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IN THE SUPREME COURT OF FLORIDA

MARGARET A. ALLEN,

Appellant,

v.

Case No. SC17-1623
DEATH PENALTY CASE

STATE OF FLORIDA,

Appellee.
____________________________/

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

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PRELIMINARY STATEMENT

This is an appeal of the circuit court's denial of Margaret A. Allen's ("Allen") motion for post-conviction relief pursuant to Fla. R. Crim. P. 3.851. This brief will refer to Appellant as such, Defendant, or by proper name, e.g., "Allen." Appellee, the State of Florida, was the prosecution below. This brief will refer to Appellee as such, the prosecution, or the State. Appellant's defense attorneys at trial will be referred to by proper name and title or "trial counsel."

Citation to the direct appeal record will be cited as DAR, V_, R_. Citations to the postconviction appeal record will be V_, R_.

RESPONSE TO REQUEST FOR ORAL ARGUMENT

The State defers to this Court's judgment as to whether or not oral argument is necessary in this case.

STATEMENT OF THE CASE AND FACTS

As authorized by Florida Rule of Appellate Procedure 9.210(c), the State submits its rendition of the case and facts. In its direct appeal decision affirming Allen's convictions and death sentence, this Court summarized the facts of the case in the following way:

> On March 8, 2005, Margaret A. Allen was indicted for the first-degree murder and kidnapping of Wenda Wright. Wright's domestic partner, Johnny Dublin, last saw Wright leaving his home with Allen. Wright never returned home. A few days after Wright went missing, Quintin Allen, Margaret Allen's co-defendant and the State's main witness turned himself in to the police and told the police about the events that led up to Wright's death. Quintin also took the police to the location in which he, Allen, and James Martin buried Wright's body.

Guilt Phase

A jury trial commenced on September 13, 2010. Johnny Dublin testified for the State. Dublin testified that on the day Wright went missing, Allen came to Dublin and Wright's house and whispered something into Wright's ear. In response, Wright and Allen left the house together. A little while later, Allen returned to Dublin's house and told Dublin that Wright stole about $2000 of Allen's money and Allen asked Dublin if she could search his house. Dublin obliged and Allen searched Dublin's house. Dublin testified that he noticed that Allen had scratches on her when she came back to his house. Dublin asked Allen where Wright was, and Allen responded that she was still at Allen's house. Dublin testified that the next day, Allen came back to his house and asked him where Wright was. Dublin testified that Quintin was with Allen.

Quintin Allen testified for the State. He acknowledged that he was serving a fifteen-year sentence of incarceration followed by five years' probation for his guilty plea for second-degree murder based on his involvement in Wright's murder. Quintin testified that he was at Allen's house on the day of the murder when Allen noticed that her purse was missing. Allen left her house and told Quintin to stay with her children. Allen returned to her house with Wright and asked Quintin to come inside. Allen told Quintin that Wright must have stolen Allen's purse because Wright was the only person at Allen's house before the purse went missing. Allen and Quintin searched for the purse. Allen left the house again and told Quintin not to let Wright leave if she tried. At one point while Allen was gone, Wright tried to leave; Quintin told Wright that Allen wanted her to stay, and Wright obliged.

Upon Allen's return, Quintin plaited Allen's hair. Quintin testified that at one point Wright started crying and begged Allen to let her go home. Wright attempted to leave Allen's house and Allen hit Wright on the head; Wright fell to the ground. Quintin testified that Allen had a gun and told him that if he did not help her with Wright, she would shoot him, so Quintin held Wright down on the floor. While he held Wright down, Allen found chemicals including bleach, fingernail polish remover, rubbing alcohol and hair spritz and poured them all onto Wright's face. At one point, one of Allen's children walked into the room in which this was taking place, and Allen told the child to rip off a piece of duct tape for Allen. Allen attempted to put the duct tape over Wright's mouth, but because Wright's face was wet from the chemicals that were poured on her face, the duct tape would not stick to her skin. Allen retrieved belts from her closet

and beat Wright with them. Quintin then tied Wright's feet together with one of the belts. Quintin testified that at that point Wright was not struggling. Allen then put one of the belts around Wright's neck and pulled. At one point, Wright said, “Please, stop. Please stop. I am going to piss myself.” Wright's body started shaking and after about three minutes, Wright did not move. Allen then told Quintin to get some sheets to tie Wright's hands together in case Wright woke up.

Quintin left soon after the incident. Allen called Quintin throughout the night, but he did not answer her calls. The next day, Allen found Quintin at the barbershop. Quintin testified that Allen still had the gun. Quintin got into the truck that Allen was driving; James Martin was also in the truck. Allen told Quintin that Wright was dead. Allen then told Quintin that he had to help her get rid of the body.

Allen, Quintin, and Martin drove to Lowe's to buy plywood to help move Wright's body from inside the house into the truck. They also borrowed a dolly hand truck from a local shop to help move the body. Quintin testified that upon returning to Allen's house, Wright's body had been moved from where he had last seen her and had been wrapped in Allen's carpet. They were eventually able to get Wright's body into the truck. Then, all three took shovels from Allen's mother's tool shed and drove to an area off of the highway to dump Wright's body. Quintin and Martin dug a hole while Allen stood as a lookout. They placed Wright's body in the hole, covered the hole with debris, and took the carpet with them. They threw the carpet into a dumpster outside of a truck stop and picked up Allen's daughter from school. Quintin went to the police and turned himself in. Quintin also took the police to the place where Wright's body had been buried.

James Martin testified that he was sentenced to sixty months' incarceration for his participation in hiding Wright's body. Martin testified that on the day of the murder, he was at Allen's house helping her repair a car. Allen asked Martin to help her search for her purse, and Martin did. He testified that he left Allen's house around 10 p.m. to get a starter belt for the car. Martin finished repairing the car and asked Allen if she had any cocaine. She did not, so Martin left Allen's house, found cocaine, came back to Allen's house, and smoked it. Martin testified that when he got back from finding the cocaine, Wright was the only one at Allen's house. Martin testified that the timing of the events of the day was unclear because he had been high. Martin testified that he slept at Allen's house

until the morning and got a ride from Allen when she took her children to school. At that point, Allen told Martin that she needed help. Allen and Martin went back to Allen's house, and Martin saw Wright's body. Martin testified that Allen told him, “He must have hit her too hard.” Martin testified that he noticed a bandana tied around Wright's hands.

Allen told Martin that they had to bury Wright's body. Allen sent Martin to Allen's brother's house to borrow a truck. Martin testified that the truck was never found by police. Martin testified that the entire plan, including getting the plywood at Lowe's was Allen's idea. Martin testified that he was the only smoker of the group, and he dumped all of the ashtrays out of the car after they buried the body. When they got back to Allen's house, Quintin left, and Martin cleaned the nylon strap that had been used to secure the carpet around Wright's body. Martin also washed the truck but testified that he did not know what became of the vehicle. Martin was at Allen's house when the police came to Allen's house with a search warrant.

On cross-examination, Martin testified that it was Quintin who first told Wright that she could not leave. Martin also testified that Quintin gave directions to bury the body. The defense elicited that Martin told Allen's sister that Quintin “did this.” On redirect, the State elicited from Martin that he was asleep and did not see who killed Wright. Denise Fitzgerald, a crime scene technician, testified that she exhumed Wright's body and located a cigarette butt in the vicinity. The State and defense stipulated that the DNA found on the cigarette butt was consistent with Martin's DNA.

Dr. Sajid Qaiser, a forensic pathologist and chief medical examiner for Brevard County, testified that while he did not perform the autopsy on Wright, he had reviewed the autopsy report. He testified that Dr. Robert Whitmore 1, the medical examiner who had performed the autopsy on Wright was no longer the chief medical examiner. Dr. Qaiser testified that a body cannot bruise once dead and that Wright had bruising in the following places: upper and lower eye lid, front and back of her ear, left torso, all over the left side, trunk, right hand, thigh, knee, left eyebrow, forehead, upper arm and shoulder area. Additionally, Wright's chest, hands, torso, face, and lower lip had contusions. Wright's wrist showed signs of ligation, meaning her hands were tied. Wright's neck showed signs of ligation, meaning that she was either hung or something was tied tightly around her neck. Dr. Qaiser testified that his medical conclusion was that Wright's death was the result of homicidal violence, and strangulation and

ligature were an important cause of death. Dr. Qaiser testified that Wright was morbidly obese, with an enlarged heart, which contributed to her death. He testified that it would take from four to six minutes of strangulation to die. He could not tell whether she was rendered unconscious during the beating.

The State rested, and the defense filed a motion for judgment of acquittal asserting that the State had not proven the underlying charge of kidnapping for felony murder. The trial court denied the motion, and the defense rested without calling any witnesses. The jury found Allen guilty of first-degree murder and kidnapping.

Penalty Phase

The penalty phase commenced on September 22, 2010. Dr. Qaiser testified on behalf of the State. He acknowledged that he could not determine what kind of pain Wright felt before she died. Dr. Qaiser reiterated that Wright had about eight to ten bruises on her face. He also testified that someone would feel a sense of panic and pressure during strangulation.

On cross-examination by the defense, Dr. Qaiser acknowledged that he did not know whether Wright was conscious during the majority of the attack. Dr. Qaiser also testified that someone would lose consciousness after about ten to twenty seconds of strangulation and would die after about four to six minutes. After Dr. Qaiser's testimony, the State rested.

Dr. Michael Gebel, a neurological physician, testified for the defense. He testified that he had reviewed Allen's records and spoken with Allen. He determined that Allen suffered from numerous head injuries, including at least four incidents in which Allen lost consciousness. He testified that Allen's records included emergency room visits in 1995 and 1996 during which she was treated for facial and head trauma and bite wounds. He also testified that she was treated in 1989 for a drug overdose. Dr. Gebel testified that Allen had significant intracranial injuries and was at the lower end of intellectual capacity. He testified that Allen had organic brain damage, which would destroy impulse control. He opined that this brain damage might affect her ability to appreciate the criminality of her conduct and that she would have difficulty conforming her conduct to the requirements of the law. He also testified that Allen would not be able to create a complex plan. He acknowledged that Allen was not cooperative enough for him to determine whether Allen was substantially mentally impaired, but that she had lost the ability to control her mood.

On cross-examination, the State elicited Dr. Gebel's opinion that a person with Allen's brain injuries would not be able to create and follow through with a plan such as the one Allen executed to discard Wright's body. Upon the doctor finding out the facts of this case, he stated that while that would change the severity of his diagnosis of Allen, it would not change her brain injuries.

Dr. Joseph Wu, a neuropsychiatry and brain imaging specialist, testified on behalf of the defense that he reviewed Allen's PET scan. He testified that Allen

had at least ten traumatic brain injuries, mostly to the right side of her brain, resulting in asymmetrical changes, specifically in the frontal lobe. Dr. Wu testified that damage to the frontal lobe affects impulse control, judgment, and mood regulation. He also testified that her brain injuries would make it hard for Allen to conform her conduct to the requirements of society. He testified that she would have an overreaction to slight provocation, but that Allen's injuries should not impair her planning abilities.

Dr. Wu testified that Allen's ability to understand and regulate proportionate responses in a consistent manner was significantly impaired. He also testified that it would be difficult for her to consistently conform her conduct to the requirements of society.

Myrtle Hudson, Allen's aunt, testified that Allen had an unstable childhood in a violent and drug-infested neighborhood. Hudson testified that she never knew Allen to abuse drugs, but Allen drank alcohol. Hudson knew of at least two abusive relationships in which Allen was beaten to the point of unconsciousness. She also thought Allen had been sexually abused as a child.

Spencer **Hearing**

Myrtle Hudson testified that Allen became part of the neighborhood culture, drinking alcohol and selling drugs. Bessie Noble, an advocate for prisoners, testified that Allen had an abusive and bad life. Tara Posey, Allen's cousin, testified that Allen was a good person and friend, but she had a tough and violent life, and had a problem with alcohol. She also testified that Allen sold drugs so that she could provide for her children. April Smith, Allen's sister-in-law, testified that Allen was a good person with a hard life. Irene Posey, Allen's grandmother, testified that Allen had a good childhood, living with her intermittently. She testified that Allen had been a good child and that she did not commit this crime.

Margaret Allen testified on her own behalf regarding her harsh upbringing, including selling drugs and being abused. She recounted that she suffered head injuries as a result of being beaten. She acknowledged that she had been previously charged with drug and gun possession charges. She testified that she did not kill Wright. On cross-examination, Allen admitted that she had been arrested for assault and battery and that her daughter told the police that Allen committed the instant crime.

> The State elicited victim impact testimony from Dublin that Wright was a good person and that she and Allen had been good friends. Diane Baxter, Wright's sister-in-law, Maria Jackson, Wright's sister, and Ralph Baxter gave victim impact statements regarding the impact Wright's murder had on the family.
>
> The jury recommended a sentence of death by a unanimous vote. 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). The trial court concluded that the aggravating circumstances outweighed the mitigation. Thus, the trial court imposed the sentence of death.

Allen v. State, 137 So. 3d 946, 951- 955 (Fla. 2013) (footnotes omitted).

Allen raised four issues on direct appeal: (1) whether the trial court erred in excluding the testimony of State witness James Martin that former co-defendant-turned-State-witness 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 future dangerousness

of the defendant; and (4) various claims regarding whether Allen's death sentence is impermissibly imposed.

This Court found each of these claims meritless and upheld Allen’s conviction and sentence of death. Id. at 969. Allen filed a Petition for Writ of Certiorari with the United States Supreme Court, which was denied. Allen v. Florida, 135 S. Ct. 362 (2014).

On September 21, 2015, Allen filed a Motion to Vacate Judgment and Sentence pursuant to Florida Rules of Criminal Procedure 3.851. (V1, R403-77). The State filed its Response on November 20, 2015. (V1, R519-72). On February 12, 2016, Allen filed an amended motion addressing Hurst v. Florida, 136 S. Ct. 616 (2016) and Chapter 2016-13, Laws of Florida. (V1, R578-93). The Court granted the Motion for Leave to Amend. (V1, R649-53). The State filed its Response on April 4, 2016. (V1, R654-68). On December 8, 2016, Allen filed a second motion to amend in response to the Florida Supreme Court’s opinions in Perry v. State, 210 So. 3d 630 (Fla. 2016) and Hurst v, State, 202 So. 3d 40 (Fla. 2016). (V1, R731-47). The Court granted the Second Motion to Amend. (V1, R748-52). The State filed its Response on December 23, 2016. (V1, R761-70). In her motions, Allen raised fourteen (14) claims for post-conviction relief.

Claim 1: Counsel was ineffective in failing to strike Juror Carll for cause or peremptorily.

Claim 2: Counsel was ineffective in failing to impeach Quintin Allen with his statement to Detective Boyer indicating that Defendant did not pour bleach on the victim.

Claim 3: Counsel was ineffective in eliciting testimony from Quintin during cross examination that Defendant poured bleach, nail polish remover, and ammonia on the victim when Quintin previously testified during direct that he could only say it was rubbing alcohol.

Claim 4: Counsel was ineffective in failing to impeach Quintin's testimony that he only went along with Defendant until he could turn himself in with his statements to Sandra Pinson that he wanted her to help him leave town and in failing to cross examine Quintin regarding his possession of $4,000.00 two days after the murder.

Claim 5: Counsel was ineffective in failing to object to prosecutorial misconduct guilt phase closing arguments where the prosecutor misled the jury by implying that Defendant was not offered a plea bargain because she was more culpable.

Claim 6: Counsel was ineffective for failing to object to the prosecutor's misrepresentations of the evidence and the applicable law in the guilt phase closing arguments.

Claim 7: Counsel was ineffective in failing to object to testimony of Dr. Qaiser that unconscious people can feel pain when Dr. Qaiser was a conduit for the unnamed studies of other experts who were not available for cross examination, thereby violating the confrontation clause.

Claim 8: Counsel was ineffective in failing to object and move for a mistrial based on prosecutorial misconduct during the penalty phase.

Claim 9: Counsel was ineffective in asking Myrtle Hudson if Defendant became a part of the culture of "drugs and thugs and violence."

Claim 10: The State committed a *Giglio* violation in the penalty phase when it elicited and failed to correct false testimony that Defendant was convicted several times for selling drugs.

Claim 11: Counsel was ineffective for failing to present expert testimony that the autopsy did not allow for a specific cause of death, that the autopsy photos did not show ligature strangulation, that the victim's cocaine level was capable of causing or contributing to death, that there was no objective evidence that caustic substances were poured on the victim, and that an unconscious person can no longer feel pain or suffering.

Claim 12: Counsel was ineffective in failing to elicit testimony from Dr. Wu to establish that Defendant's brain injury impaired her capacity to conform her conduct to the requirements of the law and that Defendant was under the influence of extreme emotional distress at the time of the capital offense.

Claim 13: Counsel failed to conduct a reasonably competent mitigation investigation and was ineffective by failing to investigate and present testimony regarding Defendant's chaotic childhood and her various mental health issues which rendered Defendant under the influence of extreme mental or emotional disturbance at the time of the capital offense.

