No. SC17-1623

IN THE

Supreme Court of Florida

MARGARET A. ALLEN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT, IN AND FOR BREVARD COUNTY, FLORIDA
Lower Tribunal No. 05-2005-CF-048260-AXXX-XX

INITIAL BRIEF OF THE APPELLANT

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PRELIMINARY STATEMENT

This is an appeal of a final order by the Circuit Court of the Eighteenth Judicial Circuit, in and for Brevard County denying the Appellant, Margaret A. Allen's ("Allen") Motion to Vacate Judgment and Sentences pursuant to Florida Rule of Criminal Procedure 3.851 ("Motion"). Page references to the record on appeal are designated with R[volume number]/[page number]. Page references to the postconviction record on appeal are designated with P[page number]. Page references to the supplemental postconviction record on appeal are designated with PS[page number]. All other references will be self-explanatory or otherwise explained. All emphasis is supplied unless otherwise noted.

REQUEST FOR ORAL ARGUMENT

Allen is incarcerated at Lowell Correctional Institution, Ocala, Florida, under a sentence of death. The resolution of these appellate issues will determine whether she lives or dies. This Court has allowed oral argument in other capital cases. A full opportunity to air the issues would be appropriate given the seriousness of the claims involved and the fact that a life is at stake. Allen accordingly requests that this Honorable Court permit an oral argument.

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STATEMENT OF THE CASE

(I) Procedural history of the trial proceedings

Allen was charged by indictment with one count of first-degree felony murder and one count of kidnapping on March 8, 2005. R3/332-33. At trial, Allen was represented by only one trial counsel, Frank J. Bankowitz ("counsel"). The case was tried before the Honorable George W. Maxwell III. Jury selection took place on September 13-15, 2010. The guilt/innocence phase took place on September 15-21, 2010. On September 21, 2010, the jury returned a verdict of guilty on both counts. R20/1669. The penalty phase occurred on September 22-23, 2010. On September 23, 2010, the jury recommended a death sentence by a vote of 12-0. R22/1988-89. A *Spencer* hearing was conducted on December 16, 2010. *Spencer v. State*, 615 So. 2d 688 (Fla. 1993). On May 19, 2011, the trial court sentenced Allen to death and found the following aggravators and mitigators:

> The trial court found two aggravators: (1) the capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit a kidnapping (great weight); and (2) the capital felony was especially heinous, atrocious, or cruel (great weight). The trial court found no statutory mitigation and found the following nonstatutory mitigation: (1) defendant has been the victim of physical abuse and possible sexual abuse in the past (some weight); (2) defendant has brain damage as a result of prior acts of physical abuse and the brain damage results in episodes of lack of impulse control (some weight); (3) defendant grew up in a neighborhood where there were acts of violence and illegal drugs (some weight); and (4) defendant would help other people by providing shelter, food or money (little weight).

Allen v. State, 137 So. 3d 946, 955 (Fla. 2013); R2/296-302.

(II) Procedural history of the appellate proceedings

The issues raised by Allen in her direct appeal were as follows:

1. Whether the trial court erred in excluding the testimony of State witness James Martin that former-co-defendant-turned-State-witness Quintin Allen ("Quintin") admitted to choking the victim to death;
2. Whether the trial court erred in adjudicating Allen guilty of the kidnapping charge, and whether the trial court erred in adjudicating Allen guilty of first-degree felony murder predicated on the kidnapping charge;
3. Whether reversible error occurred when the prosecutor repeatedly asked the defendant's mental health expert about the nonstatutory and highly inflammatory aggravator of future dangerousness of the defendant; and
4. Various claims regarding whether Allen's death sentence is impermissibly imposed.

This Court denied all of the above claims. *See Allen*, 137 So. 3d at 955, 969. Allen filed a petition for writ of certiorari to the Supreme Court of the United States, which was denied on October 14, 2014. *See Allen v. Florida*, 135 S. Ct. 362 (2014).

(III) Procedural history of the postconviction proceedings

Allen filed her Motion on September 21, 2015. P403-77. The State filed its Response to the Motion on November 20, 2015. P519-72. On February 12, 2016, Allen moved to amend her Motion in light of *Hurst v. Florida*, 136 S. Ct. 616 (2016). P578-93. At the case management conference, the lower court granted Allen's motion to amend her Motion and granted an evidentiary hearing ("EH") regarding Claims Two, Five, Six, Seven, Eight, Nine, Ten, and part of One. P649-53. Pursuant to stipulation of the parties, an EH was granted on Claims Three, Four, Eleven, Twelve, Thirteen, and Fourteen. *Id*. On December 8, 2016, Allen moved to amend

her Motion again in light of *Hurst v. State*, 202 So. 3d 40 (Fla. 2016) and *Perry v. State*, 210 So. 3d 630 (Fla. 2016), which the lower court granted. P731-52.

The EH was held on April 10-12, 2017, and both parties submitted written closing arguments. P1797-1938, 2559-3363. The lower court issued a Final Order Denying Defendant's Motion to Vacate Judgment and Sentences, Amendment to Motion to Vacate, and Second Amendment to Motion to Vacate on August 2, 2017. P1939-2299.

STATEMENT OF THE FACTS

(I) Summary of the facts of the trial proceedings

This Court summarized the facts of the trial proceedings in its direct appeal opinion. *See Allen*, 137 So. 3d at 951–55. All other relevant facts from Allen's trial will be incorporated into the argument sections below.

(II) Summary of the facts of the postconviction proceedings

As the issues before this Court rely heavily on the facts presented during the trial and postconviction proceedings, the relevant evidence is incorporated into the argument sections below to prevent redundancy and allow clarity as to the arguments presented. In support of Arguments V and VIII, the testimony of Daniel J. Spitz, M.D. ("Dr. Spitz"), a forensic pathologist who is the Chief Medical Examiner for Macomb and St. Clair Counties in Michigan, was presented. P2882, 3274, 3290, 3302, 3306. He provided support to undermine the HAC aggravator and Wenda

Wright's ("Wright") cause of death. Sajid Qaiser, M.D. ("Dr. Qaiser"), the Chief Medical Examiner for Brevard County, testified as to the same claims on behalf of the State. P3097. In support of Argument II, William Russell, Ph.D. ("Dr. Russell"), a forensic psychologist, testified as to mental health and statutory mitigation. P2923. In addition, lay mitigation witnesses testified in support of Argument II. Brian Watkins ("Watkins"), Allen's ex-boyfriend, testified as to the violence and abuse he subjected Allen to. Two of Allen's children, Alvinia Ragoo ("Ragoo") and Carlos Ragoo ("Carlos"), corroborated Dr. Russell's diagnosis and detailed occasions of Allen's physical abuse. Allen's aunts, Barbara Ann Capers ("Capers") and Myrtle Hudson ("Hudson"), also provided testimony to substantiate Dr. Russell's diagnosis and discussed Allen's childhood, including instances of sexual abuse. Michael Gamache, Ph.D. ("Dr. Gamache"), a forensic psychologist, who failed to conduct an evaluation of Allen, testified in rebuttal for the State. P3155, 3247. Finally, Allen's trial counsel testified at the EH.

SUMMARY OF THE ARGUMENTS

Argument I: The lower court erred in denying Allen's claim that her death sentence is unconstitutional under the Sixth and Eighth Amendments, *Hurst v. Florida*, and *Hurst v. State.* The *Hurst* error is not harmless in her case, especially due to counsel's ineffectiveness and her case not being the most aggravated and least mitigated. Her jury's sense of responsibility was improperly minimized under *Caldwell*.

Argument II: The lower court erred in denying Claim Thirteen of Allen's Motion and finding that counsel was not prejudicially ineffective in violation of *Strickland* by failing to adequately investigate, prepare, and present Allen's available mitigation. Allen was found to suffer from Posttraumatic Stress Disorder ("PTSD") and a lifetime of sexual and physical abuse, which was corroborated by her family. Nonstatutory mitigation and a weighty mental health statutory mitigator were found.

Argument III: The lower court erred in denying Claims Five and Six of Allen's Motion, which argued that counsel provided prejudicial ineffective assistance in violation of *Strickland* when he failed to object to multiple improper comments and misrepresentations made by the prosecutor in the guilt phase closing argument. Many of these misstatements prejudiced Allen in both phases of her trial because they related to the victim's cause of death and HAC aggravator.

Argument IV: The lower court erred in denying Claim Eight of Allen's Motion, which argued that counsel provided prejudicial ineffective assistance in violation of *Strickland* by failing to object and move for a mistrial based on multiple instances of prosecutorial misconduct in the penalty phase. Allen's guilt phase was prejudiced by this misconduct, which included misstatements, inflammatory and pejorative comments, denigrated mitigation, and the introduction of nonstatutory aggravators.

Argument V: The lower court erred in denying Claim Eleven of Allen's Motion, which argued that counsel violated *Strickland* and provided prejudicial ineffective

assistance by failing to present available expert testimony that corroborated the original medical examiner's findings and refuted Dr. Qaiser's testimony. This testimony called into question Wright's cause of death and the HAC aggravator.

Argument VI: The lower court erred in denying Claim Three of Allen's Motion, which argued that counsel was prejudicially deficient in violation of *Strickland* when he elicited testimony from Quintin that Allen poured chemicals in Wright's eyes and mouth. Counsel was also prejudicially ineffective by soliciting testimony that multiple chemicals were poured on Wright when Quintin had already conceded on redirect-examination that he could only identify rubbing alcohol.

Argument VII: The lower court erred in denying Claim Two of Allen's Motion, which argued that, in violation of *Strickland*, counsel was prejudicially ineffective when he failed to impeach Quintin with his statements to Detective Gary Boyer ("Detective Boyer") indicating that Allen did not pour bleach on Wright. The impeachment would have shown Quintin was not credible and undermined HAC.

Argument VIII: The lower court erred in denying Claim Seven of Allen's Motion, which argued that counsel violated *Strickland* by providing prejudicial ineffective assistance when he failed to object to Dr. Qaiser's testimony that unconscious people can feel pain. His scientifically inaccurate comment supported the HAC aggravator.

Argument IX: The lower court erred in denying Claim Ten of Allen's Motion by finding the State did not violate *Giglio v. United States*, 405 U.S. 150 (1972) when

it elicited and failed to correct false testimony that Allen was convicted several times for selling drugs. The lower court wrongly found the false evidence was immaterial.

Argument X: The lower court erred in denying Claim Nine of Allen's Motion, which argued that counsel provided prejudicial ineffective assistance in violation of *Strickland* when he elicited testimony from Hudson about Allen's culture of "drugs, thugs, and violence". The phrase negatively biased the jury to think Allen was a thug who was undeserving of mercy and unduly influenced their recommendation.

Argument XI: The lower court erred in denying Claim One of Allen's Motion, which argued that counsel provided prejudicial ineffective assistance by failing to challenge biased Juror Carll ("Carll") for cause or strike her peremptorily. Her actual bias was plain on the face of the record and as such, a biased juror served on the jury.

APPLICABLE CASE LAW AND STANDARD OF REVIEW

The majority of Allen's claims assert that she received ineffective assistance of counsel, which are reviewed under the two–prong test established by *Strickland v. Washington*, 466 U.S. 668 (1984). "First, the defendant must show that counsel's performance was deficient" by "showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687. The representation must fall "below an objective standard of reasonableness." *Id*. at 688. Second, the defendant must establish that the deficient performance prejudiced the defense by showing "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 687, 694. "The essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect." *Kimmelman v. Morrison*, 477 U.S. 365, 374 (1986). A mixed standard of review applies to *Strickland* claims because the performance and the prejudice prongs "present mixed questions of law and fact." *Sochor v. State*, 883 So. 2d 766, 771 (Fla. 2004). As such, this Court defers to the factual findings of the lower court if supported by competent, substantial evidence and independently reviews the application of the law to the facts. *See State v. Dougan*, 202 So. 3d 363, 378 (Fla. 2016).

ARGUMENT AND CITATIONS OF AUTHORITY

ARGUMENT I
THE LOWER COURT ERRED IN DENYING ALLEN'S CLAIM THAT HER DEATH SENTENCE IS UNCONSTITUTIONAL UNDER THE SIXTH AMENDMENT, EIGHTH AMENDMENT, AND *HURST*.

Allen argued in her Amendment and Second Amendment to Defendant's Motion to Vacate Judgment and Sentences that in light of *Hurst v. Florida* and *Hurst v. State*, Allen's death sentence violates the Sixth and Eighth Amendments to the United States Constitution. The lower court found "that even if the jury were properly instructed, that it would have still found that the aggravators greatly

outweighed the mitigators" and "any *Hurst* error regarding [Allen's] sentence, which was based upon a unanimous recommendation of death, is harmless beyond a reasonable doubt." P2019. As this claim was summarily denied without an EH, the ruling is subject to *de novo* review and this Court must accept Allen's factual allegations as true to the extent they are not refuted by the record. *See Ventura v. State*, 2 So. 3d 194, 197 (Fla. 2009).

On January 12, 2016, *Hurst v. Florida* issued and declared Florida's capital sentencing scheme unconstitutional. 136 S. Ct. at 619. The United States Supreme Court held, "The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. *A jury's mere recommendation is not enough*." *Id*. An advisory recommendation by the jury cannot be treated as the factual finding required. *See id*. at 622.

On October 14, 2016, this Court issued its decision in *Hurst v. State*, and held:

> *Hurst v. Florida* mandates that **all the findings** necessary for imposition of a death sentence are "elements" that **must be found by a jury**, and Florida law has long required that jury verdicts must be unanimous. Accordingly, we reiterate our holding that before the trial judge may consider imposing a sentence of death, the jury in a capital case must **unanimously** and **expressly** find all the aggravating factors that were proven beyond a reasonable doubt, unanimously find that the aggravating factors are sufficient to impose death, unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death. We equally emphasize that by so holding, we do not intend to diminish or impair the jury's right to recommend a sentence of life even if it finds aggravating factors were proven, were sufficient to impose death, and that they outweigh the mitigating circumstances.

202 So. 3d at 57–58. Allen's sentence became final on October 14, 2014, and is entitled to *Hurst* review. *See Allen*, 135 S. Ct. 362; *see Mosley v. State*, 209 So. 3d 1248 (Fla. 2016).

This Court has stated that the *Hurst* error "is harmless only if there is no reasonable possibility that the error contributed to the sentence." *Hurst*, 202 So. 3d at 68. Moreover, '"the harmless error test is to be rigorously applied,'" and "the State bears an extremely heavy burden in cases involving constitutional error." *Id.* (quoting *State v. DiGuilio*, 491 So. 2d 1129, 1137 (Fla. 1986)). Therefore, "the burden is on the State, as beneficiary of the error, to prove *beyond a reasonable doubt* that the jury's failure to unanimously find all the facts necessary for imposition of the death penalty did not contribute to [the defendant]'s death sentence in this case." *Id.* at 68. The State has failed to prove beyond a reasonable doubt that the *Hurst* error in Allen's case was harmless.

In addition, "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Caldwell v. Mississippi*, 472 U.S. 320, 328–29 (1985). This Court has yet to squarely address a *Caldwell* challenge since *Hurst v. Florida*:

> With the rationale underlying its previous rejection of the *Caldwell* challenge now undermined by this Court in *Hurst*, petitioners ask that the Florida Supreme Court revisit the question. The Florida Supreme Court, however, did not address that Eighth Amendment challenge…

> Because petitioners here raised a potentially meritorious Eighth Amendment challenge to their death sentences, and because the stakes in capital cases are too high to ignore such constitutional challenges, I dissent from the Court's refusal to correct that error.

Truehill v. Florida, 138 S. Ct. 3, 4 (2017) (Justice Sotomayor, with whom Justice Ginsburg and Justice Breyer join, dissenting from the denial of certiorari). As such, Allen urges this Court to address the *Caldwell* error that arose from *Hurst*.

As no interrogatory-style verdict form was used in Allen's penalty phase, the jury did not *expressly* make any findings, let alone unanimously. R5/858. Allen's jury was only asked if the jury "advise[d] and recommend[ed] to the court that it impose the death penalty" and the number of votes, on a document titled "Advisory Sentence." *Id*. After the March 13, 2017 enactment of Chapter 2017-1, which finally created a constitutional capital sentencing scheme in Florida, penalty phase juries now use an interrogatory-style verdict form that leads the jury through the deliberation process step-by-step. *See* FL ST CR JURY INST 3.12(e).[1] The new form requires the jury to expressly detail their findings and instructs the jury to either stop or go on to the next section of the form based on their findings.

[1] Notably, since the use of these verdict forms, most capital defendants across the state have received at least one mercy vote, which subsequently resulted in a binding life sentence. All of these cases have more egregious facts than Allen's and two cases had four victims. *See State of Florida v. Adam Matos,* Pasco County, Case No. 2014-CF-005586AXWS (four murders)*; State of Florida v. James Bannister,* Marion County, Case No. 2011-CF-3085 (four murders and two of the victims were children under the age of twelve); *State of Florida v. William Wells,* Bradford County, Case No. 04-2011-CF-000498-B (three aggravators); *State of Florida v. Kendrick Silver*, Miami-Dade County, Case No. F0930889A.

