No. SC17-1623

IN THE

Supreme Court of Florida

MARGARET A. ALLEN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

REPLY BRIEF OF THE APPELLANT

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PRELIMINARY STATEMENT

Appellant, Margaret A. Allen ("Allen") relies on the arguments presented in the Initial Brief of the Appellant ("Initial Brief"), and offers the following reply to the Answer Brief of Appellee dated April 5, 2018 ("Answer Brief"). While Allen will not reply to every issue and argument raised by Appellee, she expressly does not abandon the issues not specifically replied to herein.

Page references to the record on appeal are designated with R[volume number]/[page number]. Page references to the postconviction record on appeal are designated with P[page number]. Page references to the supplemental postconviction record on appeal are designated with PS[page number]. Page references to the Initial Brief are designated with IB[page number]. Page references to the Answer Brief are designated with AB[page number]. All other references will be self-explanatory or otherwise explained. All emphasis is supplied unless otherwise noted.

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ARGUMENT AND CITATIONS OF AUTHORITY

REPLY TO ARGUMENT I

Appellee argues that the *Hurst*[1] error in Allen's case is harmless. AB44-47. However, Allen asserts that *Hurst* errors should be deemed "structural" and not subject to harmless error analysis. *See Arizona v. Fulminante*, 499 U.S. 279, 307-09 (1991). The Sixth Amendment error identified in *Hurst*—stripping the capital jury of its constitutional fact-finding role—represents a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Id.* at 310. *Hurst* errors "infect the entire trial process," and "deprive defendants of basic protections without which a [capital] trial cannot reliably serve its function as a vehicle for determination" of whether the elements necessary for a death sentence exist. *Brecht v. Abrahamson*, 507 U.S. 619, 630 (1993); *Neder v. United States*, 527 U.S. 1, 8-9 (1999). The effect of failing to require a jury finding as to whether sufficient aggravation exists, and if so, whether it is not outweighed by the mitigation, cannot be quantified. There are no means of quantifying ***any*** of Allen's jury's findings in the penalty phase absent the number of votes for a non-binding death recommendation, which was not subject to a reasonable doubt standard. *See* § 921.141, Fla. Stat. (2010). Although the jury findings required by *Ring*[2] and *Hurst*

[1] *Hurst v. State*, 202 So. 3d 40 (Fla. 2016).
[2] *Ring v. Arizona*, 536 U.S. 584 (2002).

function as an additional element of the crime of death-eligible first-degree murder, harmless error cannot be assessed as set forth in *Neder* because, in a capital trial, the jury makes the findings as to the possible punishment (the "death-eligibility" element under *Ring*) separately from its guilt phase findings (the remaining elements constituting only first-degree murder). There are no findings by which a reviewing court could determine that Allen's jury actually found that there was sufficient aggravation that outweighed the mitigation, beyond a reasonable doubt. Instead, the reviewing court has to substitute its ***own*** findings for that of the jury in order to determine error, and in doing so, fails to protect the Sixth Amendment jury right for capital cases as set forth in *Ring*. Accordingly, as the constitutional error in Allen's case is structural, harmless error analysis is not possible.

Further, any reliance on the jury's recommendation in denying *Hurst* relief on harmless error grounds would contravene the Sixth Amendment in light of *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993) (emphasizing that valid harmless-error review looks "to the basis on which the jury ***actually rested*** its verdict."). In Allen's case, there was no constitutionally valid jury verdict containing the findings of fact required to impose a death sentence. *Sullivan* requires that, before a reviewing court may apply harmless error analysis, there must be a valid jury verdict, grounded in the proof beyond-a-reasonable-doubt standard. The logic of *Sullivan* applies here:

> The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but

> whether the guilty verdict actually rendered in this trial was surely unattributable to the error. That must be so, because to hypothesize a guilty verdict that was never in fact rendered—no matter how inescapable the findings to support that verdict might be—would violate the jury-trial guarantee.

Id. at 279-80. Accordingly, any reliance on Allen's advisory jury's recommendation would constitute a violation of the Sixth Amendment.

In addition, the Due Process Clause of the Fourteenth Amendment requires that the State must prove each element beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970). This requirement attaches to any factual finding necessitated by the Sixth Amendment. "It would not satisfy the Sixth Amendment to have a jury determine that the defendant is probably guilty, and then leave it up to the judge to determine (as *Winship* requires) whether he is guilty beyond a reasonable doubt . . . . In other words, the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt." *Id.* This requirement is incorporated into the *Hurst* line of cases beginning with *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000). Therefore, any reliance upon the jury recommendation requires the underpinnings of the recommendation to be made beyond a reasonable doubt. Florida's pre-*Hurst* jury determinations, including the advisory recommendation in Allen's case, did not incorporate the beyond-a-reasonable doubt standard.

As supplemental authority for Argument I, Appellee submitted *Reynolds v. State*, an opinion where the majority of this Court appears to agree with Appellee's

contention that *Hurst* did not induce a *Caldwell*[3] error. *See* 43 Fla. L. Weekly S163 (Fla. Apr. 5, 2018); AB47-48. However, Allen's case can be distinguished because the role of her jury was undermined more than just simply being instructed using Florida Standard Jury Instruction (Criminal) 7.11. *See id*. at *10. For example, Allen's trial judge specifically told the venire, "You do understand that ***nobody*** will impose the sentence but ***me***. Although I'm going to give great weight to your recommendation, it is ***not*** controlling. ***I can fly in the face of your recommendation or I can follow your recommendation***, with some qualifications." R10/157. The State also told the venire that, "In Florida, okay, it is the judge who makes the ultimate sentencing decision in this type of case." R10/143. During voir dire, the fact that the sentencing decision was advisory or a recommendation was referenced over seventy times to the potential jurors. P1869-74. During penalty phase closing arguments, jurors were told another eighteen times that they were merely issuing a recommendation as to the sentence. R22/1911-44. Notwithstanding, Allen still maintains that the jury instructions themselves do create a constitutional error because section 921.141, Florida Statutes was deemed unconstitutional in *Hurst v. Florida*, 136 S. Ct. 616 (2016). *See Reynolds*, 43 Fla. L. Weekly S163, *16 (Pariente, J., dissenting). This Court relied on Justice O'Connor's position in *Romano v. Oklahoma*, 512 U.S. 1 (1994), to find that a *Caldwell* error only occurs when the

[3] *Caldwell v. Mississippi*, 472 U.S. 320 (1985).

remarks to the jury improperly described the role assigned to the jury by local law. *Id*. at *10. Surely, the general rule stated by Justice O'Connor presumes that the role assigned to the jury by local law is otherwise consistent with the United States Constitution. It is illogical to conclude that Justice O'Connor meant no error occurs if the remarks to the jury properly described the jury's role according to local law, even if that local law violated the federal constitution. Accurately instructing the jury on an unconstitutional law is still unconstitutional. Allen maintains that this Court's repeated treatment of these accurately instructed, yet unconstitutional, jury ***recommendations*** as "binding" and as "the necessary factual finding that *Ring* requires" is also unconstitutional. *Hurst*, 136 S. Ct. at 622.