Claim 14: Counsel was ineffective in failing to call Quintin Allen at the penalty phase to testify to Defendant's demeanor at the time of the offenses.

EVIDENTIARY HEARING TESTIMONY

An evidentiary hearing was granted on claims 3, 4, 11, 12, 13, and 14, pursuant to a stipulation of the parties. An evidentiary hearing was granted on claims 2, 5, 6, 7, 8, 9, and 10. In regard to claim 1, a hearing was denied on Subclaim (a) but granted on Subclaim (b).

The evidentiary hearing on Allen's initial postconviction motion was held on April 10-12, 2017. (V1, R2559-3363). Allen called eight witnesses: Brian Watkins, a former boyfriend; two aunts, Barbara Capers and Myrtle Hudson; Allen's children, Alvinia Ragoo and Carlos Ragoo; trial counsel, Frank Bankowitz; and two hired

consultants, Dr. William Russell, a psychologist; and Dr. Daniel Spitz, a medical examiner from Michigan. The State called one witness: Dr. Sajid Qaiser, a medical examiner from Brevard County, Florida, and rebuttal witness, Dr. Michael Gamache, a psychologist.

On August 2, 2017, the circuit court issued its Order Denying Defendant's Motion to Vacate Judgments and Sentences, Amendment to Motion to Vacate, and Second Amendment to Motion to Vacate. (V1, R1939-2299).

This appeal follows.

EVIDENTIARY HEARING FACTS

Brian Watkins was called as a witness by the defense. He testified regarding his relationship with Allen. They dated for about five years, from 1992 until 1997, during which time they had a child together, Latisha Watkins. (V1, R2597-98; 2623-24). Watkins testified that the relationship between him and Allen was violent and that they would "abuse each other." (V1, R2603). He described one altercation that occurred in Winn-Dixie. He stated that she hit him, after which he hit her back. They then proceeded to fight in several aisles of the store, during which she stabbed him with a box cutter and he hit her in the head with a hammer. (V1, R2608-09). As a result of

these arguments, he went to a batterer's intervention or domestic violence class a couple of times. (V1, R2602). When they committed violent acts towards each other, they occasionally dropped the charges against the other, but he never pressed charges against Allen. Watkins described Allen as exhibiting behaviors that included hand and feet sweating, anxiety, frustration, and "little fits." (V1, R2599). He stated that Allen slept all day and would complain of headaches. (V1, R2601). He did not know whether or not Allen sought medical treatment for her problems. (V1, R2602).

Watkins testified to having three state-level felony convictions and one federal conviction. (V1, R2571). He served ten years at Coleman Correctional Facility before being released to a halfway house. (V1, R2614). When asked about the trial, he stated that no one from Allen's defense team spoke to him. (V1, R2615). He testified that at the time of Allen's trial, he was living in a halfway house but he would have spoken to them and testified in court. (V1, R2626-27).

On cross-examination, Watkins testified that although he knew Allen was having a trial, he made no effort to let it be known that he was ready to testify. He attributed that to the fact that he had done so much time in prison and did not want to get caught up in the system. (V1, R2618). Watkins admitted that he was reluctant to get involved and if Allen's defense had looked for him, he may or may not have been cooperative. (V1, R2619). In response to questions regarding his relationship with Allen, Watkins testified that he was the aggressor. He stated that Allen was sometimes

violent towards him, but regardless of what Allen said, "I am a man … I would act out … I know better than to put my hands on a woman." (V1, R2623-24). Watkins also admitted that both he and Allen sold drugs and financially helped each other. (V1, R2620-22). Watkins stated he was not familiar with Dr. Russell and had not spoken to him prior to the day of his testimony. (V1, R2619-20).

Barbara Ann Capers was called as a witness by the defense. She is Allen's older aunt by ten years. She testified that there were times she lived in the same household as Allen along with Allen's mother, Alvaina, and Allen's brother, Peter. (V1, R2632-33, 2635-36, 2660-61). She recalled that Allen was "slow" in school and had a stroke as a teenager which affected her speech and memory. (V1, R2641-42). Capers described Allen's childhood as rough, stating that she witnessed Allen's mother beating Allen almost daily. (V1, R2639, 2663). Capers also testified to the sexual abuse by male relatives that Allen sustained while growing up. (V1, R2642). She testified Allen claimed Capers's father, Curtis, Allen's grandfather, sexually and physically abused her. (V1, R2643, 2648). Allen also claimed her own brother sexually assaulted her. (V1, R2648). However, Capers testified that she had no personal knowledge of these incidents. Capers testified to only having personal knowledge of the sexual abuse of Allen by her father's brother, Roy Posley. (V1, R2645). Capers witnessed Brian Watkins physically abusing Allen, including when Allen was pregnant. (V1, R2654-55). Capers described that when Allen was in her twenties, she was badly beaten by

another boyfriend which resulted in her being hospitalized. (V1, R2653). Capers said Allen exhibited signs of anxiety, slept a lot, would shake and have sweaty hands or feet. (V1, R2656).

In regard to Allen's trial, Capers testified that she was contacted by one of Allen's attorneys prior to trial. She was available to testify at the trial in 2010 but no one asked her to testify. (V1, R2634). Capers stated that during the postconviction proceedings, she spoke with Dr. Russell about Allen's case. (V1, R2634). She went on to say that she was also available to speak with a doctor in 2010 about Allen but no one asked her to speak to a doctor at that time. (V1, R2635).

On cross-examination, Capers testified that although a friend told Capers that Allen had killed someone and was arrested, she never visited Allen in jail. (V1, R2670-71). Capers however, did attend the trial and was present when her sister, Myrtle Hudson, testified about how Allen was beaten. (V1, R2672-73). Capers stated she was also present when two doctors testified at trial. (V1, R2673). Capers was questioned regarding whether anyone asked her to testify on Allen's behalf. In response, she admitted that she was present when the attorneys told Hudson that they wanted her to testify at the trial. (V1, R2674-75). When asked why Allen slept all day, Capers admitted that Allen slept all day because she would go out at night and come home drunk. (V1, R2658). Capers has three felony convictions and two convictions for crimes of dishonesty. (V1, R2571).

Alvinia Ragoo was called as a witness by the defense. She is Allen's daughter, born in 1989. (V1, R2681). She testified that her stepfather, Brian Watkins, lived with them from 1989 through 1995. During that time, she witnessed her stepfather physically abusing Allen. (V1, R2684-85). Ms. Ragoo recalled living with her grandmother the first time Allen went to prison. (V1, R2687). In regard to Allen's trial, she stated she was not in prison at the time of the murder but was in prison when her mother went to trial. (V1, R2688). The witness did not recall talking to Allen's lawyers or any doctors about her mother's life at the time of trial. (V1, R2691). She stated that she would have been willing to testify on her mother's behalf. However, she was able to talk to Dr. Russell during the postconviction proceedings. (V1, R2692).

During cross-examination it was brought up that the police believed she was present when her mother killed the victim. (V1, R2692-93). Alvinia Ragoo testified that she was at the house that day and recalled seeing Wenda Wright and Quintin Allen. (V1, R2693). She testified to being deposed in 2005[1] but could not recall the lawyer's name. (V1, R2691). She admitted that at that deposition, she said she did not want to talk and did not give any information. (V1, R2695, 2702). When asked if she would have taken the same position at trial, Ragoo replied, "Maybe not." (V1, R2702). The witness has four prior felony convictions. (V1, R2571).

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[1] The deposition was entered as Defense Exhibit 1. (V1, R1557-74; 2703).

Myrtle Hudson was called as a witness by the defense. She is Allen's aunt. (V1, R2721). She testified that she spoke with Allen's trial counsel on a regular basis and helped him get in touch with relatives, some of whom did not have a telephone. (V1, R2722-23). Hudson recalled Allen's mother had a quick temper and that there were occasions Hudson saw Allen's mother hit Allen with a belt. (V1, R2728, 30). Hudson stated that she had testified at Allen's trial about the abuse Allen suffered from Brian Watkins and former boyfriend, Bill Skane. (V1, R2734, 2736). Hudson never spoke to any doctor before trial about Allen but she would have been willing to do so. (V1, R2724). She did speak with Dr. Russell during postconviction proceedings. (V1, R2724).

During cross-examination, Hudson stated that she took several relatives to Orlando to meet with Allen's trial counsel, including Allen's mother. (V1, R2751-52). She testified that she gave Bankowitz a list of names of people he needed to talk to. (V1, R2753). Hudson admitted that during the penalty phase, she testified about Allen being around drugs and that she was in an abusive relationship in which she was beaten unconscious. (V1, R2746). Hudson also admitted to testifying that Allen sold drugs at night and slept during the day. (V1, R2744, 2751, 2755). Hudson has seven felony convictions and nine convictions for crimes of dishonesty. (V1, R2571).

Carlos Ragoo was called as a witness by the defense. He is Allen's son. He is incarcerated and has four felony convictions. (V1, R2571, 2761-62). He testified to

witnessing Allen being abused by Brian Watkins and another boyfriend. (V1, R2770-72). He stated he observed Allen experience mood swings in which she would throw temper tantrums. (V1, R2766). He stated that he would have testified on his mother's behalf at trial but no one contacted him. (V1, R2774).

During cross-examination, Carlos Ragoo admitted that Allen went to clubs at night and that she sold drugs. (V1, R2784-85).

Allen's trial attorney, Frank Bankowitz, was called as a witness by the defense. He is a solo practitioner who has been practicing criminal law for 43 years. (V1, R2789-90, 2809). He has been death qualified for approximately 10 years. (V1, R2791). Bankowitz testified that he had defended approximately five or six death penalty phases prior to this case. (V1, R2794). Bankowitz testified that he spoke to prosecutor Russ Bausch on a fairly regular basis about dropping the death penalty but the State Attorney's Office would not agree. (V1, R2793). In regards to experience with death penalty cases, Bankowitz testified he was familiar with the DSM-IV, "a psychological testing" used by neuropsychologists, psychologists, and psychiatrists. (V1, R2794-95). He was also familiar with Post Traumatic Stress Disorder. (V1, R2795).

Bankowitz stated he took over Allen's case from the Public Defender's Office about a year or a year and a half before the trial began. (V1, R2791, 2880). He reviewed all of the documents from the Public Defender's Office. (V1, R2797, 2880).

The mitigation investigation had already been done and witnesses were already lined up, including the key mitigation witness, Dr. Wu.[2] (V1, R2790-91; 2795). In preparing for mitigation, Bankowitz spoke to Dr. Wu as well as Allen's aunts, Myrtle Hudson and Hudson's sister, Barbara Capers. (V1, R2796). He remembered he had regular contact with them and asked them to line up family members. (V1, R2796). Bankowitz testified that Hudson told him that Allen was sexually and physically abused, including having multiple hospital stays and being beaten into unconsciousness and becoming unrecognizable. (V1, R2857-58). He testified that he attempted to reach other family through Hudson, who told him that Allen's daughters would not cooperate – that they did not want any part of it. Bankowitz testified that there was an allegation that two of the daughters may have been involved in the crime and that is why did they did not want to be involved in the case. (V1, R2843-47). He felt that the credibility of the daughters would have been in question. He also recalled that one of Allen's aunts did not want to testify due to health issues. (V1, R2813, 2845). He remembered Myrtle Hudson testified that Allen grew up around "drugs, thugs, and violence" a phrase that he did not bring up himself. (V1, R2814-15, 2858-59).

Bankowitz testified that he met with Allen monthly and reviewed all the evidence with her, but she did not want to talk about the case and did not want her daughters involved. (V1, R2878-79). He admitted he did not speak to the daughters

[2] Dr. Joseph Wu is a medical doctor with a specialization in neuropsychiatry.

and was somewhat fearful that if they said something inconsistent with a prior statement, they could be impeached. (V1, R2880-81).

Bankowitz stated that the Public Defender's Office already had the autopsy report by the time he got the case. (V1, R2797). Bankowitz became aware of Dr. Gebel through the Public Defender's Office. (V1, R2860). Bankowitz felt that Dr. Gebel and Dr. Wu were more than sufficient experts to handle the mental health aspect of the case. (V1, R2875-76). He recalled that Dr. Gebel, a psychologist, met with Allen once to gather information for mitigation but she was uncooperative. (V1, R2861). Based upon the history he reviewed, Dr. Gebel told the jury about the traumatic brain injuries Allen suffered. (V1, R2862). Dr. Gebel also testified about Allen's impulse control, frontal lobe disorder in her brain and issues that would prevent her from thinking and acting in a normal fashion. (V1, R2863). Bankowitz stated that he presented information to the jury that, if Allen felt wronged in some way or taken advantage of, she might have the inability to control an impulse to react quickly. (V1, R2863). He did not ask Dr. Gebel to meet with Allen again because Bankowitz looked at Gebel's report and thought that it was more than sufficient. (V1, R2887).

Bankowitz also used Dr. Wu as an expert on the PET scan. (V1, R2863). Dr. Wu opined in front of the judge and jury that Allen's brain did not function as a normal brain would in particular areas of her brain. (V1, R2864). Dr. Wu also testified about the impulse control problem that Allen exhibited. If Allen perceived that someone had

done her wrong, Allen might react in a manner that somebody else would not. (V1, R2864). Bankowitz testified that both Dr. Gebel and Dr. Wu presented testimony that would create mental health mitigators to the jury and for the judge to consider. (V1, R2864-65).

Bankowitz stated he received an amended witness list which listed another medical examiner. He filed a Motion to Continue because the State had switched doctors fairly close to the trial. (EH, R2883-84). Bankowitz said he was a little shocked at Dr. Qaiser's report since it was diametrically opposed to Dr. Whitmore's report. (V1, R2802). Bankowitz testified that he believed he brought up the issue of Dr. Qaiser acting as a witness in the State's case but he could not recall if he filed a formal motion. (V1, R2802). Bankowitz deposed Dr. Qaiser in August 2010. (V1, R2802-03).

Bankowitz spoke to Dr. Whitmore by telephone. Dr. Whitmore, who was in Alaska, made it clear that he was not coming to Brevard County. (V1 R2835). Dr. Whitmore's report listed the cause of death as homicidal violence with cocaine intoxication and the manner of death as a homicide. (V1, R2842). Dr. Qaiser found ligature marks which Dr. Whitmore did not reference in his autopsy report. (V1, R2803, 2853). Bankowitz referred to the report consistently during cross-examination and showed it to Dr. Qaiser. The jury saw it as well. (V1, R2810). Dr. Qaiser did not write a report. (V1, R2852).

Bankowitz testified that he cross-examined Dr. Qaiser and there was nothing else he would have cross examined him about. (V1, R2854). Bankowitz presented to the jury the fact that the opinion of Dr. Whitmore, who actually performed the autopsy differed from that of Dr. Qaiser, who looked only at the photographs and paperwork. (V1, R2855). He pointed out Dr. Qaiser never saw the victim's body nor did he perform the autopsy. (V1, R2855). Bankowitz also noted that Dr. Qaiser acknowledged in his testimony that he could not specify if Wenda Wright could feel any pain. (V1, R2856, 2874). Bankowitz testified that he did not feel as though he needed another expert to cumulatively say the same thing that Dr. Whitmore said in his report. (V1, R2875).

Bankowitz believed that he cross-examined co-defendant Quintin Allen extensively and that both of the medical examiners testified that no caustic chemical was poured on the victim. (V1, R2868-69). The defense's theory was that Quintin Allen may have taken Margaret Allen's money and that Quintin was making things up to cover up his act of thievery. (V1, R2870).

In regard to the testimony of the Pinsons, Bankowitz testified that they had become uncooperative after their daughter was murdered in Titusville. (V1, R2871). Bankowitz also noted that Pinson's deposition testimony "was all over the ballpark" about whether Quintin had money or could get money or what he was doing. (V1, R2872). After determining that their testimony was inconsistent and considering that

they were uncooperative, Bankowitz decided that he did not want something coming out that he did not want to come out. (V1, R2872).

In regard to Juror Carll, Bankowitz did not have an independent recollection of her but upon reading the transcript, he felt that she was sufficiently rehabilitated. (V1, R2866). He also felt that if he removed her from the jury, he was concerned about other people that were further down the line. (V1, R2866). Bankowitz, who has tried many cases over the years, testified that he considers many things while selecting jurors, including body language and whether or not they were sleeping when he was talking to him. (V1, R2866-67). Bankowitz felt that Juror Carll was sufficiently rehabilitated, and, in considering what was left, he had to keep her. (V1, R2867). He did not move to strike her. (V1, R2888).

Bankowitz testified that the jury was told that its decision as to death was a recommendation at the time of the trial. (V1, R2889-90). Bankowitz could not testify as to what the jury believed. (V1, R2889-90). It was his opinion that the jury's role was not minimized. (V1, R2891). The jury's instruction indicated that the judge must place great weight on the jury's recommendation. (V1, R2891).