However, in Allen's case, "[b]ecause there was no interrogatory verdict, we cannot determine what aggravators, if any, the jury unanimously found proven beyond a reasonable doubt." *Hurst*, 202 So. 3d at 68. It is pure speculation whether the jury unanimously found both aggravating factors proven beyond a reasonable doubt. Moreover, the jury was instructed consistently that their role was merely advisory or a recommendation. Further, **Allen's jury was *never* instructed that *any* of the aggravating circumstances must be found *unanimously***. R22/1969-83. The jury was only instructed, "In order to consider the death penalty as a possible penalty, you must determine that at least one aggravating circumstance has been proven." R22/1975. There is no way for this Court to know if ***any*** aggravator was found ***unanimously* by the jurors**. *See Franklin v. State*, 209 So. 3d 1241, 1248 (Fla. 2016) (finding prior violent felony conviction aggravator does not render *Hurst* error harmless). If no aggravators are found unanimously, the jury should not even go on to weighing mitigation because it is unclear what the mitigation is even being weighed against. Notably, based on the new verdict form, if no aggravator is found unanimously (which could be the situation in Allen's case), the jury is instructed that the defendant is not eligible for the death sentence. As such, the lower court erred in finding, "Based on the instructions, the Court finds that the jury unanimously made the requisite factual findings to impose death." P2018.

This uncertainty as to what findings Allen's jury would have made if properly

instructed under a constitutional sentencing scheme is even more significant in light of *Caldwell*. When the jury's sense of responsibility for determining the appropriateness of death is impermissibly minimized, as it was in Allen's case, it cannot be said to have no effect on the sentencing decision because "that decision does not meet the standard of reliability that the Eighth Amendment requires." *Caldwell*, 472 U.S. at 341. As counsel recalled, the jury was informed numerous times that they were only recommending an advisory sentence and the judge would impose the final sentence. P2889-90. From voir dire all the way through the jury instructions, the role of Allen's jury was minimized throughout her trial by repeatedly emphasizing that they were merely providing an advisory recommendation because the final decision rests solely with the judge. *E.g.*, R10/157, R13/591, 605, R21/1706. The judge specifically told the venire, "You do understand that nobody will impose the sentence but me. Although I'm going to give great weight to your recommendation, it is not controlling. I can fly in the face of your recommendation or I can follow your recommendation, with some qualifications." R10/157. Further, the following exchange regarding jury sequestration highlights how advisory majority votes undermined Allen's jury deliberation:

> State: Okay. Well, even if we do (unintelligible) the cure for that is you don't instruct them until tomorrow morning, you don't have to worry about sequestering them tonight. They're not going to be out overnight. If we do the charge tomorrow, if we do jury instructions tomorrow

> morning and the penalty phase, it doesn't need to be, ***it needs to be majority vote. So the odds of them staying over tomorrow night is zip***.
>
> Trial Court: I understand that. And ***it seems like only needs one vote rather than a lot of deliberation.***
>
> State: Right.
>
> Trial Court: I did talk to one of the court staff lawyers who was actually on a jury - - and not that this is maybe relevant to this case - - but she said that one of the things that happened is ***they just basically vote***. Your - - it is not a consensus vote, your vote speaks for your mind and your conscious.

R21/1693.If the jury was given proper instructions under *Hurst* and *Caldwell*, each juror would be mandated to feel the weight of their sentencing responsibility because each juror would possess the power to save Allen's life by voting in favor of a life sentence. As post-*Hurst* cases have shown, properly instructed jurors have appreciated the gravity of the proceeding and exercised their individual right to preclude the death sentence. Therefore, a reasonable probability exists that the error of not properly instructing Allen's jury contributed to her death sentence.

As "there is a reasonable possibility that the error affected the sentence" in Allen's case, the *Hurst* error cannot be harmless. *Hurst*, 202 So. 3d at 68 (quoting *DiGuilio*, 491 So. 2d at 1139). Allen asserts unequivocally that the State is unable to meet its high burden and any decision to the contrary is a violation of her rights. Allen's case must be analyzed for harmless error on an individual basis. *See id*. A blanket finding that the error is harmless where the jury recommendation was unanimous is arbitrary and capricious. As the findings of Allen's jury are unknown,

to deny Allen the effect of *Hurst* by considering the error harmless, while granting relief to similarly situated defendants sentenced in the same timeframe, deprives her of the due process and equal protection she is entitled to under the Fourteenth Amendment to the United States Constitution and the corresponding provisions of the Florida Constitution.

Allen's situation is unique and an individualized harmless error review will show that the *Hurst* error was not harmless. As argued below, if counsel provided Allen with effective assistance such as effectively investigating mitigation and the State did not commit a *Giglio* violation, Allen would not have received a unanimous jury recommendation and would have been in the class of post-*Ring*[2] defendants whose *Hurst* errors were not found harmless and were entitled to a new penalty phase. Further, Allen's case pales in comparison to the other 12-0 recommendation cases that have come before this Court.[3] Only two aggravators were independently found by the trial court, one of which, HAC, would have been undermined if counsel had been effective. Further, if counsel had properly investigated Allen's background and presented her full history of sexual and physical abuse and statutory mental

[2] *Ring v. Arizona*, 536 U.S. 584 (2002).

[3] *See Davis v. State*, 207 So. 3d 142, 175 (Fla. 2016) (triple homicide with seven aggravators); *Truehill v. State*, 211 So. 3d 930 (Fla. 2017) (six aggravators); *Guardado v. Jones*, 226 So. 3d 213 (Fla. 2017) (five aggravators); *Tundidor v. State*, 221 So. 3d 587 (Fla. 2017) (five aggravators); *Knight v. State*, 225 So. 3d 661 (Fla. 2017) (murder of mother and child); *Hall v. State*, 212 So. 3d 1001 (Fla. 2017) (four aggravators); *Cozzie v. State*, 225 So. 3d 717 (Fla. 2017) (four aggravators).

health mitigation, her mitigation would have outweighed both aggravators.

Florida law further evolved when this Court decided *Bevel v. State*, and acknowledged that *Hurst* has affected the prejudice analysis of *Strickland* claims. 221 So. 3d 1168, 1179 (Fla. 2017). Although Bevel's jury recommendation was *unanimous*, his death sentence was vacated because the "unpresented evidence of substantial mitigation" could have swayed one juror, which "would have made a critical difference." *Id*. Not only were the facts of Bevel's case worse (he was charged with two first-degree murders, one being a thirteen-year-old, and one attempted first-degree murder), Allen's counsel was far more deficient. *See id*. at 1172. Similar to Bevel, Allen's counsel also failed to interview family members, obtain records, and present expert testimony regarding her PTSD and sexual abuse, but he was ineffective in many other areas as shown below. *See id*. at 1180. The cumulative effect of all of the errors and instances of ineffective assistance of counsel throughout Allen's trial prejudiced the outcome of her penalty phase. But for counsel's deficiencies, there is a reasonable probability that Allen would have received at least one vote for life. Accordingly, if Allen was not deprived of a fair penalty phase and had received one vote for a life sentence, she would have already been granted a new penalty phase under *Hurst*. Even though Bevel's advisory jury recommendation was also unanimous, in this post-*Hurst* landscape he met the prejudice prong for *Strickland* and his death sentence was vacated and remanded for

a new penalty phase. *Id.* at 1179, 1182. As a matter of due process and equal protection of laws under the Fourteenth Amendment, the law must be applied consistently to all capital defendants and as one of Allen's ineffective assistance claims is practically identical to Bevel's, Allen's death sentence must be vacated, and she must be granted a new penalty phase.

Lastly, in *Hurst*, this Court held:

> [T]he unanimous finding of the aggravating factors and the fact they are sufficient to impose death, as well as the unanimous finding that they outweigh the mitigating circumstances, all serve to help narrow the class of murderers subject to capital punishment. However, the further requirement that a jury must unanimously recommend death in order to make a death sentence possible serves that narrowing function required by the Eighth Amendment even more significantly, and expresses the values of the community as they currently relate to imposition of death as a penalty.

202 So. 3d at 60. This analysis is in accord with the "evolving standards of decency that mark the progress of a maturing society" that the Eighth Amendment draws its meaning from. *Trop v. Dulles*, 356 U.S. 86, 101 (1958). This narrowing, along with appellate review of proportionality, helps ensure death sentences are not imposed capriciously and arbitrarily. *See Gregg v. Georgia*, 428 U.S. 153, 206 (1976). As Allen's case is far from one of the most aggravated and least mitigated, finding Allen's *Hurst* error harmless and upholding her unconstitutional death sentence would constitute cruel and unusual punishment. The lower court erred in denying Allen *Hurst* relief.

ARGUMENT II

THE LOWER COURT ERRED IN DENYING ALLEN'S CLAIM THAT TRIAL COUNSEL PROVIDED PREJUDICIAL INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HE FAILED TO ADEQUATELY INVESTIGATE, PREPARE, AND PRESENT AVAILABLE MITIGATION.

In violation of *Strickland*, counsel rendered prejudicial ineffective assistance of counsel to Allen by failing to adequately investigate, prepare, and present available mitigation. The lower court found that counsel performed a reasonable mitigation investigation and was not ineffective. P2013. The lower court also found that prejudice was not established "[g]iven the significant aggravators found and the comparatively weak mitigation found." P2014. The lower court's findings are not supported by competent and substantial evidence.

"An attorney has a duty to conduct a reasonable investigation, including an investigation of the defendant's background, for possible mitigating evidence." *Porter v. Singletary*, 14 F.3d 554, 557 (11th Cir. 1994) (citing *Thompson v. Wainwright*, 787 F.2d 1447, 1451 (11th Cir. 1986)). "Counsel may be deemed ineffective at the penalty phase where the investigation of mitigating evidence is 'woefully inadequate' and credible mitigating evidence existed which could have been found and presented at sentencing." *Simmons v. State*, 105 So. 3d 475, 509 (Fla. 2012) (citing *Hildwin v. Dugger*, 654 So. 2d 107, 109 (Fla. 1995)). "[T]he duty to investigate does not force defense lawyers to scour the globe on the off chance something will turn up." *Rompilla v. Beard*, 545 U.S. 374, 383 (2005). Still, "counsel

has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691.

Counsel wrongly assumed that the mitigation investigation was complete when he took over Allen's case from the Public Defender's Office ("PD"). P2790-91, 2795. This assumption was detrimental to Allen's case. Counsel thought the "witnesses were all lined up" and it was just a matter of "putting that on." P2790-91, 2795. As such, counsel, who was trying the case alone, failed to enlist the help of an investigator or mitigation specialist. P2790, 2835. Competent counsel would have realized the mitigation provided was relatively weak and did not address statutory mitigators and investigated further. Counsel had ample time to investigate mitigation, but unreasonably failed to do so. Counsel said he had the case for a year or a year and half prior to trial, although his Notice of Appearance was actually filed in March 2008, two and a half years prior to trial. P2791, R4/649. He admitted that in all that time he *did not even interview all the witnesses* the PD provided. P2795. As such, counsel's conduct "fell short of the standards for capital defense work articulated by the American Bar Association (ABA)-standards to which [the United States Supreme Court] long have referred as 'guides to determining what is reasonable,'" which provides that efforts must be made to discover all reasonably available mitigation and evidence to rebut aggravators. *Wiggins v. Smith*, 539 U.S. 510, 524 (2003); *see* AM. BAR ASS'N, GUIDELINES FOR THE APPOINTMENT AND

PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES (rev. ed. 2003).

It is incumbent on counsel to make efforts to collect reasonably available background records and testimony from family and friends. *Walker v. State*, 88 So. 3d 128, 141 (Fla. 2012). Counsel in essence improperly delegated his duty to investigate mitigation to Allen's aunt, Hudson. P2796, 2811-13, 2817. Though counsel concedes that he understands ABA guidelines to require establishing "a family tree" and to talk to everybody, "grandparents all the way through," counsel only spoke with Hudson, who he incorrectly thought was Allen's sister, and another sister whose name he did not remember. P2796-97, 2813, 2816. Hudson even gave him a list of people to contact and told him that Capers wanted to testify. P2753. Counsel claimed Hudson said Allen's daughters did not want to be involved, so he did not pursue interviewing them. P2837. However, he did not independently verify that sentiment, even though he knew some of Allen's children were in prison and could easily be found in "thirty seconds on the computer." P2812, 2815-16, 2837. Although counsel believed Allen's daughters told police they were present during the crime and were alleged to be involved, a reasonable attorney would have at least interviewed them. P2843-45. Worse yet, he admitted that Allen's daughters had the potential to be witnesses in the guilt phase too, but he still did not seek to speak with them. P2860. As a result of counsel's deficiencies, he only suggested two nonstatutory mitigators in his sentencing memorandum. R6/923. His whole

argument and analysis of the mitigation encompassed less than a page. R6/923-24. Notably, the State's memorandum actually suggested more mitigators. P891. It is clear that counsel did not exercise reasonable professional judgment.

"[M]ental mitigation that establishes statutory and nonstatutory mitigation can be considered to be a weighty mitigator, and failure to discover and present it, especially where the only other mitigation is insubstantial, can therefore be prejudicial." *Hurst v. State,* 18 So. 3d 975, 1014 (Fla. 2009). Further, this Court has "consistently recognized that severe mental disturbance is a mitigating factor of the most weighty order, and the failure to present it in the penalty phase may constitute prejudicial ineffectiveness." *Simmons,* 105 So. 3d at 506 (quoting *Rose v. State,* 675 So. 2d 567, 573 (Fla. 1996)). As this Court pointed out, "neither of her experts was asked if he had an opinion about this mitigator." *Allen,* 137 So. 3d at 965.

Counsel set up his experts, and his client, for failure. Counsel knew that Allen was leery about fully cooperating with Michael Gebel, M.D. ("Dr. Gebel") during her 2007 evaluation because a guard was in the room. P2861-62, R21/1745. Combined with the fact that Dr. Gebel did not evaluate Allen for statutory mitigation, counsel was deficient in failing to either have him visit her for a reevaluation or have another expert evaluate her. P3064-66. Although Dr. Gebel's report specified what records he considered and there was no mention of the crime or statutory mitigation, counsel did not request a follow-up meeting or assessment

from any expert because he thought Dr. Gebel's report was "more than sufficient." P2887. Counsel was also deficient in not giving the experts enough information to formulate an educated opinion, including the circumstances surrounding the crime. P3065-66. Prior to Dr. Gebel testifying, counsel did not provide any additional information for him to consider, such as the details of the crime. P2890, R21/1751-52, 1758-61. Joseph Wu, M.D. ("Dr. Wu") was not provided enough background to determine anything other than what the PET scan showed and answer hypotheticals instead of giving an opinion as to how Allen was affected. P3062-63, 3067-69. Counsel also failed to accommodate a meeting between Dr. Gebel or Dr. Wu and Allen's family. P2814, 2885. Although he was in contact with Hudson, he did not have any of the doctors speak with her. P2724.

In postconviction, Dr. Russell, a forensic psychologist, evaluated Allen but unlike Dr. Gebel he was provided details of the crime, among other records, and interviewed several family members of Allen. P2923, 2916, 2930, 3010. Prior to testifying at the EH, he also spoke briefly with Watkins and Carlos at the courthouse. P2620, 2786. He determined that Allen suffered from complex PTSD currently as well as at the time of the crime. P2966. He is well versed in recognizing PTSD because he has worked with children and families who experienced severe trauma, such as physical or sexual abuse or witnessing the homicide of a parent. P2909-10, 2914. Through meeting with Allen and reviewing records, Dr. Russell found that

Allen had a physically and sexually abusive background and experienced significant chaos and violence in her life. P2932-33. Upon speaking to her family, he found the damage that she was exposed to was more extensive than she presented. This was evident by Allen's memory problems, her exposure to physical trauma, genetics, and her dissociative amnesia where she blocks out memories. P2933-34. Dr. Russell was able to diagnose Allen with PTSD as he had comprehensive background information for Allen, which included family interviews. P2980. Attempting to make a full analysis with just one client interview is ineffective when there was an abundance of available mitigation background information. P2930-31. Dr. Russell concluded that if he had been given the limited information that Dr. Gebel had, and was unable to interview any of Allen's family members, he would not have had enough information to establish PTSD. P2980. Notably, through the totality of the evidence provided, Dr. Russell found the mitigator of "the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance" to exist. P2968-69, 2971, 2995, 3069. The extreme emotional disturbance was related to her PTSD and factors such as her environment, leaving her vulnerable to emotional dysregulation when faced with the loss of her money. P2995-96. The longer she could not find her money, the more frustrated she became, and as her emotional dysregulation escalated, she did not have the ability to handle the stressor without overreacting. P3027-28. Allen was unable to think logically and rationally.

P2972. Dr. Russell confirmed that without interviewing her family, an expert would not have been able to find this statutory mitigator. P3071-72. Therefore, counsel was also prejudicially ineffective in failing to further investigate whether this weighty statutory mitigator applied, especially since the other mitigation counsel presented was insubstantial.

Protective factors are factors a child has growing up to help them cope with and meet challenges of life. P2934-35. Allen grew up in a chaotic, unstable environment moving frequently, where some of her homes subjected her to physical and sexual abuse. P2935-36. She had no stable adult figure to mirror or to turn to after suffering abuse. *Id*. She also had no support for academic success and dropped out of school. P2936. She was not provided guidance or support by the adults in her life because most of them were also involved in drugs and were not high-functioning individuals. P2938-39. Knowing nothing else, Allen replicated that same unstable pattern with her children. P2944-46. She lacked an environment that encouraged brain development through school, social support, and active activities which inhibited her ability to cope with traumatic stress and increased her risk of future violence. P2959. The episodes of physical, mental, and sexual abuse perpetrated upon Allen all combined to create situations where she is susceptible to emotional mental health damage. P2934. Allen has all the predisposing factors of developing PTSD after trauma. P2955-58. Counsel testified that he was familiar with "DSM-

IV"[4] and PTSD at the time of trial. P2794-95. However, he was not using the DSM during interviews to ascertain issues that could be used as mitigation. P2795.

At the EH, the lower court heard testimony from Watkins, Capers, Ragoo, Carlos, and Hudson. This testimony substantiated Allen's self-reports and Dr. Russell's diagnosis, and also provided further nonstatutory mitigation. The witnesses confirm that Allen was subjected to physical and sexual abuse since childhood. These traumatic events are the source of her PTSD. P2946-49. PTSD has three areas of symptomology, reexperiencing, avoidance of reminders of the trauma, and increased arousal (emotional dysregulation), which, as shown below, the witnesses also corroborated. P2974, *see* DSM at 463-68.