Notwithstanding, Allen contends that she is still entitled to relief under a harmless error analysis. Appellee asserts that Allen's unanimous jury recommendation causes her *Hurst* error to be harmless. AB46. Appellee's blanket assertion is wrong because this Court has held that "a unanimous recommendation is not sufficient alone; rather, it 'begins a foundation for 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."' *Reynolds*, 43 Fla. L. Weekly S163 at *3 (quoting *King v. State*, 211 So. 3d 866, 890 (Fla. 2017)). As the U.S. Supreme Court explains, the State does not meet its burden of establishing that an error in capital sentencing is harmless merely by showing that the evidence in the

record is sufficient to support a death sentence. *See Satterwhite v. Texas*, 486 U.S. 249, 258-59 (1988). When considering harmless error, this Court must look at the totality of the evidence, both at trial and in postconviction. In Allen's case, one of the two aggravators independently found by the trial court, the capital felony was especially heinous, atrocious, or cruel ("HAC"), has been undermined. As explained in her Initial Brief, Allen contends that if trial counsel, Frank J. Bankowitz ("counsel"), was not deficient in his questioning of co-defendant Quintin Allen ("Quintin") and by failing to call an expert such as Daniel J. Spitz, M.D. ("Dr. Spitz") at trial, a finding of HAC would not have been made. IB67-91. Especially taken together with Allen's unpresented mitigation, it cannot be concluded beyond a reasonable doubt that a rational jury would unanimously find that aggravators outweigh mitigation. IB18-36. Further, if this Court finds that an aggravator was undermined, then only one sole aggravator would remain and death would be a disproportionate punishment, regardless of *Hurst*. *See Wood v. State*, 209 So. 3d 1217, 1234-39 (Fla. 2017) (finding the defendant's death sentence disproportionate where two aggravators were struck and only one aggravating factor remained).

Appellee also appears to argue that Allen would not be able to convince one juror to vote for a life sentence, which is now the prejudice standard in light of *Hurst*. AB48-49; *see also Bevel v. State*, 221 So. 3d 1168, 1179 (Fla. 2017). As this Court found that similar unpresented mitigation in *Bevel* would have swayed one juror to

vote for a life sentence and granted relief under *Strickland*,[4] the same result should follow for Allen. *See id*. at 1182. In addition, as detailed throughout the Initial Brief, Allen's counsel was deficient in a multitude of ways, plus the State committed a *Giglio*[5] violation. The cumulative effect of all of counsel's deficiencies, combined with the *Hurst* error, *Caldwell* error, and *Giglio* error present in Allen's case, made a critical difference and deprived her of a fair penalty phase. Without the presence of these deficiencies and errors, Allen maintains that she could sway the vote of at least one juror to vote for life, which would now be a binding life sentence under *Hurst*. As support for Allen's contention, in her Initial Brief, Allen referenced multiple post-*Hurst* cases that contained stronger evidence in support of the aggravating factors and still received life sentences. IB11. The trend has persisted and two more capital cases with more egregious facts than Allen's case have resulted in life sentences. In *State of Florida v. Sanel Saint-Simon*, a murder committed during the commission of aggravated child abuse, the jury only found two of four aggravators and found that the aggravators were not sufficient to warrant a possible death sentence. *See* Orange County Case No. 2014-CF-012661-A-O. Also, in *State of Florida v. Johan Rafael Quinones*, two jurors gave mercy votes on each count of first-degree murder. *See* Orange County Case No. 2014-CF-008535-A-O. Therefore,

[4] *Strickland v. Washington*, 466 U.S. 668 (1984).
[5] *Giglio v. United States*, 405 U.S. 150 (1972).

Appellee cannot demonstrate beyond a reasonable doubt that at least one juror would not have voted for life. Accordingly, Allen's death sentence must be vacated and remanded for a fair penalty phase by a properly instructed, impartial jury.

REPLY TO ARGUMENT II

Appellee erroneously asserts that the mitigation presented during postconviction regarding Allen's childhood was cumulative to the mitigation presented at Allen's trial. AB51. Notably, during Allen's penalty phase, there was ***no mention*** of the abuse Allen suffered as a child. Allen's case is distinguishable from *Troy v. State*, which Appellee cites as support, because the jury was ***not*** "aware of most aspects of the mitigation evidence that the defendant claims should have been presented." 57 So. 3d 828, 835 (Fla. 2011). In postconviction, Barbara Ann Capers ("Capers") testified that Allen's mother subjected Allen to physical abuse almost every single day of her childhood. P2639-40, 2663, 2678-79. In fact, Allen's mother beat Allen so badly that Capers had to call the police. P2640. Capers also testified about the degrading abuse that both she, Allen, and the other children in their family endured at the hand of her father (Allen's grandfather). P2648-49. Allen's grandfather would line up all of the boys and girls naked, including Capers and Allen, and go down the row beating all of the children until they bled. P2649. Myrtle Hudson ("Hudson") testified to witnessing Allen's mother hold Allen's head underwater in the bathtub. P2729-30. On a couple occasions, Hudson also witnessed

Allen's mother beat Allen with a belt until she left marks on Allen. P2730. The people who Allen was supposed to be able to trust to make her feel safe and protected as a child were the aggressors perpetrating abuse on her. The jury at Allen's trial was not privy to ***any*** of these horrific details about Allen's abusive childhood.