When the prosecutor made a reference during the guilt phase closing argument about plea bargains with Quintin Allen, Bankowitz knew that this information had been brought out to the jury during the direct and cross-examination of Quintin. (V1,

R2873-74). The jury also knew that Quintin had originally been indicted by the grand jury. (V1, R2873).

Bankowitz testified that during closing arguments of the guilt phase, he could have been consulting with Allen at that moment when the State referenced Dr. Whitmore's report during closing argument. (V1, R2876). Bankowitz also noted that if he referenced Dr. Whitmore's report during his closing, he would not have objected to the State referencing it because he would have opened the door to it. (V1, R2877). Bankowitz also testified that he did not object to the State reading Dr. Whitmore's report in closing arguments because it reinforced what he had already done in closing. (V1, R2810).

Dr. William Russell was called as a witness by the defense. He is a psychologist licensed in Pennsylvania. (V1, R2909, 2911). He has testified only for the defense in other States regarding mitigation in death penalty cases, but never in Florida. (V1, R2911-12, 2924). In regard to the death penalty, Dr. Russell testified that he believes that the research or literature supports that it is not effective in deterring crime. (V1, R2925, 2996).

Dr. Russell reviewed records from Allen's hospitalizations, schools, and the jail. He also spoke to relatives and wrote a report based on his observations of her. (V1, R2927-28). Dr. Russell testified that the traumatic stresses that he found in Allen's life were physical and sexual abuse, and witnessing violence as a child. (V1, R2947-48).

In his opinion, Allen suffered from Complex Post Traumatic Stress Disorder due to her exposure to multiple stressors over a period of time, including physical violence, developmental problems, a violent neighborhood, and alcohol abuse. (V1, R2966). Using the DSM-IV guide, he found symptoms of PTSD, including Allen's excessive sleeping, anger outbursts, memory lapses, and difficulty concentrating. (V1, R2976-79).

Dr. Russell administered the Stanford-Binet IQ test to Allen and in his opinion, Allen was "slightly delayed." (V1, R2960-61, 2964). Dr. Russell opined that Allen was suffering from a state of extreme emotional disturbance at the time of the homicide. (V1, R2968-69).

Russell reviewed testimony from Dr. Michael Gebel and Dr. Wu. (V1, R2972). Dr. Russell was aware that the jury heard testimony about Allen's background, poverty, and the neighborhood. (V1, R2997-99). Dr. Russell was also aware that Dr. Gebel testified at trial that he had reviewed Allen's records from schools, hospitals, DOC's medical records and correctional facility records. (V1, R3000). Russell knew Dr. Gebel also told the jury that he was aware of Allen's history of suffering head injuries throughout the years which came from Allen's self-report and hospital records. (V1, R3000). Dr. Russell recalled Dr. Gebel telling the jury about Allen's emergency room visits for facial and head trauma and possibly a sexual assault from 1996 as well as a 1989 admission for a drug overdose and a psychological evaluation. (V1, R3001).

Dr. Russell affirmed that Dr. Gebel indicated that Allen was hesitant to completely cooperate with his mental status test. (V1, R3001). Dr. Russell confirmed that it was Dr. Gebel's opinion that within a reasonable degree of medical certainty, Allen fit a patient who has brain damage. (V1, R3002-03). Dr. Russell said Dr. Gebel described to the judge and jury what organic brain injury was by describing it as frontal and temporal lobe damage and that it affects impulse control, and the inability to think things through in a clear and concise pattern. (V1, R3003). Dr. Russell acknowledged that it was Dr. Gebel's opinion that Allen had a lesser ability to appreciate the criminality of her conduct. (V1, R3003). Further, it was Dr. Gebel's opinion that Allen would have difficulty conforming her conduct to the requirements of law. (V1, R3004-05). Dr. Russell affirmed that Dr. Gebel testified that because of her disability, Allen would have an inability to control her mood and an inability to understand that when someone loses control of their mood there may be certain consequences. (V1, R3004). Dr. Russell was also asked about the testimony of Dr. Wu, a medical doctor who specializes in brain imaging. (V1, R3005). Dr. Russell confirmed that during the trial, Dr. Wu reviewed a PET scan administered to Allen, explained what a PET scan was, and testified that the Allen's medical records indicated at least ten cases of traumatic head injury. (V1, R3005). It was Dr. Wu's opinion that Allen had frontal lobe damage as a result of a head injury. (V1, R3006). Dr. Russell recalled Dr. Wu explained that damage to the frontal lobe, which controls impulse, could cause a person to react

disproportionally and sometimes catastrophically to what was perceived as a wrong or insult. (V1, R3006). Dr. Wu attributed frontal lobe injury and all of the things that go with it to Allen. (V1, R3006).

Dr. Russell also recalled Myrtle Hudson testifying during the penalty phase that Allen had violent, abusive relationships, was beaten into unconsciousness and physically unrecognizable as a result of the injuries, and that she grew up around drugs, thugs, and violence. (V1, R3007).

Dr. Russell testified that the jury heard all of the things that he testified about at the evidentiary hearing. (V1, R3009). He also testified that the DOC records that he reviewed were not created until after the trial. (V1, R3009-10). He testified that he deviated from the Stanford-Binet test and attempted to validate its results with the Validity Indicator Profile but could not because Allen could not complete the test. (V1, R3364, 3367). There is no test that indicates whether or not Allen was malingering on the Stanford-Binet test. (V1, R3059).

The mental health records from prison included several reports of having mental health evaluations completed on Allen and multiple instances of her refusal to participate. (V1, R3079). Dr. Russell was shown several records from prison in which Allen was found to have no signs of significant mental or emotional impairment or she refused the assessment. (V1, R3079-81).

Dr. Russell stated that when he went to a home to talk to Allen's relatives, he did not feel the need to talk to every single person who was present at the house. (V1, R3010-11).

Dr. Russell explained that having a diagnosis of Post-Traumatic Stress Disorder does not always affect a person's mood in everything that they do. (V1, R3019). Although Dr. Russell testified that Allen isolates herself from others, he also stated that she was not isolated when she was out selling drugs at night. (V1, R3021-22). Allen also had two other people – Quintin Allen and James Martin – at her house before the murder took place. Dr. Russell opined that PTSD was "building" but "she was able to act." (V1, R3023). Dr. Russell acknowledged that the murder did not happen in seconds but that the victim suffered an escalating pattern of physical abuse over a lengthy period of time. (V1, R3024-25). Dr. Russell testified that Allen acknowledged being upset and looking for her money but denied committing the homicide or holding the victim against her will. (V1, R3026-27).

The State called Dr. Sajid Qaiser, the chief medical examiner for Brevard County. (V1, R3097, 3109-10).[3] He recalled testifying at trial that there was evidence

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[3] The parties stipulated to Dr. Qaiser's qualifications and the lower court took judicial notice of same. (V1, R3097-98). In addition, Qaiser said he was placed on administrative probation for the period of August 2016-2017, if the probation was not terminated before the end of that time period. (V1, R3110). Qaiser disagreed with defense counsel's assertion that "probable cause" was found by the Medical

indicating ligature strangulation on the victim. (V1, R3098). A photograph depicting the left side of Wenda Wright's neck and ear indicated "a patchy distribution of the contusion." A photograph of the right side of her neck showed "the same thing … it is a complete belt … the clear sharp lines, the upper line and the lower line." (V1, R3104, 3106, 3108, State Exh. 2). Another photograph (State Trial Exh. 44) indicated that, Wright's strap muscles below the hyoid bone depicted patchy hemorrhages in those areas, which in Dr. Qaiser's opinion, was evidence of the "forced application" of a ligature. (V1, R3104-05). In Dr. Qaiser's opinion, the parallel, sharp lines were not a natural fold of skin as "the fold of the skin will not be going that way parallel to each other and in a straight line. They will be in a different distribution." (V1, R3106).

Dr. Qaiser knew Dr. Whitmore's autopsy report did not make a finding as to ligature marks, but rather, findings of "contusions … on the right side and the left side of the neck." (V1, R3119). Dr. Qaiser testified he was aware of the facts of the case. After reviewing the entire autopsy file, and taking Quentin Allen's statement into consideration, Dr. Qaiser determined the manner of death was homicide. (V1, R3106, 3120, 3121). Dr. Qaiser's findings were consistent with Quentin Allen's testimony at trial. (V1, R3107, 3108). He stated that a photograph taken during the autopsy (State Trial Exh. 33) showed the victim's tongue protruding which is common whenever

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Examiner's Commission of negligence on Qaiser's part in some cases which prompted the implementation of Qaiser's probationary period. (V1, R3111-17).

pressure is applied to the neck in a case of strangulation, either hanging or by ligature strangulation. (V1, R3107-08).

Dr. Qaiser reviewed defense expert Dr. Spitz's deposition and his report and disagreed with Spitz's conclusion. (V1, R3107, 3108, 3122).

The State also called Dr. Michael Gamache. Forensic psychologist Dr. Michael Gamache has been in practice for thirty years. His work is equally divided between court appoints, retention by the State, and the same for defense work. (V1, R3154). He testifies as an expert between 100-150 times a year. (V1, R3155).

Dr. Gamache reviewed documents including discovery from the investigation and trial, prison records, medical records, school records, Stanford-Binet test results, the notes of a psychologist involved in the early part of Allen's case, Dr. Greenblum's notes, the trial testimony of Drs. Wu and Gebel, the sentencing order, and Dr. Russell's deposition and report. (V1, R3160-62, 3209-10, 3213-16). He did not conduct any interviews or consultations with witnesses. (V1, R3211). In Dr. Gamache's opinion, however, there was not anything significant that trial defense counsel or trial defense experts missed in presenting additional mitigation at trial. (V1, R3163). There were no "glaring oversights or omissions." (V1, R3163). Dr. Gamache was aware the defense presented evidence to the jury of Allen's alleged episodes of physical, sexual, and domestic abuse, as well as her childhood situation. (V1, R3164-66). The jury heard experts testify that Allen suffered from organic brain damage. (V1, R3165). Dr. Wu

presented images from a PET scan indicating asymmetry in Allen's brain and that Wu concluded Allen suffered from impulse control problems. (V1, R3165-66).

Dr. Gamache reviewed Dr. Russell's report which, in Russell's opinion, stated Allen suffered from "post-traumatic stress disorder (PTSD)." (V1, R3166). However, Dr. Gamache testified that merely being exposed to a traumatic stressor is not sufficient to diagnose a person with that condition. (V1, R3167). Dr. Gamache explained that PTSD is commonly diagnosed in military veterans, and yet, the majority of veterans who experience traumatic events do not develop PTSD. (V1, R3171). In addition, PTSD typically develops fairly quickly after exposure to a traumatic stressor. (V1, R3185). In Allen's case, if Allen had PTSD, she would have developed signs and symptoms shortly after she experienced her childhood traumas. (V1, R3185). Signs and symptoms can last several months, can resolve on their own, or resolve with treatment. (V1, R3186-87). Dr. Gamache's approach is to obtain a self-report from the person and look for any evidence of corroboration. (V1, R3235).

The information Gamache reviewed did not indicate Allen had intrusive dreams or flashbacks of abuse suffered during her childhood. (V1, R3173). In addition, if PTSD is going to be argued as a mitigator, Allen would need to present some evidence that she was having intrusive dreams at the time of the crime and that it "had some nexus, some relationship, to the criminal behavior." (V1, R3173-74). Although testimony was presented at trial that Allen had been exposed to traumatic stressors,

"there was no psychometric evidence and no clinical evidence that she met the diagnostic criteria for PTSD." (V1, R3175). Allen was never diagnosed with PTSD prior to the crime. In addition, her prison records subsequent to the murder did not indicate mental health professionals found she suffered from PTSD, either. (V1, R3177, 3178). Prison records also indicated there were times Allen refused to participate in mental health assessments. (V1, R3179). In Dr. Gamache's opinion, there is no historical evidence that Allen had the signs and symptoms at the time of the offense. (V1, R3180). Further, in Dr. Gamache's opinion, there was logical connection between the events that occurred at the time of the crime with traumatic experiences that Allen suffered in her life. (V1, R3182).

Dr. Gamache testified, there was no indication whatsoever that Allen in any way associated the victim or the victim's behavior with any of these historical events or traumatic stress that she has experienced. (V1, R3194). Wenda Wright was not associated with any of the male partners who had abused Allen nor was Wright associated with any of the family members who had abused or sexually assaulted Allen. (V1, R3184).

In Dr. Gamache's opinion, there were no marked alterations of arousal or reactivity associated with Allen's traumatic events. (V1, R3194-95). Gamache "was not aware of anything specific to the crime events in this case that would have triggered this kind of reactivity on Allen's part." (V1, R3195). Gamache explained that

anger in and of itself in not definitive as a PTSD. “People can get aroused and angry but they don’t have post-traumatic stress disorder (PTSD).” (V1, R3196). There must be a nexus with the traumatic stressors that result in the angry reaction. (V1, R3196).

He also noted that Allen did not exhibit signs of “depersonalization” at the time of the murder. (V1, R3198). Neither Allen, nor others that observed her at the time of the offense described an extended period of time “like she is outside of her body; that she is in a dream that she is just observing this and not an actor in this.” (V1, R3198-99). Nor did Allen describe any type of account that “this whole thing was like a dream to me.” None of that is documented in the records provided to Dr. Gamache. (V1, R3199).

Dr. Gamache concluded that, in his opinion, Allen was not suffering from PTSD at the time of the crime. (V1, R3188). He disagreed with defense trial experts Drs. Wu and Gebel. (V1, R3227). There were no historical medical or psychological records that documented that Allen was ever diagnosed with PTSD. (V1, R3200). While awaiting trial, Allen’s county jail records indicated there were no mental health issues and there was no record of administering psychotropic medications. (V1, R3204). There were no records of Allen being diagnosed as intellectually disabled. (V1, R3205, 3228). Test scores did not indicate a diagnosis of PTSD. (V1, R3205). Tests administered by defense expert Dr. Russell indicated errors in the administration scoring. (V1, R3205). Allen, however, answered only some questions and refused to

continue. As a result, Dr. Gamache said, "there is no basis to conclude that the scores Dr. Russell got were valid, because they are inconsistent with historical scores and his testing was not valid." (V1, R3206).

In Dr. Gamache's opinion, there was no support for the conclusion that at the time of the murder, Allen was suffering from extreme mental or emotional disturbance. This was based on trial testimony regarding possible neurological impairment, possible psychological impairment, or possible exposure to lifelong traumatic stressors. (V1, R3207-08). In addition, in Dr. Gamache's opinion, there was no support for the conclusion that Allen was unable to conform her behavior to the requirements of the law at the time. (V1, R3208).

Dr. Daniel Spitz was called as a witness by the defense. He is the Chief Medical Examiner for Macomb County, Michigan and St. Clair County, Michigan. (V1, R3274). He testified that as a medical examiner he has trained law enforcement. (V1, R3340). He reviewed a case for the Innocence Project. (V1, R3339). The defense paid him a fee of $350 an hour. (V1, R3337). On two occasions, Dr. Spitz has been found not to be credible in criminal postconviction proceedings. (V1, R3278).

He reviewed an autopsy report from Dr. Whitmore, autopsy and scene photographs, investigation reports, toxicology report, and testimony from Quintin Allen, Dr. Qaiser, and a deposition of Dr. Whitmore. (V1, R3281-82). Dr. Spitz testified to reviewing about 50 photographs. (V1, R3282). He testified that Dr. Qaiser

said that there were 50 or 60 contusions or maybe a hundred different contusions. (V1, R3289).

Dr. Spitz testified that the victim's body did not show indicators or findings that would support a conclusion of ligature strangulation. (V1, R3289). He testified that there were no ligature contusions or ligature marks and that was based upon what Dr. Whitmore described in his autopsy report as well as review of the photographs. (V1, R3289-90). Dr. Spitz testified that the lines on the victim's neck are not parallel lines – that they are curved lines indicative of skin folds of the neck, especially in a large obese individual. (V1, R3290). He testified that there were no other indicia of neck compressions, such as petechial hemorrhages. (V1, R3290).

Dr. Spitz testified that Dr. Whitmore's report described 15 areas of bruising. (V1, R3304). He agreed with Dr. Whitmore's assessment, which does not describe any ligatures marks. (V1, R3305). He explained that the victim's tongue was protruding because of decomposition. (V1, R3306). Dr. Spitz opined that with a horizontal ligature, there is no force or pressure pushing the tongue up and out. (V1, R3309). He testified that he could not exclude ligature – that it was within the range of possibility. (V1, R3323). He agreed that a medical examiner can miss something that is obvious, especially in a decomposed body. (V1, R3324).

Dr. Spitz testified that if Dr. Whitmore had found petechiae, it would have been one more feature that the neck was compressed. (V1, R3326). After being shown a

photograph of the victim's left eye, (State's Exh. C), Dr. Spitz said it was a small hemorrhage and could be petechial hemorrhage. (V1, R3326-27).

Dr. Spitz testified that the victim died because of homicidal violence that cannot be specifically characterized. (V1, R3315). He testified that it is unknown what caused the death but asphyxia is a possible cause. (V1, R3316, 3346).

