No. 18-1158
CAPITAL CASE

In the Supreme Court of the United States

JARROD TAYLOR,
Petitioner,
v.
JEFFERSON S. DUNN, COMMISSIONER,
ALABAMA DEPARTMENT OF CORRECTIONS,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION TO CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

(Restated)

By no later than October 1998, before state trial court proceedings had concluded, Jarrod Taylor knew the key facts that would form the basis for the claim he is pressing here. Even so, he waited more than a decade to raise that claim, and only after his state postconviction proceedings had been sent back to the circuit court on limited remand. The state courts thus refused to consider the claim, and the federal district court then dismissed Taylor's claim as procedurally defaulted and unexhausted. The question presented is whether the Eleventh Circuit erred in denying Taylor's motion for certificate of appealability.

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INTRODUCTION

This is a case about procedural default.

When Jarrod Taylor was arrested for a triple robbery-murder in 1997, police seized from his motel room a blue duffel bag containing Taylor's papers. The bag, in substantially the same condition in which it was seized, was introduced at trial as State's Exhibit 58 without objection. Around the time of judicial sentencing in August 1998, one of the former jurors allegedly went on a talk radio show and discussed reading some of the papers in the bag that made reference to Taylor's criminal history, but neither that juror nor any other juror was ever asked to testify as to what was seen.

Despite presumably knowing what was contained in his own duffel bag—and claiming in October 1998 that a juror had publicly stated that the jury had considered documents from the bag addressing Taylor's criminal history—Taylor's only protest on direct appeal was that the paperwork in the bag concerning his missed child support payments was improperly admitted. Not until 2011, during state postconviction proceedings, did Taylor claim that the State had improperly provided the jury with evidence of his criminal history. This claim was raised in his second amended petition—a petition disallowed because the case was then back in the circuit court on limited remand from the Alabama Court of Criminal Appeals.

As Taylor never properly presented this claim to the state circuit court, he failed to exhaust it for habeas purposes. The federal district court correctly

found that the claim was procedurally defaulted, noting that the factual basis of the claim was "reasonably available" to defense counsel in 1998. The Eleventh Circuit Court of Appeals concurred, explaining that Taylor had not shown that reasonable jurists could disagree as to whether the district court's ruling was correct because Taylor could not show cause to excuse his procedural default. That court made a further commonsense point: "The factual basis for this claim was available to [Taylor] the moment the bag was offered into evidence. It was his bag with his documents."[1]

Taylor now contends that the Eleventh Circuit applied an incorrect standard of review in denying his motion for certificate of appealability (COA) and that the court should have granted a COA as to his claim of prosecutorial misconduct concerning the duffel bag. This claim is not cert-worthy. Even disregarding the Eleventh Circuit opinion, Taylor knew about the basis for this claim no later than August 1998—indeed, he referenced the alleged juror interview in his motion for new trial. That he waited thirteen years to raise the claim on state postconviction review, and that he only attempted to do so during a limited remand, when the circuit court was unauthorized to accept amendments to his petition, shows that there is no cause to excuse his procedural default. The federal courts' rulings as to this claim were appropriate, and this Court should deny review.

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1. App'x A at 3a.

STATEMENT OF THE CASE[2]

A. The murder of Sherry Gaston, Bruce Gaston, and Steve Dyas

On the morning of December 12, 1997, Jarrod Taylor and his accomplice, Kenyatta McMillan, took a .380 caliber pistol from the home of one of Taylor's friends, then bought a BB gun at Walmart. McMillan testified that Taylor carried the pistol, while she carried the BB gun.

The two proceeded to Steve Dyas Motors, a used car dealership in Mobile, Alabama, intending to rob it. Taylor negotiated the purchase of a Ford Mustang with Sherry Gaston, a salesperson, and told her that his father-in-law would give him the purchase money as an early Christmas present. During the day, Taylor and McMillan test-drove the car, filled out the paperwork, and waited for Taylor's non-existent father-in-law to bring the $13,700 needed for purchase. The pair came and went from the dealership several times, even once asking Sherry for a bill of sale to take to the father-in-law.

Late in the day, the employees began to leave the dealership in preparation for the company Christmas party. Taylor and McMillan returned around dusk to find only Sherry, her husband, Bruce Gaston, and Steve Dyas, the owner, remaining. Taylor immediately shot Bruce in the chest; Sherry locked herself in the bathroom, while Dyas attempted to escape through a back window. McMillan brought

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2. Record citations are to the habeas record below in Taylor v. Dunn, 1:15-cv-00439-WS-N (S.D. Ala.).

Dyas back, and the two demanded to know where the safe was. On his knees, Dyas begged for his life, tried to convince them that he did not keep money in the office, and offered them any car on the lot and his wallet. Taylor shot Dyas in the head, then ordered Sherry to come out of the bathroom. Like Dyas, Sherry begged to be spared, explaining that she had two children. Again, as with Dyas, Taylor shot her in the head.