Appellee also claims, "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." AB52. This assertion is incorrect because the jury only heard minimal mentions of the abuse Allen suffered. For example, in Allen's penalty phase, Hudson only briefly mentioned that Allen had "been a victim of some sexual abuse." R22/1883. There was an immediate objection as to predicate and the only discussion of the sexual abuse was Hudson answering in the affirmative that she spoke with Allen, received facts about it, and knew Allen was hospitalized. R22/1884. Hudson admitted that she was not in the vicinity when it happened. R22/1884. The only other minor reference was Michael Gebel, M.D. ("Dr. Gebel") stating that medical records referenced "a possible sexual assault." R21/1745. Notably, the evidence of Allen's history of sexual assault presented during postconviction was accurate, more significant, and compelling. Allen was the victim of sexual assault on multiple occasions, perpetrated mostly by the men in her family. Capers testified that Allen was sexually molested by her brother, her grandfather,

her grandfather's brother (Uncle Roy), and another man. P2642-48. Capers observed Uncle Roy touching Allen in private places, grabbing Allen's breasts, and kissing Allen on the mouth. P2645-46. Uncle Roy also sexually abused Capers and the other children in the family, sometimes in front of Allen. P2646. The U.S. Supreme Court has repeatedly emphasized the importance of focusing the sentencer's attention to the ***particularized characteristics and past life*** of the individual defendant. *See Gregg v. Georgia*, 428 U.S. 153, 206 (1976); *see also Roberts v. Louisiana*, 428 U.S. 325, 333-34 (1976). However, due to the ineffectiveness of counsel's mitigation investigation and presentation, Allen's jury did not hear ***any*** of this poignant testimony.

The physical, emotional, and sexual abuse Allen suffered during childhood was so severe that Capers even forged Allen's mother's name to send Allen to Job Corps in an attempt to help Allen escape her abusive family. P2641, 2667-69. Sadly, upon Allen's return she fell into a string of abusive relationships and domestic violence. IB22-27; P2652. However, these events were only testified to briefly at Allen's penalty phase. Hudson briefly mentioned domestic violence incidents, but Hudson was not present during most of the instances that she described. R22/1880-83, 1886. In contrast, at the evidentiary hearing, Capers and two of Allen's children, Alvinia and Carlos Ragoo, testified to witnessing firsthand Allen being beaten up by multiple ex-boyfriends. P2652-55, 2684-85, 2770-73. Allen's ex-boyfriend, Brian

Watkins ("Watkins"), also testified in detail to the voluminous amount of violence he perpetrated on Allen.[6] P2602-12. If these individuals had testified at Allen's trial, the jury would have been able to give greater weight to this testimony because these individuals personally witnessed Allen being attacked on multiple occasions. Their testimony was not cumulative to Hudson's because their testimony detailed the pattern of abuse that Allen endured her whole life from multiple individuals, which led to her Posttraumatic Stress Disorder ("PTSD").

There is a distinction between the jury hearing limited references to domestic violence and sexual abuse versus the jury hearing that Allen lived in a constant state of violence and abuse that was inflicted on her since childhood by her family and boyfriends. Limited references do not foreclose relief. For example, in *Ellerbee v. State*, limited testimony of abuse from Ellerbee's father was presented during penalty phase, but evidentiary hearing testimony "painted a much darker picture of Ellerbee's childhood." 232 So. 3d 909, 926–27 (Fla. 2017). Just like Allen's counsel, Ellerbee's counsel also failed to explore how the abuse ***affected*** Ellerbee. *Id*. at 931-32. Accordingly, as this Court found that Ellerbee was prejudiced by these

[6] Appellee claimed that Watkins was reluctant to get involved and "may or may not have been cooperative." AB13. However, Watkins clarified that he was just unsure if the rules of the halfway house he resided in at the time would have allowed him to cooperate. P2625-26. Watkins said that if attorneys were able to come visit him, which they "more than likely" would have been, he would have spoken to them and he would have testified in court. P2626-27.

deficiencies, this Court should reach the same result for Allen. *Id*. at 932. Similarly, in *Bevel*, "the quality and depth of the postconviction evidence painted a more complete and troubling picture of Bevel's background than was presented to the jury and the trial court." 221 So. 3d at 1180. Just like in Allen's case, "Bevel offered a more compelling picture of a 'poor childhood' during the postconviction proceedings," as well as "unpresented evidence of substantial mitigation related to Bevel's childhood sexual abuse," and "mental disorders that affected Bevel's mental state at the time of the crime." *Id*. at 1182. By "reweighing the evidence in aggravation against the mitigation evidence presented during the postconviction evidentiary hearing and the penalty phase," Bevel met the prejudice prong of Strickland. *Id.* As Bevel's circumstances were similar to Allen's case and his death sentence based on a unanimous recommendation was vacated and remanded for a new penalty phase, the same result must follow for Allen. *See id*. at 1178, 1182.

Appellee also argues that counsel had valid strategic reasons for not calling Allen's daughters to testify. AB52. However, that does not explain why he did not at least ***interview*** her daughters or her son. A "strategic" decision cannot be reasonable when counsel has failed to investigate his options and make a reasonable choice between them. *See Rose v. State*, 675 So. 2d 567, 572-573 (Fla. 1996). Counsel must be found to be ineffective for failing to investigate his options by at least interviewing Allen's children in order to make a reasonable, informed decision

on whether to call them to testify. Further, if counsel was still worried about Allen's daughters taking the stand ***after*** interviewing them, he should have introduced the most important parts of their testimony, which corroborated Allen's PTSD, through a mental health expert. Notably, counsel even admitted that tactic is useful because the jury may view the expert as a more credible witness. P2829, 2834-35. In postconviction, William Russell, Ph.D. ("Dr. Russell") testified that speaking to Allen's family was crucial to finding the weighty statutory mitigator of "the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance." P3071-72. Therefore, counsel's failure to speak with Allen's family prejudiced Allen in numerous ways.

Appellee argues that the testimony of Watkins "would have done more harm than good." AB53. Again, counsel never spoke with him, so counsel did not know what type of testimony he could provide. P2615. Therefore, counsel failed to investigate his options and make a reasonable, informed choice between them. *See Rose*, 675 So. 2d at 572-573. If counsel had interviewed Watkins, he could have made an educated decision whether to have him testify. At the very least, he should have had Dr. Gebel and Joseph Wu, M.D. ("Dr. Wu") speak with Watkins because he was able to corroborate symptoms of Allen's PTSD and injuries to her head. P2599-2600, 2609-11, 2613.