Dr. Spitz also testified that once a person is unconscious, they do not experience any more pain. (V1, R3311). He testified that a person having a belt pulled around their neck would experience anxiety. (V1, R3329). Dr. Spitz referred to the case as being an altercation between two people, saying the injuries did not indicate that the victim was beaten. (V1, R3330). Dr. Spitz testified that he did not know what the jury heard. (V1, R3332).

SUMMARY OF ARGUMENT

ISSUE I: The trial court was correct in finding that Allen was not entitled to Hurst relief. Any Hurst error was harmless, as it was a unanimous recommendation for the death penalty. As for any Caldwell issues, even under the current death penalty statute, the jury's final unanimous recommendation of death is still an "advisory" verdict as the judge is free to disagree with the jury's recommendation of death and sentence a defendant to a life sentence. Thus, characterizing the jury as "advisory" is an accurate description of the role assigned to the jury by Florida law and there is no Caldwell violation. Furthermore, unlike Bevel, trial counsel performed sufficient

investigation and preparation of mitigation witnesses. Allen received a fair penalty phase.

ISSUE II: The trial court was correct in denying Allen's motion for post-conviction relief alleging that trial counsel was ineffective for failing to adequately investigate, prepare, and present available mitigation because trial counsel mounted a reasonable investigation into Allen's background and medical history. Furthermore, there can be no prejudice because there is no reasonable probability that Allen would have a received a life sentence in the penalty phase had any additional witnesses testified, as the information provided at the evidentiary hearing was cumulative.

ISSUE III: Allen failed to carry her burden of establishing that trial counsel was ineffective for failing to object to allegedly improper comments by the prosecutor during the guilt phase closing argument. Counsel's failure to object to the State's comments did not undermine the confidence in the outcome of Allen's case. Furthermore, Allen cannot show prejudice where the jury was instructed that what the attorneys say is not evidence and that the jury should rely on their own recollection of the evidence. The trial court properly found that Allen failed to establish prejudice and no cumulative error existed.

ISSUE IV: Allen failed to carry her burden of establishing that trial counsel was ineffective for failing to object to allegedly improper comments by the prosecutor during the penalty phase. Allen cannot show prejudice where the jury was instructed

that what the attorneys say is not evidence and that the jury should rely on their own recollection of the evidence. The trial court properly found that Allen failed to show prejudice or that she was deprived of a reliable penalty phase proceeding.

ISSUE V: The trial court was correct in denying Allen's motion for postconviction relief alleging that trial counsel was ineffective for failing to hire his own forensic expert. The evidence Allen argues should have been presented by an expert witness was presented at trial. Trial counsel was able to introduce Dr. Whitmore's conflicting autopsy report through the cross-examination of Dr. Qaiser. Trial counsel had a valid strategic reason for not presenting this evidence, and Allen failed to establish any prejudice from counsel's decision.

ISSUE VI: The trial court properly denied Allen's ineffective assistance of counsel claims relating to counsel's cross examination of State's witness Quintin Allen. Quentin had given various versions of the events that took place and trial counsel effectively brought out these inconsistencies through cross-examination. Furthermore, no prejudice can be shown as there was other evidence in support of the HAC aggravator.

ISSUE VII: The trial court was correct in denying Allen's motion for post-conviction relief alleging that trial counsel was ineffective for failing to impeach Quintin with his statements to Detective Boyer indicating that Allen did not pour bleach on the victim. The record shows that there were no inconsistent statements to

impeach. Furthermore, Allen cannot prove prejudice. Quintin's testimony about bleach being poured on the victim was impeached by the definitive medical forensic evidence that no evidence of bleach was found on the victim.

ISSUE VIII: Allen failed to establish that trial counsel was ineffective for failing to raise meritless objections to argument and testimony by Dr. Qaiser that unconscious people can feel pain. As the court correctly found, trial counsel did not perform deficiently by failing to object and Allen failed to establish any prejudice based on counsel’s performance.

ISSUE IX: The trial court was correct in denying Allen’s motion for postconviction relief finding that the State did not violate Giglio v. United States, 405 U.S. 150 (1972). This claim should have been raised on direct appeal and is accordingly procedurally barred. Nevertheless, the evidence of prior drug convictions was not material. There is no reasonable likelihood that the jury hearing that Allen had prior drug convictions impacted the sentencing decision. There was ample evidence for the jury to return with a death sentence, regardless of that information.

ISSUE X: The trial court was correct in denying Allen’s motion for postconviction relief alleging that trial counsel was ineffective for eliciting testimony from Myrtle Hudson about Allen’s culture of “drugs, thugs, and violence.” The record establishes that the statements were made by Myrtle Hudson in response to questions trial counsel posed to her in the attempt to present mitigation evidence.

ISSUE XI: The trial court was correct in denying Allen's motion for postconviction relief alleging that trial counsel was ineffective for failing to challenge Juror Carll for cause or strike her peremptorily. Juror Carll's statement that she was a "flexible person" who was "absolutely" willing listen to the aggravating and mitigating circumstances demonstrated her competence to serve on the jury. Juror Carll's responses to trial counsel evidenced her ability to listen to the evidence and follow the law.

ARGUMENT

STANDARD ON CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL

The majority of the issues raised in this appeal involve claims of ineffective assistance of trial counsel which were denied after the multi-day evidentiary hearing proceedings. Claims of ineffective assistance of counsel are reviewed under the standard set forth in Strickland v. Washington, 466 U.S. 668 (1984).

To establish a claim for ineffective assistance of trial counsel Allen must first show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction

or death sentence resulted from a breakdown in the adversary process that renders the result unreliable. Strickland v. Washington, 466 U.S. 668, 687 (1984).

In order to establish the first prong, Allen must prove that, "counsel's representation fell below an objective standard of reasonableness." Wheeler v. State, 124 So. 3d 865, 873 (Fla. 2013) (quoting Strickland, 466 U.S. at 688). The objective standard of reasonableness is measured by the prevailing professional norms under the circumstances as seen "from counsel's prospective faced at the time" of trial. Hannon v. State, 941 So. 2d 1109, 1125 (Fla. 2006) (citing Wiggins v. Smith, 539 U.S. 510, 521-23 (2003)). See also Preston v. State, 970 So. 2d 789, 803 (Fla. 2007).

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

There is a strong presumption that counsel's performance was constitutionally effective. Hannon, 941 So. 2d at 1118 (quoting Strickland, 466 U.S. at 689) ("Judicial scrutiny of counsel's performance must be highly deferential.")). The defendant must

"overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Hannon, 941 So. 2d at 1118 (quoting Strickland, 466 U.S. at 689). And "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland, 466 U.S. at 689.

Failure to establish either prong results in a denial of the claim. Ferrell v. State/Crosby, 918 So. 2d 163, 170 (Fla. 2005) (quoting Strickland, 466 U.S. at 687). Because a court can make a finding on the prejudice prong of Strickland without ruling on the deficiency prong, claims of ineffective assistance of counsel are subject to denial when the court can determine the outcome of the proceeding would not be affected even if counsel were deficient. See Franqui v. State, 59 So. 3d 82, 95-97 (Fla. 2011); Sweet v. State, 810 So. 2d 854, 863-64 (Fla. 2002) (declining to reach deficiency prong based on finding that there was no prejudice; Preston v. State, 970 So. 2d 789, 803 (Fla. 2007) (citing Whitfield v. State, 923 So. 2d 375, 384 (Fla. 2005) ("[B]ecause the Strickland standard requires establishment of both [deficient performance and prejudice] prongs, when a defendant fails to make a showing as to one prong, it is not necessary to delve into whether he has made a showing as to the other prong.").

"Because both prongs of the Strickland test present mixed questions of law and fact, this Court employs a mixed standard of review, deferring to the circuit court's factual findings that are supported by competent, substantial evidence, but reviewing the circuit court's legal conclusions de novo." Hurst v. State, 18 So. 3d 975, 996 (Fla. 2009) (citing Sochor v. State, 883 So. 2d 766, 771-72 (Fla. 2004). Thus, this Court "defer[s] to the circuit court's factual findings, but … review[s] de novo the circuit court's legal conclusions." Sochor, 883 So. 2d at 772. See also, e.g., Simmons v. State, 105 So. 3d 475, 503 (Fla. 2012) ("deferring to the post-conviction court's factual findings that are supported by competent, substantial evidence, but reviewing the post-conviction court's application of law to the facts de novo"; citing Mungin v. State, 932 So. 2d 986, 998 (Fla. 2006)).

Appellate deference to trial-court fact finding recognizes "the trial court's superior vantage point from which to make credibility assessments." Sochor, 883 So. 2d at 781. Accordingly, "'this Court will not substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of the witnesses as well as the weight to be given to the evidence by the trial court.'" Hurst, 18 So. 3d at 988-989 (Brady claim; quoting Lowe v. State, 2 So. 3d 21, 30 (Fla. 2008) (quoting Blanco v. State, 702 So. 2d 1250, 1252 (Fla. 1997)). The above-cited standards apply to all of the claims of ineffective assistance of counsel (IAC) in the Appellant's Initial Brief.

ISSUE I

WHETHER ALLEN'S DEATH SENTENCE IS UNCONSTITUTIONAL UNDER THE SIXTH AMENDMENT, EIGHTH AMENDMENT, AND HURST

Allen argues that she is entitled to relief from her death sentence following the rulings in Hurst v. Florida, 136 S. Ct. 616 (2016) and Hurst v. State, 202 So. 3d 40 (Fla. 2016). The trial court properly denied this claim, holding:

> The Court rejects the Defendant's claim that she is entitled to be resentenced to a life sentence, based on the Hurst error.
>
> The jury recommendation that the Defendant be sentenced to death did not make specific factual findings as to the existence of any aggravating circumstances, nor did it make any findings as to the relative weight of the aggravating and mitigating circumstances. Her sentence is contrary to Hurst v. Florida. However, the Court finds that the Hurst error was harmless beyond a reasonable doubt. The Court notes that the unanimous jury recommendation of death in this case sets a foundation to conclude beyond a reasonable doubt that a rational jury would have unanimously found that there were sufficient aggravators to outweigh the mitigating factors. The trial judge instructed the jury that it needed to determine whether sufficient aggravators existed and whether the mitigating circumstances outweighed the aggravating circumstances. (Trial Transcript, pp. 1977-78). The jury was further instructed that, "[T]he final decision as to what punishment shall be imposed is the responsibility of the judge. In this case, as the trial judge, that responsibility will fall on me. However, it is your duty to follow the law that will now be given you by the court and render to the court an advisory sentence as to which punishment should be imposed." (Trial Transcript, p. 1970). The trial judge instructed the jury that, "Should you find sufficient aggravating circumstances do exist to justify recommending the imposition of the death penalty, it will then be your duty to determine whether the mitigating circumstances outweigh the aggravating circumstances that you find to exist." (Trial Transcript, pp. 1977-78).

> The trial court did not inform the jury that the finding that sufficient aggravating circumstances outweighed the mitigating circumstances must be unanimous. Even though the jury was instructed that it was not required to recommend death even if the aggravators outweighed the mitigators, the jury recommended death unanimously. The trial judge instructed the jury, 'If after weighing the aggravating circumstances and the mitigating circumstances you determine that at least one aggravating circumstances is found to exist and the mitigating circumstances do not outweigh the aggravating circumstances, or in the absence of mitigating factors, that the aggravating factors alone are sufficient, you may recommend that a sentence of death be imposed rather than a sentence of life in prison without the possibility of parole. Regardless of your findings in this respect, you are neither compelled or required to recommend death." (Trial Transcript, p. 1980). Based on the instructions, the Court finds that the jury unanimously made the requisite factual findings to impose death before it issued the unanimous recommendation. The Hurst error is harmless as the Court finds beyond a reasonable doubt that the failure of the jury to find all facts necessary to impose the death penalty did not contribute to the death sentence in this case. The underlying facts of the case add additional support for the conclusion that the Hurst error is harmless. Ms. Wright "was terrorized over a substantial period of time and she was aware of what was happening to her." Allen, 137 So. 3d at 963. She was aware of her impending death. "Wright was conscious and continually pleaded to be released and that upon being strangled, Wright pleaded for Allen to stop, stating that she might wet her pants." Allen, 137 So. 3d 963-64. The Court finds that even if the jury were properly instructed, that it would have still found that the aggravators greatly outweighed the mitigators in this case. The Court finds any Hurst error regarding the Defendant's sentence, which was based upon a unanimous recommendation of death, is harmless beyond a reasonable doubt.

(V1, R2016-19).

In Davis v. State, 207 So. 3d 142, 174 (Fla. 2016), this Court found that when the jury unanimously recommends a death sentence, their unanimous recommendation **"allow[s] us to conclude beyond a reasonable doubt that a rational jury would**

have unanimously found that there were sufficient aggravators to outweigh the mitigating factors." (emphasis added).

This Court has consistently held that any Hurst v. Florida error is harmless if the jury's recommendation for death was unanimous. [4] See Kaczmar v. State, 228 So. 3d 1 (Fla. 2017); Tundidor v. State, 221 So. 3d 587 (Fla. 2017), petition for cert. filed Nov. 8, 2017, Case No. 17-6735; Middleton v. State, 220 So. 3d 1152 (Fla. 2017); Oliver v. State, 214 So. 3d 606 (Fla. 2017), cert. denied, 138 S.Ct. 3 (2017); Hall v. State, 212 So. 3d 1001 (Fla. 2017); Jones v. State, 212 So. 3d 321 (Fla. 2017), cert. denied, 138 S.Ct. 175 (2017); Truehill v. State, 211 So. 3d 930 (Fla. 2017), cert. denied, 138 S.Ct. 3 (2017); and King v. State, 211 So. 3d 866 (Fla. 2017). In the instant case, the jury unanimously recommended that death was the appropriate

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[4] In addition, the State maintains that there was no underlying constitutional violation in this case. Appellant became eligible for a death sentence given her the guilt phase conviction for the contemporaneous violent felony of kidnapping. The unanimous verdict by Appellant's jury establishing her guilt of this contemporaneous felony was clearly sufficient to meet the Sixth Amendment's factfinding requirement, and she was properly rendered eligible for a death sentence at that point. See Alleyne v. United States, 570 U.S. 99, 115-16 (2013) (the Court explained that "[t]he essential point is that the aggravating fact produced a higher range, which, in turn, conclusively indicates that the fact is an element of a distinct and aggravated crime."). See also Jenkins v. Hutton, 582 U.S. ___, 137 S. Ct. 1769 (2017) (confirming the constitutionality of an Ohio death sentence based on a jury's guilt-phase determination of facts); Waldrop v. Comm'r, Alabama Dep't of Corr., 15-10881, 2017 WL 4271115, at *20 (11th Cir. Sept. 26, 2017) (unpublished) (In rejecting a Hurst claim the Court explained: "Alabama requires the existence of only one aggravating circumstance in order for a defendant to be death-eligible, and in Mr. Waldrop's case the jury found the existence of a qualifying aggravator beyond a reasonable doubt when it returned its

sentence, and such a recommendation is "precisely what [this Court] determined in Hurst v. Florida to be constitutionally necessary to impose a sentence of death." Id. at 175. Moreover, the disturbing facts of this case add additional support for the conclusion that the Hurst v. Florida error is harmless.

Allen also argues that since the jury only recommended imposition of the death penalty, there is a "Caldwell issue." See Caldwell v. Mississippi, 472 U.S. 320 (1985). This Court has repeatedly rejected challenges to the standard jury instructions in death penalty cases pursuant to Caldwell. Hall v. State, 212 So. 3d 1001, 1032-33 (Fla. 2017). "To establish a Caldwell violation, a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law." Dugger v. Adams, 489 U.S. 401, 407 (1989); see also Romano v. Oklahoma, 512 U.S. 1, 9 (1994). Thus, references and descriptions that accurately characterize the jury's and judge's sentencing roles under Florida law do not violate Caldwell.

Even under the current death penalty statute, the jury's final unanimous recommendation of death is still an "advisory" verdict as the judge is free to disagree with the jury's recommendation of death and sentence a defendant to a life sentence. After such a decision is made, under double jeopardy principles a defendant "can no longer be put in jeopardy of receiving the death penalty." Williams v. State, 595 So. 2d 936, 938 (Fla. 1992). The judge remains the final sentencing authority in

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guilty verdict. See § 13A-5-45(e).").

Florida and a jury's recommendation of death remains "advisory." The jury is told their recommendation is given "great weight" **and if given**, only rarely would a trial judge impose a sentence not recommended by the jury. Thus, characterizing the jury as "advisory" is an accurate description of the role assigned to the jury by Florida law and there is no Caldwell violation.

Finally, Allen relies on Bevel v. State, 221 So. 3d 1168 (Fla. 2017) in regard to the effect Hurst has had on the prejudice analysis of Strickland claims. Allen inaccurately compares the admittedly failed mitigation by trial counsel in Bevel to her case.