With three victims on the ground, Taylor and McMillan took Sherry's purse, the men's wallets, and the paperwork Sherry had prepared for the sale of the Mustang, leaving copies on her desk to make it appear that Taylor had bought the car. As they prepared to leave, Taylor noticed Bruce move, and so he shot him in the head. Taylor and McMillan then drove their stolen Mustang to Selma, where they were caught the next morning.[3]

B. The trial

Taylor was indicted on four counts of capital murder in April 1998: one count of robbery-murder for each of the deaths of Sherry Gaston, Bruce Gaston, and Steve Dyas, and one count of murder of two or more persons pursuant to one scheme or course of conduct.[4] Trial began in Mobile County on August 3, 1998.[5] Of note to the matter at bar, during the guilt

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3. *Taylor v. State*, 808 So. 2d 1148, 1160–61 (Ala. Crim. App. 2000) (Vol. 53, Tab #R-114).
4. Vol. 1 at C. 9–11; *see* ALA. CODE §§ 13A-5-40(a)(2), (a)(10) (1975).
5. Vol. 2, Tab #R-8, at TR. 74.

phase of the trial, the State introduced Exhibit 58, a blue duffel bag retrieved from Taylor's motel room, which was in substantially the same condition at trial as it had been when it was seized.[6] While the State did not itemize the contents of the bag at trial,[7] it did mention certain documents inside the bag during its closing argument:

> How would Jarrod Taylor know the workings of a car lot? Well, one of the pieces of evidence in this case, state's number 58, a blue bag. This bag was seized from the motel room, if you recall, up in Selma. In this bag is some business cards. The name J. Taylor on there, Treadwell Honda. You will see this when you get back to the jury room. Mr. Taylor not only from these cards but from some records inside this bag here worked at a car dealership at one point.
>
> [. . .]
>
> Well, there was something else interesting in that blue bag. There was some other paperwork in there. Paperwork in the name of Jarrod Taylor which shows he was in arrears in his child support over $9,000.00—excuse me, over $19,000.00 in arrears in his child support. This is a man who is carrying his life in this bag here, his previous work, how much child support he owed. Ask yourselves, did this man

6. Vol. 7, Tab #R-15, at TR. 1054.

7. During the postconviction evidentiary hearing, the bag was described as "full of paper," "at least fifty" pages. Vol. 47, Tab #R-103, at TR. 70.

> have $13,700.00 in cash to pay for a car that night?[8]

According to Taylor, the bag's contents were inadmissible:

> Taylor posits that the duffel bag contained prejudicial, inadmissible information about his criminal history, including (i) a document showing that Taylor had been charged with misprision of a felony in the U.S. District Court for the Western District of Louisiana in November 1993; (ii) that the same federal court ordered Taylor arrested in March 1994 for a hearing on the Government's motion for revocation of his supervised release on that charge; (iii) that a warrant of arrest was in fact issued for Taylor in March 1994; (iv) that the misprision case was set for trial in September 1994; (v) that the U.S. Probation Office discharged Taylor from supervision on September 30, 1997, for a sentence that had expired one day earlier. According to Taylor, the duffel bag also contained various other prejudicial items, such as documents showing Taylor's overdue loan payments and medical bills, as well as the suspension of his driver's license.[9]

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8. Vol. 8, Tab #R-19, at TR. 1398–99.
9. App'x C at 147a (internal citations omitted).

After five days of testimony, the jury found Taylor guilty as charged on all counts.[10]

Following the penalty-phase presentation, the jury recommended 7–5 that Taylor be sentenced to life without parole.[11] At the time of Taylor's trial, the jury's verdict as to penalty was advisory and not binding on the trial court, a scheme this Court upheld in Court in *Harris v. Alabama*.[12] The trial court held a sentencing hearing on August 25, 1998, heard additional testimony, overrode the jury's recommendation, and sentenced Taylor to death.[13]

C. Post-trial and direct appeal

Allegedly, a juror went on a local radio talk show in August 1998 and stated that the jury was made aware of Taylor's prior criminal record through evidence or personal effects belonging to Taylor.[14] Counsel filed a motion for new trial based in part on this ground.[15] While the trial court suggested bringing the juror in for questioning,[16] Taylor failed to do so. Indeed, there is no indication in the record that Taylor's trial, direct appeal, or state postconviction counsel contacted any juror to identify what evidence

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10. Vol. 9, Tab #R-25, at TR. 1522; *see* Vol. 1 at C. 12–15 (verdict forms).
11. Vol. 9–10, Tab #R-36, at TR. 1599–1601; *see* Vol. 1 at C. 16–19 (verdict forms).
12. 513 U.S. 504 (1995).
13. Vol. 10, Tab #R-38, at TR. 1636–38; *see* Vol. 53, Tab #R-113 (sentencing order).
14. *See* Vol. 1 at C. 178.
15. Vol. 1 at C. 177–79.
16. Vol. 10, Tab #R-39, at TR. 1647.

concerning Taylor's criminal history was seen during deliberations.[17]

On direct appeal, the Alabama Court of Criminal Appeals affirmed Taylor's convictions and sentence,[18] as did the Alabama Supreme Court,[19] and this Court denied certiorari in 2002.[20]

D. State postconviction proceedings

The state postconviction proceedings in Taylor's case lasted for twelve years. The following is a brief synopsis.