In addition, Appellee incorrectly argues that Allen's diagnosis of PTSD was

not supported by the evidence. AB56-57. Appellee's main support for this contention is that Michael Gamache, Ph.D. ("Dr. Gamache") ***opined*** that Allen was not suffering from PTSD at the time of the crime and her PTSD diagnosis is unsupported. AB57; P3188, 3226. Although Appellee admits that Dr. Gamache testified that his approach was to obtain the self-report of the person he is evaluating and look for evidence of corroboration, in this case he relied solely on Allen's self-reports to other people and records the State provided to him. AB55; P3174, 3235-36, 3249. At the end of Dr. Gamache's testimony, he made it clear that his testimony ***did not express an independent opinion of an evaluation*** of Allen, but only reflected ***his opinion of whether Dr. Russell's opinion was supported by the data***.[7] P3247. Dr. Gamache went on to say that ***he had not conducted his own evaluation*** of Allen. P3247. He admitted that he did not speak with Allen or her family. P3211, 3242-43. In fact, the ***only*** person he spoke to regarding this case was the prosecutor. P3243. Dr. Gamache did not evaluate Allen, personally obtain her self-report, or speak with her family; therefore he did not have the same information that Dr. Russell obtained and used to formulate his diagnosis of Allen. Dr. Gamache's opinion of Allen is unreliable and speculative.

[7] Appellee also claims that tests administered by Dr. Russell were invalid due to errors in administration and scoring. AB33-34. However, this is irrelevant because Dr. Russell explained that he only administered the Stanford-Binet test to examine consistency with prior testing, because Allen's adaptive functioning ruled out her being intellectually disabled. P2961-62, 3028-36, 3049-61, 3205-07.

Appellee also incorrectly insinuates that Allen did not develop signs and symptoms of PTSD shortly after experiencing her childhood and young adult traumas. AB55. However, multiple witnesses testified that Allen suffered from symptoms at a young age. IB28-29. For example, Capers testified that Allen exhibited signs of anxiety and slept excessively as a teenager and in her 20s. P2655-56. In addition, Allen dated Watkins in her early 20s and he testified that Allen had emotional fits of anxiety, fidgeted, perspired excessively, and slept all day. P2599-2601, 2613, 2653.

Allen does not dispute that if counsel ***had*** conducted a reasonable investigation into mental health mitigation, it would not be rendered incompetent merely by securing the testimony of a more favorable mental health expert. AB54-55; *see also Asay v. State*, 769 So. 2d 974, 986 (Fla. 2000). However, unlike in *Asay*, Dr. Gebel was not aware of the facts that Dr. Russell found through an evaluation that Allen actually participated in, interviews with Allen's family, and the review of additional records. *See* 769 So. 2d at 986; P2930-32. Further, this Court found that the testimony of Asay's postconviction mental health experts "would not have been entitled to significant weight had it been presented in the penalty phase because neither expert was familiar with the significant facts of this crime." *Id*. This is exactly one of the major problems with Dr. Gebel's trial testimony. Unlike Dr. Russell, Dr. Gebel was not provided with significant facts of the crime. P3065-66; R21/1751-52,

1759-61. Counsel also did not facilitate a meeting between Allen's family and Dr. Gebel, a procedure that Dr. Gamache agreed is very important to corroborate a self-report or to find inconsistencies. P3234-36. As laid out in Allen's Initial Brief, a simple conversation with any of Allen's friends or family would have uncovered significant facts such as Allen's stroke, memory loss, and other corroboration of Allen's PTSD and traumatic abuse. IB22-29. Further, counsel failed to provide Dr. Gebel with adequate background materials. P2890. Due to all of these deficiencies, Allen suffered prejudice because the sentencer was unable to find statutory mental health mitigation or assign it the great weight that it was entitled.

In an attempt to argue that Allen was not prejudiced, Appellee references many cases that are distinguishable from hers. AB53, 58-59. Appellee quotes *Asay* for the proposition "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 …." 769 So. 2d at 988. Similarly, Appellee cites *Hall v. State* to support its argument that it is unlikely that additional mitigation would have been sufficient to outweigh the significant aggravators found. 212 So. 3d 1001, 1027 (Fla. 2017). These cases are distinguishable from Allen's case because she did not have substantial and compelling aggravation. Notably, in Hall's case ***four***

aggravators remained after an aggravator was stricken, and three were automatic. *See id*. at 1027, 1035. However, in Allen's case, only ***two*** aggravators were found independently by the trial court and Allen contends that one of those aggravators should be stricken, which would leave only one aggravator remaining. *See Wood*, 209 So. 3d at 1234-39 (death was a disproportionate punishment when two aggravators were stricken leaving only the sole aggravator of the capital felony was committed while defendant was engaged, or was an accomplice in the commission of, or an attempt to commit burglary and/or robbery remaining). Further, Appellee's quote from *Hodges v. State*, "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," is also misplaced. 885 So. 2d 338, 351 (Fla. 2004). To prove prejudice, Allen would only have to show that there is a sufficient probability that she could convince ***one*** juror to vote for a life sentence. *See Bevel*, 221 So. 3d at 1181-82. Allen maintains that her compelling unpresented mitigation would make a critical difference by swaying the vote of at least one juror. *See id*. at 1182. As counsel's failure to investigate and present mitigating evidence deprived Allen of a reliable penalty phase proceeding, Allen's death sentence must be vacated and remanded for a fair penalty phase.

REPLY TO ARGUMENT III

Appellee has misconstrued Allen's argument regarding the failure of counsel

to object to the State's misstatement as to the length of time it would take for a person to die from strangulation. AB62-63; IB40. Co-defendant Quintin testified that a belt was only around Wenda Wright's ("Wright") neck for ***three*** minutes. R15/914-915. The State's misrepresentation at trial that it would have only taken Wright ***three*** or four minutes to die from strangulation was prejudicial. R20/1578-79. Sajid Qaiser, M.D. ("Dr. Qaiser") admitted that if the belt was not around Wright's neck for at least ***four*** minutes, ***she could not have died from strangulation***. R18/1448. Therefore, counsel's failure to object to the foregoing misstatement prejudiced Allen by allowing the jury to believe that strangulation was the cause of Wright's death instead of what the testimony actually supports, which is that Wright did ***not*** die of strangulation. IB41-44. Accordingly, there is a reasonable probability that the jury would have found Allen not guilty or guilty of a lesser offense.