For claims that allege counsel was ineffective during the penalty phase, prejudice is measured by "whether the error of trial counsel undermines the [c]ourt's confidence in the sentence of death when viewed in context of the penalty phase evidence and the mitigators and aggravators found by the trial court." Wheeler, 124 So. 3d at 873 (quoting Hurst v. State, 18 So. 3d 975, 1013 (Fla. 2009).

Unlike Bevel, Allen's trial counsel performed sufficient investigation and preparation of mitigation witnesses. Trial counsel presented evidence on cognitive deficits, childhood trauma, brain injuries and how these factors caused extreme mental or emotional disturbance and/or substantially impaired Allen's capacity to conform her

conduct to the requirements of the law. The testimony presented at the evidentiary hearing was cumulative to that presented at the penalty phase.

The extreme aggravation in this case, especially the brutal HAC evidence, coupled with Allen's *de minimis* postconviction mitigation evidence falls short of meeting Allen's burden to prove Strickland prejudice.

The Appellant is not entitled to Hurst relief.

ISSUE II

WHETHER ALLEN WAS DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL IN THE PENALTY PHASE IN REGARD TO SUFFICIENT MITIGATION

Allen argues that trial counsel provided prejudicial ineffective assistance of counsel by failing to conduct a competent mitigation investigation. This claim has no merit. As discussed below, Allen's allegation falls far short of establishing either deficient performance or resulting prejudice.

The trial court properly denied this claim, holding:

> The Court finds that the additional mitigation to which the family testified was testified to by Myrtle Hudson.
>
> The Court finds the testimony presented at the evidentiary hearing was cumulative to that presented at the penalty phase. Attorney Bankowitz attempted to speak with additional witnesses yet none were forthcoming. The Court finds that counsel performed sufficient investigation and preparation of mitigation witnesses.
>
> The Court finds the Defendant has failed to show that her attorney was ineffective for failing to investigate and interview additional family members

> and present additional expert mental health testimony regarding PTSD, cognitive deficits, childhood trauma, brain injuries and how these factors caused extreme mental or emotional disturbance and/or substantially impaired her capacity to conform her conduct to the requirements of the law. Defense attorney Bankowitz performed a reasonable mitigation investigation and did present evidence on each of these issues, save PTSD that Dr. Russell opines was present.
>
> Even if trial counsel was deficient for failing to adequately investigate mitigation, the Court finds she has failed to establish prejudice. In order to assess the probability of a different outcome under Strickland, the Court is to consider the totality of the available mitigation evidence—both that introduced at trial and the evidence introduced at the evidentiary hearing, and reweigh it against the evidence presented in aggravation. Sears v. Upton, 561 U.S. 945, 955-56 (2010), "When the trial court has found substantial and compelling aggravation there is no reasonable probability that the outcome would have been different had counsel presented additional mitigation evidence. Asay v. state, 769 So. 2d 974, 988 (Fla. 2000).
>
> The Court finds the Defendant was not prejudiced by counsel's failure to further investigate and present additional cumulative background mitigation and mental health mitigation. See Hall v. State, 212 So. 3d 1001 (Fla. 2017).

(V1, R2010-15).

There is competent, substantial evidence to support the trial court's finding that trial counsel mounted a reasonable mitigation investigation in regard to Allen's childhood, and physical, mental, and sexually abusive background.

As stated in Robinson v. State, 95 So. 3d 171, 178 (Fla. 2012), in order to prevail on an ineffective assistance of counsel claim on this ground, Allen must first show "that counsel's ineffectiveness deprived the defendant of a reliable penalty phase proceeding." (quoting Henry v. State, 937 So. 2d 563, 569 (Fla. 2006)); Asay v. State,

769 So. 2d 974, 985 (Fla. 2000); Coleman v. State, 64 So. 3d 1210, 1218 (Fla. 2011). A defendant's claim that he was denied effective assistance of counsel because counsel failed to present mitigation evidence will be rejected where the [sentencer] was aware of most aspects of the mitigation evidence that the defendant claims should have been presented. Troy v. State, 57 So. 3d 828, 835 (Fla. 2011) (citing Van Poyck v. State, 694 So. 2d 686, 692-93 (Fla. 1997)). Further, if the record demonstrates that counsel's decision not to present evidence "might be considered sound trial strategy" the claim may be summarily denied. Franqui, 59 So. 3d at 99 (quoting Strickland, 466 U.S. at 689).

While Allen presented several witnesses at the evidentiary hearing that testified regarding the difficult childhood experienced her, the testimony was simply cumulative to the evidence that was presented during the trial.

As noted in the Florida Supreme Court's opinion from direct appeal:

> Myrtle Hudson, Allen's aunt, testified that Allen had an unstable childhood in a violent and drug-infested neighborhood. Hudson testified that she never knew Allen to abuse drugs, but Allen drank alcohol. Hudson knew of at least two abusive relationships in which Allen was beaten to the point of unconsciousness. She also thought Allen had been sexually abused as a child.

Allen, 137 So. 3d at 955.

For any claim on which an evidentiary hearing is granted, the determinations of Strickland's prongs are not measured by the volume of the post-conviction evidence but rather how it measures up to the specific Strickland criteria; thus, Hannon v. State,

941 So. 2d 1109, 1136 (Fla. 2006), explained that, "contrary to the dissent's claim that an investigation by trial counsel would have revealed 'voluminous evidence of mitigation,' … the mitigation provided by witnesses during the post-conviction evidentiary hearing was not compelling."

The fact that Allen provided more witnesses at the hearing than trial counsel presented during the trial does not make the presentation of mitigation evidence more thorough. Even if Brian Watkins, Barbara Capers, Alvinia Ragoo, and Carlos Ragoo had testified in front of the jury, there is nothing substantially different or more mitigating in their testimony than what the jury heard though Allen's aunt. "Furthermore, even if a witness was available to testify and counsel was deficient in not presenting his or her testimony during trial, counsel is not ineffective if that testimony would have been cumulative to other evidence presented, because such cumulative evidence removes a defendant's ability to establish prejudice." Nelson v. State, 73 So. 3d 77, 89 (Fla. 2011) (citing Darling v. State, 966 So. 2d 366, 377 (Fla. 2007)).

Moreover, Allen did not want trial counsel to speak to her daughters. In fact, trial counsel explained in great detail, he had valid strategic reasons for not calling them. It appeared that they were somehow involved in the crime and that their credibility may be called into question. (V1, R2844-45). See Fennie v. State, 855 So. 2d 597, 605-06 (Fla. 2003) (noting that trial counsel was not ineffective for failing to

call an “unpredictable witness,” and had trial counsel gambled and presented such a witness only to have the witness inculpate the defendant, collateral counsel would now be claiming ineffective assistance of counsel for presenting the witness).

Trial counsel’s failure to interview Brian Watkins and present him as a witness also fails to show deficiency or prejudice. Mr. Watkins' testimony would have done more harm than good. His testimony at the hearing would have included their time together when they sold drugs, and that Allen had a violent nature. The testimony about abusive relationships was introduced through Myrtle Hudson, without testimony about Allen’s violence coming into play. This Court has recognized that, “an ineffective assistance claim does not arise from the failure to present mitigation evidence where that evidence presents a double-edged sword.” Winkles v. State, 21 So. 3d 19, 26 (Fla. 2009). See also Reed v. State, 875 So. 2d 415, 437 (Fla. 2004).

Allen presented no new non-statutory mitigation regarding her background that could have been considered by the trial court. See Hodges v. State, 885 So. 2d 338, 351 (Fla. 2004) (“Even with the postconviction allegations regarding Hodges’ upbringing, it is highly unlikely that the admission of that evidence would have led four additional jurors to cast a vote recommending life in prison.”).

There is also competent, substantial evidence to support the trial court’s finding that trial counsel mounted a reasonable mitigation investigation in regard to Allen’s mental health.

At trial, Dr. Wu testified that there were reports that Allen had at least ten cases of traumatic injuries, most of which involved the head. (DAR, V21, R1816). He

testified that she had damage to the frontal lobe of her brain. (DAR, V21, R1820). Dr. Wu testified that a person with frontal lobe damage does not have the same ability to regulate and control the impulses as a normally functioning frontal lobe individual would have. (DAR, V21, R1823). In the direct appeal opinion, this Court noted that Dr. Wu testified that Allen's brain injuries would make it hard for Allen to conform her conduct to the requirements of society. Allen, 137 So. 3d at 955. He testified that she would have an overreaction to slight provocation, but that Allen's injuries should not impair her planning abilities. Id. Dr. Wu testified that Allen's ability to understand and regulate proportionate responses in a consistent manner was significantly impaired. Id. He also testified that it would be difficult for her to consistently conform her conduct to the requirements of society. Id.

During the postconviction hearing, Allen presented Dr. Russell, in an effort to argue that trial counsel was ineffective in developing mental health mitigation. However, trial counsel is entitled to rely on the opinions of a qualified mental health expert even if the defendant discovers an expert with a more favorable opinion in postconviction. Rodgers v. State, 113 So. 3d 761, 770 (Fla. 2013). See Wyatt v. State, 78 So. 3d 512, 533 (Fla. 2011) ("As this Court has repeatedly held, a defendant cannot establish that trial counsel was ineffective in obtaining and presenting mental mitigation merely by presenting a new expert who has a more favorable report.") (citing Peede v. State, 955 So. 2d 480, 494 (Fla. 2007)); Asay v. State, 769 So. 2d 974,

986 (Fla. 2000) (stating that trial counsel's reasonable investigation is not rendered incompetent merely because the defendant has now secured the testimony of a more favorable expert in post-conviction).

During the evidentiary hearing, Allen's expert, Dr. Russell, testified that Allen suffered from PTSD, although she was never diagnosed with PTSD prior to the crime and her prison records subsequent to the murder did not indicate that mental health professionals found she suffered from PTSD. (V1, R2966, 3177-78). While Dr. Russell concluded that Allen suffered from PTSD, Dr. Gamache testified that merely being exposed to a traumatic stressor is not sufficient to diagnose a person with that condition. (V1, R3167). Dr. Gamache explained that PTSD is commonly diagnosed in military veterans, and yet, the majority of veterans that experience traumatic events do not develop PTSD. (V1, R3171).

In addition, PTSD typically develops fairly quickly after exposure to a traumatic stressor. (V1, R3185). In Allen's case, if Allen had PTSD, she would have developed signs and symptoms shortly after experiencing her childhood traumas. (V1, R3185). Dr. Gamache's approach is to obtain a self-report from the person and look for any evidence of corroboration. (V1, R3235). Dr. Gamache based his opinion on DOC records pertaining to Allen, as to both her classification records and medical and psychological records. He reviewed the reports of various doctors that had seen and

evaluated Allen to include: Dr. Riebsame, Dr. Greenblum and Dr. Russell, as well as the trial testimony presented by Dr. Wu and Dr. Gebel. (V1, R3160-61).

Dr. Gamache explained what the criteria of a PTSD diagnosis was and its applicability to Allen. (V1, R3166-3172). The information Dr. Gamache reviewed did not indicate Allen had intrusive dreams or flashbacks of abuse during childhood. (V1, R3173). Although testimony was presented at trial that Allen had been exposed to traumatic stressors, "there was no psychometric evidence and no clinical evidence that she met the diagnostic criteria for PTSD." (V1, R3175).

In Dr. Gamache's opinion, there is no historical evidence that Allen had the signs and symptoms at the time of the offense and no logical connection between the events that occurred at the time of the crime with traumatic experiences that Allen suffered in her life. (V1, R3180-3182). He gave as an example: a military veteran suffering from PTSD who hears a car backfire. The veteran thinks it's a gunshot. This event brings back the emotions and memories of being under gunfire, which in turn leads to a sequence of behaviors. (V1, R3181). The impetus for the murder was the theft of Allen's money. There was no indication whatsoever that Allen in any way associated the victim or the victim's behavior with any of these historical events or traumatic stress that she has experienced. (V1, R3194). Dr. Russell stated that he found her under an extreme mental/emotional disorder at the time of the crime, yet he admitted Allen has never told him what was going through her mind at the time. (V1,

R3084-3086). In fact, Dr. Russell admitted that Allen never told him anything, that she denied the homicide and his conclusions were based on his training and experience. (V1, R3026-3028).

Dr. Gamache concluded that in his opinion, Allen was not suffering from PTSD at the time of the crime. (V1, R3188). Dr. Gamache also noted that Dr. Riebsame had administered two objective psychological tests relevant to PTSD, and found that her responses were not consistent with the signs and symptoms of someone suffering from PTSD. (V1, R3174-75, 3204). This Court has held that "simply presenting the testimony of experts during the evidentiary hearing that are inconsistent with the mental health opinion of an expert retained by trial counsel does not rise to the level of prejudice necessary to warrant relief. Dufour v. State, 905 So. 2d 42, 58 (Fla. 2005).

Dr. Gamache opined that there was not anything significant that trial defense counsel or trial defense experts missed in presenting additional mitigation at trial. (V1, 3163). Dr. Russell himself admitted during the hearing that the jury heard all of the things that he testified about at the evidentiary hearing, save for the PTSD diagnosis which was not supported by the evidence. (V1, R3009). See Raleigh v. State, 932 So. 2d 1054, 1061 (Fla. 2006) (affirming denial of relief where trial court found that the postconviction expert was "essentially no more than a better repackaging" of the trial mental health expert's testimony).

Allen has not established that her counsel's performance fell below an objective standard of reasonableness. A defendant claiming ineffective assistance of counsel must explain how the failure to call the uncalled witness prejudiced the outcome of the trial. Nelson v. State, 875 So. 2d 579, 583 (Fla. 2004). Neither deficient performance nor prejudice can be discerned from defense counsel's investigation and presentation of mental health evidence or background evidence in the penalty phase. "To assess [the] probability [of a different outcome under Strickland], we consider the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the [evidentiary hearing]—and reweig[h] it against the evidence in aggravation." Sears v. Upton, 561 U.S. 945, 955–56 (2010) (quoting Porter v. McCollum, 558 U.S. 30, 41 (2009). "[T]his Court has reasoned that where the trial court found substantial and compelling aggravation, such as commission while under sentence of imprisonment, prior violent felonies, commission during a burglary, and CCP, there was no reasonable probability that the outcome would have been different had counsel presented additional mitigation evidence ...." Asay, 769 So. 2d at 988.

In the instant case, the trial court found two aggravators: (1) committed while the Defendant was engaged in the commission of kidnapping; and (2) especially heinous, atrocious or cruel. Both of the aggravators were assigned great weight. Given the significant aggravators found and the comparatively weak mitigation found, it is

unlikely that the additional mitigation presented would have been sufficient to outweigh the established aggravation. See Hall v. State, 212 So. 3d 1001 (Fla. 2017).

Accordingly, this claim should be denied.

ISSUE III

WHETHER ALLEN WAS DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL IN GUILT PHASE CLOSINGS BY NOT OBJECTING AND MOVING FOR A MISTRIAL

Allen claims that counsel rendered ineffective assistance by failing to object and move for a mistrial based on prosecutorial misconduct in the guilt phase closing arguments. Allen first claims the State committed misconduct by failing to object to the misstatement of the elements of first-degree felony murder during closing argument. The trial court properly denied this claim.

Allen points to the fact that the State had to prove that the death occurred "as a consequence of" the kidnapping. However, the State's closing argument made this very same point:

> Element number two, now, you will notice there is an A or B. A or B, not both. Okay? So, element number two can either be:
>
> The death of Wenda Wright occurred as a consequence of and while Margaret Ann Allen was engaged in the commission of kidnapping.
>
> Or the death occurred as a consequence while Margaret Ann Allen was attempting to commit the crime of kidnapping.

(DAR, V20, R1579-1580).

Furthermore, Allen cannot show prejudice. The elements of the charges were included in the jury instructions and the jury was instructed that what the lawyers say is neither the law nor the evidence in this case. (DAR, V20, R1557).

Allen next claims her counsel was deficient in failing to object when the State implied that she was not offered a plea bargain because she was more culpable. Appellant further claims that the State mislead the jury about the fact that plea discussions were had between the State and defense prior to trial. The trial court properly denied this claim.

Logical inferences may be drawn, and counsel is allowed to advance all legitimate arguments. Thomas v. State, 748 So. 2d 970, 984 (Fla. 1999). The facts of the case as presented to the jury indicated that Allen believed the victim stole her money and ultimately tortured and killed her. (DAR, V20, R1561-63). The State's comments regarding who was most culpable and responsible are logical inferences the jury could reasonably infer based on facts in evidence.

The details of Quintin's plea bargain came into evidence. Once the defense raised the question whether Allen had been offered a deal to testify against Quintin, it was proper for the State to comment to a lack of evidence to support this claim. Furthermore, the statements were not misleading. The informal plea offer which was referenced by the State prior to trial never addressed the requirement that Allen would need to testify against Quintin in exchange for the offer.