Taylor filed a petition for postconviction relief pursuant to Rule 32 of the Alabama Rules of Criminal Procedure in July 2002[21] and a corrected first amended petition on May 2, 2003.[22] This was his last permitted amendment. The State moved to dismiss most of the claims in the corrected first amended petition and to prohibit further amendments,[23] and the circuit court granted these motions in October 2003.[24] In August 2004, the circuit court issued a final order summarily dismissing the petition.[25]

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17. App'x C at 149a.
18. *Taylor v. State*, 808 So. 2d 1148 (Ala. Crim. App. 2000).
19. *Ex parte Taylor*, 808 So. 2d 1215 (Ala. 2001).
20. *Taylor v. Alabama*, 534 U.S. 1086 (2002) (mem.).
21. Vol. 18 at C. 16–124.
22. Vol. 22, Tab #R-56.
23. Vol. 25, Tabs #R-61, R-64, R-65, R-70, R-71.
24. Vol. 53, Tabs #R-117, R-118, R-119, R-120, R-121.
25. Vol. 53, Tab #R-122.

Taylor filed notice of appeal in September 2005.[26] As his counsel had not been admitted pro hac vice at that time, the Court of Criminal Appeals dismissed the case, explaining that the notice of appeal was a legal nullity.[27] The Alabama Supreme Court reversed.[28]

On remand in the Court of Criminal Appeals, Taylor filed a brief in May 2008 in which he argued that the circuit court's final dismissal order was erroneous because the State had never moved to dismiss certain claims.[29] In October 2010, the Court of Criminal Appeals held that the circuit court's adoption of the State's proposed orders was not improper but ordered a limited remand to resolve the claims that the State had not moved to dismiss.[30]

Back in the circuit court, Taylor moved for leave to file a second amended petition in September 2011.[31] Therein, he raised for the first time a claim that the State "knowingly and improperly" introduced the documents in his duffel bag, that the documents were prejudicial, and that the State had failed to disclose that the jury had reviewed the documents.[32] The State moved to strike the proposed second amended petition, explaining that due to the remand directive,

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26. *See* Vol. 53, Tab #R-124.
27. *Taylor v. State*, 978 So. 2d 76 (Ala. Crim. App. 2006).
28. *Ex parte Taylor*, 157 So. 3d 122 (Ala. 2008).
29. Vol. 31, Tab #R-90.
30. *Taylor v. State*, 157 So. 3d 131 (Ala. Crim. App. 2010).
31. Vol. 34, Tab #R-93.
32. Vol. 35, Tab #R-93, at C. 432–37; *see* Vol. 34, Tab #R-93, at 365–71 (counsel ineffective for failing to review and object to contents of bag and wallet).

the circuit court did not have jurisdiction to consider either Taylor's new claims or his previously dismissed claims.[33] The circuit court agreed with the State,[34] as did the Court of Criminal Appeals when Taylor petitioned for mandamus.[35] After an evidentiary hearing in January 2012[36]—and still on limited remand—Taylor filed a motion for leave to file a revised second amended petition, which contained the allegations made in the prohibited second amended petition as well as new material.[37] The motion was denied,[38] and the circuit court dismissed Taylor's petition in May.[39]

Once again in the Court of Criminal Appeals, Taylor moved for a second remand to the circuit court to force that court to consider the claims raised in his prohibited second amended and revised second amended petitions.[40] The Court of Criminal Appeals denied the motion,[41] then affirmed the circuit court in

33. Vol. 55, Tab #R-137.
34. Vol. 53, Tab #R-129.
35. Vol. 53, Tab #R-130.
36. Vols. 47–48, Tab #R-103.
37. Vol. 46, Tab #R-101.
38. This order does not appear in the habeas record. Order, Taylor v. State, 02-CC-1998-1328.60 (Mobile Cty. Cir. Ct. May 23, 2012).
39. Vol. 53, Tab #R-131.
40. Vol. 49, Tab #R-104.
41. Vol. 53, Tab #R-132; *see* Vol. 53, Tab #R-133 (corrected order).

April 2013.[42] The Alabama Supreme Court denied certiorari the following April.[43]

E. Federal habeas proceedings

Taylor turned to the federal courts for relief, filing a habeas petition in the Southern District of Alabama in September 2014.[44] After briefing, including supplemental briefing on the effect of *Hurst v. Florida*[45] on Taylor's case, the district court denied the petition and a COA in January 2018.[46] Taylor's motion to alter or amend the judgment was denied.[47]

Taylor then petitioned the Eleventh Circuit Court of Appeals for a COA. In October 2018, the court denied the petition in an order signed by the Honorable Gerald Tjoflat.[48] Taylor moved for panel reconsideration; that motion was denied in January 2019 in an order signed by a three-judge panel.[49]

The present petition for writ of certiorari followed.

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42. *Taylor v. State*, CR-05-0066 (Ala. Crim. App. Apr. 26, 2013) (Vol. 53, Tab #R-134).
43. *Ex parte Taylor*, No. 1130313 (Ala. Apr. 25, 2014) (Vol. 53, Tab #R-135).
44. Petition, Taylor v. Dunn, 1:14-cv-00439-WS-N (S.D. Ala. Sept. 22, 2014), Doc. 5.
45. 136 S. Ct. 616 (2016).
46. App'x C at 52a–297a.
47. App'x B at 15a–51a.
48. App'x A at 1a–14a.
49. App'x D at 298a–99a.