Watkins subjected Allen to traumatic physical and mental abuse. Watkins had a violent relationship with Allen for about five years in the 1990s and they have a child together. P2598, 2602, 2624. He hit her with his fist and with other objects and even attended domestic violence classes to get charges dropped. P2602-03. He would also choke her until she nearly passed out. P2612. He often hit her and choked her when she was pregnant. P2603-05. While she was pregnant, he would grab her, cover up her mouth and nose until he felt her go limp or lightheaded and when he let go of her, she would gasp for air. P2604-05. They had a fight in Winn-Dixie and he

[4] AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS FOURTH EDITION, TEXT REVISION (2000) ("DSM")

hit her in the head with a hammer two or three times. P2608-09, 2611. She ended up in the hospital with a gash on her head and he was arrested. P2610-11. They drank every day and although she did not smoke marijuana, he would hold her down and blow smoke in her nose while she was pregnant. P2606.

Capers personally witnessed Allen's mother physically abusing Allen by beating her with her hands and fists almost every day. P2639-40, 2663. Allen's mother would also beat Allen with belts, whip her with sticks, and slap her in the face. P2678-79. When Allen was about twelve, her mother beat her so badly that Capers called the police. P2640. Allen's grandfather, Curtis (Capers' father), physically abused Allen, Capers, and the other children. P2648-49. Curtis would often line up all the boys and girls naked, including Allen, and go down the row beating them all with three oak switches tied together until they bled. P2649. He would also whip Allen with sticks. P2679. Allen also witnessed Curtis being abusive to Capers' mother and his other wife, Irene. P2650. On multiple occasions, in the presence of Allen, Capers saw Curtis bust Irene's lip and black her eyes with his fist. P2651-52. In her 20s, Allen was beat up by her then-boyfriend, Bill Skane ("Skane"), and when Capers visited her in the hospital, she was unrecognizable, had injuries to her face, could not get out of bed, and could not speak. P2652-54. Capers also witnessed Watkins physically abuse Allen many times, including one time he and another boy punched and kicked Allen while she was pregnant. P2654-55.

Ragoo, Allen's daughter, also witnessed Watkins frequently being aggressive towards Allen. P2684. The worst time that she remembers is when he hit Allen at the laundromat, dragged her to the car, and kept hitting her. P2685. Carlos, Allen's son, also remembers Watkins regularly hitting Allen, giving her black eyes and busted lips, and throwing her down stairs and choking her. P2770. If she tried to escape, Watkins would grab her clothes and rip them off. P2771. Carlos also witnessed another boyfriend of Allen's, Kevin Green ("Green"), hit her, punch her with closed fists, give her black eyes, and put her in the hospital. P2772-73. He remembers Allen crying and being emotional when she had a miscarriage as a result of Green beating her. P2773.

When Allen was about seven, Hudson witnessed Allen's mother grab her by her hair, push her head under the water in the bathtub, and hold her head underwater. P2729-30. Hudson also witnessed her beating Allen with a belt a couple times, which left swollen marks on her. P2730. She witnessed Watkins kick in a heavy door while pregnant Allen was behind it, after the door came down on her, he stomped on it while she was underneath it. P2735. She also visited Allen in the hospital after Skane beat up Allen and she escaped from the trunk of his car. P2736. She was disfigured, lost the baby she was pregnant with, and in the hospital over a week. P2737.

Allen also experienced traumatic sexual abuse since childhood, which upset her very much. P2644, 2648. At trial, there was only a brief reference to sexual abuse

and a possible sexual assault. R21/1745, R22/1883. As a young girl, when Allen's mother went to jail, Allen stayed with Curtis and told Capers that she wanted to stay with her instead because he was sexually molesting her. P2642-43, 2665. Her uncle, Roy, also sexually molested her when he visited Curtis every other weekend. P2645. Capers saw Roy touch and grab Allen in private places like her breasts and kiss her on the mouth. P2645-46. Allen also told Capers that her brother sexually molested her and another man molested her too. P2647-48.

Dr. Russell noted that Allen would physically demonstrate anxiety and stress when asked to discuss these traumatic experiences, which is a clear example of reexperiencing. P2952-53. Allen also reported having dreams about the incidents. P2952, 3084. The witnesses noted that Allen suffers from constant, excessive sweating. P2599-2600, 2738, 2768. Consequently, she tends to carry a towel and Dr. Russell said she would rub her hands faster and wring the towel when describing the traumatic abuse. P2953. Watkins recalled Allen showing physical signs of anxiety and frustration, and having emotional crying fits. P2599-2600, 2609, 2613. Capers also saw Allen exhibit signs of anxiety by shaking and sweating. P2656. Further, Carlos was diagnosed with depression, anger issues, and other mental illness and medicated, and he saw many of the same symptoms in Allen. P2768-69.

Dr. Russell said Allen currently shows avoidance of trauma-related stimuli by refusing to come out of her cell and refusing meals. P2953-54. Allen has experienced

trembling and panic attacks when coming out of her cell. P2954. Similarly, Carlos recalled that Allen would often lock herself in her room for days. P2766. The lay witnesses noted Allen's unusual sleep patterns of sleeping all day, or for two to three days straight. P2601, 2613, 2656, 2739-40, 2758, 2767-68. Allen had a problem trusting people and having friends and told Ragoo not to trust people. P2686. Oversleeping, paranoia, and trust issues are PTSD symptoms. P2967-68, 2976.

Dr. Russell testified that Allen's pattern of reckless, aggressive behavior and emotional dysregulation demonstrated increased arousal, which is when she has difficulty managing her emotional reactions. P2954, 2977. Carlos said she often had mood swings where she would lose control and temper tantrums where she would throw things. P2766-67, 2777. Dr. Russell found she also had difficulty concentrating which is tied to her memory issues and supported by her school records. P2977-78. Trembling when she leaves her cell also shows hypervigilance. P2978. Two persistent symptoms of increased arousal must be shown for PTSD, and Allen has three. P2978-79.

Other than detailing the actual physical injuries to Allen's head, the family was also able to corroborate other symptoms of the brain injuries she has endured due to the violence. As a teenager, Allen experienced a cerebral accident that her family refers to as a stroke and has memory loss. P2641-2, 2738, 2966. She also complained of headaches and migraines. P2601.

All of these witnesses were available at the time of trial and expressed that they would have testified. P2627, 2678, 2692, 2775, 2994. Dr. Russell would have been available to testify if requested. P2994. Capers was contacted by an attorney before trial, was available to speak with an expert and wanted to testify, but was not asked to. P2634-35, 2674-75. She wanted to help Allen but was never told that her testimony could help, if she was asked to testify she would have. P2677-78. At the time of trial, Watkins was in a halfway house and as long as they allowed him to speak with an attorney, he would have spoken to the attorney or an expert and would have testified, but no one from Allen's defense team contacted him. P2615-16, 2619, 2625-27. Ragoo spoke with Allen's first attorney because she was deposed, but was inexplicably never contacted by counsel or an expert. P2690-91. She wanted to help her mother but did not know how so she just wrote a letter to the court. P2690, R5/867-68. Carlos always wondered why he was never contacted by Allen's defense team or an investigator because he would have spoken with them. P2774.

"In assessing the reasonableness of an attorney's investigation, however, a 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." *Wiggins*, 539 U.S. at 527. Hudson was the only lay witness to testify and she briefly discussed some of Allen's abusive relationships, which would have led a reasonable attorney to investigate further. R22/1880-83, 1886. Based on the EH

testimony, countless police reports existed where Allen was the victim of physical and sexual abuse. Although counsel was aware that a police report should have existed if Allen was beat up, he did not recall looking for criminal records to find potential witnesses who were arrested for injuring Allen. P2830-31. Allen's school records also should have been red flags to investigate further. P2929. Although counsel was aware that Allen was not high functioning, he was deficient in failing to ensure the jury was aware of Allen's borderline functioning and learning difficulties, instead of one casual mention. R21/1750, P2959, 2987, 2833.

Testimony from Watkins and Allen's family would have illustrated the egregiousness of Allen's upbringing and surroundings for the jury and corroborated her symptoms of PTSD and brain injuries. Counsel conceded that it would have been of benefit to find witnesses to substantiate Allen's family life and the violence she was subjected to. P2829. He also admitted that it possibly would have been useful to have a psychologist analyze the family history provided by the witnesses and to corroborate the history through the expert, since the jury may view the expert as a more truthful witness. P2829, 2834-35. Testimony corroborating Allen's PTSD and detailing the circumstances surrounding her brain injuries would have caused the jury to assign more weight and credibility to the mental health experts and the mitigation would have outweighed aggravation. Further, the EH testimony "gave considerable insight into [her] childhood and young adulthood" which would

"serv[e] to humanize her to the jury" and persuade jurors to be more sympathetic and merciful. *Walker*, 88 So. 3d at 140–41.

Dr. Gamache, the State's witness, who never conducted any evaluation of Allen, simply disagreed with Dr. Russell's diagnosis and did not think counsel or his experts missed anything significant. P3163, 3247. Dr. Gamache's testimony has no relevance as Allen's diagnosis, and is limited by what records he looked at. He gave an opinion on a diagnosis without ever seeing Allen. He went on to describe PTSD and symptoms required for diagnosis and opined that Allen did not suffer from it. P3166-73, 3176, 3180-99, 3233-41. Dr. Gamache did not find evidence of some of the symptoms or any statutory mitigators, but he had only relied on her self-report and records. P3174, 3207-08. Notably, he did not speak with anyone other than the prosecutor. P3243. He has never met Allen and did not consult with any witnesses or speak with Allen's family. P3211, 3242-43. Although he was not requested to provide an evaluation in this case, Dr. Gamache agreed that it is very important to look for evidence to corroborate the self-report because the individual may not tell him something or tell him something inconsistent. P3235-36, 3247. Information from a third party could indicate that he would need to inquire further. P3237

Counsel failed "to conduct a constitutionally adequate mitigation investigation." *Bevel*, 221 So. 3d at 1177-78. As this Court opined, "where the jury's vote recommending death was dependent on one juror's vote, our confidence has

been undermined when counsel was deficient in presenting mitigation to the jury, because '[t]he swaying of the vote of only one juror would have made a critical difference.'" *Id.* at 1179 (quoting *Phillips v. State*, 608 So. 2d 778, 783 (Fla. 1992)). In light of circumstances similar to Allen's case, this Court found that Bevel met the prejudice prong of *Strickland* and his death sentence based on a ***unanimous*** jury recommendation was vacated. *Id*. at 1182. Like Bevel's counsel, counsel was similarly ineffective in failing to interview family members, obtain records, and investigate and present expert testimony regarding her PTSD, her cognitive deficits, her early childhood sexual and physical abuse, and how these factors interacted with her multiple traumatic brain injuries to affect her mental state at the time of the crime. *Id*. at 1179-80. Just as in *Bevel*, Allen's postconviction mental health expert also offered qualitatively more favorable opinions, such as Allen being under the influence of extreme emotional disturbance at the time of the crime. *Id*. at 1180, P2995. Dr. Russell was provided with the details of the crime and other background information that he found essential in forming his opinion, but was not previously provided to Allen's trial experts, a point that this Court found critical to note in *Bevel*. *Id*., P2980, 3069, 3071-72.

Ellerbee's trial counsel was deficient for many of the same reasons as Allen's counsel due to failing "to explore and present various aspects of Ellerbee's childhood," PTSD, and abuse. *Ellerbee v. State*, 42 Fla. L. Weekly S973, *12 (Fla.

Dec. 21, 2017). The extensive amount of mitigation uncovered in postconviction for Ellerbee was nearly identical to the mitigation uncovered for Allen, including evidence of physical abuse by a parent that affected emotional and cognitive development. *Id.* at *17-18. As in *Ellerbee*, close family members witnessed the abuse Allen suffered and her PTSD symptoms but were not contacted by counsel which "resulted in an incomplete presentation of mitigation." *Id*. at *17. Ellerbee was prejudiced by the deficient mitigation investigation and presentation and he was entitled to a new penalty phase even if he was not receiving *Hurst* relief. *Id.* at *18.

"The appropriate analysis of the prejudice prong of *Strickland* requires an evaluation of 'the totality of the available mitigation evidence-both that adduced at trial, and the evidence adduced in the [evidentiary hearing]-in reweighing it against the evidence in aggravation.'" *Bottoson v. Moore*, 234 F.3d 526, 534 (11th Cir. 2000) (quoting *Williams v. Taylor*, 529 U.S. 362, 397-98 (2000)); *see also Simmons*, 105 So. 3d at 503. The totality of the mitigation includes Dr. Russell's diagnosis and testimony, which adds a statutory mitigator to all of the unpresented mitigation and as only two aggravators were independently found by the trial court, would tip the weighing of mitigation in Allen's favor. "[T]his Court has rejected the notion that the existence of HAC will defeat the need for a new penalty phase when substantial mitigation existed that was not presented to the jury." *Simmons*, 105 So. 3d at 509. Especially when the only other mitigation was insubstantial and presents the

defendant in a bad light. *Id*. Here, counsel only presented the testimony of Hudson, Dr. Gebel, and Dr. Wu as mitigation. Their testimony was simple and unprepared and Dr. Gebel and Hudson's testimony put Allen in a bad light. It was clear that counsel did not provide the experts with necessary information. P3066.

As a result of counsel's ineffectiveness, Allen was prejudiced in her penalty phase. *Bevel* has altered the prejudice analysis so that the prejudice prong is now an easier hurdle to overcome by stating that under *Hurst*, if counsel was deficient in presenting mitigation, the confidence in the outcome is undermined due to the potential to convince one juror to vote for life. *See Bevel*, 221 So. 3d at 1179. Had counsel presented expert testimony that Allen suffered from PTSD and severe cognitive deficits, and was a victim of extensive sexual and physical abuse since childhood, and that these factors, when combined with her frontal lobe damage, caused an extreme mental and emotional reaction to the loss of her purse full of money and rendered her under the influence of extreme mental or emotional disturbance at the time of the crime, it would have made a critical difference by swaying at least one juror to vote for a life sentence. Therefore, prejudice must be found. Further, as a matter of due process and equal protection of laws under the Fourteenth Amendment to the United States Constitution, the law must be applied consistently to all capital defendants. As counsel was deficient in the same ways as counsel for Bevel and Ellerbee and Allen's postconviction mitigation is practically

identical to Bevel's and Ellerbee's, Allen's death sentence must be vacated, and she must be granted a new penalty phase.

ARGUMENT III

THE LOWER COURT ERRED IN DENYING ALLEN'S CLAIM THAT TRIAL COUNSEL PROVIDED PREJUDICIAL INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO OBJECT TO MULTIPLE IMPROPER PROSECUTORIAL COMMENTS AND MISSTATEMENTS AND FAILING TO MOVE FOR A MISTRIAL DURING GUILT PHASE CLOSINGS.

Allen was provided ineffective assistance of counsel in violation of *Strickland* when counsel failed to object to multiple improper comments and misrepresentations in the State's guilt phase closing argument and rebuttal closing argument. The lower court found that Allen failed to establish prejudice and no cumulative error existed. P1962, 1965, 1966, 1967, 1969. The lower court erred in denying relief.

"Statements made by a prosecutor, implicitly backed by the authority of [his] office, can have a powerful effect on a jury." *Pope v. Sec'y, Florida Dept. of Corr.*, 752 F.3d 1254, 1270 (11th Cir. 2014) (citing *Berger v. United States*, 295 U.S. 78, 88 (1935)). "It is improper to bolster a witness' testimony by vouching for his or her credibility." *Gorby v. State*, 630 So. 2d 544, 547 (Fla. 1993). Further, it is improper for a prosecutor to misstate facts or the testimony of a witness. *See United States v. Williams*, 504 U.S. 36, 60 (1992).

In its closing, the State misstated the elements of first-degree felony murder:

> And even if you want to believe that cocaine was a factor, well, like the doctor said there is a number of factors that could have

> contributed to this death. Her obesity, her size, made her less able to withstand the trauma. But you know what, if you read the felony murder instruction, we don't have to prove even how she died. ***All we have to prove is that during the course of the kidnapping she died. And it doesn't matter how. That's the law.***

R20/1632-33. The State insinuated that even if the victim's death was caused by her own voluntary cocaine intoxication that Allen would still be guilty of first-degree felony murder and counsel failed to object. Counsel was deficient because this Court has held that failure to object to misstatements of law is deficient performance. *Anderson v. State*, 18 So. 3d 501, 517 (Fla. 2009). Competent counsel would have objected to the misrepresentation of the law and ensured that a curative instruction was given so that there was no question that death by voluntary drug use would not satisfy the elements of first-degree felony murder. Instead, the jury was incorrectly led to believe that the law was, if Wright died during the kidnapping, no matter how she actually died, then Allen should be found guilty of first-degree felony murder.

Counsel's deficient performance prejudiced Allen in her guilt phase because her jury was told the wrong law in closing. As the misrepresentation was not brought to the jury's attention, the jury would not know that if they found that Wright died of cocaine intoxication that Allen was ***not*** guilty of first-degree felony murder. The verdict has no interrogatories, therefore it is unknown if the jury relied on the State's misstatements and found that Wright died of cocaine intoxication but still found Allen guilty of first-degree felony murder instead of finding her not guilty or guilty of a lesser included offense. R5/794. Due to counsel's deficient performance in

failing to object to the State's felony murder misstatements, there is a reasonable probability that the confidence in the guilt phase of Allen's trial is undermined.