There was no error by defense counsel in failing to request an instruction that the prosecutor had discussed a twenty-year prison sentence, to correct the prosecutor's misleading statement. The statement was not misleading. Moreover, under Florida Rule of Criminal Procedure 3.172(i) evidence of an offer later withdrawn is not admissible in any proceeding against the person who made the plea offer. Counsel cannot be ineffective for failing to raise a meritless claim. Teffeteller v. Dugger, 734 So. 2d 1009, 1019 - 1020 (Fla. 1999).

Allen also claims there were improper comments related to the victim's cause of death and HAC aggravator. Allen claims trial counsel erred in failing to object to the State's following argument:

> She is the one 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 that Dr. Qaiser said that you don't get it unless it is held real tight. Margaret Allen is the one that did that.

(DAR, V20, R1581) The trial court properly denied this claim.

Dr. Qaiser explained petechia on multiple occasions. First he explained as follows:

> STATE: What is petechia?
>
> DR. QAISER: Petechia is whenever you apply the manual strangulation or ligation strangulation you will see small spots on the face, especially on the eye area and within the – unintelligible -. But that is – if you take both cases of strangulation, you will see it gets small in the manual strangulation. And also whenever the strangulation is complete and really tight, you won't see petechia.

(DAR, V19, R1473). Dr. Qaiser also explained the absence of petechia later in the proceedings as follows:

> STATE: Okay, Now counsel was asking you some questions about petechia. Did you see in those photographs any evidence of petechia at all?
>
> DR. QAISER: No. I did not see that.
> STATE: Okay. And that could indicate meaning it was very tightly ligature strangulation, correct?
>
> DR. QAISER: That's correct.

(DAR, V19, R1489).

Allen's claim is insufficient because it fails to establish prejudice as required under Strickland. Dr. Qaiser's consistent testimony regarding the fact that petechia does not occur when there is a very tight strangulation supported Quintin's testimony about how Allen strangled the victim. Likewise, the jury was instructed that they rely upon their own recollection of the evidence.

Allen claims that the State misrepresented testimony regarding Dr. Qaiser's testimony in reference to the time it takes to die from strangulation. The prosecutor made the following statement in closing argument:

> 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 premeditation [sic] here.

(DAR, V20, T1578-79) The trial court properly denied this claim.

Dr. Qaiser testified it takes four to six minutes to die from strangulation. (DAR, V18, R1448). Stated another way, four minutes would be the shortest time it would take to die and six minutes would be the longest time it would take to die. A careful reading of the State's argument demonstrates that the State did not in fact misrepresent Dr. Qaiser's testimony. The State, when using strangulation evidence to argue premeditation, recalled that Dr. Qaiser testified it would take three **or** four minutes to die from strangulation. (DAR, V20, R1578-89). By utilizing the word "or" the State recognized within this comment that one of these number could have been mistaken and, in fact, such was the case. Four was the accurate amount of time and three was not. The State's argument was not a misrepresentation of the evidence.

Furthermore, Allen cannot show prejudice where the jury was instructed that what the attorneys say is not evidence and that the jury should rely on their own recollection of the evidence. (DAR, V20, 1556-57; 1653-58). Further, since the State was arguing premeditation, the State would have benefited more, and Appellant prejudiced more, if the State argued that it takes a longer amount of time for a person to die from strangulation than what was established at trial rather than a shorter amount of time.

Allen claims that the State misrepresented testimony regarding the autopsy report. Allen takes exception with the following State 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.

(DAR, V20, R1629-30). The trial court properly denied this claim.

The only error identifiable in the State's argument was the word "internal" which was a misstatement of the word "external" and under the circumstances of this case this was not a factor that resulted in any prejudice to Allen.

Dr. Qaiser testified as to the evidence of ligation and that she suffered a ligature strangulation. (DAR, V18, R1428, 1443). He explained that the lack of petechia could indicate a very tight strangulation. Quintin's testimony as to the manner the victim was strangled also comports with Dr. Qaiser's testimony. Even Dr. Spitz agreed that a ligature strangulation was feasible. (V1, R766).

Allen kidnapped, tortured and strangled the victim. Whether the strangulation caused internal injuries as opposed to external injuries is of no significance to a HAC finding. Allen's final claim is based upon the cumulative effect of the preceding subclaims. Since the subclaims are insufficient for ground previously raised herein, the State respectfully contends there are no errors of counsel to accumulate.

Accordingly, this claim should be rejected.

ISSUE IV

WHETHER ALLEN WAS DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL IN PENALTY PHASE CLOSINGS BY NOT OBJECTING AND MOVING FOR A MISTRIAL

Allen claims that counsel rendered ineffective assistance by failing to object and move for a mistrial based on prosecutorial misconduct in the penalty phase closing arguments. Allen first claims the State committed misconduct by raising questions about two witnesses' knowledge of Appellant's criminal history during the penalty phase. The trial court properly denied this claim.

At the outset, Allen's scoresheet indicates that she was previously convicted of one (1) Sale of Cocaine charge and three (3) Possession of Cocaine charges. Allen also has felony convictions for Carrying a Concealed Firearm, Possession of a Short-Barrel Shotgun and Felon in Possession of Concealed Weapon. (DAR, V6, R938). Accordingly, any claim alleging that the State incorrectly referred to Allen having multiple drug convictions or felony convictions is misguided.

The crux of Appellant's argument in support of this subclaim relies upon the precedent set forth in Geralds v. State, 601 So. 2d 1157, 1162 (Fla. 1992). The State agrees that Geralds applies to this claim, but contends that Allen overlooks the critical aspect of this opinion which belies the validity of this subclaim. While the Florida Supreme Court has denounced the State's use of a defendant's criminal history under the guise of witness impeachment, the Court also noted that use of such would be

proper where the defense has opened the door to such impeachment. See Geralds, 601 So. 2d at 1162 ("As we have already said, the entire line of questioning should never have occurred **because the defense had not opened the door to such impeachment** on direct examination.") (emphasis added).

In the instant case, each time the State referred to Allen's criminal history, the record reflects that the door to such impeachment had been opened. Dr. Gebel's testimony was premised on the opinion that Allen has brain damage caused exclusively from trauma. Since brain damage is also commonly known to be caused by drug usage, such testimony opened the door for the State to inquire as to whether Dr. Gebel was aware of any evidence of Allen's drug usage. Dr. Gebel's response indicated that Allen denied taking drugs and that he had looked through available records. (DAR, V21, R1758-59). He mentioned that he had correction facility records and correction department out patient records, among others. When Dr. Gebel's testified that he was aware of, but did not know what the "correctional facility" records consisted of, this response certainly opened the door to the State asking if the "records" he reviewed included Allen's county jail records or prison records. (DAR, V21, R1757-58).

The State inquired as to when Ms. Posey's became a mother figure to Allen. Using Allen's release date of 1999 to establish a time reference, Ms. Posey initially responded that she did not know. (DAR, V22, R1891). However, when the State asked the same question again, her answer changed from "I don't know" to "yes, sir."

Id. The only reason the question regarding Allen's release date was asked more than once was because the witness failed to recall the answer when asked the first time.

Myrtle Hudson specifically testified that she did not know Allen to use drugs. This testimony also clearly opened the door for the State to inquire about her knowledge of Appellant's drug convictions.

Furthermore, Allen fails to show prejudice. The trial court instructed the jury on the proper aggravating circumstances they could consider. The testimony presented in the penalty phase that Allen had been involved in a drug lifestyle was found to be a nonstatutory mitigator.

Next, Allen alleges counsel was ineffective for failing to object to prosecutor comments regarding future dangerousness. While Allen asserts that the State was referring to "a violent outbreak," the record clearly indicates that the State was referring to "a disproportionate overreaction to provocation," which is by no means a definitive comment on future violence or future dangerousness. (DAR, V21, R1855). The trial court properly denied this claim holding:

> The Court finds this issue was raised on direct appeal as fundamental error.
>
> As the Defendant failed to show that the comments amounted to fundamental error on direct appeal, she fails to demonstrate that counsel's failure to object to the comments resulted in prejudice under Strickland, See Serrano v. State, 42 Fla. L. Weekly S545 (Fla. May 11, 2017), '[b]ecause [Serrano] could not show the comments were fundamental error on direct appeal, he likewise cannot show that trial counsel's failure to object to the comments resulted in prejudice sufficient to undermine the outcome of the case under the prejudice prong of the Strickland test." Chandler v. State, 848 So. 2d 1031, 1046 (Fla. 2003); see also

> Thompson v. state, 759 So. 2d 650, 664 (Fla. 2000) ("Because none of these prosecutorial comments would have constituted reversible error had they been objected to at trial, we affirm the trial court ruling summarily denying this claim.").

(V1, R1978-79).

Allen argues that the State improperly yet subtly raised the issue of Appellant's lack of remorse regarding the murder. The trial court properly denied this claim.

This is not an instance where the State commented during argument about the facts which may have shown that the Appellant was not remorseful about a crime or where the State directly argued to the jury that Appellant has no remorse for a crime. Moreover, this Court has recognized that comments made in fair reply to a defense argument are proper. Pagan v. State, 830 So. 2d 792, 809 (Fla. 2002).

Defense expert, Dr. Wu had testified that Allen suffered from a lack of impulse control. He went on to explain that this is at times accompanied with an overwhelming feeling of remorse whenever a person afflicted with the disorder has an impulsive outburst. (DAR, V21, R1851). Clearly, Dr. Wu's opinion opened the door for the State to challenge the defense expert as to the completeness of his investigation regarding this aspect of the disorder. Because the State's comment was merely a fair response to Allen's argument, it was not improper. Pagan, 830 So. 2d at 809.

Allen alleges counsel was deficient in failing to raise a Golden Rule objection and motion for mistrial regarding the following State arguments:

> Dr. Qaiser tried to give you some idea of what physiological, mental process you go through when you are being strangled . . . 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.

(DAR, V22, R1920).

> 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. . . . Those are the last few moments of Wenda Wright's life.

(DAR, V22, R1921). Allen focuses on the State's word choice of "you" in support of her claim. The trial court properly denied this claim.

"In general, a `golden rule' argument encompasses requests that the jurors place themselves in the victim's position, that they imagine the victim's pain and terror, or that they imagine that their relative was the victim." Williams v. State, 689 So. 2d 393, 399 (Fla. 3d DCA 1997). Clearly, from the context of the record, the State was not asking to jury to imagine for themselves what it would be like to be strangled.

Additionally, when arguing HAC, the State may ask the jury to consider the terror and anguish that the victim was facing prior to death. See Braddy v. State, 111 So. 3d 810, 842-43 (Fla. 2012) (A prosecutor may make comments describing the murder where these comments are based on evidence introduced at trial and are relevant to the circumstances of the murder or relevant aggravators, so long as the

prosecutor does not cross the line by inviting the jurors to place themselves in the position of the victim. See, e.g., Bailey v. State, 998 So. 2d 545, 555 (Fla. 2008) (holding comments that encouraged jurors to visualize the actual distance between the gun and the victim, based on evidence in the record, were not improper).

The "imaginary scenario" Allen complains of, is also without merit. The comments the State made were based upon facts in evidence as the record demonstrates that Quintin testified that the victim cried and begged to go home to her kids. See Rogers v. State, 957 So. 2d 538, 549 (Fla. 2007) (holding, in the context of an ineffective assistance of counsel claim, that prosecutorial comments about the victim's murder and her last moments alive were "not improper because they were based upon facts in evidence" and concluding that the comments were not "golden rule" arguments).

Allen next alleges counsel was deficient for failing to object and move for a mistrial when the prosecutor advised the jury that it is "not easy to stand up here and ask a jury to recommend the death penalty, but in certain cases, it is what the law calls for." (DAR, V22, R1932). Allen claims this argument personalized the prosecutor in the eyes of the jury and led them to gain sympathy for him in violation of Ruiz v. State, 743 So. 2d 1, 6-7 (Fla. 1999). The trial court properly denied this claim. In Ruiz the Supreme Court held:

The State engaged in a third line of improper comment during closing argument in the penalty phase. Prosecutor Cox urged the jurors to do their duty as citizens just as her own father had done his duty for his country in Operation Desert Storm:

> Ask Mr. Ruiz why should their love be a reflection upon him when it had no effect on him or his behavior, none. Doesn't his reckless indifference to their love, to their well-being, to their concern make his action even more despicable?
>
> And it's not easy for any of us to be here. *My father was a physician and commander in the United States Military, U.S. Navy Reserve, and about six years ago, he got orders to go to Operation Desert Storm to command a Naval ship in the Gulf. And as he prepared to close his practice down and leave, they found a shadow on his brain, and the doctors would not commit to anything, but we all knew, the family all knew that that was going to be the cancer that ultimately killed him.*
>
> *And so I begged him, don't go, your days are numbered. Stay here with your family. Go talk to the people who issued your orders, go talk to the Navy and tell them that you can't go. You've got an excuse now. You've got an excuse that no one can deny. And he said, "I can't do that. This is my duty."* And the thing about duty is that it's often difficult and it's usually unpleasant, but it's a moral and in this case a legal obligation.
>
> When you got your duty summons in this case, it was a call to duty, and no one of us is underestimating the difficulty of your task in this case, but *it's your duty to make sure that justice is meted out in this case.*
>
> *It's without any pleasure that the State asks for the ultimate sentence because for there to be justice in our society, the punishment must fit the crime,* the crime that was inflicted upon Rolando Landrian, the ultimate act of moral depravity and unmitigated evil. And justice can be harsh and demanding, but there's no room in these facts for compassion. There's no room in these facts for mercy.
>
> We ask you to consider this not because it's easy, because we all know it's very difficult, but it's the right thing and we ask that you have the courage and the moral strength to bring justice to this case.

Thank you.

> This blatant appeal to jurors' emotions was improper for a number of reasons: it personalized the prosecutor in the eyes of the jury and gained sympathy for the prosecutor and her family; it contrasted the defendant (who at that point had been convicted of murder) unfavorably with Ms. Cox's heroic and dutiful father; it put before the jury new evidence highly favorable to the prosecutor; it exempted this new evidence from admissibility requirements and from the crucible of cross-examination; and most important, it equated Ms. Cox's father's noble sacrifice for his country with the jury's moral duty to sentence Ruiz to death.

Ruiz v. State, 743 So. 2d 1, 6-7 (Fla. 1999) (emphasis in original).

In the instant case, the prosecutor's mere comment that it is not easy to ask for a death recommendation pales in comparison to the comments made in Ruiz and cannot reasonably be deemed to be indistinguishable therefrom.

Allen has also failed to show prejudice. Brooks v. State, 762 So. 2d 879 (Fla. 2000), "While this comment was improper, the comment still does not amount to fundamental error. The prosecutor did not repeat this statement during the rest of his closing arguments." Similarly, the State made this singular statement and moved on. No prejudice can be found.

Allen also alleges counsel was ineffective for failing to object where the State allegedly denigrated the testimony of Dr. Gebel and misrepresented his testimony to the jury. The State argument at issue reads as follows:

> 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 she had cognitive disorders.

(DAR, V22, R1926). The trial court properly denied this claim.

This Court has made it clear that a prosecutor may "neither denigrate mitigating evidence nor undermine the credibility of defense counsel. Prosecutors who claim in closing statements that defendants' mitigating evidence are "excuses," "make-believe," "flimsy," or "phantom" have been rebuked by this Court. See Delhall v. State, 95 So. 3d 134, 167–68 (Fla.2012); Franqui v. State, 59 So. 3d 82, 98 (Fla.2011); Brooks, 762 So. 2d at 904.

What the State did here, was successfully discredit Dr. Gebel's opinion regarding Allen's impaired executive functioning based on the actions she took in planning and executing the cover up after the murder. This isolated comment made in Allen's case falls short of those found to be inappropriate by this Court. Allen's claim that counsel was deficient for failing to object to this argument as a misstatement of the evidence is not supported by the record factually.

Furthermore, Allen fails to establish prejudice because the jury was not only instructed that what the lawyers say is not evidence, but also instructed by the State itself to "use your own judgment about what you thought about Dr. Gebel." (DAR, V22, R1923).

Allen next claims counsel was insufficient for failing to object and move for a mistrial regarding the State's characterization of the actions Appellant perpetrated against the victim as being similar to water boarding when the State presented closing arguments during the penalty phase. The trial court properly denied this claim.

Allen cites various authorities to establish what water boarding entails, and the State does not contest such. However, Allen has failed to establish deficiency in light of the fact that there was evidence adduced at trial indicating that Allen did engage in torturing the victim. The testimony of Quinten Allen described liquids being poured over her face in attempt to obtain information about Allen's missing money.

Again, the "proper exercise of closing argument is to review the evidence and to explicate those inferences which may reasonably be drawn from the evidence." Wade v. State, 41 So. 3d 857, 868 (Fla. 2010), Bertolotti v. State, 476 So. 2d 130, 134 (Fla. 1985). Attorneys are permitted wide latitude in arguing the facts and law to the jury and may draw logical inferences in doing so. Smith v. State, 7 So. 3d 473, 509 (Fla. 2009). In light of the fact that the jury was instructed that what the attorneys say is not to be considered evidence, Allen has also failed to show prejudice.