REASONS THE PETITION SHOULD BE DENIED

No issue in Taylor's petition is worthy of certiorari. The Eleventh Circuit Court of Appeals correctly denied a COA because Taylor's procedural default was inexcusable, and Taylor cannot show that the district court erred as to its procedural ruling. His contentions that the Eleventh Circuit applied an incorrect standard of review and that reasonable jurists could disagree with the district court are simply not meritorious. For the reasons that follow, Taylor's petition is not cert-worthy.

I. Taylor's petition is due to be denied because the district court's procedural ruling was correct.

The question at the heart of this matter is whether reasonable jurists could disagree with the district court's procedural ruling that Taylor's claim concerning the duffel bag was inexcusably defaulted. The answer to that question is no.

A. The state-court procedural background

As set forth above, the State seized Taylor's duffel bag from his motel room when he was arrested the day after the triple robbery-murder. That bag was introduced at trial in substantially the same condition as when it was seized.[50] There is no question that the bag was Taylor's. As the Eleventh Circuit aptly noted, the bag contained Taylor's "own stuff," and he had

50. Vol. 7, Tab #R-15, at TR. 1054.

knowledge of what was being introduced.[51] The defense did not object to the introduction of the bag.[52]

In August 1998, the defense filed a motion for new trial, claiming, in relevant part:

> On a talk show on Thursday and Friday, August the 13th and 14th a juror was on the air and testified, among other things, that the jury was made aware of the prior criminal record of Jarrod Taylor through evidence and/or personal effects purportedly belonging to the defendant Taylor. Based on information and belief, in counsels' review of all evidence, there was no indication, in any of the clothes, personal items, or documents that Jarrod Taylor had a prior criminal record. But if said evidence did exist, it was illegal and improper.[53]

The trial court was willing to hear testimony from this juror:

> THE COURT: It said something in here in either the motion or the amended motion about an interview with a juror. [Counsel], when did that take place?
>
> [COUNSEL]: Judge, it was not an interview. It was something I found out about Friday morning. That

51. App'x A at 2a.
52. Vol. 7, Tab #R-15, at TR. 1055.
53. Vol. 1 at C. 177–79.

was—I don't remember who told [co-counsel], but they had heard a radio program on I think the same talk show Thursday morning and Friday morning following the verdict.

THE COURT: Uh-huh.

[COUNSEL]: And—I am sorry. It was following, I believe, the sentencing. So that would have been somewhere around the 27th [or] 28th of August that this woman was on the radio and I think [co-counsel] has her name. That she was discussing the fact that they had seen evidence during the guilt phase that Jarrod Taylor had a prior conviction and I don't know what that might have been because I recall looking at all the evidence and I don't recall seeing anything like that.

THE COURT: Uh-huh. I suppose for the sake of getting as good a record as we can we ought to try to get the lady here, if she can be brought here.[54]

54. Vol. 10, Tab #R-39, at TR. 1647–48.

But Taylor failed to bring the juror to the subsequent hearing:

> THE COURT: There was something about a juror?
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> [COUNSEL]: Yes, Your Honor, with regard to—
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> THE COURT: Is that person here?
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> [COUNSEL]: No, is not and will not be. I have looked at my notes and looked at the law with regard to that issue and I don't believe that the witness' testimony, even if it were exactly as it is characterized, would be admissible.
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> THE COURT: All right.[55]

The record does not indicate that the juror was ever identified or that trial, direct appeal, or state postconviction counsel spoke with the juror about what evidence was seen during deliberations.[56]

Despite presumably knowing the contents of his own duffel bag, and indisputably knowing that a juror had stated that the jury had considered documents from the bag addressing Taylor's criminal history, Taylor raised only a limited claim concerning the bag on direct appeal. The Court of Criminal Appeals addressed the merits of this claim:

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55. Vol. 10, Tab #R-40, at TR. 1685–86.
56. App'x C at 149a.

Taylor argues that the trial court erred in admitting into evidence a document found in Taylor's possession at the time of his arrest that indicated he was $19,000 in arrears in child support payments. Taylor also argues that the trial court erred in allowing the prosecutor to refer to this document during his closing argument and that the trial court erred in not *sua sponte* giving the jury a limiting instruction concerning the document. Because there was never any objection at trial to the admissibility of the document and the argument of counsel concerning the document, and there was not a request by Taylor for a limiting instruction or an objection to the lack of such an instruction, we review this claim of error for plain error only. Rule 45A, ALA. R. APP. P.