During the State's guilt phase closing argument, the prosecutor also said, "Now, I will tell you this, okay, there is no one in this courtroom, no one, that finds it more distasteful to have to plea bargain with co-defendants than me." R20/1562. "When you are looking at these cases, you have to look at, you know, in some instances, who is the most culpable, who is the most responsible, and who caused everything to happen. There is the person right there (indicating [to Allen])." R20/1563. In essence, the prosecutor was bolstering Quintin's testimony by vouching for his credibility and advising the jurors that although plea bargains are distasteful, it was proper in this case because he thought Allen was the most culpable and responsible. Counsel was deficient by failing to object to either statement.

Worse yet, the State's comment was false because it was admitted on the record prior to voir dire that informal discussions regarding a plea offer *did* take place. R10/8-10. The State even said, "Again, nothing in writing, nothing formalized, but we discussed the possibility of whether or not Ms. Allen was interested in tendering a plea to us to second-degree murder, and I believe we talked about possibly 20 years." R10/8. The prosecutor later compounded the problem by stating in his rebuttal closing argument:

> Defense counsel at one point in time in cross examining Quintin Allen said, "You knew that the State was going to Margaret Allen to give her

> a deal to testify against you, don't you?" He said, "I didn't know that." Did you hear any evidence that the State ever offered Margaret Allen any kind of deal to testify about anybody in this case? No. … Defense counsel said such an offer was made. There's absolutely no evidence of that.

R20/1625-26. The State implied that counsel was dishonest and should not have asked Quintin because the statement was false. Clearly, if Allen had been interested in taking a plea offer, which appears to be the exact same plea offer that Quintin accepted, it would have been conditioned upon testifying against Quintin, just as his plea offer was conditioned upon testifying against her. R15/860; R16/1022. No other evidence linked the co-defendants to the murder; therefore, the State needed one of the co-defendants to testify against the other. The State had no incentive to offer anyone a plea without conditioning it upon testifying against the co-defendant, thus although unmentioned in the discussion prior to voir dire, the condition existed. Counsel was deficient by not objecting to the mischaracterization and by not requesting that the jury be instructed about the informal plea offer discussions. As Allen was offered a plea, the lower court erred in finding it proper for the State to comment on a lack of evidence to support counsel's question to Quintin. P1962.

There were also multiple improper comments related to both Wright's cause of death and the HAC aggravator. The State misrepresented Dr. Qaiser's testimony multiple times during the closing argument, the first instance was:

> She is the one that was holding that belt around her neck so tightly that it would even cause petechia, the little pinpoint blood vessels that pop in your eyes. Okay? So tight ***Dr. Qaiser said that you don't get that***

unless it is held real tight. Margaret Allen is the one that did that.

R20/1581. The lower court's finding that "the State's argument is inconsistent with the evidence" is supported by the record. P1966, R19/1473. Therefore, counsel rendered deficient performance by failing to object to this misrepresentation.

The State also argued to the jury in its closing:

> Now, I would suggest to you, all right, and you can take this for discussion, that placing a rope around someone's neck and holding it there for **three or four minutes**, because that is what Dr. Qaiser said it would take, okay, **three or four minutes**, all right, that may have some aspects of premeddation [sic] here.

R20/1578-79. Dr. Qaiser actually testified that it would take a person **four to six minutes** to die from strangulation. R18/1448. Quintin testified that the belt was only around Wright's neck for **three minutes**. R15/914-915. Counsel was deficient in not objecting to the misrepresentation and not requesting a curative instruction.

In addition, the State misstated the autopsy report in the closing argument:

> Then on top of that Dr. Whitmore said -- it's sort of vague what he said -- atraumatic neck, but then he says, "see evidence of ***internal*** injuries," and then ***we read*** that in which he says there is [sic] ***contusions on both sides of the neck***.

R20/1629-30. However, Robert Whitmore, M.D.'s ("Dr. Whitmore") autopsy report actually specified to see "External Evidence of Injury" and under that section, he notated that one 2 x 2 inch contusion was on the right side and one 1 ½ x 2 inch contusion on the left. P1577-78. Under the Internal Examination section, no internal injuries to the neck were reported. P1580. Further, the State had previously drawn Dr. Qaiser's attention to that portion of the report and he testified that the report

referred to external evidence of injury and described contusions on the neck. R19/1490. The State's characterization of the autopsy report was completely misleading. Competent counsel would have objected and requested a curative instruction that no internal injuries were found, only one contusion was found on each side of the neck, and listed the differing sizes of the two contusions. In addition, as the autopsy report was not introduced into evidence, competent counsel would have objected to the State reading the report to the jury.

Allen was prejudiced in both phases of her trial by counsel's deficiencies in failing to object to these misstatements and move for a mistrial. As the absence of petechia could show that either strangulation did not occur or that strangulation was very tight, there is a reasonable doubt as to whether strangulation actually occurred. Further, if it takes **four to six minutes** for a person to die from strangulation and Wright died within **three minutes** of the belt being held around her neck, there is a reasonable doubt that even if strangulation did occur, it did not cause Wright's death. This was especially prejudicial to Allen because no expert testified to explain these inconsistencies with Dr. Qaiser's testimony. *See infra* p. 67-80. Misleading the jury that internal injuries to the neck existed would also convince them to believe that the victim was violently strangled, but if the argument was corrected, the jury would have heard that no internal neck injuries were reported in the autopsy report and only two small contusions (not ligature marks) were present.

Taken with the cumulative effect of the other mischaracterizations of the evidence, Wright's obesity and health issues, and the original medical examiner's autopsy report which stated that cocaine intoxication was a cause of death, her neck was symmetrical and otherwise atraumatic, and no ligature marks were found, there is a reasonable probability that the outcome of Allen's guilt phase is undermined because strangulation may not have occurred. *See* P1575-1604. In addition, Dr. Spitz's testimony provides further support that strangulation is unlikely to have occurred. *See infra* p. 67-80. As a death by strangulation could support the HAC aggravator, Allen was also prejudiced in the penalty phase of her trial. The State's inflammatory and misleading remarks that Wright was brutally strangled with a belt pulled so tightly that it caused internal injury to the victim's neck and burst the blood vessels in the victim's eye would horrify the jury and surely sway them to find HAC. Without a strong HAC aggravator, especially with all her new mitigation, there is a reasonable probability that at least one juror would have voted for a life sentence. *See supra* p. 8-17.

To consider reversal, the totality of the improper comments by the prosecutor during his closing argument must be reviewed. *See Gore v. State*, 719 So. 2d 1197, 1202 (Fla. 1998). Taken as a whole, the cumulative effect of counsel's failure to object to the multitude of improper comments and misrepresentations by the State prejudiced Allen's guilt phase and deprived her of a fair trial. Allen's case is similar

to *Gore*, where this Court remanded for a new trial because it could not "conclude beyond a reasonable doubt that, collectively, the[] errors were harmless and did not affect the verdict, especially since there was no physical evidence directly linking [the defendant] to the murder, [the defendant] did not confess, and the State's case was circumstantial." *Id*. at 1202–03. Similarly, Allen also did not confess and no physical evidence linked her to Wright's murder. In order for the State to make its case for felony murder, the State had to give Quintin a plea deal in exchange for his testimony, which was the sole evidence against Allen. Without the cumulative effect of counsel's deficiencies, a reasonable probability exists that the jury would have found Allen not guilty or guilty of a lesser offense, therefore confidence in the outcome of her guilt phase is undermined.

The State's comments had a doubly prejudicial effect on Allen by persuading the jury to not only find Allen guilty of felony murder, but also to persuade them to vote for the death penalty. Allen was prejudiced in her penalty phase by the cumulative effect of these improper comments and misstatements because the jury was instructed prior to deliberations, "[Y]ou can take into consideration what you have learned in the guilt phase and the penalty phase." R22/1976. As the trial court deviated from the standard jury instructions, the jury was led to believe that anything they learned could be considered when voting for their recommendation. R5/842. A reasonable juror could conclude that would encompass all the improper comments

and misstatements the jury learned from the State in the guilt phase closing argument because the jury was not specifically instructed during any point in the penalty phase that "what the attorneys say is not evidence or your instruction on the law." FL ST CR JURY INST 2.7; *see also* FL ST CR JURY INST 7.11 (as amended in 2017). Furthermore, the State's mischaracterizations made Allen look unsympathetic, more culpable, and undeserving of mercy and provided support for the HAC aggravator. Consequently, there is a reasonable probability that counsel's failure to object to the State's comments undermined the confidence in the outcome of Allen's case. Also, under *Hurst*, a vote for mercy is especially important because if one juror votes for a life sentence, then the death penalty cannot be imposed. *See supra* p. 8-17.

ARGUMENT IV

THE LOWER COURT ERRED IN DENYING ALLEN'S CLAIM THAT TRIAL COUNSEL PROVIDED PREJUDICIAL INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HE FAILED TO OBJECT AND MOVE FOR A MISTRIAL BASED ON MULTIPLE INSTANCES OF PROSECUTORIAL MISCONDUCT IN THE PENALTY PHASE.

In violation of *Strickland*, counsel rendered Allen prejudicial ineffective assistance of counsel in the penalty phase of her trial by failing to object to multiple instances of prosecutorial misconduct or move for a mistrial. The lower court found that Allen failed to show that she was prejudiced. P1976, 1977, 1979, 1981, 1982, 1983, 1984, 1986, 1987, 1988, 1989, 1990. The lower court erred in denying relief.

The State is **only** permitted to present evidence of the aggravating circumstances provided in section 921.141, Florida Statutes, "which does not

include a defendant's convictions for nonviolent felonies" presented under the pretense that it is being admitted for another purpose. *Poole v. State*, 997 So. 2d 382, 392 (Fla. 2008) (citing *Hitchcock v. State*, 673 So. 2d 859, 861 (Fla. 1996)). Notably,

> The State is not permitted to present otherwise inadmissible information regarding a defendant's criminal history under the guise of witness impeachment. This rule is of particular force and effect during the penalty phase of a capital murder trial where the jury is determining whether to recommend the death penalty for the criminal accused. Improperly receiving vague and unverified information regarding a defendant's prior felonies clearly has the effect of unfairly prejudicing the defendant in the eyes of the jury and creates the risk that the jury will give undue weight to such information in recommending the penalty of death.

Geralds v. State, 601 So. 2d 1157, 1162-63 (Fla. 1992). In *Geralds*, this Court held that permitting the prosecution to question a witness regarding the defendant's prior nonviolent felonies was reversible error, which is similar to the *Strickland* prejudice prong. *See id.* at 1163. Geralds was granted a new penalty phase because there was a reasonable possibility that the error contributed to the jury's recommendation. *Id*.

Similarly, during the State's cross-examination of Dr. Gebel, under the guise of witness impeachment, the State improperly insinuated that Allen had multiple drug convictions and irrelevantly brought up that she had previously been in prison.

> State: Okay. You reviewed some medical records. You reviewed some jail records. **Did you also review the prison records of the Defendant as well?**
>
> Dr. Gebel: According to my notes there was correctional facility records. I don't know what they consisted of.
>
> State: So, you don't know if those were county jail records or **prison**

records where she had been in prison before?

Dr. Gebel: I have no knowledge of that.

R21/1757-58. It is reasonable to believe that a member of the jury may have previously thought the terms "jail" and "prison" were interchangeable. However, the specific way the State asked the questions highlighted that the two terms were not the same and insinuated that Allen was frequently imprisoned.

Worse yet, the State did not lead into drug-related questions by asking if Allen used drugs, which could be relevant to mitigation. Instead, the State asked Dr. Gebel, "Now, you are aware the Defendant has been ***involved*** in drugs for a number of years, correct?" R21/1758. This suggested that Allen's participation was not merely in the consumption of drugs. Dr. Gebel went on to testify that Allen denied drug use and he did not find anything in the physical record showing drug use. R21/1758-59. Even still, the State asked, "So, you don't know about her past drug convictions?" and Dr. Gebel replied, "No." R21/1759. The improper exchange implied to the jury that Allen had numerous nonviolent convictions. The State's intent to unduly influence and inflame the jury was obvious.

During the State's cross-examination of Hudson, the State again solicited similarly inappropriate testimony. Hudson was asked, "So, that would have been about the time she got out of prison in 1999 that you became a mother figure?" R22/1891. To which she replied, "I don't know." *Id*. The State later asked, "So, that would have been when she got released from prison back in 1999?" and Hudson

replied, “Yes, sir.” *Id*. If the State truly wanted to inquire about the timeframe in which Hudson was a mother figure to Allen, it could have been accomplished without asking about Allen being in prison. The State even went on to ask whether Hudson “was acquainted with [Allen] prior to her going to prison.” *Id*. This disingenuous and inflammatory question fully ignored the fact that Hudson testified on direct examination, and on cross-examination just minutes prior, that she knew Allen since birth and Allen stayed with her as a child. R22/1877-78, 1891. Clearly, the State was just maliciously emphasizing that Allen was previously in prison.

Moreover, even though Allen only had ***one*** conviction for selling drugs, the State knowingly elicited false prejudicial testimony from Hudson by asking, “You were aware that **she was convicted *several* times for selling drugs**, right?” R22/1891-92. *See infra* p. 91-93. In response, Hudson simply agreed with the State’s statement. R22/1892. Finally, to further emphasize the false testimony and inflammatory statements, the State argued to the jury during the closing argument, “You heard about the Defendant's time in prison for previous drug sale convictions.” R22/1930. The State made sure that this deceitful nonstatutory aggravation was on the forefront of the jury’s minds before they deliberated.

These instances of prosecutorial misconduct regarding Allen’s prison history and supposed multiple convictions for selling drugs were egregious and the State’s deliberate intent to vilify Allen was blatantly obvious. Competent counsel would

have known she only had ***one*** prior conviction for the sale of drugs and realized any plural mention of convictions was a lie. R5/881-82. However, the fact of the matter remains that evidence of irrelevant nonviolent offenses have no place in penalty phase proceedings, no matter how many prior convictions a defendant has. *Hitchcock*, 673 So. 2d at 861-62. Therefore, counsel deficiently failed to object to these instances of the State presenting inadmissible nonstatutory aggravation in the form of vague, unverified information regarding nonviolent offenses and their punishments. Counsel also failed to move for a mistrial.

The lower court correctly found that the statements about Allen's drug convictions were improper, but erred in finding no prejudice. P1976. Allen was prejudiced because the State made it seem like Allen had multiple convictions for dealing drugs and irrelevantly brought up her time in prison for the nonviolent offense, leaving the jury with the impression that Allen was a drug dealer who never learned her lesson. The jury would think that she continued the same immoral criminal behavior and went on to be convicted multiple times for dealing drugs, instead of one time almost nine years prior to this incident and fourteen years prior to trial. The State deliberately created a risk that the jury would give undue weight to this inadmissible nonstatutory aggravation when recommending Allen's sentence. Allen was prejudiced by counsel's deficiencies because the jury may have thought that the life of career criminal drug dealer who already spent time in prison was not

a life worth saving. A jury is also less likely to consider giving a mercy vote to someone who appears to have failed to be rehabilitated in the past.

As the prosecutorial misconduct regarding prior criminal history in *Geralds* was found to be reversible error and was similar to the misconduct at Allen's penalty phase, she should receive the same relief. 601 So. 2d at 1163. Aside from the burden being on the State in a harmless error analysis, the standard of proving "that the error did not contribute to the jury's recommendation of death" is similar to the *Strickland* prejudice standard. *See Perry v. State*, 801 So. 2d 78, 91 (Fla. 2001) (citing *DiGuilio*, 491 So. 2d at 1138). Therefore, based on *Geralds*, the lower court erred in finding that Allen was not prejudiced by the improper statements regarding nonviolent convictions and a new penalty phase should be granted.

"It is important to note that our death penalty statute does not authorize a dangerousness aggravating factor." *Kormondy v. State*, 703 So. 2d 454, 463 (Fla. 1997). This Court has "held that arguments of future dangerousness as a basis to impose a death sentence are improper and 'prosecutorial overkill.'" *Allen*, 137 So. 3d at 961 (quoting *Teffeteller v. State*, 439 So. 2d 840, 844 (Fla. 1983)). Testimony elicited by the State which is unrelated to proving a statutory aggravating circumstance constitutes impermissible nonstatutory aggravation. *Kormondy*, 703 So. 2d at 463. "As this Court has stated, '[t]he jury is charged with formulating a recommendation as to whether [the defendant] should live or die....[O]ur turning a

blind eye to the flagrant use of nonstatutory aggravation jeopardizes the very constitutionality of our death penalty statute.'" *Perry*, 801 So. 2d at 91 (Fla. 2001) (quoting *Kormondy*, 703 So.2d at 463).

Prior to Allen's trial, on December 26, 2006, she filed a Motion to Preclude Improper Argument ("Motion to Preclude"). R4/583-91. Notably, paragraph 6.b. sought to preclude the State from arguing that the death penalty should be imposed due to the defendant's future dangerousness and cited to *Kormondy*. *Id.* The Motion to Preclude was granted in its entirety on May 11, 2007. R4/621-25. Therefore, the State was indisputably on notice that future dangerousness was an improper argument. As *Kormondy* was cited, the State was also on notice that it was improper to elicit testimony regarding future dangerousness on cross-examination because those were the exact facts of *Kormondy*. *See* 703 So. 2d at 460-63.

In an attempt to elicit improper testimony, the State initiated an inflammatory exchange regarding future dangerousness during Dr. Wu's cross-examination. *See Allen*, 137 So. 3d at 960. Ignoring the trial court's ruling prohibiting future dangerous arguments and in a flagrant disregard for this Court's prior precedent, the State asked, "So, [an episode of a violent act from Allen] could happen, say, in the future to a prison guard, correct?" R21/1855. To further taint the jurors' minds, the State followed up with, "So, you are saying to a reasonable degree of medical probability she is a risk to any prison guard who is watching her in the future?" *Id*.