Appellee also improperly asserts, "Since the subclaims are insufficient for ground[s] previously raised herein, the State respectfully contends there are no errors of counsel to accumulate." AB64. However, allegedly improper comments are ***not*** examined in isolation. *See Card v. State*, 803 So. 2d 613, 622 (Fla. 2001). "Rather, the Court examines the totality of the errors in the closing argument and determines whether the cumulative effect of the numerous improprieties deprived the defendant of a fair" hearing. *Id*. Therefore, this Court must consider the effect of counsel failing to object to all of these improper statements in Allen's guilt phase and determine

whether there is a "reasonable probability" of a different result. *Strickland*, 466 U.S. at 695. As Allen's conviction was primarily based on the testimony of a co-defendant who took a plea deal to testify against her, without this prosecutorial misconduct there is a reasonable probability that a jury could have found her not guilty or guilty of a lesser included offense. In addition, as Allen's penalty phase jury instructions deviated from the standard jury instructions, this Court also must determine whether the cumulative effect of the improper statements made during ***both*** phases of Allen's trial undermined confidence in the outcome of her penalty phase. IB43-44.

REPLY TO ARGUMENT IV

Appellee improperly contends that Allen opened the door to questioning witnesses about Allen's nonviolent felonies. AB65-67. Appellee claims that Dr. Gebel's testimony regarding brain damage opened the door to questions about drug usage. AB66. However, the State did not simply ask Dr. Gebel if Allen used drugs. R21/1758-59. Instead, the State insinuated that Allen had been "***involved*** in drugs for a number of years." R21/1758. When Dr. Gebel testified that he did not know of Allen taking drugs and again reiterated that Allen denied using drugs, the State improperly went on to ask, "So, you don't know about her past drug convictions?" R21/1758-59. Testimony about Allen's brain damage ***did not*** open the door to the State asking Dr. Gebel about nonviolent convictions because drug-related convictions are not evidence of drug use.

Further, Appellee incorrectly argues that Hudson's testimony that she did not ever remember Allen doing drugs and to her knowledge, Allen did not use drugs, opened the door to the State asking if Hudson was aware that Allen "was convicted ***several*** times for ***selling*** drugs." AB67. First, this is inaccurate because Allen only had ***one*** conviction for selling drugs.[8] AB65. Second, a conviction for selling drugs does not mean that Allen was actually using the drugs herself. Therefore, any testimony elicited about selling drugs was not relevant to whether Allen used drugs. As Allen did not open the door to this false testimony, counsel should have objected and moved for a mistrial.

Appellee also incorrectly asserts that Allen was not prejudiced by the introduction of inadmissible nonstatutory aggravation. AB67. Allen was prejudiced by these inadmissible aggravators because she was depicted as a career criminal drug dealer whose life was not worth saving. Appellee erroneously argues that the "testimony presented in the penalty phase that Allen had been involved in a drug lifestyle was found to be a nonstatutory mitigator." AB67. However, the sentencing order titles the mitigator as "the defendant grew up in a neighborhood where there

[8] Appellee points out that Allen had multiple drug-related convictions and that any allegation that Allen did not have multiple drug convictions or felony convictions is misguided. AB65. Allen is finding fault with the fact that the State indicated in both its cross-examination of Hudson and its closing argument that Allen was convicted ***several*** times for ***selling*** drugs, which ***is*** a false statement. R22/1891-92, 1930. In fact, Appellee listed Allen's convictions on page 65 of the Answer Brief and only ***one*** conviction for selling drugs is on its list.

were acts of violence and illegal drugs" and almost exclusively is supported by testimony from the *Spencer*[9] hearing. R6/960-61. Therefore, Allen ***was*** prejudiced because her ***jury*** did not hear any explanation about her conviction for selling drugs or any information that would allow the jury to assign more weight to her mitigation or find her more deserving of a mercy vote. Instead, the jury only heard inadmissible, inflammatory aggravation that Allen spent time in prison, supposedly had multiple convictions for selling drugs, and could be a dangerous risk to a prison guard.

Appellee erroneously claims that Allen was not prejudiced because "the jury was instructed that what the attorneys say is not to be considered evidence." AB74, 75, 78. However, ***nowhere*** in Allen's penalty phase was her jury given such an instruction. Therefore, Allen was actually prejudiced by counsel's failure to object to the instances of prosecutorial misconduct ***more*** than most capital defendants whose juries were instructed that "what the attorneys say is not evidence or your instruction on the law." Fla. Std. Jury Instr. (Crim.) 2.7; *see also* Fla. Std. Jury Instr. (Crim.) 7.11 (as amended in 2017). The prejudice is further magnified because the trial judge asked, "Do you understand you can take into consideration what you have learned in the guilt phase and the penalty phase?" R22/1976. The jury responded in the affirmative and retired to deliberate shortly thereafter. R22/1976.

Further, Appellee improperly compares Allen's case to *Franqui v. State*, 59

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

So. 3d 82 (Fla. 2011). In *Franqui*, this Court found that relief was not warranted due to the extensive evidence of guilt and aggravation presented. *Id*. at 98. Franqui confessed to his crime and ***four*** aggravators were found. *Id*. at 87-88. Allen's case is distinguishable because there was no confession and only ***two*** aggravators were found independently by the trial court. Allen's case is further distinguished because she only needs to show that there is a reasonable probability of ***one*** juror voting for a life sentence, whereas at the time of Franqui's opinion, he would have had to convince ***three*** more jurors to vote for a life sentence. *See id*. at 87.