The record reflects that, during the State's case, the prosecutor introduced into evidence a blue bag found in Taylor's motel room after he was arrested in Selma. The blue bag, apparently with unidentified contents inside it, was admitted into evidence without objection. During the prosecutor's closing argument, the following argument was made:

> "How would Jarrod Taylor know the workings of a car lot? Well, one of the pieces of evidence in this case [is] State's number 58, a blue bag. This bag was seized from the motel room, if you recall, up in Selma. In this bag is some business cards. The name 'J. Taylor' on there; 'Treadwell Honda.' You will see this

> when you get back to the jury room. Mr. Taylor, not only from these cards but from some records inside this bag here, worked at a car dealership at one point.
>
> "That is very important, because having worked at a car dealership, don't you think this man knew when he fled from that scene that night which paperwork he thought he needed, if he had to answer questions to the police? Don't you think he knew what he might need?
>
> "....
>
> "Speaking of cash, $13,700, which he told the officers that he had—He told these folks, 'I had $13,700 cash that I had saved up.' Well, there was something else interesting in that blue bag. There was some other paperwork in there. Paperwork in the name of Jarrod Taylor which shows he was in arrears in his child support over $9000—excuse me, over $19,000 in arrears in his child support. This is a man who is carrying his life in this bag here; his previous work; how much child support he owed. Ask yourselves, did this man have $13,700 in cash to pay for a car that night?"

On appeal, Taylor argues that the paperwork showing that he was in arrears in child support payments was improper evidence

> of collateral conduct and that it was improperly admitted for the sole purpose of prejudicing Mr. Taylor and influencing the jury to convict him solely because he had a bad character. He also argues that the trial court improperly allowed the prosecutor to refer to the document in closing argument.
>
> [. . .]
>
> Taylor also argues that the trial court erred in not sua sponte giving a limiting instruction on the proper use of evidence of collateral bad acts. Again, we review this issue for plain error only.[57]

The court found no plain error, explaining that the child support document was used to show motive for the robbery, as Taylor did not have the money to purchase the Mustang he stole, and that there was no error in failing to give an unrequested limiting instruction.[58]

On state postconviction review, Taylor argued that his counsel were ineffective for failing to object to the State's reference to the duffel bag and the child support document,[59] but it was not until he attempted to file a second amended petition in September 2011, when the matter was on limited remand to the circuit court, did he allege that the State knowingly admitted prejudicial materials concerning his prior bad acts.[60]

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57. *Taylor*, 808 So. 2d at 1164–66 (internal citation omitted).
58. *Id.* at 1166–67.
59. Vol. 22, Tab #R-56, at C. 905; Vol. 27, Tab #R-76, at 53, 68; Vol. 31, Tab #R-90, at 53, 69.
60. Vol. 35, Tab #R-93, at C. 432–37.

In that petition, Taylor claimed that he could not have known of the contested documents' existence at trial and that he only learned of them in post-trial interviews with jurors, despite the fact that the documents were supposedly contained within a trial exhibit admitted without objection, *his own duffel bag*, and by Taylor's own account in October 1998, a juror had declared on the radio that such documents were in the bag.[61]

Alabama law directs that "[a]mendments to [postconviction] pleadings may be permitted at any stage of the proceedings prior to the entry of judgment" and that "[l]eave to amend shall be freely granted."[62] This does not mean that a petitioner has unfettered discretion to file an amendment at any time, however, such as in Taylor's case, where the circuit court had no discretion to permit an amendment due to the scope of the remand. The circuit court correctly disallowed Taylor's second amended petition, explaining:

> Here, the Court of Criminal Appeals has instructed this Court on remand only to resolve the specific claims which the parties agreed were still pending before its summary dismissal of Taylor's first amended corrected petition, with Taylor being "entitled to the

61. *Id.* at C. 436.

62. ALA. R. CRIM P. 32.7(b), (d); *see Ex parte Rhone*, 900 So. 2d 455, 458 (Ala. 2004) ("[I]t is clear that only grounds such as actual prejudice or undue delay will support a trial court's refusal to allow, or to consider, an amendment to a Rule 32 petition.").

> opportunity to prove *the allegations in those claims* and to establish that he is entitled to relief." The Court detects no instruction which would allow it to permit amendments to Taylor's petition on remand, either to supplement those specific claims or to add new ones.[63]

The Court of Criminal Appeals denied Taylor's subsequent petition for mandamus, holding that the circuit court was correct to disallow the amendment. While Taylor claimed that his posture was like that of the petitioner in *Ex parte Apicella*,[64] who was improperly prohibited from filing an amended petition after the Court of Criminal Appeals reversed the circuit court's summary dismissal of his petition, the Court of Criminal Appeals explained why the cases were distinguishable:

> Taylor argues that according to the Alabama Supreme Court's opinion in *Ex parte Apicella*, 87 So. 3d 1150 (Ala. 2011), because his case was reversed and remanded, "no final judgment was in effect, and *Ex parte Rhone*, 900 So. 2d 455 (Ala. 2004), must govern the consideration of that amended petition." 87 So. 3d at 1154–55. This Court did not reverse and remand the case for further proceedings as was the case in *Apicella*. We limited the scope of the circuit's court remand to specific claims of ineffective assistance and we affirmed the other claims raised by Taylor on appeal. This case is not