Counsel then finally objected based on speculation and the trial court sustained the objection. R21/1855-56.

Counsel was deficient in specifically failing to object to each improper statement on the basis that "the State was impermissibly attempting to elicit testimonial evidence assessing Allen's likely future dangerousness" and move for a mistrial. *See Allen*, 137 So. 3d at 961. The State's inflammatory questions regarding future dangerous were considered on direct appeal, but fundamental error was not found. *Id*. at 960-62. However, this Court did find that the State's questions to Dr. Wu were improper and the State was clearly "attempting to improperly allege Allen's future dangerousness, without a valid basis." *Id*. at 961. Therefore, the deficiency prong of *Strickland* is satisfied.

These comments were previously reviewed under the standard for fundamental error, which is a higher standard than the *Strickland* prejudice standard. "Fundamental error is that which 'reaches down into the validity of the trial itself to the extent that a verdict...could not have been obtained without [that] error.'" *Floyd v. State*, 850 So. 2d 383, 403 (Fla. 2002) (quoting *Archer v. State*, 673 So. 2d 17, 20 (Fla. 1996)). Whereas under *Strickland*, "a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would *reasonably likely have been different* absent the errors." 466 U.S. at 696. "[T]he fact that prosecutorial misconduct was raised as fundamental error on direct appeal does

not preclude [the defendant] from raising this related issue as a matter of ineffective assistance of counsel." *Nolan v. State*, 794 So. 2d 639, 641 (Fla. 2d DCA 2001). "[T]here are times when an error that is unsuccessfully argued as fundamental error on direct appeal results in a facially sufficient claim in a postconviction proceeding because the trial lawyer was allegedly ineffective when he or she failed to object to the offending evidence or argument, thereby rendering the outcome of the trial court proceedings unreliable." *Hughes v. State*, 22 So. 3d 132, 135 (Fla. 2d DCA 2009). Now, under *Hurst*, a reasonable probability of a different result only requires a reasonable probability that if counsel was not deficient, ***one*** juror would have been swayed to vote for life. *See Bevel*, 221 So. 3d at 1179; *see supra* p. 8-17. As these improper questions would lead the jury to believe that Allen was a danger to society including prison guards, it is reasonable that it caused at least one juror to determine that her life was not worth saving and vote for the death penalty.

This Court has held that "lack of remorse should have no place in the consideration of aggravating factors." *Pope v. State*, 441 So. 2d 1073, 1078 (Fla. 1983). "Any convincing evidence of remorse may properly be considered in mitigation of the sentence, but absence of remorse should not be weighed either as an aggravating factor nor as an enhancement of an aggravating factor." *Id*. This Court has also taken a stance on questioning witnesses regarding lack of remorse, "we continue to caution prosecutors that this type of questioning should not take

place when the defendant has not made remorse an issue in the penalty phase." *Poole*, 997 So. 2d at 394.

Although Allen did not introduce any evidence of remorse, on the State's cross-examination of Dr. Wu, the State insinuated that Allen lacked remorse.

> State: Okay. Let's talk a little bit about impulse controls. Doctor, isn't it true that somebody who actually suffers from full-blown impulse control, that one of the clinically significant signs of that is that immediately after they have this impulse outburst, they are overwhelmed with remorse?
>
> Dr. Wu: It depends. That is true in some cases but not all cases.
>
> State: Okay. **Did you see and study anything about Margaret Allen that she had any level of remorse after this murder occurred?**
>
> Dr. Wu: I don't have specific details of the circumstances. I don't know what her -- I don't know about those facts.

R21/1851. The lower court erred in finding that the comments were proper. P1977; *see Atwater v. State*, 626 So. 2d 1325, 1328 (Fla. 1993) (trial court erred in permitting the State on cross-examination to ask doctor whether a person with antisocial personality showed remorse). The second comment was especially improper because the State was not inquiring about the disorder or completeness of investigation as the lower court wrongly claimed. P1977. Dr. Wu stated that he reviewed a PET scan of Allen and some of her records, but he never said he met her or interviewed her. R21/1800, 1815-16. The State was improperly trying to plant lack of remorse in the jurors' minds. Although counsel testified that he was familiar with prosecutorial misconduct such as "[i]ssues of remorse being brought up during

the penalty phase," he still failed to object. P2792-93. This deficiency prejudiced Allen in her penalty phase by adding an improper additional nonstatutory aggravator.

"This Court has repeatedly held that 'golden rule' arguments are improper." *Mosley v. State*, 46 So. 3d 510, 520 (Fla. 2009) (citing *Bailey v. State,* 998 So. 2d 545, 555 (Fla. 2008)). "A 'golden rule' argument asks the jurors to place themselves in the victim's position, asks the jurors to imagine the victim's pain and terror or imagine how they would feel if the victim were a relative." *Davis v. State,* 928 So. 2d 1089, 1121 (Fla. 2005). The "imaginary scenario" argument is a subtle form of the "golden rule" argument "where the prosecutor asks the jurors to put his or her own imaginary words in the victim's mouth." *Williamson v. State,* 994 So. 2d 1000, 1006 (Fla. 2008) (citing *Urbin v. State*, 714 So. 2d 411, 421 (Fla. 1998) (prosecutor improperly created an imaginary script stating, "Don't hurt me. Take my money, take my jewelry. Don't hurt me." in an attempt to show the victim was shot while pleading for his life)). Further, the repeated use of the pronoun "you" suggests the State is inviting the jurors to place themselves in the position of the victim. *Braddy v. State,* 111 So. 3d 810, 843 (Fla. 2012). The State was also indisputably on notice that these arguments were prohibited based on Allen's Motion to Preclude. R4/583-91.

During the closing argument, the State blatantly ignored the prohibition of "golden rule" arguments by this Court and the trial court:

> Now, let's talk about the strangulation and what somebody goes through. Dr. Qaiser tried to give you some idea of what physiological,

> mental process ***you*** go through when ***you*** are being strangled. Okay? Forget about the part where ***you*** have got water – the liquids being poured on ***your*** face. What did he tell us? The first thing is, ***you*** are going to have difficulty breathing when that strap is placed around ***your*** neck. ***You*** cannot get ***your*** breath. Okay? Use your common sense. I mean, ***all of us have,*** **you know, run somewhere, maybe *we* have a medical condition, asthma or whatever, it is scary when *you* can't get *your* breath.** All right?

R22/1920. The State went on to continue vividly painting a picture for the jurors to envision the pain and terror of Wright's last moments and added an imaginary script.

> Panic. Dr. Qaiser told us there would be panic. A sense of not being able to get your breath. A sense of this pain above and below the ligature mark. The desire to survive. That basic human instinct. You know, I want to live. I don't want to die. I want to see my children again. I want to see my companion again. And finally the jerky movements Dr. Qaiser told us about. The movement of the head and the neck. And finally the shaking. And it is left on there for three or four minutes. Death. Those are the last few moments of Wenda Wright's life.

R22/1921. Most of the comments the State claimed that Wright made are not found anywhere in the record and none are actual quotes. Thus, the statements are the imaginary words of the State, not facts in evidence, and clearly were argued to inflame the passion and sympathy of the jury.

Counsel was deficient in failing to object to any of these statements. Competent counsel would have recognized the State's repeated use of "you" pronouns and literally inviting the jurors to think of a time when they were personally unable to breathe to be obvious "golden rule" arguments and would have objected and moved for a mistrial. Competent counsel would have also objected to the State putting imaginary words in the victim's mouth because none of the

statements were quotes of what Wright supposedly said. Although not mentioned the first time that the State asked Quintin what Wright said when the belt was around her neck, Quintin later added that Wright said she wanted to go home to her kids. R15/914, 1005. Otherwise, the next closest remark to anything the State argued was that Quintin claimed Wright said "Please stop" and please let her go. R15/914, 1005. Therefore, counsel was also deficient in not objecting on the grounds that the State was misstating the evidence. *See Williams*, 504 U.S. at 60.

Counsel's ineffectiveness in failing to object to the State's "golden rule" arguments prejudiced Allen. These inflammatory statements unduly inflamed the sympathy and passions of the jury to Allen's detriment and were on the forefront of the jurors' minds when they deliberated. If counsel had objected, the jurors would not be imagining themselves going through the terror and panic of not being able to catch their breath while replaying the imaginary script of Wright's last moments that the State fabricated and would have been more likely to vote for mercy.

A jury is neither compelled nor required to recommend or impose a death sentence, even if aggravating circumstances outweigh mitigating circumstances. *See Brooks,* 762 So. 2d at 902. It is improper for a prosecutor to "cloak the State's case with legitimacy as a bona-fide death penalty prosecution, much like an improper 'vouching' argument." *Id.* (citing *Gorby*, 630 So. 2d at 547). Further, a prosecutor personalizing himself in the eyes of the jury to gain their sympathy is an improper

blatant appeal to the jurors' emotions. *Ruiz v. State*, 743 So. 2d 1, 7 (Fla. 1999).

During closing argument, the State advised the jury:

> [T]here are cases where the recommendation for the death penalty is warranted. This is that case. … It is not going to be an easy decision. It's not easy to stand up here and ask a jury to recommend a death penalty. ***But in certain cases it is what the law calls for***. It's what justice calls for.

R22/1932. The lower court found that the statement regarding "what the law calls for" was improper, but did not find prejudice. P1989-90. As the law never requires a death sentence be imposed, counsel was deficient in failing to object and move for a mistrial based on the State misstating the law and cloaking the State's case with legitimacy as a death case. Counsel should have objected on the grounds that the State was attempting to gain sympathy from the jurors and moved for a mistrial.

Counsel's deficient performance prejudiced Allen because the jury was improperly told that Allen's case is one where the *law* calls for the death penalty. Without any correction or objection, the jury is left to believe that the law (and justice) required them to impose the death penalty. The jurors sympathized with the prosecutor for having the difficult task of asking the jury to sentence Allen to death because the law supposedly required it.

"This Court has long recognized that a prosecutor cannot improperly denigrate mitigation during a closing argument." *Williamson*, 994 So. 2d at 1014 (citing *Brooks v State*, 762 So. 2d 879, 904 (Fla. 2000)). The State also may not undermine the credibility of defense counsel. *See Oyola v. State*, 158 So. 3d 504,

512 (Fla. 2015). Inappropriately denigrating mental health mitigation has the additional effect of impugning the defendant's defense "because it implies that counsel concocted a 'scheme' to present mental health as a nonstatutory mitigating factor." *Id*. at 513. Further, "[v]erbal attacks on the personal integrity of opposing counsel or on the manner in which counsel conducted the defense are improper and have no role in the State's case." *Braddy*, 111 So. 3d at 853–54 (citing *Merck v. State*, 975 So. 2d 1054, 1064 (Fla. 2007)).

The State inappropriately argued in closing argument:

> And then I said, well, Doctor, what if you knew those were the facts in this case because that is exactly what she did? Wouldn't that change your opinion? Well, blah, blah, blah, no, that really wouldn't change my opinion. And you know why? Because he was paid $3,000 to come in here and say that she had cognitive disorders.

R22/1926. In essence, the argument exceeded the bounds of commenting on the evidence and inappropriately "implied that the jury could not believe defense counsel or the arguments asserted by them." *Brooks*, 762 So. 2d at 904–05. Counsel rendered deficient performance in failing to object to this denigration of mitigation and attack on counsel and move for a mistrial.

The lower court also erred in finding that a misstatement of the evidence was not supported by the record. P1987; *see Williams*, 504 U.S. at 60. Dr. Gebel never testified that his opinion would not change if he knew the facts of the case. In fact, just the opposite occurred. He testified that if he knew the facts of the case that it may change the severity or degree of her injury, but it would not change the fact that

she has been injured throughout the years. R21/1761. Therefore, counsel was also deficient in failing to object to the State misstating Dr. Gebel's testimony.

Allen was prejudiced by counsel's deficiencies because the State in essence argued that both counsel and Dr. Gebel were dishonest and had no integrity, which substantially affects the jury finding and weighing mitigation. If the jurors felt counsel was deceptive, it reflects unfavorably on Allen because counsel was the voice of her defense. The comments also lead the jury to believe that Dr. Gebel was fabricating his diagnosis and would say anything for a sum of money, which undermines Allen's mental health mitigation. Absent counsel's deficiencies, there is a reasonable probability that the penalty phase outcome would have been different, especially when considered with the multitude of other prejudicial deficiencies, such as failing to object to nonstatutory aggravation. *See Oyola*, 158 So. 3d at 513.

"Closing argument 'must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant.'" *King v. State*, 623 So. 2d 486, 488 (Fla. 1993) (quoting *Bertolotti v. State*, 476 So. 2d 130, 134 (Fla. 1985)). If "comments in closing argument are intended to and do inject elements of emotion and fear into the jury's deliberations, a prosecutor has ventured far outside the scope of proper argument." *Garron v. State*, 528 So. 2d 353, 359 (Fla. 1988).

Although prohibited by this Court and the trial court in Allen's Motion to

Preclude, during the penalty phase closing argument, the State argued to the jury:

> We have heard a lot of things on the news in the last couple of years about torture, systematic torture. Water boarding, pouring water on someone's face making them think that they are drowning. That is torture. That is an attempt to get somebody to fess up to something. That didn't work. And all the while, all the while, you know, think of what is going through Wenda Wright's mind. So, the liquids doesn't [sic] work.

R22/1919, R4/583-91. In the next paragraph, the State makes yet another reference to water torture. *Id*.

Counsel deficiently failed to object to these inflammatory misstatements of the evidence. Waterboarding is defined as "an interrogation technique in which water is forced into a detainee's mouth and nose so as to induce the sensation of drowning." *Waterboarding*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/waterboarding (last visited Jan. 9, 2018). There was no evidence that what Quintin alleged Allen did to Wright constituted waterboarding, which the State even acknowledged in guilt phase closing by stating, "I don't recall anybody ever saying that liquids were poured down her mouth or throat." R20/1574. Therefore, the State sought to inflame the passions and emotions of the jurors.

This deficiency prejudiced Allen because it sounded like she was a terrorist whose life was not worthy of saving. Members of the jury are unlikely to know the exact definition of waterboarding in order to deduce if the State was exaggerating. The lower court pointed out that Dr. Qaiser testified that there was no evidence of chemicals, but the jury was unlikely to make that connection since water could be

used to perform waterboarding. P1982. Waterboarding and systematic torture have constantly been in news headlines with a negative connotation, especially around the time of trial, and describing the events of Wright's death as such would have elicited negative emotion in the jurors' minds. P442 (graph in Motion).

"This Court has explained that '[a] criminal trial is a neutral arena wherein both sides place evidence for the jury's consideration; the role of counsel in closing argument is to assist the jury in analyzing that evidence, *not to obscure the jury's view with . . . nonrecord evidence*.'" *Evans v. State,* 177 So. 3d 1219, 1237 (Fla. 2015) (quoting *Ruiz,* 743 So. 2d at 4) (emphasis in original). It is also improper for a prosecutor to urge a jury to consider facts not in evidence. *Patrick v. State,* 104 So. 3d 1046, 1065 (Fla. 2012).

The State improperly misstated Dr. Wu's testimony as follows:

> Dr. Wu admitted in his own slide -- did you see it in his own slide that the PET scan is not a standalone test. Remember? He said, I don't use this as standalone. **We rely on MRIs, *CAT scans***, and the neuropsych' testing. Well, **there is no MRI. *There is no CAT scan***. And the neuropsych' testing which was done by the first doctor is the one where he said she couldn't do all of those things that we know that she did. So, **how valid is all of that?**

R22/1928. However, Dr. Wu actually testified on direct examination that "PET scans have been shown to be more sensitive than in [sic] CAT and MRI scans in detecting traumatic brain injury." R21/1817. Dr. Wu did say it is not a standalone diagnostic test, but he said to make a diagnosis you consider any history of head trauma and other signs and symptoms of behavioral, cognitive, or psychiatric changes consistent

with head trauma. R21/1817-18. On cross-examination, Dr. Wu specifically stated that a MRI is not always done in conjunction with a PET scan, although it would be preferable, it is not essential and he would not lack any necessary information without it. R21/1856-57. The record does not support any reliance on CAT scans.

As it was not necessary for Dr. Wu to rely on a MRI or CAT scan in formulating his diagnosis, counsel ineffectively failed to object to this misstatement and move for a curative instruction. *See Williams*, 504 U.S. at 60. Further, this argument also improperly denigrates the mental health mitigation presented by Dr. Wu. *Oyola*, 158 So. 3d at 513. Accordingly, competent counsel would have objected on that basis as well. Allen was prejudiced by this deficiency because it allowed Dr. Wu's diagnosis to appear to have no factual basis, which the jury would consider when finding and weighing mitigation.

If a defendant does not testify or present witnesses to testify about the defendant's good character, the prosecution is unable to present evidence of bad character. *Martinez v. State*, 761 So. 2d 1074, 1082 (Fla. 2000). When the defense does not introduce evidence of good character, a "character attack utilized by the prosecutor has no place in closing argument." *Id*. "It is clearly improper for the prosecutor to engage in vituperative or pejorative characterizations of a defendant." *Gore*, 719 So. 2d at 1201. In addition, as previously stated, it is impermissible for the State to inflame "the passions and prejudices of the jury with elements of emotion

and fear." *Brooks*, 762 So. 2d at 900.

The State made these inflammatory and judgmental remarks in closing:

> You heard about the Defendant's time in prison for previous drug sale convictions. You heard about her children, her son in prison for 11 years and one of her daughters is in prison for five years. And her other daughter is with her grandmother. ***And we can only hope that there may be some hope for that daughter.***

R22/1930. The inappropriateness of the first sentence is discussed above; however, the State's extraneous comment suggesting that Allen is a bad mother and her daughter is better off without her is also improper, and prohibited by her Motion to Preclude. R4/583-91; *see supra* p. 45-49. Counsel was deficient in failing to object to these inflammatory remarks regarding Allen's purported bad character. This deficiency prejudicially inflamed the passions of the jury and portrayed her as unsympathetic and undeserving of mercy.