Appellee also argues that some of the statements were not prejudicial because the statements were isolated and were not repeated. AB72-73. However, for purposes of prejudice, an improper statement cannot be examined alone. In order to determine whether confidence in the outcome of Allen's penalty phase was undermined, the cumulative effect of the totality of the prosecutorial misconduct must be considered. *See Gore v. State*, 719 So. 2d 1197, 1202 (Fla. 1998). Counsel was deficient in failing to object to the wide array of improper questions and comments by the State and for failing to move for a mistrial. Allen was prejudiced because her jury considered inadmissible nonstatutory aggravators and a multitude of improper inflammatory statements against Allen in both the guilt phase and the penalty phase, which led the jury to decide that her life was not worth saving.

REPLY TO ARGUMENT V

Appellee erroneously argues that counsel's strategy to cross-examine Dr. Qaiser was sufficient and Allen would have just been "re-presenting virtually the same evidence" through another witness if counsel called an expert to testify. AB80-82. Dr. Spitz clearly refuted Dr. Qaiser's testimony at the evidentiary hearing. P3332-37. If Dr. Spitz had been called to testify at Allen's trial, he would have been able to explain the autopsy photographs to the jury and show that no ligature marks were present and that it was unlikely that Wright was strangled. P3289-90, 3302. Dr. Spitz would have explained the autopsy results and relevant concepts related to asphyxiation in terms that the jury could have easily understood. He also would have been able to rebut Dr. Qaiser's testimony that unconscious people feel the sensation of pain by explaining what the studies have ***actually*** shown and let the jury know that assertion goes against mainstream medicine. P3333-36. Accordingly, the *Reichmann* factors have been satisfied because counsel did not make a reasonable decision to solely cross-examine Dr. Qaiser and did not effectively bring out his weaknesses. *See State v. Riechmann*, 777 So. 2d 342, 354 (Fla. 2000). Therefore, counsel was ineffective in failing to call an expert such as Dr. Spitz, who was available at the time of trial, to rebut Dr. Qaiser's testimony. *See id.*; P3343.

In addition, Appellee is mistaken in its assertion that "Dr. Spitz has been found not to be credible in criminal postconviction proceedings on two occasions." AB83.

This statement is further misleading because Appellee cites to where the State was only questioning Dr. Spitz about one case, *State v. Clemente Aguirre-Jarquin*, but improperly claimed the postconviction judge[10] in that case made findings on two occasions that Dr. Spitz was not credible. P3278. Notably, this Court reversed the order that the State questioned Dr. Spitz about, vacated Aguirre's convictions, and remanded for a new trial. *Aguirre-Jarquin v. State*, 202 So. 3d 785, 795 (Fla. 2016). Further, this Court has previously found Dr. Spitz to be a credible witness in the very same opinion that Allen cites as support for this argument.[11] *See State v. Fitzpatrick*, 118 So. 3d 737 (Fla. 2013); IB67-68, 74-75. The postconviction testimony of Dr. Spitz refuted the testimony of an expert at trial and was paramount in this Court affirming the postconviction court's finding of ineffectiveness during Fitzpatrick's guilt phase and that he was entitled to a new trial. *Id*. at 750-51, 760-61, 770.

Appellee also asserts that Dr. Spitz's testimony does not undermine the HAC finding. AB84. Appellee's contention that "[t]his Court has already found that the

[10] Circuit Court Judge Jessica J. Recksiedler presided over Aguirre's case on postconviction. She has since been accused of being biased and later recused herself from presiding over Aguirre's new trial. Michael Williams, *After Initial Refusal, Judge Accused of Bias Steps Aside in Controversial Death-Penalty Case*, ORLANDO SENTINEL (Mar. 15, 2018, 4:35 PM), http://www.orlandosentinel.com/news/breaking-news/os-seminole-county-judge-recuses-herself-death-penalty-case-20180315-story.html. She has also been publicly reprimanded by this Court for violating Canons of the Code of Judicial Conduct. *In re Recksiedler*, 161 So. 3d 398, 401 (Fla. 2015).

[11] The opinion also specifically noted that witness Dr. Spitz was "expressly found to be credible by the postconviction court." *Fitzpatrick*, 118 So. 3d at 75.

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" misstates this Court's findings on direct appeal. AB84; *see also Allen v. State,* 137 So. 3d 946, 963–64 (Fla. 2013). This Court upheld the finding of HAC, but did so based on Quintin's testimony that Wright was aware of what was happening to her and her impending death. *Id*. However, this narrative of events that the trial court and this Court relied upon was formulated by Quintin, the biased co-defendant who received a plea deal to testify against Allen. Dr. Spitz's testimony that the findings on Wright's body do not quite corroborate what Quintin stated refutes Quintin's testimony and also undermined Quintin's credibility as a whole. P3323. Further, if counsel had effectively cross-examined Quintin and impeached Quintin's testimony, the sentencer would have had even more evidence that Quintin was not a credible witness. IB80-88. Accordingly, the HAC aggravator should be stricken.

REPLY TO ARGUMENT VI

Appellee argues that Allen cannot demonstrate prejudice because there was evidence supporting HAC that was unrelated to whether ***bleach*** had been poured on Wright. AB88. This assertion seems to be more of a response to Argument VII of Allen's Initial Brief. IB83-88. In Argument VI, Allen contends that counsel was deficient in eliciting detrimental false testimony from Quintin about caustic

chemicals that were supposedly poured on Wright and that the liquids were supposedly poured in Wright's face, eyes, and mouth instead of just on her. IB80-83. Regardless, Appellee's response just illustrates further the importance of Quintin's testimony and confirms that the detrimental testimony that counsel deficiently elicited would have led the jury to find that the facts of Allen's case were more HAC than if that testimony was not elicited. Appellee even cites this Court's summary of the facts Quintin testified to at trial as its support. *See Allen,* 137 So. 3d at 963. Therefore, Appellee is further illustrating that the credibility of Quintin's testimony was vital for the HAC aggravator. Accordingly, undermining Quintin's credibility undermines HAC respectively. Especially when combined with counsel's failure to challenge Dr. Qaiser's testimony, which was the other support for HAC, if the jury did not hear this testimony there is a reasonable probability that the jury would not have found HAC and at least one juror would have voted for a life sentence. IB67-80.