Allen alleges counsel was ineffective for not objecting to an alleged misstatement of the evidence by the State. The alleged misstatement of the evidence reads 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 a standalone. We rely on MRIs CAT scans and the neuropysch testing. Well there is no MRI. There is no CAT scan.

(DAR, V22, R1928). The trial court properly denied this claim. Dr. Wu did in fact testify that the PET scan "is not by itself a standalone diagnostic test" and that it would be "preferable to have an MRI in conjunction with a PET scan." (DAR, V22, R1856-57).

The comments made in Allen’s case fall short of those found to be inappropriate by this Court in Oyola, 158 So. 3d at 513, concluding “that the trial court improperly denigrated mental health mitigation offered by Oyola and impugned defense counsel in the statement that a life sentence “would be a reward” for Oyola's “elaborate scheme to use a mental health expert to thwart justice.” While the State’s argument did not recite Dr. Wu’s testimony verbatim, the record clearly does not support Allen’s allegation that the prosecutor denigrated the mental health mitigation presented by him.

Furthermore, Allen fails to establish prejudice because the jury was instructed that what the lawyers say is not evidence and because the alleged misstatement involved is not clear upon the fact of the record.

Allen alleges counsel rendered deficient performance in failing to object to argument that indicated that she was a bad mother when the State argued:

> 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.

(DAR, V22, R1930). The trial court properly denied this claim.

As legal support for this claim, Allen relies on Martinez v. State, 761 So. 2d 1074, 1082 (Fla. 2000). Allen contends that since she presented no testimony that she was of good character, the defense did not open the door to enable the prosecution to present evidence of bad character.

However, the tragic state of Allen's children was introduced by the Appellant and not the State. The evidence that two of her children were in prison and the third one was in the grandmother's custody was testified to by Ms. Myrtle Hudson. She indicated that, "One of her daughters stay with her grandmother. One of them just got five years in prison. And her son just got eleven years in prison." She testified that they all had "learning disability and behavior disability" and had been in special classes at school. (DAR, V22, R1888-89).

The State's arguments that are criticized by Allen constitute fair argument based on the evidence presented. Trial counsel cannot be deemed ineffective for failing to object to a fair comment which is based on the evidence presented during the trial. Spann v. State, 985 So. 2d 1059, 1068 (Fla. 2008) (citing Mungin v. State, 932 So. 2d 986, 997 (Fla. 2006)).

Allen claims counsel was deficient for failing to object when the prosecutor allegedly "added the authority of his office" to the prosecutor's argument by indicating that he wrote down notes when arguing in closing: "But here is [sic] some things. First of all, what I wrote down was [Dr. Gebel] said, no major brain issues with the Defendant. No major brain issues with the Defendant. Okay?" (DAR, V22, R1923). She also contends that said argument misstated the evidence. The trial court properly denied this claim.

Allen cites to United States v. Garza, 608 F2.2d 659, 666 (5th Cir. 1979) in comparison to her case. This case is clearly distinguishable from Garza. In Garza, during rebuttal argument, the prosecutor responded:

> And he (defense counsel) said something else that kind of irritated me at one point. He said that he hoped an innocent man was not found guilty. I have been doing this kind of work for a long time. He's a defense lawyer, and I told you while ago that I thought Rudy Gonzales over here was a professional man. And I think these Drug Enforcement Administration people are professionals. And I think the record of being able to move from one job to another job and staying in that work as long as they have indicates that they are professionals. He talks about motive. I think their motives are pure as the driven snow. Their motives are to get out and make this world a better place to live in. A better place to live in, and I'll tell you they don't have to fabricate to do it because there is enough wrong going on and there is enough corruption going on out there that if you just go out and walk around the streets and know what you are looking at and looking for you just bump right into it. You don't have to frame anybody.
>
> And, ladies and gentlemen, if I thought that I had ever framed an innocent man and sent him to the penitentiary, I would quit. Now, I resent the innuendoes that I would stand up here and try to send an innocent man to the penitentiary, and

> that's what it was. I resent that because it's simply not true because, believe you me, there is presently enough work to do without fooling around with innocent people. Plenty enough. All over the place.

United States v. Garza, 608 F2.2d 659, 666 (5th Cir. 1979).

The prosecutor in Allen's case mentioned in passing that he wrote down notes. The prosecutor in Garza rendered a full speech riddled with improper and demeaning comments. In the instant case, the prosecutor's comment cannot reasonably be deemed to be indistinguishable therefrom. Allen fails to show deficiency by trial counsel in failing to object to these remarks.

Furthermore, Allen fails to show prejudice as well. The jury was not only instructed that what the lawyers say is not evidence, but also instructed by the State itself just prior to this argument being made that the jury should "use your own judgment about what you thought about Dr. Gebel." (DAR, V22, R1923).

Allen also erroneously contends that said argument misstated the evidence concerning Dr. Gebel's testimony about brain damage. However, Dr. Gebel testified he did not know if she had any structural brain damage as no MRI had been done. (DAR, V21, R1757). He testified that it did not seem like she "has any major brain injury in terms of weakness in an arm or leg or anything on those terms. He testified that her mental status was questionable, but he noted she was hesitant to cooperate with the testing. (DAR, V21, R1745). While the prosecutor's statement may not have quoted

Dr. Gebel's remarks verbatim, it is unlikely to have had an effect on her mental health mitigation.

Lastly, Allen alleges counsel was ineffective in failing to object and move for a mistrial on the basis that the cumulative effect denied the her a fair trial. The trial court properly denied this claim. Since the subclaims are insufficient for ground previously raised herein, the State respectfully contends there are no errors of counsel to accumulate.

In summation, in order to require a new trial based on allegedly improper prosecutorial comments, the prosecutor's comments must either deprive the defendant of a fair and impartial trial, materially contribute to the conviction, be so harmful or fundamentally tainted as to require a new trial, or be so inflammatory that they might have influenced the jury to reach a more severe verdict than that it would have otherwise. Anderson v. State, 863 So. 2d 169, 187 (Fla. 2003).

In this case, as in Franqui v. State, 59 So. 3d 82, 97 (Fla. 2011), Allen failed to establish how the alleged instances of ineffective assistance of counsel prejudiced her — mere conclusory allegations are not sufficient. Here, as in Franqui, the majority of the prosecutorial arguments alleged to be improper were fair comment on the evidence or inferences arising from the evidence, or proper response to the arguments of defense counsel.

Accordingly, this claim should be rejected.

ISSUE V

WHETHER DEFENSE COUNSEL'S STRATEGIC DECISION NOT TO CALL HIS OWN FORENSIC EXPERT CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL

Allen claims that once trial counsel became aware that the State intended to call Dr. Qaiser as a witness instead of the original medical examiner, that trial counsel was ineffective by failing to present available expert testimony to corroborate the findings of Dr. Whitmore. The trial court properly denied this holding.

> The Court finds that there is no prejudice, as there is no reasonable probability that more thorough preparation by trial counsel by consultation with, or presentation of an expert, would have made any difference in the outcome. \'Strategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct." Peterson v. State, 154 So. 3d 275 (Fla. 2014). Confidence in the outcome is not undermined.

(V1, R2003-04).

Allen argues that trial counsel should have hired a forensic expert, rather than rely on the cross-examination of Dr. Qaiser. "Strickland does not enact Newton's third law for the presentation of evidence, requiring for every prosecution expert an equal and opposite expert from the defense. In many instances cross-examination will be sufficient to expose defects in an expert's presentation." Anderson v. State, 223 So. 3d 1133, 1146 (Fla. 2017), citing Harrington v. Richter, 562 U.S. 86, 111, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011); "[t]here is no reasonable probability that re-presenting virtually the same evidence through other witnesses would have altered the outcome in

any manner." Atwater v. State, 788 So. 2d 223, 234 (Fla. 2001). This Court has stated that "mere disagreement by a subsequent counsel with a strategic decision of a predecessor does not result in a showing of deficient performance". See Occhicone v. State, 768 So. 2d 1037, 1048 (Fla. 2000). "Differing, yet reasonable trial strategy comes in various forms. One example is trial counsel's decision to not call certain witnesses to testify". See Johnston v. State, 63 So. 3d 730, 741 (Fla. 2011).

The evidence Allen argues should have been presented by an expert witness was presented to the jury through trial counsel's cross-examination of Dr. Qaiser.

From the onset, trial counsel established through effective cross-examination who Dr. Whitmore was, his relationship to the case and his relationship to Dr. Qaiser. The jury knew that Dr. Whitmore had previously been found to be an expert witness as a forensic pathologist, he had been Dr. Qaiser's boss, and that Dr. Whitmore was the medical examiner who actually performed the autopsy, which is significant considering the fact that Dr. Qaiser was only able to view photographs of the victims.

This Court has explained that, in deciding whether trial counsel was deficient for failing to call an expert to rebut the State's expert, "a number of factors should be considered[:]"

> First among these are the attorney's reasons for performing in an allegedly deficient manner, including consideration of the attorney's tactical decisions. See State v. Bolender, 503 So. 2d 1247, 1250 (Fla. 1987); Lightbourne v. State, 471 So. 2d 27, 28 (Fla. 1985). A second factor is whether cross-examination of the State's expert brings out the expert's weaknesses and whether those weaknesses

> are argued to the jury. Card v. Dugger, 911 F.2d 1494 (11th Cir. 1990). See Rose v. State, 617 So. 2d 291, 297 (Fla. 1993)[.] The final factor is whether a defendant can show that an expert was available at the time of trial to rebut the State's expert. See Elledge v. Dugger, 823 F.2d 1439, 1446 (11th Cir. 1987).

State v. Riechmann, 777 So. 2d 342, 354 (Fla. 2000).

Trial counsel's strategy was to get in Dr. Whitmore's report and he felt he accomplished that through the cross-examination of Dr. Qaiser. (V1, R246). From the onset, trial counsel made the existence of Dr. Whitmore and his initial report known. His questioning of Dr. Qaiser informed the jury that Dr. Whitmore made his findings over five years prior to the trial taking place, whereas Dr. Qaiser had only been brought in on the case within a few months of trial to review the autopsy. (DAR, V19, R1469). They were aware that Dr. Qaiser never saw the victim's body nor did he perform the autopsy. (V1, R2855). Trial counsel used those distinctions to infer to the jury that Dr. Whitmore's findings were more reliable than Dr. Qaiser. Trial counsel cross-examined Dr. Qaiser extensively with Dr. Whitmore's report and felt that he did not need any other expert to come in and say the same thing Dr. Whitmore said. (V1, R2874-75).

While defense expert Dr. Spitz concluded that there were no ligature marks on the victim, he also admitted that he could not exclude ligature – that it was within the range of possibility. (V1, R3323). He testified that although the body didn't show the indicia on the ligature strangulation, that doesn't mean that it is completely and entirely off the table. (V1, R3324). He testified that a medical examiner can miss something

that is pretty patent, especially in a decomposed body. (V1, R3324). Dr. Spitz did not completely discredit Dr. Qaiser's findings as scientific impossibilities, but instead agreed they were possible. He even agreed that there could have been a petechial hemorrhage to the victim's left eye. (V1, R3328). He concluded that he and Dr. Qaiser "basically have a difference of opinion." (V1, R3324). As this Court has stated, "credibility determinations by the trial court are entitled to deference on appeal". Stephens v. State, 748 So. 2d 1028, 1034 (Fla. 1999). It is also important to note that Dr. Spitz has been found not to be credible in criminal postconviction proceedings on two occasions. (V1, R3278).

Furthermore, there is no prejudice, as everything defense expert Dr. Spitz testified to was brought out on cross-examination of Dr. Qaiser through Dr. Whitmore's autopsy report. (V1, R3337-38). Allen's case is similar to Abdool v. State, 220 So. 3d 1106 (Fla. 2017) , which held, "because the expert Abdool faults trial counsel for failing to consult and retain actually provided information that is consistent with the testimony presented by the State's arson expert, there is no prejudice."; See Henry v. State, 948 So. 2d 609, 621 (Fla. 2000) ("Strickland requires defendants to show '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.'") (quoting Strickland, 466 U.S. at 694, 104 S.Ct. 2052). Trial counsel had elicited testimony that the doctor

who performed the autopsy determined that cocaine intoxication was a cause of death and that the victim's neck was asymmetrical and atraumatic with no markings from a ligature.

Dr. Spitz's testimony does not undermine a finding of heinous, atrocious and cruel, considering the horrific facts of the case. The HAC aggravator is proper ‘‘only in torturous murders—those that evince extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another.’’ Guzman v. State, 721 So. 2d 1155, 1159 (Fla.1998) (citing Kearse v. State, 662 So. 2d 677 (Fla.1995)).

This Court has already found that the State presented sufficient evidence to establish the HAC aggravator, even absent the exact number of blows to her body or whether she felt pain in the 10, 15 or 20 seconds before she may have lost consciousness. The victim was held captive in Allen’s home and begged for her life. Allen tortured the victim, beating her and pouring liquids over her face. She then strangled the victim while the victim screamed that she was going to wet herself. The victim was shaking and moving around for about three minutes after the belt was placed around her neck.

Accordingly, no relief is warranted and this Court should affirm the trial court’s order denying post-conviction relief.

ISSUE VI

WHETHER COUNSEL WAS INEFFECTIVE IN ELICITING TESTIMONY FROM QUINTIN ALLEN THAT ALLEN POURED MULTIPLE CHEMICALS ON THE VICTIM

Allen first argues that trial counsel went too far in his impeachment of Quentin Allen by eliciting testimony from him that Allen poured chemicals in the victim's eyes and mouth, rather than "on" the victim. Allen also argues that counsel was ineffective by eliciting testimony on re-cross that there were multiple substances when Quentin had stated he could only identify alcohol during his re-direct. The trial court properly denied this claim.

Allen claims that the majority of counsel's cross-examination of Quintin was more damaging than what Quintin and the State had already put in front of the jury. Generally, Allen argues that trial counsel should not have elicited testimony regarding the type of chemicals and where they were poured.

The totality of Quintin's testimony about the kind of substances poured on the victim waivered throughout the course of his trial testimony. Quintin stated on numerous occasions that he did not recall or ever really know the identity of the various liquids poured on the victim (DAR, V15, 905, 906; V16, R1036-44) and his statement to police made two days after the murder was just as uncertain as his testimony during trial. Trial counsel used this, as well as multiple other statements, to impeach Quintin's testimony and show that he could not be believed. (V1, R2869).

"The proper purposes of cross-examination are: (1) to weaken, test, or demonstrate the impossibility of the testimony of the witness on direct examination and, (2) to impeach the credibility of the witness, which may involve, among other things, showing his possible interest in the outcome of the case." Steinhorst v. State, 412 So. 2d 332 (Fla. 1982).

Counsel stated that the major reason to impeach someone was to show inconsistencies in their testimony. (V1, R2601). During the State's direct examination, Quintin testified that Allen had poured bleach, alcohol, spritz, and nail polish remover onto the victim's face. He explained that Allen brought all the liquids out at one time and poured them all out together as well. (DAR, V15, R906-9070). During cross-examination, trial counsel impeached Quintin's testimony by referencing his deposition in which he stated that Allen had poured the substances out one after the other as opposed to all at once. Trial counsel was able to get Quintin to state that he did not remember which statement was correct. Quentin later committed to the answer at deposition. (DAR, V15, R1042, 1044). This was contrary to his direct testimony.

As for the liquids and where they were poured, during direct examination, Quintin testified that the victim was laying on her back and moving her head side to side and using her hands to try to refrain from the liquids getting into her eyes or mouth. (DAR, V15, R906). During cross-examination, trial counsel impeached this testimony once again referring to Quintin's deposition in which he stated that the

substances were poured in the victim's eyes and mouth. (DAR, V15, R1043). Significantly, by soliciting that information, trial counsel was able to later highlight the impossibility of that statement during closing argument. (DAR, V20, R1598).

On direct examination, Quintin testified that he had held the victim's arms and legs while the liquids were being poured on her. During cross-examination, trial counsel once again impeached Quintin with his statement to police, in which he stated that the victim's legs were tied up and he stood by her. Trial counsel also impeached Quintin with his deposition in which he stated that the victim was never restrained while the substances were being poured onto her face. Quintin conceded that none of the statements he made agree, and ultimately committed to the statement he made to police. This is contrary to his direct testimony. (DAR, V16, R1054-55).

On direct examination, Quintin testified that he had stopped to get a dolly on the way back to Allen's house. (DAR, V15, R937). During cross-examination, trial counsel impeached Quintin with his statement to police, in which he stated that the victim was already on the dolly when he got to Allen's house. Additionally, counsel was also able to impeach Quinten on the type of belt that was first put around the victim's neck, where the victim was punched and who got the bedsheet. (DAR, V16, R1035-36,1055-57, 1059).

Allen cannot demonstrate deficiency. Trial counsel presented a competent and effective cross-examination. Counsel was able to get Quintin to agree that what he had

testified to was not true. (DAR, V16, R1066). Counsel was able to argue during closing arguments that Quintin did not have an accurate memory and was not to be believed. (DAR, V20, R1592, 1598).