It is improper for the prosecutor to use the status and influence of the government to bolster the believability of his case. *See United States v. Garza*, 608 F.2d 659, 666 (5th Cir. 1979). Further, misstating facts and witness testimony are classic examples of prosecutorial misconduct. *See Williams*, 504 U.S. at 60. In closing, the State improperly asserted, "First of all, what I wrote down was [Dr. Gebel] said, no major brain issue with the Defendant. No major brain issues with the Defendant. Okay?" R22/1923. The State later reiterates the point, "And, again, the first doctor says no major brain injury." R22/1928. The lower court found the statement may not have been a complete reflection of Dr. Gebel's remarks, but also

found counsel's failure to object was not unreasonable and no prejudice. P1985-86.

Counsel was deficient in failing to object to these remarks, request a curative instruction, and move for a mistrial. Dr. Gebel testified that "[w]ithin a reasonable degree of medical probability she does fit a patient who has brain damage" and that the brain damage is organic in nature due to physical damage to the frontal and temporal lobes of her brain. R21/1750-51. Counsel allowed the State to argue these misstatements regarding Allen's brain injury instead of clarifying that Dr. Gebel just said Allen did not seem to have a "major brain injury in terms of weakness in an arm or a leg or anything in those terms." R21/1745.

Allen was prejudiced because her mental mitigation was devalued yet again. Misstating that Allen had no major brain issues caused the jury to assign less weight to mental health mitigation. Further, even if the jury could not recall what Dr. Gebel actually said, they were likely to believe that the prosecutor was correct because he said that he wrote it down. *See generally Pope*, 752 F.3d at 1270.

Allen was denied a fair trial due to the cumulative effect of counsel failing to object to each of these instances of prosecutorial misconduct. Alternatively, after the last instance, counsel should have objected to the cumulative effect of the instances and move for a mistrial. The totality of the improper questions and comments by the State during cross-examination and during closing argument must be reviewed. *Gore*, 719 So. 2d at 1202. Taken as a whole, the improper comments affected Allen's

rights and had a substantial influence on her jury. *See Garza*, 608 F.2d at 665-66. As the misconduct diminished her mitigation and added improper nonstatutory aggravators, her jury was unable to properly assign weight to factors or determine if aggravators outweighed mitigators. Further, many of the improper arguments that counsel failed to object to were emphasized at closing. As the multitude of egregious unobjected to errors were fresh in the jurors' minds when they retired to consider her sentence, "it is entirely possible that several jurors voted for death not out of a reasoned sense of justice but out of a panicked sense of self-preservation." *Campbell v. State*, 679 So. 2d 720, 725 (Fla. 1996).

As in *Poole*, "[t]he combination of these errors had the effect of unfairly prejudicing [the defendant] in the eyes of the jury because these errors created a risk that the jury would give undue weight to this information in recommending the death penalty." 997 So. 2d at 394. In fact, the same errors present in *Poole* are present here, the State introduced lack of remorse and inadmissible nonstatutory evidence of criminal history through witnesses and alluded that Allen was a thug. *Id*., *see infra* p. 93-96. As this Court found that Poole was deprived of a fair penalty phase based on the same issues, Allen should be granted the same relief of a new penalty phase. *Id*. Especially since Allen was arguably prejudiced more than Poole because those few examples are just a small sample of the multitude of unobjected to prosecutorial misconduct present in Allen's case. Notably, Poole's jury recommendation was also

unanimous. *Id.* at 388. Thus, for this Court to find that there was a reasonable possibility the errors contributed to Poole's sentence, this Court must have found that absent the errors it was possible that at least ***six*** jurors would vote for a life sentence. Now under *Hurst*, to find Allen prejudiced this Court would only need to find that absent counsel's deficiencies in objecting to the same errors as in *Poole*, there is a reasonable probability that ***one*** juror would vote for a life sentence. *See supra* p. 8-17. Notably, Poole did not receive a unanimous jury recommendation at his resentencing, thus it is extremely likely that Allen also would not. *Poole v. State*, 151 So. 3d 402, 405 (Fla. 2014). As the prejudice standard for *Strickland* is less stringent than fundamental error and a similar standard as harmless error, Allen must be granted a new penalty phase due to the cumulative effect of the prejudice caused by counsel's ineffectiveness.

Further, the cumulative effect of all the prosecutorial misconduct during Allen's guilt phase also prejudiced her jury recommendation. During the penalty phase, the jury was instructed, "[Y]ou can take into consideration what you have learned in the guilt phase and the penalty phase." R22/1976. This deviation from the standard jury instructions and the jury not being specifically instructed during the penalty phase that statements from attorneys are not evidence, would lead the jury to believe that anything they learned could be considered, including all the State's improper comments and misstatements in the guilt phase closing argument. *See*

supra p. 36-44. Therefore, all of counsel's egregious deficiencies throughout the entire trial cumulatively prejudiced Allen and undermined the confidence in the outcome of her penalty phase.

ARGUMENT V

THE LOWER COURT ERRED IN DENYING ALLEN'S CLAIM THAT TRIAL COUNSEL PROVIDED PREJUDICIAL INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HE FAILED TO PRESENT AVAILABLE EXPERT MEDICAL TESTIMONY THAT CORROBORATED THE ORIGINAL MEDICAL EXAMINER'S FINDINGS AND REFUTED DR. QAISER'S TESTIMONY.

Counsel provided prejudicial ineffective assistance in violation of *Strickland* by failing to present a forensic expert to testify on Allen's behalf regarding independent findings that corroborated the findings of the medical examiner who performed Wright's autopsy, Dr. Whitmore, and challenged Dr. Qaiser's testimony. The lower court found that counsel's strategy to challenge Dr. Qaiser through cross-examination instead of hiring a forensic expert was not unreasonable under prevailing professional norms. P2004. The lower court also found no prejudice. *Id*. Allen seeks review of these findings.

"While it is counsel's responsibility to educate themselves about the aspects of a case they do not understand, gaining personal knowledge of a subject does not end counsel's obligation to his or her client." *State v. Fitzpatrick*, 118 So. 3d 737, 757 (Fla. 2013). "Counsel must *apply* the knowledge gained in a way that provides his or her client with evidence and constitutionally adequate legal representation."

Id. (emphasis in original). Counsel is deficient if he fails to adequately prepare himself to present evidence to support his client's defense or challenge the State's forensic evidence. *See id.* Counsel must be able to know or discover whether the State's experts make scientifically correct statements. *See id.* at 755.

The lower court erred in finding that counsel made a strategic decision whether to hire an expert. P2004. The record does not show that counsel considered and rejected alternative courses as required, or even considered anything other than just cross-examining Dr. Qaiser and trying to get Dr. Whitmore's report in to evidence. *See id.*, P2804, 2809. Counsel even admitted that he does not recall if it was a conscious choice not to bring in an expert to establish that there were no ligature marks. P2810-11. In retrospect, counsel thought he cross-examined Dr. Qaiser extensively, so he did not feel like he needed any other expert to testify to what Dr. Whitmore said. P2875.

Counsel testified that other than Quintin's testimony, the other major portion of the State's case was Dr. Qaiser. P2801-02. Counsel was shocked at Dr. Qaiser's "report since it was diametrically opposed to Dr. Whitmore's." P2802. Counsel said Dr. Qaiser basically changed the autopsy findings and found ligature marks, so his findings were not only converse to Dr. Whitmore's, but also corroborated Quintin's testimony. P2803. When asked, "But an important aspect of your trial preparation would be to confront Quintin's claim as to bindings of the wrist and challenge the

ligatures?" counsel replied, "Probably, yes." P2804. Counsel agreed that it would have been important to establish that no evidence of ligature marks existed. *Id*. Counsel even conceded that he was aware that he was not going to be able to effectively challenge testimony on ligature marks because Dr. Qaiser disagreed with everything he said. P2807-08.

At trial, when shown State's Trial Exhibits 38, 39, and 42, Dr. Qaiser claimed to find strangulation and ligature marks on Wright's neck. R18/1433-35, 1436, R21/1722, R9/1327, 1329, 1335. He testified that Wright's cause of death was homicidal violence in which "ligature and strangulation is deemed important cause of death." R18/1442. **Dr. Qaiser admitted that the ligature marks were not found by Dr. Whitmore, who conducted the actual autopsy**. R21/1729-30. Notably, just as Dr. Whitmore did not find ligature marks, neither did Dr. Spitz, the forensic pathologist in postconviction. P2882, 3290, 3302. Dr. Spitz's EH testimony illustrates the importance of counsel hiring an expert. Dr. Spitz found that the lines on Wright's neck were clearly not parallel like a ligature mark, but were simply indicative of skin fold, especially in an obese individual. P3290. He found that **Wright's "body does not show indicators or findings that would support a conclusion of ligature strangulation."** P3289.

At the EH, Dr. Qaiser continued to claim that the marks in the photographs of Wright's neck were evidence of forced ligature application. P3105. He also claimed

that State's Exhibit 2 showed sharp, straight parallel lines consistent with a belt or a strap and inconsistent with natural folds of skin. P3105-06, PS3849. Notably, this photograph was not introduced at trial. P3099-3102, 3123. He marked his findings on another copy of the photograph, and upon review, Dr. Spitz found there was no correlation between Dr. Qaiser's "lines and anything anatomic or injury wise on the unmarked photograph." P3124-26, 3299, PS3849, 3853. Dr. Spitz also reviewed State's Trial Exhibit 39 and the copy marked by Dr. Qaiser, and found that the head was again pulled to the side and there are two lines that are not parallel which represent folds in the skin. P3300-01, R9/1329, PS3851. Dr. Spitz pointed out that Dr. Qaiser had marked one of the lines he described, but the other line marked higher up does not correlate with anything in particular, but may be an additional fold. P3301-02. The second line Dr. Spitz described was not even marked by Dr. Qaiser at all. P3302. As decomposition causes challenges, if Wright's body was not decomposing, it would have probably been more clear that the lines represented folds of skin. P3303.

Dr. Qaiser's testimony also overreached in other areas. At the EH, Dr. Qaiser testified that Wright's protruding tongue in State's Trial Exhibit 33 indicated strangulation. P3107-08, R9/1317. However, Dr. Spitz said that simply indicates gas formation during decomposition. P3306. Protrusion of the tongue can occur during a suicidal hanging, but not during a strangulation. P3307-09. At trial, Dr. Qaiser

testified in front of the jury that based on contusions, he believed Wright's body sustained "maybe 30, 40, 50, 100" blows. R21/1713. However, Dr. Spitz only found fifteen areas, which corroborates Dr. Whitmore's findings. P1575-81, 3304-05.

Petechiae are dot like hemorrhages that are common in the face, eyelids, and eye membranes when a neck compression occurs. P3290-91. No petechiae were present here. P3290. In State's Exhibit 3, Dr. Spitz observed a small non-specific scleral hemorrhage on the left eye. P3327-28, PS3997. He did not think it was petechiae because it would usually be smaller and come in a cluster. P3327-28. As Wright was faced down and decomposed, and blood vessels rupture as part of the decomposition process, he did not make much of it. P3327-28, 3342. Although the State again wanted to insist that petechiae was present, just as in its penalty phase closing argument, no specific findings of petechiae were made in this case by Dr. Spitz, Dr. Whitmore, or Dr. Qaiser. P1577, 3342-43, R20/1581, *see supra* p. 39-42.

Dr. Spitz testified that if a ligature was pulled tightly on Wright's neck for three minutes, like Quintin claimed, he would expect some injury related to that. P3321. **"[T]he findings on the body don't quite corroborate what is being indicated or stated."** P3323. In the overwhelming majority of neck compressions there is some hemorrhage in the neck musculature, however here there were no injuries. P3292. This testimony is important to refute Dr. Qaiser's disagreement with Dr. Whitmore's autopsy report that found Wright's neck to be symmetrical and

atraumatic. R19/1471. Further, if occlusion of the airway occurred instead of the carotid arteries, there is usually evidence of fractures of thyroid cartilage or hyoid bone, which is unaffected by decomposition. P3314. None of these findings of ligature strangulation were present. P3290. If the jury had heard that Wright's injuries, or lack thereof, did not support Quintin's testimony of the events surrounding her death, all of his testimony would be called into question and discounted. The fact that Dr. Spitz's testimony undermines Quintin's credibility is also incredibly important because this Court relied on his testimony of the events surrounding Wright's death in Allen's direct appeal opinion. *Allen*, 137 So. 3d 946.

To clarify further, Dr. Spitz testifying that a ligature is "within the broad realm of possible" does *not* mean that ligature strangulation actually occurred. P3323. In fact, he stressed that it is "an unlikely situation." P3346. However, he did concede that if the death happened ***instantaneously*** that indicia of ligature strangulation may not be present. P3321. Regardless of whether Wright was either not strangled or died instantaneously, the HAC aggravator would be severely undermined.

Although unfounded, Dr. Qaiser testified multiple times that a person who is unconscious can feel pain. R19/1474, R21/1709-12, 1728, *see infra* p. 88-91. Dr. Spitz testified, "There is no more pain once an individual is unconscious." P3311. He confirmed that Dr. Qaiser's assertion of feeling pain during unconsciousness is "completely at odds with mainstream medicine." P3311-12. Mainstream medicine

indicates that brainwaves continue up to the point of death, but once unconscious, pain cannot be perceived. P3312-13. Dr. Spitz knew of no studies indicating people felt pain while unconscious. P3333. Studies have shown activity in the brain while unconscious, but that does not mean the person is having the sensation of pain. *Id*.

Further, asphyxiation by occlusion of the carotid arteries does not involve fear because the individual is able to breathe and speak before passing out. *See* P3295-97. Narrowing of the vessels like this results in unconsciousness very quickly, as in ten to fifteen seconds, and no pain is involved in that process. P3295-96. Once unconscious, there would be no sensation of pain and there would be a complete loss of awareness of their surroundings. P3313-14. This testimony refutes Dr. Qaiser's testimony during the penalty phase that there would be panic, difficulty breathing, and a sense of choking. R21/1724, 1727.

At the EH, the State even assisted Dr. Spitz in undermining the HAC aggravator. Both parties agreed Wright was morbidly obese, had a pre-existing cardiac condition, and cirrhotic liver. P3318-19. Dr. Spitz agreed with the State's contention that the asphyxiation process could have been accelerated and death could have occurred sooner due to her conditions. P3319. The State suggested that Wright could have died of cardiac arrest when the belt was around her neck, and therefore did not show signs of ligature strangulation. P3320-21. Dr. Spitz agreed that if Wright died "very, very quickly" or "instantaneously" as the State suggested

occurred, then it is possible that traditional signs of strangulation may not be present. P3321. At the EH, the State stated that Wright was "a heart attack waiting to happen." P3319. If counsel had called Dr. Spitz to testify at trial, and the jury had heard this line of cross-examination, there is a reasonable probability that Allen would not have been found guilty as charged, and if she was convicted of first-degree murder at least one juror would have voted in favor of life.

As counsel did not present expert testimony, the jury was left to believe Dr. Qaiser's testimony regarding HAC. Dr. Qaiser did not participate in the autopsy, failed to follow Dr. Whitmore's findings, and presented uncontroverted claims that lacked scientific basis.[5] P3122. The jury would have found Dr. Spitz's testimony to be not only informative and credible, but also unbiased considering he mainly testifies for the State and also testifies for both sides in civil matters. P3277. He admitted that, even when hired by the defense in a first-degree murder case, most of the time he agrees completely with the State's expert medical examiner. P3340.

The lower court erred in finding that *Fitzpatrick* was not controlling. P2002. Just as in *Fitzpatrick*, counsel "lacked the requisite knowledge to effectively cross-examine the State's experts on their scientifically inaccurate testimony" and deficiently failed to retain any forensic or medical experts, despite the fact Dr. Qaiser's testimony would corroborate Quintin's testimony and implicate his client

[5] Dr. Qaiser was on administrative probation at the time of the EH. P3110-18.

if not refuted. 118 So. 3d at 754, 757. Counsel in *Fitzpatrick* was found to be prejudicially deficient in failing to meaningfully challenge the findings and conclusions of the State's experts. *Id*. at 756. *Fitzpatrick* found that the trial would have been substantially different if counsel had not been constitutionally deficient because the prosecutor relied almost exclusively on the evidence of the expert in closing. *Id*. at 758. Allen was prejudiced in the same way as Fitzpatrick in both phases of her trial. Worse yet, in Allen's trial, Dr. Qaiser corroborated Quintin's testimony, therefore leaving Dr. Qaiser's testimony unchallenged in any meaningful way also erroneously strengthened the credibility of Quintin's testimony.

The lower court also erred in finding that *Hodges v. State,* 213 So. 3d 863 (Fla. 2017) was controlling. P2002. Unlike in *Hodges*, if counsel had presented expert testimony that explained concepts such as asphyxiation, occlusion of carotid arteries, ligature marks, and petechiae, which were relevant to Wright's death, and also challenged Dr. Qaiser's testimony, it would have undermined the State's case to a significant extent. *See id.* at 872. Consulting with an expert to verify that no ligature marks were present and presenting expert testimony to the jury creating doubt as to Dr. Qaiser's findings would have changed how the jury determined what actually caused Wright's death. In essence, that is akin to what "statistical numbers" are to a case reliant on DNA such as *Hodges*. Therefore, Allen's case is contrary to *Hodges*, which held, "Where consulting an expert 'would not have changed the

statistical numbers in any way,' trial counsel's tactic of bringing out the limitations of the expert testimony through cross-examination is reasonably effective representation." 213 So. 3d at 873 (quoting *Reed v. State*, 875 So. 2d 415, 425 (Fla. 2004)). Thus, counsel's tactic was not reasonably effective representation, and unlike Hodges, Allen did not confess and no physical evidence linked her to Wright's death, therefore Allen's outcome was undermined. *See id*. at 874.