REPLY TO ARGUMENT VII

Regarding the liquids Quintin claimed were supposedly poured on Wright, Appellee argues that Quintin never clearly eliminated bleach as being a possibility. AB90. However, Quintin stated that Allen ***did not*** have a bleach bottle and only had boxes of bleach. R7/1113. As boxes of bleach do not contain liquids and Quintin could only say that Allen could have only had liquid bleach if she had poured it into

a hair products bottle, it is not likely that Allen even ***possessed*** any bleach that could have been poured on Wright. R7/1113. The fact that Quintin could smell the other liquids that he claimed were poured is further evidence that bleach was ***not*** involved. R7/1039; R16/1074. Bleach would have had a distinct smell even if it had been poured into another bottle, therefore Quintin would have mentioned it in his interview just as he mentioned the scent of the alcohol. R7/1039; R16/1077.

Appellee contends that Allen was not prejudiced because "medical forensic evidence did not find any evidence of bleach having been poured on the victim." AB90. However, Dr. Qaiser only stated that he did not see any indication that bleach or other caustic substances were poured down Wright's throat in Robert Whitmore, M.D.'s ("Dr. Whitmore") report. R19/1487. As Dr. Qaiser only viewed Dr. Whitmore's autopsy photographs and report, Dr. Qaiser could not even give his own opinion on the subject. R19/1487. He could only testify to whether he saw it in the report. Contrary to Appellee's assertion, Quintin's testimony that bleach was poured ***on*** Wright was never refuted. If the jury had heard that Allen did not even ***possess*** a bleach bottle, there is a reasonable probability that the jury would not have found the HAC aggravator. Accordingly, Allen was prejudiced by counsel's deficiency in failing to impeach Quintin regarding the presence of bleach, especially when combined with the fact that counsel actually ***elicited*** testimony that bleach was poured in Wright's face, eyes, and mouth. R16/1077; IB80-83.

REPLY TO ARGUMENT VIII

Appellee claims that Allen is procedurally barred and attempting to re-litigate the same issue that was decided on direct appeal. AB92. However, the issue on direct appeal that Appellee refers to was the assertion that the trial court erred in finding HAC because "Wright could have lost consciousness upon the initial blow to her head and therefore been unaware of her impending death" and "there were no defensive wounds." *Allen*, 137 So. 3d at 962-63. This argument is not the same issue. Under Argument VIII, Allen argued that counsel provided prejudicial ineffective assistance by failing to object to or meaningfully refute Dr. Qaiser's testimony that an unconscious person can feel the sensation of pain. IB88-91.

Appellee is also incorrect in its statement that any testimony that an unconscious person could feel pain was discredited. AB91. Although Dr. Qaiser agreed that he could not testify within a reasonable degree of medical probability that there ***was*** a sensation of pain ***in this case***, that does not mean that the jury was left with the impression that unconscious people could not feel pain. R21/1728. He still said in his prior sentence that ***he could not rule out that Wright perceived pain*** and he claimed that studies have shown it has taken place. R21/1728. Therefore, due to counsel's failure to object to Dr. Qaiser repeatedly testifying that unconscious people feel pain or call an expert to refute Dr. Qaiser's assertions, the jury was left to believe that there was a possibility that Wright perceived pain after she was

unconscious. If counsel had objected to the testimony or introduced testimony of an expert such as Dr. Spitz to show that Dr. Qaiser's testimony was scientifically inaccurate, no juror would even be able to ***wonder*** if Wright felt any pain after she was unconscious. P3311-13. Further, Allen was prejudiced because the jurors were unable to properly weigh Dr. Qaiser's credibility because the jurors did not know that his testimony contained statements that lacked a scientific basis, which would have called into question the reliability of the rest of his testimony and the HAC aggravator. *See generally Fitzpatrick*, 118 So. 3d at 753-64. HAC is undermined even more when combined with the prejudice that Allen suffered from counsel's failure to effectively challenge Quintin's credibility. IB80-88. Accordingly, there is a reasonable probability that at least one juror would have found that aggravation did not outweigh mitigation or at the very least, given Allen a mercy vote.

REPLY TO ARGUMENT X

Appellee claims that counsel was not deficient in eliciting the "drugs, thugs, and violence" language. AB95. Appellee points to counsel's evidentiary hearing testimony as support. AB95. The record refutes these assertions. Counsel claimed he made a strategic decision to show that Allen lived in an aggressive atmosphere where people constantly sold drugs in the neighborhood; however, that was clearly not his strategy at the time of trial because he did not even mention ***any*** related mitigation in his sentencing memorandum. P2828-30; R6/906-24. Appellee notes

that the trial court found that "the defendant grew up in a neighborhood where there were acts of violence and illegal drugs" was a nonstatutory mitigator. AB95; R6/960-61. This mitigator was assigned "some weight", but the ***jury*** did not hear most of the testimony that the trial court found to support that mitigator because the support was presented almost exclusively at the *Spencer* hearing. R6/960-61. Therefore, not only was the "drugs, thugs, and violence" theme not a strategy that counsel actually made a decision to utilize, but the jury would not have interpreted the theme as mitigating.

In addition, Appellee errs in arguing that the "drugs, thugs, and violence" language did not prejudice Allen. AB95. The "overwhelming evidence" of torture that Appellee references as support for its contention that Allen was not prejudiced was all testimony provided by either Quintin or Dr. Qaiser. AB95. Therefore, even if overwhelming evidence existed at trial, which Allen maintains that there was not, the credibility of both witnesses would have been undermined if counsel had not been ineffective. IB67-91; *see supra* pp. 23-29. Further, if counsel had not been prejudicially ineffective in other areas and had properly presented a complete picture of the abuse that Allen suffered her entire life then the theme of "drugs, thugs, and violence" that he elicited may not have been as damaging, but the jury was never made aware of Allen's actual traumatic background. IB18-36; *see supra* pp. 8-17. Consequently, if counsel had not elicited this harmful catchy phrase then the jurors

would not have viewed Allen in such a negative light, which allowed jurors to find her undeserving of mercy. But for the deficiencies of counsel, there is a reasonable probability that at least one juror would have voted for a life sentence.

REPLY TO ARGUMENT XI

Appellee argues that Juror Carll ("Carll") was not biased because she said "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." AB97 (emphasis in original). This paraphrasing misquotes Carll's actual statement. In response to counsel asking Carll if she would ***listen*** to the aggravating circumstances and the mitigating circumstances, she said:

> Absolutely. Yeah. I believe that the death penalty should be used in certain circumstances where someone was a direct result of a death. But I also believe that if you are a party of somebody's death, it doesn't necessarily mean they deserve to die themselves. It has a lot to do with the actual participation and the planned event and what happened that day that made that person die.