63. Vol. 53, Tab #R-129, at C. 694 (internal citation omitted).
64. 87 So. 3d 1150 (Ala. 2011).

> governed by the Supreme Court's decision in *Apicella*.
>
> As we have stated: "On remand, the issues decided by an appellate court become the law of the case, and the trial court's duty is to comply with the directions given by the reviewing court." *Ellis v. State*, 705 So. 2d 843, 847 (Ala. Crim. App. 1996). If [the circuit court] allowed Taylor to amend his Rule 32 petition he would be acting beyond the scope of our remand directions. The circuit court's ruling was consistent with this Court's instructions in our October 1, 2010, opinion.[65]

Pursuing certiorari in the Alabama Supreme Court, Taylor argued that the Court of Criminal Appeals' decision prohibiting him from amending his petition was improper, based on *Ex parte Apicella* and *Ex parte Rhone*.[66] That court declined to grant certiorari.[67]

B. The district court correctly deemed the claim procedurally defaulted.

As the United States Code and this Court have made clear, with limited exception, habeas relief cannot be granted on a claim that has not been exhausted in state court.[68] A claim is not exhausted

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65. Vol. 53, Tab #R-130, at 2 (cleaned up).
66. Vol. 52, Tab #R-112, at 36–54.
67. Vol. 53, Tab #R-135.
68. 28 U.S.C. § 2254(b)(1); *e.g.*, *Cullen v. Pinholster*, 563 U.S. 170, 208 (2011); *Harrington v. Richter*, 562 U.S. 86, 103 (2011); *Medellin v. Dretke*, 544 U.S. 660, 666 (2005).

unless the petitioner has "invoke[ed] one complete round of the State's established appellate review process."[69] This requirement "is designed to avoid the unseemly result of a federal court upsetting a state court conviction without first according the state courts an opportunity to . . . correct a constitutional violation."[70] Moreover, "a federal court may not review federal claims that were procedurally defaulted in state court—that is, claims that the state court denied based on an adequate and independent state procedural rule."[71] A petitioner can, however, circumvent this bar if he meets certain criteria:

> A state prisoner may overcome the prohibition on reviewing procedurally defaulted claims if he can show "cause" to excuse his failure to comply with the state procedural rule and "actual prejudice resulting from the alleged constitutional violation." *Wainwright v. Sykes*, 433 U.S. 72, 84 (1977); *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). To establish "cause[,]" the prisoner must "show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Murray v. Carrier*, 477 U.S. 478, 488 (1986). A factor is external to the defense if it "cannot fairly be attributed to" the prisoner. *Coleman*, *supra*, at 753.[72]

In other words:

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69. *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999).
70. *Davila v. Davis*, 137 S. Ct. 2058, 2064 (2017) (cleaned up).
71. *Id.*
72. *Id.* at 2064–65 (citations edited).

> [A]bsent showings of "cause" and "prejudice," *see Wainwright v. Sykes,* 433 U.S. 72, 84–85 (1977), federal habeas relief will be unavailable when (1) "a state court [has] declined to address a prisoner's federal claims because the prisoner had failed to meet a state procedural requirement," and (2) "the state judgment rests on independent and adequate state procedural grounds." *Coleman*, 501 U.S. at 729–730.[73]

Here, when Taylor initiated federal habeas proceedings, the district court was presented with a clear-cut case of an unexhausted claim and no showing of cause and prejudice to excuse the procedural default. The court rejected his claim, explaining that Taylor could not establish cause to overcome the procedural default because the facts were reasonably available to him in 1998:

> In particular, in his Amended Motion for New Trial filed in October 1998, Taylor moved for relief on the grounds that on August 13 and 14, 1998, a juror had stated "on the air" that "the jury was made aware of the prior criminal record of Jarrod Taylor through evidence and/or personal effects purportedly belonging to the defendant Taylor." At a hearing on October 5, 1998, Taylor's counsel explained to Judge Johnstone that a female juror (whose identity was known to them) had appeared on a radio talk show airing on the Thursday and

73. *Walker v. Martin*, 562 U.S. 307, 316 (2011) (citations edited). A second exception, not at issue here, is that default may be excused if the petitioner makes a showing of actual innocence. *Schlup v. Delo*, 513 U.S. 298, 327 (1995).

Friday after the August 1998 sentencing hearing, and that the juror "was discussing the fact that they had seen evidence during the guilt phase that Jarrod Taylor had a prior conviction and I don't know what that might have been." In response, Judge Johnstone commented that "for the sake of getting as good a record as we can we ought to try to get the lady here, if she can be brought here." Yet defendants did not bring the juror in to testify at the hearing on the motion for new trial. Nor is there any indication that defense counsel (including trial counsel, direct appeal counsel, or state post-conviction counsel) attempted to contact that juror (or any other juror) to identify what evidence of Taylor's criminal history the jury had seen in its deliberations. . . .

[. . .]