Counsel's representation was not reasonably effective in many ways. On April 21, 2010, counsel filed a Motion to Exclude Dr. Qaiser from testifying, but the motion was denied a week later. R5/729. On May 3, 2010, Allen's trial was set for September 13, 2010. R5/725-26, 730. Although counsel knew in April that Dr. Qaiser was permitted to testify, he did not even depose Dr. Qaiser until mere weeks before trial, on August 20, 2010. Even at that late date, counsel should have at least attempted to confer with an expert since Dr. Qaiser's opinion was jarringly different from Dr. Whitmore's. Competent counsel would have set Dr. Qaiser's deposition as soon as he was informed that Dr. Whitmore was unavailable and Dr. Qaiser would be testifying instead. Then upon realizing at the deposition that Dr. Qaiser's opinion was substantially different from the autopsy report, and worse for his client, counsel would have had more than enough time to hire an independent forensic pathologist to verify which medical examiner's findings were correct. Competent counsel would have had the expert review the autopsy report and photographs, toxicology report,

investigative reports, and the depositions of Quintin, Dr. Whitmore, and Dr. Qaiser, and give his opinion. At the time of trial, Dr. Spitz was available to testify and based on his testimony at the EH, his findings corroborate Dr. Whitmore's autopsy report, refute Dr. Qaiser's testimony, and undermine the HAC aggravator. *See* P3343-46.

Counsel's ineffectiveness in not presenting the testimony of an independent forensic expert severely prejudiced Allen in both phases of her trial. The cause of death and HAC aggravator were heavily tied to Dr. Qaiser's brutal strangulation testimony, which Dr. Spitz's testimony called into question. Further, in the penalty phase, the jury was able to consider all evidence from the guilt phase as well, including Quintin's testimony. Competent counsel would have known that relying solely on cross-examining Dr. Qaiser would not be effective as presenting his own expert witness. Having a reputable expert testify about the inconsistencies would have allowed the jury to assign more legitimacy to Dr. Whitmore's findings than counsel's simple cross-examination where the jurors in essence just had the word of the obviously biased defense counsel to rely on, especially since the autopsy report was not admitted as evidence at trial. An expert would have been received better by the jury and would have explained why Dr. Qaiser's opinions were speculative or incorrect. P3333. Counsel's basic cross-examination of Dr. Qaiser could not accomplish that because as counsel admitted, Dr. Qaiser just disagreed with counsel on everything and was not going to explain how his opinion could possibly be wrong.

See P2808. It also allowed the State to assert during the guilt phase that Dr. Whitmore "just plain missed" the ligature marks and to claim that the marks were visible even to a juror's untrained eye. R19/1493-94. Consequently, there is a reasonable probability that the outcome of both phases of Allen's trial would have been different if an expert such as Dr. Spitz testified.

In Allen's guilt phase, she was specifically prejudiced as to the findings regarding the cause of Wright's death. Dr. Qaiser disagreed with Dr. Whitmore's indication that Wright's toxicology report showed a high level of cocaine and caused her death. R19/1470, R18/1444. Dr. Qaiser did not believe the amount of cocaine present in Wright's system even *contributed* to her death. R18/1445. However, the testimony of Dr. Spitz, which corroborates Dr. Whitmore's autopsy report, supports the fact that cocaine intoxication played a part in her death. P3344-45. This creates reasonable doubt as to how Wright died, particularly combined with her morbid obesity, heart problems, and cirrhosis of the liver. P3318-19.

Allen was prejudiced most in the penalty phase of her trial. The trial court only found two aggravators: (1) the murder was committed while the Defendant was engaged, or was an accomplice, in the commission of a kidnapping; and (2) HAC. R6/951-53. As no premeditation was found, if the first aggravator did not exist, Allen would not have even been death penalty eligible. Therefore, HAC was essentially the sole aggravator independently found by the trial court. Although Allen was

convicted of kidnapping which is what made her eligible for felony murder, and subsequently the death penalty, the facts of Allen's case are not what a layperson would think of when hearing the term "kidnapping". It was not as if she violently abducted a child from their front yard. In fact, under the principal theory, the jury may have convicted Allen of kidnapping and felony murder even if she was not present at the time of death if they thought she somehow incited Quintin to kill Wright. R20/1652. Therefore, it is evident that HAC was the deciding factor convincing the jury to vote for a death sentence.

There is a reasonable probability that but for counsel's deficiency in failing to present expert testimony to challenge Dr. Qaiser's findings, the outcome of Allen's penalty phase would have been different. The forensic expert's testimony would have either undermined or eliminated the HAC aggravator. Dr. Whitmore's autopsy report and Dr. Spitz's testimony do not support the version of events that Quintin testified to, which the lower court and this Court found to have supported the HAC aggravator. *Allen*, 137 So. 3d at 963-64, P2003. This undermines the credibility and reliability of all of Quintin's testimony, including the testimony this Court relied on, where he claimed Wright was terrorized, scared, screaming, and pleading, which the jury likely relied on too. *Id*. As Dr. Spitz testified, in the only possible way that Wright could have been asphyxiated, she would have lost consciousness in ten to fifteen seconds and until then would have been able to breathe and speak and would

have had no pain or fear. P3295-97. In light of this testimony, the mitigation would weigh heavier in comparison, especially if the mitigation found in postconviction had been presented. If counsel had not been deficient, there is a reasonable probability that at least one juror would have voted for a life sentence, even if it was just out of mercy. Just one juror voting against a death sentence would have made Allen eligible for a new penalty phase under *Hurst*. *See supra* p. 8-17.

ARGUMENT VI

THE LOWER COURT ERRED IN DENYING ALLEN'S CLAIM THAT TRIAL COUNSEL PROVIDED PREJUDICIAL INEFFECTIVE ASSISTANCE OF COUNSEL BY UNREASONABLY ELICITING INCORRECT TESTIMONY FROM QUINTIN ALLEN THAT ALLEN POURED MULTIPLE CHEMICALS ON THE VICTIM

At trial, counsel provided Allen ineffective assistance of counsel in violation of *Strickland* by eliciting testimony from Quintin that Allen poured chemicals in Wright's eyes and mouth when Quintin only said Allen poured substances *on* Wright. Counsel was also ineffective by eliciting testimony on recross-examination that the substances were bleach, ammonia, nail polish remover, and hairspray when Quintin had already conceded on redirect-examination that he could only identify rubbing alcohol. The lower court's findings focused more on bleach and impeachment than the heart of the claim, which was that counsel should not have elicited this testimony. *See* P1955-56. The lower court stated "there is no prejudice, as there is no reasonable probability that additional impeachment would have produced a different result." P1956. Allen's claim did not suggest that competent

counsel would have impeached Quintin further; it asserted that competent counsel would not have elicited this unfavorable testimony at all. The lower court also found that the HAC aggravator was established even without knowing which chemicals were poured on the victim. *Id*. Allen seeks review of these findings.

The majority of counsel's cross-examination of Quintin elicited less favorable testimony than what Quintin and the State had already put in front of the jury. Although the State did not assert that substances were poured in Wright's mouth or eyes, counsel elicited such testimony from Quintin. R16/1036. Then counsel had Quintin specifically reiterate all the chemicals he mentioned on direct examination, including bleach, and additionally had Quintin testify that ammonia was present. R16/1038-39. Throughout the cross-examination, in an attempt to impeach the witness, counsel incompetently continued to highlight the chemicals and where they were poured. *See* R16/1036-63. Counsel asked if Allen poured ammonia in Wright's mouth and when Quintin responded "I told you she poured the chemicals on the face," counsel continued to push the subject until Quintin finally agreed the chemicals were poured in her mouth. R16/1042-44. Competent counsel would have instead impeached Quintin with other less damaging discrepancies from his interview that would not have supported the HAC aggravator.

On redirect-examination, the State actually brought up the portion of Quintin's interview that referred to liquids being poured on Wright. R16/1073-74.

> State: Okay. So, you don't really know if it was bleach? If it was lye? If it was hairspray? Other than the alcohol, you could smell that -- and we are talking about rubbing alcohol, right?
>
> Quintin: Yes, sir.
>
> State: Okay. Other than the alcohol, you are not sure what these liquids were?
>
> Quintin: Yes, sir.

R16/1074. This testimony actually helped Allen and mitigated some of the harsh effects of counsel's deficient and prejudicial line of cross-examination questioning. However, on recross-examination counsel unreasonably decided to solicit testimony that Quinton could identify all the substances even though he just admitted on redirect examination that he could not. Counsel elicited testimony that Quintin knew what bleach looked like and smelled like, and that he saw a bleach bottle. R16/1077. Counsel also had Quintin admit that nail polish remover was present, and that both bleach and nail polish remover were poured in Wright's face, eyes, and down her mouth. *Id*. In addition, he convinced Quintin that he knew ammonia and hair spritz were the other substances. R16/1078. Counsel should have realized how damaging his cross-examination was and not made matters worse during recross-examination by essentially trying to prove that *he* was right at the expense of his client, Allen.

These deficiencies prejudiced Allen in her penalty phase because the details that counsel elicited supported the HAC aggravator. Pouring chemicals in a person's eyes and mouth is substantially more torture than Quintin's original testimony of pouring rubbing alcohol on a person's face. Notably, counsel insisted that Quintin

commit to the existence of worse substances that were more caustic such as bleach and ammonia, which a juror would find much more cruel than rubbing alcohol or hairspray. Further, a layperson would know that mixing bleach and ammonia creates a dangerous, toxic gas. As only two aggravators were independently found by the court, without soliciting this testimony to support the HAC aggravator, there is a reasonable probability that mitigation would have weighed heavier and at least one juror would have voted for life. Under *Hurst*, if Allen received one vote for a life sentence, she would have been granted a new penalty phase. *See supra* p. 8-17.

The effect of these deficiencies is even more prejudicial when you consider the cumulative effect of counsel's other instances of ineffectiveness. Especially when considered with the other evidence that undermines the HAC aggravator such as the testimony of Dr. Spitz. Cumulatively, the outcome of Allen's penalty phase would have been different due to the HAC aggravator being undermined.

ARGUMENT VII

THE LOWER COURT ERRED IN DENYING ALLEN'S CLAIM THAT TRIAL COUNSEL PROVIDED PREJUDICIAL INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HE FAILED TO IMPEACH QUINTIN ALLEN WITH HIS STATEMENTS TO DETECTIVE BOYER INDICATING THAT ALLEN <u>DID NOT POUR BLEACH</u> ON THE VICTIM.

Contrary to the previous claim where counsel went too far in attempting to impeach Quintin and elicited statements harmful to Allen, here counsel failed to impeach Quintin on a favorable inconsistency. Counsel failed to show that Quintin's trial testimony regarding bleach being poured on Wright conflicted with his prior

statements to Detective Boyer. As such, Allen received ineffective assistance of counsel in violation of *Strickland*. The lower court found that counsel was not unreasonable in failing to impeach Quintin and there was no prejudice to either phase of Allen's trial. P1951-52. The lower court erred in denying relief.

At trial, Quintin testified on direct examination:

> Um, I get up and I hold Ms. Wenda down. Margaret Ann goes to her personal bathroom and she comes out with **bleach** that [sic] used to wash clothes; spritz, which is for the hair; nail polish remover, and green rubbing alcohol.

R15/903.

> State: Okay. All right. Do you know how many different liquid objects were poured on Ms. Wright's face?
>
> Quintin: As I stated, it was the **bleach**, the green rubbing alcohol, the spritz for hair, fingernail polish remover. And that is all I can remember, sir.

R15/906. However, in his 9:54 p.m. interview with Detective Boyer on February 10, 2005, approximately two days after Wright's death, Quintin stated:

> Boyer: What type of chemicals was it?
>
> Quintin: I wasn't, I couldn't---**all I can remember alcohol.**
>
> Boyer: Okay.
>
> Quintin: But I know it was a whole bunch of different stuff, cause her bathroom, when y'all go to look in the bathroom, she got a million different hair, different kind of products.
>
> Boyer: Any **bleach** or anything?
>
> Quintin: Yeah (yes), she got boxes of bleach. But I don't, ***she ain't have no bleach bottle***, less [sic] she had done poured it in a hair products bottle.
>
> Boyer: Okay. So it's hair products stuff that she was pouring on her?

Quintin: Yeah (yes), alcohol, stuff like that.

R7/1113-14.

> Boyer: Was there something that happened between her **pouring the bleach**---or the, ***not the bleach but the hair products***, and when you thought she was dead? Did your aunt do anything with any of the belts or anything?
>
> Quintin: She, she kept the belts. I don't know what she did with them.

R7/1115. There was also no mention of bleach in Quintin's first interview with detectives earlier that evening. P1606-80. In that interview, Quintin suggested that the other substances might have been hairspray or ammonia, but Quintin only knew alcohol was one of the substances because he could smell it. P1628-29. Counsel could have also used this interview to impeach Quintin and show that he could only identify the rubbing alcohol. Ultimately, it appears that the detectives suggested the idea of bleach to Quintin through their questioning and Quintin later adopted the idea of bleach being present once he became a State witness.

Counsel was also familiar with Quintin's November 9, 2009 deposition, which showed Quintin's story changed after he accepted a plea offer from the State. Quintin's deposition statements were more favorable to the State and put counsel on notice that Quintin was likely to testify similarly at trial. Counsel did impeach Quintin on some inconsistencies, such as whether Wright was restrained when substances were poured on her. Counsel pointed out that Quintin's trial testimony conflicted with his statements at his deposition and his February 10, 2005 interview. R16/1054-55. Counsel was even able to get Quintin to admit that none of the

statements agreed and his initial statement to Detectives Boyer and Arthur Esposito was the truth. *Id*. Competent counsel would have found that to be a perfect time to impeach Quintin with his prior inconsistent statement to Detective Boyer that bleach was not poured on the victim. Quintin likely would have just admitted he did not know if bleach was present like he did on redirect prior to counsel incompetently insisting Quintin knew bleach was present on recross-examination. Conversely, if Quintin agreed that bleach was present it would have called into question the truthfulness of his testimony that his initial statement to the detectives was the most reliable. Either way he answered would have shown the jury that not only is Quintin forgetful and unreliable, but his stories are more embellished each time he tells them. However, instead of impeaching Quintin with his prior inconsistent statement that Allen ***did not pour bleach on the victim***, counsel actually made matters worse by incompetently eliciting testimony alleging that Allen poured bleach *into Wright's mouth and eyes*. R16/1037-44, 1077, *see supra* p. 80-83. Counsel ended up deficiently painting a picture of Allen torturing Wright more than the State and Quintin originally alleged during their opening argument and direct examination.

Under *Strickland*, counsel was deficient by failing to impeach Quintin's trial testimony with his prior inconsistent statement. The lower court erred in pointing to Dr. Qaiser's testimony to show that Quintin's testimony was refuted. P1952. However, Dr. Qaiser only testified that he ***did not see*** in the report that bleach or any

other caustic substances were poured *down the victim's throat*. R19/1487. Impeaching Quintin's testimony on this point would have also illustrated that Quintin was not credible about bleach being poured *onto the victim*.

Allen was prejudiced in her guilt phase because Quintin was the sole witness to testify about the events surrounding Wright's death and implicate Allen. If the jury was shown that Quintin had changed his story and was not credible, that would have compounded Quintin's bias of being a co-defendant-turned-State-witness due to taking a plea deal instead of facing the death penalty himself. Therefore, there is a reasonable probability that at least one juror would not have believed him. As such, confidence in the outcome of Allen's guilt phase is undermined.

In addition, Allen was prejudiced in her penalty phase. Quintin's testimony that Allen poured bleach on Wright would have been on the juror's minds when they considered whether HAC was applicable. If counsel impeached Quintin, the jury would be shown that he lacked credibility and HAC would be undermined. This unchallenged testimony presented the jury with an aggravated HAC scenario where bleach, was poured on Wright. Allen was prejudiced because the credibility of Quintin was essential to the State's case, including the HAC aggravator. As only two aggravators were found, there is a reasonable probability that at least one juror would not have voted for the death penalty if Quintin's testimony was impeached, especially taken together with HAC already being undermined by the testimony of

Dr. Spitz. *See supra* p. 67-80. Consequently, confidence in the outcome of Allen's penalty phase is undermined because even an 11-1 recommendation would have entitled Allen to a new penalty phase under *Hurst*. *See supra* p. 8-17.

ARGUMENT VIII

THE LOWER COURT ERRED IN DENYING ALLEN'S CLAIM THAT TRIAL COUNSEL PROVIDED PREJUDICIAL INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO OBJECT TO DR. QAISER'S TESTIMONY THAT UNCONSCIOUS PEOPLE CAN FEEL PAIN.

When counsel failed to object to Dr. Qaiser's testimony regarding unconscious people feeling pain, counsel provided ineffective assistance of counsel in violation of *Strickland.* However, due to Dr. Qaiser stating that he could not testify within a reasonable degree of medical probability that there was a sensation of pain in this case, the lower court claimed that any testimony that an unconscious person could feel pain was discredited. R21/1728, P1970. Therefore, the lower court found that counsel was not unreasonable in failing to object and there was no prejudice. P1971. The lower court erred in denying relief.