Furthermore, Allen cannot demonstrate prejudice where there was extensive evidence supporting the HAC finding that was unrelated to whether or not bleach had been poured on the victim. When this Court referenced the torture Wright received from Allen, the pouring of bleach was only one portion of the cruelty the victim received at the hands of the Appellant during the Court's analysis of the HAC aggravator.

> Wright was terrorized over a substantial period of time and she was aware of what was happening to her. Testimony reflects that Wright begged to be let go. When she tried to leave, Allen punched her in the head; Wright fell on the ground, and Allen continued punching her. According to Quintin, he was holding Wright down while Allen poured chemicals onto Wright's face. Allen beat Wright with belts while Wright's legs were tied. Allen then strangled Wright with a belt. Quintin testified that Wright was terrified and screamed for Allen to stop because she was going to wet herself. Wright was shaking and moving around for about three minutes after the belt was placed around her neck.

Allen, 137 So. 3d at 963.

Accordingly, relief was properly denied below.

ISSUE VII

WHETHER TRIAL COUNSEL WAS DEFICIENT IN HIS IMPEACHMENT OF QUENTIN ALLEN

Allen now argues that trial counsel did not go far enough in his impeachment of Quintin Allen. In this instance, the deficient performance was in failing to impeach Quintin's testimony on direct examination regarding whether or not Allen poured bleach onto the victim. The trial court properly denied this claim.

The statement Allen identifies as impeachment evidence reads as follows:

> BOYER: What type of chemicals was it?
>
> QUINTIN: I wasn't, I couldn't—all I can remember alcohol **. . .** 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, she got boxes of bleach. But I don't, she ain't have no bleach bottle less she had done poured it in a hair products bottle.
>
> BOYER: Okay. So its hair products stuff that she was pouring on her?
>
> QUINTIN: Yeah, alcohol and stuff like that.

(DAR, V7, R1113-14).

From a plain reading of Quintin's statement, it is clear his interview with police did not constitute a precise or clearly inconsistent statement. In fact, the relevant factual assertion pointed to by Allen was prefaced with statements of uncertainty such as "I wasn't, I couldn't – all I can remember." Even the conclusion of this line of questioning made little sense as Boyer asked if it was hair products that was poured on the victim and Quintin responded, "Yeah, alcohol and stuff like that" - alcohol is not a product commonly associated with hair care.

Under the circumstances, this statement would not have been compelling impeachment evidence even if it had been used by Allen to challenge Quintin's testimony that bleach was poured on the victim. The statement included the declarant's assertion that he had difficulty remembering what was poured on the victim at the time he made the statement, he specifically recalled it was "a whole bunch of stuff" and never clearly eliminated bleach as being a possibility.

Furthermore, Allen cannot claim she was prejudiced by this alleged deficiency. Counsel successfully impeached Quintin's testimony regarding the bleach when cross examining Dr. Qaiser as follows:

> MR. BANKOWITZ: Was there anything in the report to indicate that bleach or any other caustic substances were poured down the victim's throat?
>
> DR. QAISER: As far as I know in the report – from the report, I did not see that.
> MR. BANKOWITZ: Thank you, Doctor.

(DAR, V19, R1487).

Counsel refuted Quintin's testimony about bleach being poured on the victim by establishing that the more definitive medical forensic evidence did not find any evidence of bleach having been poured on the victim. Accordingly, no relief is warranted and this Court should affirm the trial court's order denying post-conviction relief.

ISSUE VIII

WHETHER TRIAL COUNSEL WAS INEFFECTIVE BY FAILING TO OBJECT TO DR. QUAISER'S TESTIMONY THAT UNCONSCIOUS PEOPLE CAN FEEL PAIN

Allen contends counsel was ineffective in failing to object to expert testimony as to whether the victim could have felt pain while unconscious. The trial court found neither deficient performance or resulting prejudice from counsel's failure to object to Dr. Qaiser's testimony that unconscious people can feel pain. The trial court properly denied this claim, holding that Attorney Bankowitz's failure to object was not unreasonable under prevailing professional norms, and finding that there is was no prejudice. (V1, R1970-71).

Allen admits that trial counsel established on cross-examination that Dr. Qaiser could not testify within a reasonable degree of medical probability that the victim felt pain while unconscious.

Any testimony that an unconscious person could feel pain was discredited. Thus, there was no basis for an objection and no prejudice. Trial counsel cannot be ineffective for failing to make meritless arguments. See Lukehart v. State, 70 So. 3d 503, 519 (Fla. 2011); Raleigh v. State, 932 So. 2d 1054, 1064 (Fla.2006) ("[C]ounsel cannot be deemed deficient for failing to make a meritless objection.").

Furthermore, even if the testimony from Dr. Qaiser was impermissible, this claim is still without merit because Allen has not met the second of Strickland's two required prongs: prejudice. Allen cannot demonstrate prejudice where there was extensive evidence supporting the HAC finding that was unrelated to whether or not

the victim experienced pain after being rendered unconscious. Accordingly, relief was properly denied below.

This claim also appears to be an inappropriate attempt to use a different argument to relitigate the same issue that was already decided by this Court on direct appeal and is therefore also procedurally barred. See Willacy v. State, 969 So. 2d 131 (Fla. 2007). As this Court held on direct appeal:

> Allen contends that Wright could have lost consciousness upon the initial blow to her head and therefore been unaware of her impending death, asserting that there were no defensive wounds. This assertion is negated by Quintin's testimony that Wright was conscious and continually pleaded to be released and that upon being strangled, Wright pleaded for Allen to stop, stating that she might wet her pants. While Allen points to the medical examiner's testimony that he could not tell when Wright lost consciousness or how much pain she suffered before she died, Quintin's eyewitness testimony that Wright was conscious and pleading to be let go supports a finding that she was conscious and aware of her impending death. Furthermore, we have often upheld a finding of HAC when the victim has defensive wounds, but the mere absence of defensive wounds alone does not in and of itself preclude a finding of HAC. See, e.g., Russ v. State, 73 So. 3d 178, 197 (Fla. 2011) ("[B]ased on the evidence, common sense indicates that the absence of defensive wounds on [the victim's] body resulted from either her cooperation or being bound prior to being murdered—it does not, as [the defendant] contends, preclude a finding of HAC."); Zommer v. State, 31 So. 3d 733, 747 (Fla. 2010) ("[T]he lack of defensive wounds on the body of the victim has not precluded this Court from holding the HAC aggravator applicable."). Accordingly, the trial court did not err in finding the HAC aggravator.

Allen v. State, 137 So. 3d at 963-64.

ISSUE IX

WHETHER THE STATE COMMITTED A GIGLIO VIOLATION

Allen claims the State elicited false testimony during Hudson's cross-examination regarding convictions for the sale of drugs in violation of Giglio and the Fourteenth Amendment. She contends that the prosecutor knowingly solicited false testimony from Hudson by asking, "You were aware that she was convicted several times for selling drugs, right?" (DAR, V5, R881; V22, R1891-92). This claim should have been raised on direct appeal and is accordingly procedurally barred.

This Court has consistently held that a claim that could have been or was raised on direct appeal is procedurally barred in postconviction proceedings. Miller v. State, 926 So. 2d 1243, 1260 (Fla. 2006); Robinson v. State, 913 So. 2d 514 (Fla. 2005). Further, it is inappropriate to use a different argument to relitigate the same issue. Willacy v. State, 967 So. 2d 131 (Fla. 2007). A procedurally barred claim cannot be considered under the guise of ineffective assistance of counsel. Freeman v. State, 761 So. 2d 1055, 1067 (Fla. 2000) (holding that claims that could have been raised on direct appeal cannot be relitigated under the guise of ineffective assistance of counsel).

"The defendant must demonstrate that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome' of the trial." Reynolds v. State, 99 So. 3d 459, 471 (Fla. 2012) (citing Strickland).

The trial court denied this claim, holding that the presentation of this evidence at trial was harmless beyond a reasonable doubt. (V1, R1194-95). The trial court was correct in holding that there was no reasonable likelihood that the jury hearing Allen had prior drug convictions impacted on the sentencing decision. The overwhelming evidence of torture would have had a far stronger impact in the jury's consideration of the death penalty. No deficiency or prejudice can be proven by Allen.

ISSUE X

WHETHER TRIAL COUNSEL WAS INEFFECTIVE WHEN HE ASKED MYRTLE HUDSON IF ALLEN BECAME A PART OF THE CULTURE OF "DRUGS, THUGS, AND VIOLENCE"?

Allen claims that counsel's presentation of Myrtle Hudson's testimony regarding drugs and guns and violence was ineffective assistance of counsel. The trial court found that this claim was refuted by the record and that Allen failed to show prejudice.

Allen maintains that she was prejudiced by the ineffectiveness of her trial counsel at the penalty phase because of the manner in which she was portrayed.

Prejudice, in the context of penalty phase errors, is shown where, absent the errors, there is a reasonable probability that the balance of aggravating and mitigating circumstances would have been different or the deficiencies substantially impair confidence in the outcome of the proceedings." Jones v. State, 998 So. 2d 573, 584-85 (Fla. 2008) (quoting Gaskin v. State, 737 So. 2d 509, 516 n. 14 (Fla.1999)).

The fact of the matter was that Allen did grow up around violence and drugs and that counsel was attempting to elicit information regarding Allen's upbringing so that the jury could learn the challenges she faced as a child. As counsel testified to during the hearing, "it was brought up to show the atmosphere in which she lived, and that it had an effect on her." (V1, R2828). While trial counsel did not use the phrase, "drugs, thugs and violence," he was attempting to provide mitigation evidence to the jury to "help them understand her life and how she grew up." (V1, R2832). Accordingly, the trial court listed as a nonstatutory mitigator that the "defendant grew up on a neighborhood where there were acts of violence and illegal drugs." Allen v. State, 137 So. 3d 946, 955 (Fla. 2013). Allen fails to establish deficient performance by trial counsel.

Furthermore, there is no prejudice. There is no reasonable probability that the jury hearing the phrase, "drugs, thugs, and violence" had any impact on the decision to sentence her to death. In the instant case, the trial court found two aggravators both of which were assigned great weight.

The overwhelming evidence that Allen tortured the victim continuously by hitting her in the head, pouring chemicals in her face, beating her with belts and finally strangling her with one of the belts would have had a much greater impact and lasting impression on the minds of the jurors, than the phrase "thugs." The trial court properly denied this claim.

ISSUE XI

WHETHER TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO CHALLENGE JUROR CARLL FOR CAUSE OR STRIKE HER PEREMPTORILY

Allen claims Juror Carll was biased against her because of her belief that a person should be recommended for the death penalty if the person specifically participated in the act of killing a murder victim, as opposed to an accomplice to a murder who did not perform the act of killing. However, Juror Carll's responses to trial counsel evidenced her ability to listen to the evidence and follow the law.

The trial court addressed trial counsel's testimony, as well as the specific allegations as to Juror Carll, and determined that Allen failed to show deficient performance and prejudice under Strickland.

For jury selection issues, for Strickland's prejudice prong, Allen bears the burden of proving actual bias on the part of the juror. See Carratelli v. State, 961 So. 2d 312 (Fla. 2007) (e.g., Strickland post-conviction requirement the defendant show "one who was actually biased against the defendant sat as a juror").

This Court has generally held that in order to amount to actual bias, the juror must indicate something more than mere doubt about that juror's impartiality. See, e.g., Guardado v. State, 176 So. 3d 886 (Fla. 2015) (holding that the record did not show a juror had actual bias even though the juror stated that he was "strongly" in favor of the death penalty, knew three of the police officers who worked on the case, and had family members who knew the victim personally).

Allen claims Juror Carll was biased because she was a proponent of the death penalty and believed that a person should be recommended for the death penalty if the person specifically participated in the act of killing a murder victim-as opposed to an accomplice to a murder who did not perform the act of killing.

"Where a prospective juror is challenged for cause on the basis of his or her views on capital punishment, the standard that a trial court must apply in determining juror competency is whether those views would prevent or substantially impair the performance of a juror's duties in accordance with the court's instructions and the juror's oath." Id. (citing Wainwright v. Witt, 469 U.S. 412, 424, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985)).

Although Juror Carll initially expressed support in the death penalty, a review of her statements during trial counsel's examination contradict any evidence that she was could not be fair, listen to the law, and follow the law. When asked by trial counsel if she would listen to the aggravating circumstances and mitigating circumstances, Juror Carll replied she "absolutely" would listen to aggravating and mitigating circumstances and believed the death penalty should be used in certain, but not all circumstances where someone was a direct cause of someone's death. (DAR, V11, R249-50). Likewise, in Owen v. State, this Court found that "there was no evidence of actual bias in the record where a juror stated that she "[p]robably" would vote for the death penalty in the circumstance of multiple victims but ultimately stated that mitigating

evidence such as testimony about the defendant's mental health could influence her to recommend a life sentence)", Owen v. State, 986 So. 2d 534, 550 (Fla. 2008). When the totality of all of Juror Carll's statements are considered, evidence of her bias against Appellant is not "plain on the face of the record."

Comparably, Allen's claim that Juror 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" is unfounded. A prospective juror is not required to renounce their opinion stated in favor of the death penalty to be qualified to sit as a juror in a capital case. On the contrary, jurors who are unwilling to impose a death sentence under any circumstances are challengeable for cause by the State. In essence, there must be some willingness to impose the death penalty on some level in order to sit on a capital case. See Morrison v. State, 818 So. 2d 432, 442 (Fla. 2002) (affirming excusal of juror who stated he was not sure he could follow the law and impose the death penalty but expressed a belief in capital punishment in the limited circumstance when a person "was in my home, [and] killed my children").

Juror Carll's statement that she was a "flexible" person who was "absolutely" willing to listen to the aggravating and mitigating circumstances demonstrated her competence to serve on Allen's jury. As this Court has stated, "In a death penalty case, a juror is only unqualified based on his or her views on capital punishment, if he or she expresses an unyielding conviction and rigidity toward the death penalty." Barnhill v.

State, 834 So. 2d at 836,844 (Fla. 2002). Thus, where "a prospective juror initially states that one who murders should be executed but later states that he can follow the law upon court instruction, the trial court does not abuse its discretion in denying a cause challenge." Conde v. State, 860 So. 2d 930, 939 (Fla. 2003). Trial counsel made every effort to ensure that Juror Carll could be impartial, while still maintaining her stance on the death penalty.

Allen's claim that an impartial juror would have been seated who could have voted for life, had Juror Carll been struck, is conclusory. To the extent Allen suggests that peremptory challenges should have been used, she made no attempt below to allege which challenged jurors were better suited to serve than those who were selected or that there was a likelihood that the outcome of the case would have been different. See Phillips v. State, 894 So. 2d 28 (Fla. 2005) (Failure to exercise peremptory challenges is not a right of "constitutional dimension," . . . but "are a means of assuring an impartial jury." Phillips' claim fails to demonstrate that the jury was not impartial.); Jones v. State, 998 So. 2d 573, 584 (Fla. 2008) ("A mere conclusory allegation that the outcome would have been different is insufficient to state a claim of prejudice under Strickland; the defendant must demonstrate how, if counsel had acted otherwise, a reasonable probability exists that the outcome would have been different.")

Trial counsel has been practicing criminal law for 43 years. (V1, R2809). He testified he considers a number of factors in jury selection, including body language

and the alertness of a juror. When questioned regarding his thoughts on Juror Carll, he testified that he felt he had sufficiently rehabilitated her. He decided to keep her on the jury, especially considering other jury panel members that were further down the line. (V1, R2866-67).

The jury selection process is extremely complex and time consuming. Jury selection is a multifaceted process that includes an ongoing evaluation of not only what the prospective juror says but also other jurors in the pool. It is an evaluation of their demeanor and attention span. Trial counsels' decision to keep Juror Carll was a matter of trial strategy. See Brown v. State, 846 So. 2d 1114, 1125 (Fla. 2003) ("Again, we emphasize that this Court will not second-guess counsel's strategic decisions on collateral attack.").

The trial court properly denied Allen's claim of ineffective assistance of counsel during jury selection. Juror Carll did not possess an unyielding conviction in favor of death of the penalty. When questioned by trial counsel, she indicated that she would consider both the aggravating factors and mitigating factors in making her recommendation. Accordingly, no relief is warranted and this Court should affirm the trial court's order denying post-conviction relief.

CONCLUSION

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Answer Brief has been transmitted to this Court through the Florida Courts E-Filing Portal, which will send a notice of electronic filing and a conformed copy to Raheela Ahmed, Assistant CCRC-Middle, ahmed@ccmr.state.fl.us; Maria Perinetti, Assistant CCRC-Middle, perinetti@ccmr.state.fl.us; Lisa Bort, Assistant CCRC-Middle, bort@ccmr.state.fl.us, and support@ccmr.state.fl.us; Capital Collateral Regional Counsel; 12973 N. Telecom Parkway, Temple Terrace, FL 33637 on this 5th day of April 2018.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this reply is 14-point Times New Roman.

Respectfully submitted,

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