The point is straightforward. Taylor's counsel have known—or have had good reason to believe—since no later than October 1998 that the jury had seen something they should not have seen relating to Taylor's criminal history. Had Taylor performed reasonable follow-up between then and 2005, he would have learned about the contents of the duffel bag in advance of the final judgment entered by Judge Thomas in the Rule 32 proceedings, and therefore could have pleaded Claim II.C in the state post-conviction proceedings in a timely manner that complied with the state procedural rule. Yet Taylor has made no

> showing that he ever conducted such inquiries in a reasonably diligent manner. Because the Court finds that the factual basis for Claim II.C was reasonably available to Taylor many years before he actually attempted to raise the claim, such that he readily could have avoided the state procedural bar, he has not shown cause to overcome the procedural default. Accordingly, Claim II.C will not be considered on federal habeas review.[74]

C. Taylor's contentions do not excuse his default.

Taylor now asks this Court to overlook his own procedural failings, contending that reasonable jurists could debate whether the State's alleged misconduct violated his constitutional rights and whether the claim was procedurally defaulted.[75] Neither contention is meritorious or cert-worthy.

First, while Taylor cites various authorities to support his claim that he is entitled to a new trial due to the State's alleged misconduct,[76] these cases are distinguishable on both procedural and factual grounds. *Paz v. United States*,[77] *United States v. Perkins*,[78] and *United States v. Dressler*[79] were appeals from federal convictions, not federal review of

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74. App'x C at 148a–150a (footnote and citations omitted).
75. Pet. 21–38.
76. Pet. 23–27.
77. 462 F.2d 740 (5th Cir. 1972).
78. 748 F.2d 1519 (11th Cir. 1984).
79. 112 F.2d 972 (7th Cir. 1940).

state convictions, while *Ex parte Johnson*[80] was on direct appeal to the Alabama Supreme Court. *Benjamin v. Fischer*,[81] a habeas decision arising from a district court in the Second Circuit, is distinguishable because Benjamin, unlike Taylor, exhausted his claims in state court. Most important, none of the authorities upon which Taylor relies excuses a petitioner's failure to exhaust his claims, particularly not, as here, where the petitioner had notice of the factual basis of his claim at the time of trial, or at the very latest, in time for direct appeal.

Second, Taylor's claim that the procedural bar is reasonably debatable is unsupported. Again, this is a case in which the object at issue—Taylor's own duffel bag, stuffed with his own papers—was before the petitioner ***at the time of trial***. Knowledge of the contents of his own bag may reasonably be imputed to Taylor. And even if he had forgotten, the district court found that Taylor was on notice that the jury might have seen something concerning his criminal history as of August 1998. Indeed, Taylor sought a new trial in October 1998 based on a juror's purported statement that the jury had seen evidence of Taylor's prior conviction. Yet Taylor waited ***thirteen years*** before raising this claim in a procedurally improper petition. For that reason, Taylor's claim that the state procedural bar was manifestly unfair is likewise mistaken.

Third, while Taylor alleges that the state's procedural rule was improperly applied to bar his

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80. 507 So. 2d 1351 (Ala. 1986).
81. 248 F. Supp. 2d 251 (S.D.N.Y. 2002).

second amended petition, he is mistaken. As discussed above, while *Ex parte Apicella* and *Ex parte Rhone* generally stand for the proposition that leave to amend should be freely granted in state postconviction proceedings, that grant is not absolute, and it certainly does not apply when a case is on limited remand from an appellate court. Here, the case was remanded to the circuit court for a limited purpose:

> The State concedes in its brief to this Court that it had not moved to dismiss all the claims Taylor had raised in his petition and that the circuit court's partial-dismissal orders had not previously disposed of all claims. The State also concedes that Claims IV.B.10 and V.C. of the petition initially had been improperly summarily dismissed based on Rule 32.2(c) grounds and that the circuit court had reinstated them. Therefore, the State argues in its brief on appeal that this Court should order a limited remand for an evidentiary hearing on those claims that have not been dismissed. The parties' having agreed that the foregoing claims remained pending after the circuit court entered the orders of partial dismissal, the circuit court erred in entering its August 1, 2005, final order summarily dismissing the petition in its entirety; we therefore remand the cause to the trial court for resolution of the pending claims.[82]

82. Vol. 53, Tab #R-128, at *4 (footnote omitted, emphasis added).

In refusing to exceed the scope of the limited remand and permit Taylor to file a second amended petition with new claims, the circuit court relied upon state precedent, particularly *Hyde v. State*.[83] In that case, the Court of Criminal Appeals held that a circuit court's order on remand, which had allowed the defendant to supplement and amend his postconviction petition, was void for lack of jurisdiction because the circuit court was limited to the scope of the remand order.[84] *Hyde* remains an accurate statement of the law in Alabama.[85] As the Alabama Supreme Court has explained:

> "In *Lynch v. State*, 587 So. 2d 306, 307 (Ala. 1991), the Supreme Court of Alabama held that a lower court acts beyond its authority if it takes any action on remand that differs from the explicit instructions of the higher appellate court. In *Anderson v. State*, 796 So. 2d 1151 (Ala. Crim. App. 2000), the Alabama Court of Criminal Appeals interpreted *Lynch* as holding that 'any act by a trial court beyond the scope of an appellate court's remand order is void for lack of jurisdiction.' 796 So. 2d at 1156 (citing *Ellis v. State*, 705 So. 2d 843, 847 (Ala. Crim. App. 1996) (stating that on remand, 'the trial

83. 894 So. 2d 808 (Ala. Crim. App. 2004).

84. *Id.* at 810.