R11/250. Therefore, Carll made it clear that the certain circumstances where the death penalty should be used were "where someone was a direct result of the death." R11/250. She did not qualify her statement by saying there were any circumstances where that would ***not*** be the case. She only reiterated that if someone was "a party of somebody's death" that person did not necessarily deserve the death penalty. R11/250. Her definition of a "party of someone's death" is evident when reviewed

in context with her next sentence and her earlier statement:

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

R11/221. Counsel was deficient in failing to challenge Carll for cause or strike her peremptorily because he knew that the State was going to argue that Allen not only participated in the physical death of Wright, but also actually committed Wright's death. More disturbing yet, although Carll claimed she would ***listen*** to the aggravators and mitigators, her response shows that she did not appear to understand the concept because she continued to discuss levels of participation that would result in her automatically recommending the death penalty. Accordingly, Allen was prejudiced as a result of counsel failing to challenge Carll for cause or strike her peremptorily because it is plain on the face of the record that an actually biased juror sat on Allen's jury. *See Carratelli v. State*, 961 So. 2d 312, 324 (Fla. 2007).

Appellee also cites to *Owen v. State* as support that there was no evidence of actual bias. 986 So. 2d 534, 550 (Fla. 2008); AB97-98. However, in *Owen*, Juror Knowles' "responses during voir dire indicated that she would be able to 'lay aside any bias or prejudice and render [her] verdict solely upon the evidence presented and the instructions on the law given to [her] by the court.'" *Id*. (quoting *Lusk v. State*, 446 So. 2d 1038, 1041 (Fla. 1984)). Also in *Owen*, Juror Matousek "stated a

willingness and ability to lay aside her possible bias and follow the trial court's instructions." *Id*. In Allen's case, Carll's responses reflected the opposite. She never wavered from her predetermined belief that a person who committed or participated in a death should be recommended for the death penalty. R11/221, 250. Notably, Carll was never specifically asked if she could "render [her] verdict solely upon the evidence presented and the instructions on the law given to [her] by the court." *Carratelli*, 961 So. 2d at 318. Carll also never expressly indicated "an ability to abide by the trial court's instructions." *Barnhill v. State*, 834 So. 2d 836, 845 (Fla. 2002). Further, Juror Griffin's responses in *Owen* are also distinguishable from Allen's case because Juror Griffin ***did*** qualify her intention to vote for the death penalty under the circumstances with a "probably" ***and*** indicated that mental health testimony "could influence her toward a life sentence." 986 So. 2d at 550. Carll said she would listen to mental health evidence but never stated that it would affect her decision in any way. R12/373.

In addition, Appellee appears to misinterpret Allen's argument regarding the fact that 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." IB98; AB98. Allen is not expressing that Carll was required to renounce her opinion that she favored the death penalty in order to qualify to be seated as a juror. However, the circumstances that Carll indicated that she would recommend

the death penalty were ***identical*** to the circumstances that the State was going to argue and that Quintin was going to testify to in Allen's case. Based on the totality of Carll's responses and the circumstances in Allen's case, it would have been clear to competent counsel that seating Carll on Allen's jury was an automatic vote for the death penalty. Although Appellee claims that "[t]rial counsel made every effort to ensure that Carll could be impartial," the record does not reflect that sentiment. AB99. In fact, counsel made no real effort to confirm that Carll could abide by the trial court's instructions.

Appellee invites Allen to allege which jurors were better suited to serve than Carll if a peremptory strike had been used on her. AB99. There is no debate that counsel could have struck Carll peremptorily because the defense still had two peremptory strikes available when he agreed to the jury. R12/468-69. In fact, counsel could have even backstruck Carll the following day because the trial court had to bring in another panel in order to select alternates and the trial court stated that back striking would be permitted until the jury was sworn. R12/472-74. As it is logical to assume both parties would have challenged the same members of the venire if Carll was struck, the next juror would have been Mr. Morrissey, the second alternate, because the first alternate, Ms. Auger, deliberated in the penalty phase after Juror Holznecht was dismissed. R14/744; R21/1788-95. Mr. Morrissey indicated he was impartial by stating he could recommend the death penalty based upon "the severity

and the circumstances." R13/622-23. As Mr. Morrissey was actually impartial, there is a reasonable probability that if he had actually deliberated, the outcome of Allen's penalty phase would have been different.

Although Appellee argues that counsel's "decision to keep Juror Carll was a matter of trial strategy," that is simply not true. AB100. Failing to peremptorily strike or challenge Carll for cause was not a strategic decision on behalf of counsel. Counsel could not have been looking down the line at the other jurors as he and Appellee claimed because he still could have backstruck Carll the following day and then Mr. Morrissey would have been able to deliberate instead of being an alternate. AB100; P2866-67. If counsel truly believes that he made a strategic decision, it cannot be seen as reasonable. *See Strickland*, 466 U.S. at 690. It would be unreasonable for competent counsel to decide to sit mute and allow an impartial juror to serve on the jury. Therefore, Allen must receive a new penalty phase in front of an impartial jury of her peers.

CONCLUSION

The lower court erred in denying Allen postconviction relief. Allen respectfully requests that this Honorable Court reverse the lower court's order denying relief, vacate her convictions and sentence of death, and grant her a new trial; or grant such other relief as this Honorable Court deems just and proper.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that the PDF copy of the foregoing document has been transmitted to this Court through the Florida Courts E-Filing Portal on this 14th day of May, 2018.

WE HEREBY FURTHER CERTIFY that a true copy of the foregoing was served via electronic mail to **Doris Meacham**, Assistant Attorney General, Office of the Attorney General, 444 Seabreeze Blvd, 5th Floor, Daytona Beach, Florida 32118, at Doris.Meacham@myfloridalegal.com and capapp@myfloridalegal.com on this 14th day of May, 2018.

WE HEREBY FURTHER CERTIFY that a copy of the foregoing was mailed to **Margaret A. Allen**, DOC# 699575, Lowell Correctional Institution, 11120 Northwest Gainesville Road, Ocala, Florida 34482-1479, on or about this 14th day of May, 2018.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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

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