The Confrontation Clause of "[t]he Sixth Amendment guarantees a defendant the right to be confronted with the witnesses *against him*." *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 313 (2009) (emphasis in original); *see also Crawford v. Washington*, 541 U.S. 36, 42 (2004). In addition,

> Although experts may testify as to the things on which they rely, experts cannot bolster or corroborate their opinions with the opinions of other experts who do not testify because "[s]uch testimony improperly permits one expert to become a conduit for the opinion of another

> expert who is not subject to cross-examination." *Schwarz v. State*, 695 So. 2d 452, 455 (Fla. 4th DCA 1997). To allow an expert to do so would cause any probative value of the testimony to be "substantially outweighed by the danger of unfair prejudice, confusion of issues, [or] misleading the jury." *Id*. at 455 (quoting § 90.403, Fla. Stat. (1995)). Further, an expert's testimony may not be used as a basis to introduce otherwise inadmissible evidence. *See Linn v. Fossum*, 946 So. 2d 1032, 1037 (Fla. 2006).

Dufour v. State, 69 So. 3d 235, 255 (Fla. 2011).

The State's only penalty phase witness, Dr. Qaiser, opened his testimony with:

> Okay. See, the portion of whether the people who are unconscious, either they are minimally unconscious, mildly, moderate, or severely or profoundly unconscious, do they perceive pain or not. There is very little known about that. But the studies have been done, especially in Belgium, in Europe, and here also in the United States and all the other parts of North America.
>
> . . .
>
> So, the conclusion was, as I said before in my statement, too, that they register the pain, but it is not necessarily that they will outwardly manifest it.

R21/1709-11. In essence, Dr. Qaiser was bolstering his opinion by becoming a conduit for other individuals who were unable to be cross-examined. The State later asked if Wright "could have been experiencing the pain even if she is rendered unconscious" and Dr. Qaiser agreed, "That's true." R21/1712. Dr. Qaiser also made reference to an unconscious person's ability to feel pain in the guilt phase. R19/1474. Counsel deficiently failed to object to any of this speculative, inflammatory hearsay testimony or move for a mistrial. Counsel also should have objected on the grounds that the testimony was improper bolstering and violated the Confrontation Clause of the Sixth Amendment because counsel was unable to cross-examine the individuals

who conducted the studies. To compound the issue, Dr. Qaiser testified on cross:

> That is what I said in the very beginning of today's discussion with the jury, that is [sic] not necessary that the outward manifestation of pain will be there. But **as far as the perception of pain by the subject, you cannot rule that out.** And studies have shown that this has taken place.

R20/1728.

Counsel's deficient performance prejudiced Allen in her penalty phase. The jury was led to believe that the victim could feel pain while she was unconscious, which is a detail that would weigh heavily on their minds when determining the existence of the HAC aggravator or whether Allen deserved a vote for mercy. Just because Dr. Qaiser testified that he was *uncertain* whether there was a sensation of pain in this case does not mean the jurors were left with the impression that Wright *did not* feel any pain while she was unconscious. Dr. Qaiser testified that a person being strangled would lose consciousness after ten to twenty seconds and would take four to six minutes to die. R21/1734-35. Therefore, Dr. Qaiser's testimony still left the possibility open for the jury to think that Wright may have felt pain during the majority of the four to six minutes that she was unconscious, but alive, which is highly prejudicial. Since counsel did not object to the testimony, the jury was unaware that the statement that unconscious people feel pain was not supported by any accepted medical science and "completely at odds with mainstream medicine." P3311-13, *see supra* p. 72-73. Particularly when combined with counsel's deficiencies in failing to call an expert to refute Dr. Qaiser and Quintin's testimony,

a reasonable probability exists that if counsel was not deficient, the HAC aggravator would have been undermined and at least one juror would have voted for life.

ARGUMENT IX
THE LOWER COURT ERRED IN DENYING ALLEN'S CLAIM THAT THE STATE COMMITTED A *GIGLIO* VIOLATION WHEN IT ELICITED AND FAILED TO CORRECT FALSE TESTIMONY THAT ALLEN WAS CONVICTED SEVERAL TIMES FOR SELLING DRUGS.

In violation of *Giglio* and the Fourteenth Amendment, the State elicited false testimony during Hudson's cross-examination and allowed the false testimony to go uncorrected. *See* Amend. XIV, U.S. Const. The lower court acknowledged that the State did not dispute that Allen had only one conviction for the sale of drugs, but found that evidence of prior drug convictions was not material. P1995. The lower court erred in denying relief.

A conviction obtained through the State's use of false testimony or failure to correct false testimony, is a denial of due process under the Fourteenth Amendment. *Napue v. Illinois*, 360 U.S. 264, 265, 269 (1959). "[W]henever the State seeks to obfuscate the truth-seeking function of a court by knowingly using false testimony or misleading argument, the integrity of the judicial proceeding is placed in jeopardy." *Johnson v. State*, 44 So. 3d 51, 54 (Fla. 2010). Therefore, if the State knew the testimony was false, "[a] new trial is required if 'the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury…'" *Giglio*, 405 U.S. at 154 (quoting *Napue*, 360 U.S. at 271). Once it is established that the

State knowingly presented false testimony, "the State bears the burden of showing the false evidence was immaterial" by showing that "there is no reasonable possibility that the error contributed to the conviction." *Johnson*, 44 So. 3d at 64 (quoting *Guzman v. State*, 941 So. 2d 1045, 1050 (Fla. 2006)). A mixed standard of review is applied due to *Giglio* claims presenting mixed questions of law and fact. *See Dougan*, 202 So. 3d at 378.

Although Allen only had one conviction for selling drugs (Brevard County, Case No. 96-28348-CFA), the prosecutor knowingly solicited false testimony from Hudson by asking, "You were aware that she was convicted several times for selling drugs, right?" R5/881; R22/1891-92. Hudson replied in the affirmative. R22/1892. After the prosecutor knowingly presented this false testimony, the State also knowingly allowed this false testimony to go uncorrected. The effect of this misconduct on the jury was magnified when the State later argued to the jury in closing argument, "You heard about the Defendant's time in prison for previous drug sale convictions." R22/1930.

The State indisputably had access to Allen's criminal history because the State prepared the Criminal Punishment Code Scoresheet. R5/881-83. Further, the State was clearly aware of the particulars of Allen's criminal history prior to trial because the State filed a Notice of Intent to Seek Habitual Felony Offender Penalties on March 18, 2005. R3/340. Thus, the misconduct is unmistakably a *Giglio* violation.

The State cannot show that this false testimony regarding convictions for the sale of drugs is immaterial. It is reasonable that this false testimony contributed to Allen's death sentence because the jurors conclude that she had at least four or five convictions for selling drugs. This conclusion follows from the reasonable logic that two would have been a "couple" and three would have been a "few". Based on this false testimony, the jury would consider Allen a career criminal drug dealer whose life did not deserve saving, when in all actuality, Allen only had ***one*** conviction for selling drugs almost nine years prior to these charges and fourteen years prior to trial (and that conviction should not have been disclosed, *see supra* p. 44-49). Further, jurors would consider that sentences tend to be based on prior criminal history. As Allen was painted as a morally bankrupt drug dealer who already spent time in prison and still continued to break the law and be convicted several times, jurors would feel obligated to vote for the higher penalty and less likely to vote for mercy. The false testimony denied Allen due process and contributed to her sentence of death.

ARGUMENT X

THE LOWER COURT ERRED IN DENYING ALLEN'S CLAIM THAT TRIAL COUNSEL PROVIDED PREJUDICIAL INEFFECTIVE ASSISTANCE OF COUNSEL BY ASKING MYRTLE HUDSON IF ALLEN BECAME A PART OF THE CULTURE "DRUGS, THUGS, AND VIOLENCE".

Counsel rendered prejudicial ineffective assistance in violation of *Strickland* by questioning Hudson about Allen growing up around "drugs, thugs, and violence" and reinforcing it as a theme, even though he did not intend to use it as a mitigating

circumstance. The lower court found that there was no reasonable probability that hearing about the "drugs, thugs, and violence" impacted the sentencing decision and no prejudice was found. P1994. The lower court erred in denying relief.

Counsel was deficient in bringing out this testimony from Hudson that Allen was a part of this culture and even more deficient for repeating the phrase "drugs, thugs, and violence" back to her which reinforced it in front of the jury. R22/1878-79. Competent counsel also would not have emphasized to the jury in closing argument that Allen grew up in a culture of "drugs, thugs, and violence". R22/1934, 1943. In hindsight, at the EH, counsel claimed that he elicited the testimony to show that living in a violent atmosphere around others who were not law abiding, sold drugs, and were aggressive had an effect on Allen. P2828-30. However, if counsel had actually intended to bring out the fact that drugs and violence ran rampant in the neighborhood she grew up in, he could have accomplished it in a different manner without detrimental labels such as "thugs". Further, based on counsel's sentencing memorandum it was clearly not counsel's strategy to bring out this testimony as mitigation because the State was the only party to even suggest it as a mitigating circumstance. R6/891. In counsel's memorandum, there is no mention of Allen's neighborhood or the violent atmosphere in which she grew up, clearly counsel was oblivious that the mitigator had even been established. R6/906-24. In fact, counsel was further deficient in only devoting less than a page of the memorandum to

mitigation and only suggesting two nonstatutory mitigators. R6/923-24. In addition, if eliciting this testimony was truly a theme of counsel's mitigation case as he hollowly claimed at the EH, then counsel was even more deficient in his failure to adequately investigate mitigation to support this theme. P2829, *See supra* p. 18-36.

Allen was prejudiced by this ineffectiveness in her penalty phase. In the past, this Court has held that information regarding a defendant's "Thug Life" "tattoo prejudiced [the defendant] in the eyes of the jury and could have unduly influenced the jury in recommending the death penalty." *Poole*, 997 So. 2d at 393. Allen's situation is similar because the word "thug" has a negative connotation and unduly influenced the jury to find that she was a criminal who participated in drugs and violent behavior. A thug is commonly defined as "a brutal ruffian or assassin: gangster, tough." *Thug*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/thug (last visited Jan. 11, 2018). In fact, at the EH, counsel even defined the word "thug" negatively as "[s]omeone who causes trouble, pushes people around, [and] is not in tune with the rights of other people." P2828. Regardless of which definition went through each juror's mind, it is evident that counsel's continuous reinforcement of these pejorative words made Allen look callous and undeserving of mercy. Worse yet, the State picked up on the catchy "drugs, thugs, and violence" language and repeated it two more times in their closing. R22/1930. This catchphrase undoubtedly stuck in the minds of the jurors

too and was at the forefront of their minds during deliberations. Particularly since one of the last things counsel said to the jury in closing argument was, "Drugs, thugs, and violence. That's one of the keys here." R22/1943. But for counsel's deficiency in bringing out this harmful testimony and reinforcing it, there is a reasonable probability that the outcome of Allen's penalty phase would have been different in that at least one juror would have voted for a life sentence. *See supra* p. 8-17.

ARGUMENT XI

THE LOWER COURT ERRED IN DENYING ALLEN'S CLAIM THAT TRIAL COUNSEL PROVIDED PREJUDICIAL INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO CHALLENGE BIASED JUROR CARLL FOR CAUSE OR STRIKE HER PEREMPTORILY.

Counsel provided prejudicial ineffective assistance in violation of *Strickland* when he failed to challenge Juror Carll for cause or strike her peremptorily. Allen was granted an EH regarding whether counsel was ineffective for failing to strike Carll peremptorily, however she was denied an EH regarding whether counsel was ineffective for failing to challenge Carll for cause. P650-51. The lower court found that Carll's bias against Allen was not "plain on the face of the record" and prejudice was not established. P1948-49. The lower court also found that counsel made a strategic decision to keep Carll as a juror and the decision was reasonable. P1949. The lower court erred in denying relief.

"Where a postconviction motion alleges that trial counsel was ineffective for failing to raise or preserve a cause challenge, the defendant must demonstrate that a

juror was actually biased." *Peterson v. State*, 154 So. 3d 275, 281 (Fla. 2014) (citing *Carratelli v. State*, 961 So. 2d 312, 324 (Fla. 2007)). "The actual bias standard requires a showing that the questionable juror was not impartial, that is, was biased against the defendant, and the evidence of bias must be plain on the face of the record." *Id*.

Carll made many statements that showed that she was biased and under the facts of this case, to seat her on the jury would be a vote for the death penalty. She specifically stated that she was "pro death" and said, "I believe in the death penalty. I believe if you commit a crime and someone dies during that time, you should be recommended for the death penalty." R11/220. When counsel asked Carll for an example of what would cause her to vote for a life sentence, her answer promptly reverted back to recommending the death penalty:

> Carll: Like the defendant was part of a party that ***kidnapped a person*** but didn't actually kill that person themselves but was involved in it just by association, I would think couldn't be put to death for that. ***But if the person actually committed the death with a bunch of other people and participated in the physical death, they should be recommended for the death penalty***.
>
> Counsel: ***Everybody involved should be recommended for death penalty?***
>
> Carll: ***<u>If they had a hand in the death.</u>***

R11/221. She evaded counsel's question and her comments show that she possessed actual bias. She provides a scenario where she would not think someone *could* be put to death, however she is actually stating an example of felony murder by

principal, which even if a juror only believed some of Quintin's testimony, Allen would still be guilty of and eligible for the death penalty. Counsel knew the State alleged that Allen was part of a party who kidnapped and killed Wright. As the allegations were that Allen not only had a hand in Wright's death, but actually committed or actively participated in Wright's death, counsel was deficient in failing to move to strike Carll for cause. Even if the motion was denied, reasonable and competent counsel would have used a peremptory strike on Carll due to her impartial comments. When counsel later asked Carll if she would "listen to the aggravating circumstances and the mitigating circumstances," she answers, "Absolutely. Yeah. ***I believe that the death penalty should be used in certain circumstances where someone was a direct result of a death***." R11/249-50. Counsel knew that Quintin's testimony was going to assert that Allen directly caused Wright's death and still did not bother to strike Carll. The only favorable statement she made was that she could objectively listen to mental health evidence. R12/372-73. No efforts were made to ensure Carll could be impartial and there was no attempt to rehabilitate her either. Carll never indicated that she would lay aside her strong predetermined belief that those who have a hand in the death of another should receive the death penalty. Further, "[a]ssurances of impartiality after a proposed juror has announced prejudice is questionable at best." *Matarranz v. State*, 133 So. 3d 473, 485 (Fla. 2013).

In the alternative, even if Carll was not found biased on the plain face of the

record, counsel was still deficient by failing to strike Carll peremptorily. At the EH, counsel testified that he did not have any independent recollection, but based on reading the trial transcript, he thought Carll had been sufficiently rehabilitated. P2866. Counsel claimed that he thought he had to keep Carll due to concerns looking forward down the line to who was next. P2866-67. These statements conflict with the record and demonstrate that counsel had absolutely no recollection of his actual thought process during Allen's jury selection and instead provided generic self-serving answers. Counsel later conceded that at this time he could not note any specific red flags that he saw in the jurors after Carll or specific feelings as to why he would want her instead of them. P2888-89. The record shows that Carll was venirewoman #2, therefore counsel had many opportunities to strike or back strike her peremptorily. R5/771. Back strikes were allowed and utilized. R12/466. Counsel even had two peremptory strikes remaining when he said that he found the jury acceptable. R12/468-69. At the time that he accepted the jury and the selection of alternates began, only two people from the panel remained. R12/469. Clearly, counsel could not be looking down the line to a panel that would be arriving the next day. R12/473. Keeping Carll on the jury was not a strategic decision. However, counsel did say that he is very familiar with and involved in the *Hurst* litigation, and the new law would affect his voir dire questions and jury selection now. P2831-33.

Similarly, in *Titel v. State*, a sexual battery and kidnapping case, trial counsel

for Titel failed to strike a juror for bias. 981 So. 2d 656, 657 (Fla. 4th DCA 2008). The juror expressed his predetermined belief that rapists should be executed. *Id*. Just as in Allen's case, the juror was never asked if he "could be fair, listen to the evidence, and follow the law." *Id*. at 658 (citing *Carratelli*, 961 So. 2d. at 327). Titel's trial counsel was found to be ineffective for failing to strike the juror and Titel was entitled to a new trial. *Id*.

Counsel's deficiency in failing to strike Carll placed a biased juror on Allen's jury. Carll being seated on the jury prejudiced Allen by tainting her jury recommendation with bias and evidence of Carll's actual bias is plain on the face of the record. Carll provided specific scenarios where she would recommend the death penalty and the allegations and testimony against Allen fit squarely into those scenarios. If Carll was struck from the jury, an impartial juror would have been seated who could have voted for life. Notably, an 11-1 death recommendation would have entitled Allen to a new penalty phase under *Hurst*. *See supra* p. 8-17.

CONCLUSION

Based on the arguments in this brief and the record on appeal, the lower court improperly denied Allen postconviction relief. Allen respectfully requests that this Honorable Court reverse the lower court's order denying relief, vacate her convictions and sentence of death, and grant her a new trial; or grant such other relief as this Honorable Court deems just and proper.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that the PDF copy of the foregoing document has been transmitted to this Court through the Florida Courts E-Filing Portal on this 26th day of January, 2018.

WE HEREBY FURTHER CERTIFY that a true copy of the foregoing was served via electronic mail to **Doris Meacham**, Assistant Attorney General, Office of the Attorney General, 444 Seabreeze Blvd, 5th Floor, Daytona Beach, Florida 32118, at Doris.Meacham@myfloridalegal.com and capapp@myfloridalegal.com on this 26th day of January, 2018.

WE HEREBY FURTHER CERTIFY that a copy of the foregoing was mailed to **Margaret A. Allen**, DOC# 699575, Lowell Correctional Institution, 11120 Northwest Gainesville Road, Ocala, Florida 34482-1479, on or about this 26th day of January, 2018.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

WE HEREBY CERTIFY, pursuant to Fla. R. App. P. 9.210, that the foregoing document was generated in Times New Roman fourteen-point font.

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