. For the foregoing reasons Mr. Allred is entitled to relief. The circuit court denied this claim and Mr. Allred seeks review of these findings. PC11/1875.

CONCLUSION

Based on the arguments in this brief and the record on appeal, the circuit court improperly denied Mr. Allred relief on his 3.851 motion. Mr. Allred respectfully requests that this Honorable Court reverse the circuit court's order denying relief, vacate his conviction and sentence of death, and grant him a new trial; or grant such other relief as this Honorable Court deems just and proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing INITIAL BRIEF OF APPELLANT has been emailed to Mitchell Bishop, Assistant Attorney General, at capapp@myfloridalegal.com and Mitchell.Bishop@myfloridalegal.com, and mailed via United States Postal Service to Andrew Allred, DOC # 130930, Union Correctional Institution, 7819 N.W. 228th Street, Raiford, Florida 32026 on this 23rd day of May, 2014.

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CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Initial Brief of Appellant was generated in Times New Roman, 14 point font, pursuant to Fla. R. App. 9.210 (a) (2).

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