85. *See, e.g.*, *Ward v. State*, 228 So. 3d 490, 494 n.2 (Ala. Crim. App. 2017) ("In *Ward V*, the Supreme Court limited the remand proceedings to the issue of equitable tolling. Thus, the circuit court correctly prohibited any amendment to Ward's petition that addressed issues that were outside the scope of the Supreme Court's remand instructions.").

> court had no jurisdiction to modify the original or base sentence imposed or to take any action beyond the express mandate of this court')); *see also Hyde v. State*, 894 So. 2d 808 (Ala. Crim. App. 2004), and *Moore v. State*, 871 So. 2d 106 (Ala. Crim. App. 2003) (accord)."[86]

Taylor's claim that the state procedural rule was not adequate and independent because it is not "firmly established and regularly followed"[87] is simply wrong.

Simply put, this is a case in which Taylor blames everyone but himself for his failure to raise a claim about a piece of evidence with an alleged problem known to him no later than the time of sentencing. Reasonable jurists would not debate the district court's decision to deem this claim procedurally defaulted, and the Eleventh Circuit correctly denied a COA.

II. Taylor's petition is due to be denied because the Eleventh Circuit did not apply an incorrect standard.

Taylor alleges that this Court should grant certiorari because the Eleventh Circuit applied an incorrect standard of review to his motion for COA as to his duffel bag claim.[88] This contention is meritless.

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86. *Ex parte DuBose Const. Co., LLC*, 92 So. 3d 49, 55 (Ala. 2012) (quoting lower court's answer to petitioner's mandamus petition).
87. *Lee v. Kemna*, 534 U.S. 362, 376 (2002).
88. Pet. 16–20.

In denying the motion as to the duffel bag claim, Judge Tjoflat wrote:

> In Claim One, Petitioner argues that his constitutional rights to due process, a fair trial, and an impartial jury were violated when "the State knowingly secreted to the jury evidence of [his] prior criminal history." After Petitioner was arrested, he allowed police to search the hotel room where he was staying. During the search, police seized a duffel bag that contained several documents, and some of these documents were related to Petitioner's criminal history. At trial—without objection—the State introduced the full bag. Now, Petitioner claims his due process right to a fair trial was violated because the State "secreted" his own stuff into evidence. Of course, Petitioner knew what documents were in the bag, and he knew the bag was admitted into evidence in the same condition as when the police seized it. There was no secret, and Petitioner has not shown that reasonable jurists would debate whether Claim One states a valid due process claim.[1]
> [FN 1: The District Court found that this claim was procedurally defaulted. Petitioner has not shown reasonable jurists would debate whether the District Court's procedural ruling was correct because he cannot show cause to excuse the procedural default. The factual basis for this claim was available to Petitioner the

> moment the bag was offered into evidence. It was his bag with his documents.][89]

A three-judge panel denied reconsideration without further analysis.[90]

As this Court has explained, in determining whether a COA should issue, the reviewing court must "look to the District Court's application of AEDPA to petitioner's constitutional claims and ask whether that resolution was debatable amongst jurists of reason."[91] While "a COA does not require a showing that the appeal will succeed,"[92] "issuance of a COA must not be *pro forma* or a matter of course."[93] Rather, "[a] prisoner seeking a COA must prove something more than the absence of frivolity or the existence of mere good faith on his or her part."[94] The showing required for a COA is "straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong."[95]

Here, the Eleventh Circuit correctly found that Taylor failed to make this threshold showing for a COA, as reasonable jurists would not debate the merits of the district court's ruling as to the procedural default of the duffel bag claim. In so doing, the Eleventh Circuit reiterated the primary factual

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89. App'x A at 2a–3a.
90. App'x D at 298a.
91. *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003).
92. *Id.* at 337 (citing *Slack v. McDaniel*, 529 U.S. 473 (2000)).
93. *Id.*
94. *Id.* at 338 (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983)) (cleaned up).
95. *Slack*, 529 U.S. at 484.

points brought up by the courts below: the duffel bag was Taylor's, it was introduced without objection, and Taylor had notice of the factual basis of his claim long before September 2011, when he attempted to file a second amended postconviction petition. If the court erred at all in its order, it was in going beyond the district court's holding that Taylor knew of the alleged problem by the motion for new trial in August 1998 to find that Taylor should have known as soon as the bag was introduced at trial earlier that month—after all, it was "his own stuff." If this commonsense statement constitutes error, such error is not cert-worthy, as the court also correctly noted that Taylor failed to show that the district court's procedural ruling was debatable.

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Jarrod Taylor shot three innocent people in the head—including the parents of young children, two weeks before Christmas—in order to steal a Mustang and a few wallets. What papers, if any, were improperly seen by jurors and which jurors saw these papers was never established in the state courts. Nor has Taylor ever shown a scintilla of evidence that the papers in his duffel bag caused the jury to convict him of a crime he did not commit or improperly sentence him. Instead, Taylor simply failed to raise a claim until it was too late to present and exhaust it in the state courts, then blamed everyone but himself for the default. The lower courts correctly denied this claim and denied a COA, and this Court should deny certiorari.

CONCLUSION

This Court should deny certiorari.

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